

**'Namgis First Nations
Options to Treaty Making
Monday, June 27, 2011**

Meeting Minutes

Vancouver: Holiday Inn Downtown, Howe Street

Treaty Meeting: Treaty Alternatives
Facilitator: Sue Staniforth
Meeting Chair: Mike Rodger
Presenters: Robert Freedman and Eric Woodhouse,
Janes Freedman Kyle Law Corporation

5:00 PM Arrivals, Sign in, Dinner Served

6:00 PM Welcome / Greetings, Opening Prayer
Review of Agenda and Meeting Guidelines

Handout presentation summaries to all; Introduction of guest presenters

6:20 PM **Treaty and Alternatives to Treaty Presentation**
Eric Woodhouse

Introduction to presentation on treaty and options to treaty.

We will compare and contrast Treaty and other options, however the alternatives are limited: there is nothing as comprehensive out there as a treaty.

There are 4 available options to Treaty:

1. Staying with the Status Quo (remain under the Indian Act)
2. 'Namgis/Canada Bilateral Initiatives: deals with the federal govt.
3. 'Namgis/Province of British Columbia Bilateral Initiatives: deals with the province.
4. Litigation - Litigation breaks down into two types:
 - a) Sectoral/Strategic over a specific issue
 - b) Comprehensive Rights and Title Claim (e.g

1. The Status Quo (Indian Act)

Under the Indian Act, the 'Namgis reserve lands are owned by Crown and kept in trust for you. There are restrictions on the use and development of these lands, for example, getting mortgage financing, having tenure of lands.

The 'Namgis band members are seen as "wards of the Crown".

Question: Does that mean we don't own anything?

The European notion is that the Crown holds the lands in trustee ship for you – the reserve lands you have some ownership of. The lands in your territory have not been recognized in a court of law.

Different world views. The First Nations' world view is that you own the land and have always been stewards of the land. The European view is that the

Crown has occupied the lands and has the legal ownership and possession. The negotiations are trying to reconcile these perspectives.

Band financial affairs are largely governed by I.N.A.C. programs and priorities – giving the federal government some control over your lives and how you spend allocated money.

Question: What about Block Funding as another option? This could give us more control over how we spend the money.

Staying with the Indian Act doesn't mean necessarily that things will stay as they are. There are other options such as Block funding, the act could evolve as well.

The Section 87 Tax Exemption gets a lot of discussion. Those who can benefit from this exemption are fairly limited due to the economic situation on most reserves, plus the courts are restricting limiting its application. Under the Indian Act, the Band Council has limited law-making authority, but all laws are still subject to approval by the federal government.

The best thing about staying with the Indian Act is that it's familiar: "the devil you know". Your administrators have been able to work with it to attract funding and programs. A treaty would shift the governing authority from the federal government to your own new 'Namgis government. This new fiduciary duty would go to the 'Namgis government, giving you greater control over your lives, your community and resources, and how you spend your money.

2. 'Namgis /Canada Bilateral Initiatives

Bilateral initiatives can be agreed upon between a band and the federal government, but they are not constitutionally protected; they may be amended or terminated by successive governments or legislation.

a) Self government

This would be some form of delegated authority. Canada has enacted legislation to allow First Nations to take on certain authorities. There exists some self government agreements; for example, with the West Bank and Sechelt bands. However, they are only limited to reserve lands. It is a form of delegated authority that requires special legislation. However, there is not a lot of desire in the federal government to develop special legislation for bands, and they can be changed or taken back at any time – it is not constitutionally protected. The self government lands option is based on the reserve lands only.

b) First Nations Land Management Act

This is an act of federal Parliament, and applies only to Reserve lands. Again, it is a form of delegated authority and allows a band to enact a First Nation Land Code. The Code effectively replaces corresponding provisions in the Indian Act.

It can be coupled with First Nation administered property tax regime and Indian Act section 83 by-law, or the First Nation Fiscal and Statistical Management Act, meaning the band can take on these responsibilities.

3. 'Namgis/ Province of British Columbia Bilateral Initiatives

In the last few years there have been some of these established with BC. They are very politically driven – if the province wants something from you, for example, the oil and gas reserves in the north east region of BC, they'll talk to you about it – they want to get First Nations on board to get at these resources.

a) Strategic engagement agreements/ reconciliation agreements

Musqueam, Haida, Central Coast and North East BC precedents in BC.

They are driven by political considerations/ litigation settlement

It is still early days - These examples came out of recent court cases when Gordon Campbell was Premier – it remains to be seen with the change in leadership what the Clark government does. It can provide a useful framework for consultation.

b) Other sectoral agreements

Incremental Treaty Agreements (ITA) – there has not been a lot of uptake. BC Treaty Commission floated this a few years ago. E.g. they deal with getting control of a specific parcel of land.

They also come at a high price: the band must agree to not contest any activities of the Crown by way of asserting their rights and title. So definitely a strong consideration flowing to government for this agreement.

Question: If you don't go to treaty after making an ITA, do they take everything back?

It is based on a pre-settlement of a treaty – and it is hard to know at this time. However, accepting an ITA does take away some of your leverage.

Question: The Union of BC Indian Chiefs put forward a framework of dealing with governments nation to nation. How does this impact the treaty process?

Both levels of government would say that they deal with First Nations as nations now, so am unsure how this would affect the agreements. In the pre-ambule they don't use the term treaty but they use "Final Agreement".

'Namgis have agreed to use the terms Treaty, Nation and traditional territory. We need to ensure that your rights throughout the territory remain your rights – land and resource decision-making need to be established in the Treaty. Some First Nations take the "lock, stock and barrel" approach, as they take the view that they have sole ownership and right to control their territory, to the exclusion of the Crown. Treaty settlements necessarily involve shared ownership and jurisdiction. There are limitations going into this process. One of the reasons co-management is such a big issue for you, is if the government is going to recognize your territory as being less than the traditional territory you are claiming, there needs to be strategies and tools in place to have an effective say in how those lands are managed and developed.

Question: We hear a lot about land but what about land and sea? Our biggest asset is the ocean – what about rights to it?

When we use the word land in treaty talks we are including marine areas as well. We are talking about marine areas and resources as well. This also includes fresh water, sales of water and hydro power. The governments are willing to ensure

that water reservations for community and hydro, and they have agreed to a co-management agreement with water. We also have one with parks. A challenge we are facing at the table is around the request that 'Namgis has the right to water flowing through its lands to be unaffected in quality, quantity or flow by any act or omission of government. We are holding that line. We also want to have access to marine and land areas where 'Namgis have traditionally hunted and fished and travelled to trade.

4. Litigation as an Alternative to Treaty Presentation by Robert C. Freedman

Introduction

This presentation will describe what is involved in asserting Aboriginal rights and Aboriginal title in the courts. Litigation means going to court and legally proving the rights you are claiming. I come at this from 2 perspectives – I have worked with First Nations and litigation for 18 years, plus I am also one of the treaty negotiators for the Ditidaht First Nations.

Some Definitions in the Canadian Legal System (versus the aboriginal perspective)

Aboriginal title is a right (exclusive or non-exclusive) to use lands for a variety of purposes including the carrying out of traditional activities, modern forms of those activities, and for economic purposes.

The big difference between aboriginal rights and title is that if a First nation could ever get a court to say they had aboriginal title it is a right throughout your territory. Rights are site specific, while aboriginal title can be exercised throughout a First Nation's Traditional Territory (based on evidence of use and occupation).

Aboriginal rights are site-specific rights to carry on traditional activities or modern forms of those activities. Rights differ from title in the sense that rights are site-specific – usually limited to reserve lands - whereas title can be practiced in broader areas of the Traditional Territory.

Objectives: I'd like to do three things -

- (1) to describe the legal tests for proving Aboriginal rights and title and the content of those rights;
- (2) to describe the results of recent rights and title cases for the First Nations that have pursued their cases in court;
- (3) to review whether this kind of litigation is a reasonable alternative to the treaty process.

I'll also touch on Aboriginal rights and title litigation regarding water resources, given the importance of water to the 'Namgis First Nation.

If you chose a litigation option you'll be up against these elements:

There are three general steps in litigation if you go to court:

First - the First Nation has to prove that they have the right they are claiming to the white legal system in court.

Next, the second stage is called the “infringement stage” – in plain English, this means that the First Nation has to prove that the government has infringed on that right, for example, if you have to go further in your territory to hunt and fish due to development or laws, then government actions have affected your ability exercise your rights. In the Ahousat case they provide the right and the infringement.

So – the first two steps the First Nations have to do – the third one the government has to do.

The third stage is the government must justify the infringement, for example, using a valid objective like conservation for infringing on a First Nations right to hunt a certain species. Also, if they can show that they have consulted with you or given priority to your rights over others, then the infringement may also be justified. Governments stink at consultation, but they still use it.

The main aspect of litigation to consider is that your culture and traditions get put on trial, not the governments’ bad behavior, and it can get very nasty.

I. Proving Aboriginal Title

To establish aboriginal title over an area of land, the claimant must prove that the group had *exclusive occupation* of the land prior to the assertion of Crown sovereignty or shared exclusive possession. [Delgamuukw]. This means historical occupancy – dwelling places, seasonal uses of the land. Showing active use of your territory. This is a major element to prove.

This really has 5 parts.

1. The First Nation must prove that it is a descendant of an organized society that is the right bearer. You must be able to show a direct lineage and connection to your ancestors.

This might seem very obvious, but the government has spent millions on lineage tests, church records and genealogy records to disprove these claims. The government knows that the more they can focus the issue on these details and bankrupt you – they will do it.

[Marshall; Bernard, Ahousaht, Lax Kw’alaams, Tsilhqot’in]

2. The First Nation must prove that it occupied the land claimed as Aboriginal title land at the date of sovereignty [likely 1846]. By “occupation”, the courts mean “physical occupation,” such as village sites.

3. The First Nation must prove that its occupation of the land was exclusive in 1846. That is, the First Nation must prove that it *effectively controlled* the land and that the First Nation could have excluded any outsider from its lands if it had wanted to. It is also possible to have shared exclusive title. Non-exclusive occupation may establish aboriginal rights that fall “short of title”.

4. If the First Nation is relying on current occupation of an area to prove that it has Aboriginal title, the First Nation must prove that it continually occupied the land between 1846 and today.

5. The title must be unextinguished. The Crown may argue that aboriginal title was extinguished prior to 1982. An example is non-continuous occupation or lack of use of lands.

For anyone thinking of doing litigation, the Canadian legal system is at stake every time First Nations bring cases to court. The gloves are off and it can get very nasty.

Question: What happens if you turn the tables on the government, and say, you have got to prove it too? Why are we proving our rights to you?

Without First Nations having jurisdiction and control over lands, these are the rules that are imposed. Between spending millions of dollars on litigation versus treaty – I would choose treaty provided that the issues you want to discuss are on the table for discussion – but my job is not to sell you on one or the other, it is to present what I've seen over the years.

Proving Aboriginal Title - Evidence

Very specific and detailed evidence is needed to establish aboriginal title rather than aboriginal rights. In the Tsilhqot'in case, the First Nation spent millions of dollars and gathered and presented evidence from archaeologists, anthropologists, hydrologists, wildlife ecologist, ethnobotanist, historical geographers, biologist, legal historians, historians, forester, economist, linguist, ecological community modeler, elders, and community members, among others. Plus putting chiefs and community members on the stand.

The Content of Aboriginal Title

Despite the Tsilhqot'in, the Delgamuukw and the Ahousaht cases, NO group has yet established Aboriginal title in the courts, so its' meaning in practice is still somewhat speculative. So – no First Nation, despite years of trying and millions of dollars has yet gotten a court to agree they have title. The real reason isn't that the First Nation doesn't have the evidence, its that the courts are so scared of granting title that they find every way possible to get around it.

There are **2 limitations** on the content of Aboriginal title, *even if it is proven*:

1. Aboriginal title is subject to an ultimate limitation against using the land in a way that is irreconcilable with the nature of First Nation's attachment to the land. Who is deciding what is "irreconcilable? It is not the First Nation – it is white courts.

2. The scope of Aboriginal title also depends on how easily the Crown can justifiably infringe the title. The Supreme Court of Canada has indicated that the range of ways the Crown can limit uses of Aboriginal title lands is quite broad, including such objectives as the development of agriculture, forestry, mining, and hydroelectric power, and the general economic development of the interior of British Columbia.

So, even if you get a declaration of title, someone else can limit it, such as the federal government. A declaration of title limits what you can do with the land – whereas with a treaty, you choose what you do with the lands and water in your territory. If there was a decision 500 years from now that the First Nation wanted to fundamentally change the way they use lands or what can be done with TSL they can do that in a treaty – but with a declaration of title, the government can limit it – or even a member of your nation can push to limit it. This is scary because it means that someone other than yourselves has the power to change a title declaration.

Representative Aboriginal Title cases

- The Delgamuukw case started in the 1970's and ran through more than 10 years of court. The courts set out what the legal tests are for title, which was helpful, but they never found that the Gits'an and West'suwet'en people have title. No declaration of title was granted and the matter was sent back for trial primarily for technical/pleading reasons.
- In Tsilhqot'in, even with the large amount of evidence presented, the court found that the claimant had established aboriginal title to some areas, but dismissed the entire title case on technical grounds.
- Aboriginal title was asserted in Ahousaht, but the court did not consider the issue.

Question: Does the Canadian government pay no heed to our laws, potlatch law?

The courts now look at potlatching and other evidence of aboriginal laws, customs and traditions. However, even when proving rights and title, the terms must be understandable in the white courts according to the Supreme Court of Canada

Question: The laws are not fair – Forestry companies have now become real estate agents; the BC Liberals changed all the laws to let this happen without consulting anyone – First Nations or not. The companies have taken millions of dollars of wealth out of our forests with no consultation or control - and now the land we are fighting for is triple or quadruple the price.

This is the same situation that many First Nations find themselves in. This more than anything makes the case for treaty – this is the only way to have control over settlement lands – as you are the boss. The issue is not one of “fairness” but of the best way to gain more control of your lands.

II. Proving Aboriginal Rights

To be an aboriginal right, what is being asserted must be a part of an identifiable practice, custom or tradition that was integral to the distinctive culture of the Aboriginal claimant at the date of contact with Europeans. [Vanderpeet]

This has 5 parts.

1. The First Nation must prove that it is a descendant of an organized society that is the right bearer. As noted above, this is regularly challenged by British Columbia and Canada.
2. The First Nation must prove that the ancestral practice, custom or tradition claimed as the right is integral to the distinctive culture of the group. This requires the First Nation to prove that the practice is of “central significance” to its culture [Sappier]. Many claims for an aboriginal right to control resources have failed on this criteria. [Pamajewon]
3. The First Nation must prove that the practice, custom or tradition existed prior to contact with Europeans. For the Ahousaht on Vancouver Island, this was held to be 1793.
4. The First Nation must prove continuity between the present practice and the pre-contact practice. The practice can “logically evolve” over time, but “the activity must be essentially the same” as the pre-contact activity.
5. The right must be unextinguished.

The Content of Aboriginal Rights

The content of the right depends on how it is characterized by the courts. The facts of each case will determine the nature and breadth of the right, making evidence of the pre-contact practice very important. [Sappier]
How a court characterizes the Aboriginal right can result in a range of limitations, including quantity limitations (sustenance versus commercial rights) [Gladstone] and geographic limitations. [Mitchell v. MNR]

The content of the right also depends on whether the Crown has justifiably infringed the right. Determining whether an infringement is justified is complex and can require a second trial. This involves looking at whether government interference caused undue hardship, whether allocation of the resource accorded necessary priority, whether the interference minimally impaired the right, among other factors.

Representative Aboriginal Rights Cases

- In *R v. Gladstone*, the First Nation proved a right to exchange herring roe on kelp for money or other goods in 1997. The case was sent for a new trial on infringement. They are still fighting DFO to this day to determine how much they can take. So – even if you win a rights case, you can still be in negotiation with the very governments you’re negotiating with.
- In *Vanderpeet and in NTC Smokehouse*, the First Nations proved a limited right to fish for subsistence, social and ceremonial purposes, but failed to prove that they had a commercial right to fish.

- In *Côté*, the First Nation proved an aboriginal right to fish for food, social and ceremonial purposes within a specific area, but Court held that the Crown's use of controlled zones did not infringe the right.
- In *Sappier*, the First Nations proved they have a right "to harvest wood for domestic uses as a member of the aboriginal community" but not to harvest wood for other purposes.
- In *Lax Kw'alaams*, the First Nation proved it has a right to trade one species of fish, but it did not establish a right to trade fish generally.

The Ahousaht Decision

Five of 14 *Nuu-chah-nulth-aht* First Nations took an aboriginal fishing rights case to trial: there is a view out there that they have won an unfettered right to fish, but they haven't. They sought to prove an aboriginal right or title to harvest and sell all species of fisheries resources from within their traditional territory, claiming they had aboriginal title to submerged lands, and that Canada had infringed these rights. They also raised that they had aboriginal title to water.

The court found that the First Nations did have certain rights: they had a right to harvest fisheries resources within 9 miles of shore, and to trade those fisheries resources. This gave the First Nations more than barter rights, but less than full commercial fishing rights.

The court did not accept that the First Nations could trade for the purposes of accumulating wealth. The court also did not address the Aboriginal title argument.

So here you have a court case that cost millions and millions of dollars, was years in the making, and one of the key questions that the First Nations wanted the court to decide on – the water title issues – got knocked off the table – frankly because it was too hard to go there for the Court.

So – what did they win? A big win was getting the courts to agree that the Fisheries Act infringed the First Nations' rights and also that the rights include many species of fish, but the court would not say whether the infringement was justified. They won a stronger right to negotiate with the Department of Fisheries and Oceans – but not to exercise that right at this point. They also got the courts to agree that the whole fisheries regime had for decades infringed on their rights. The court ordered the parties to spend two years negotiating the amount and means of exercising the fishing rights before seeking a final verdict. So, they are negotiating with the same people that they have had such challenges with. They went to the court of appeal, and the court of appeal judge upheld the trial judge, which was great, but gave them another year to negotiate. The negotiation will likely be similar to the negotiation in the treaty process with the exception that certain rights of sale may be constitutionally protected

So – as of now, they have no more fishing rights than you do. They do have leverage at the negotiation table, but the Crown will argue about each species they bring to the table when the Crown tries to justify the

infringement. The Crown will raise issues like conservation concerns for each fish species that is brought to the table.

Question: What about the Constitutional rights - The Canadian Constitution keeps evolving – does it have any bearing on this case? There is also a right for the environment – in the new Chilean constitution.

One principle in Canadian constitutional law says that it keeps evolving – but that has no bearing on this case – as until the Crown has a chance to justify why it has acted so badly, the decision is frozen.

To change the Constitution in Canada requires the vote of 7 provinces.... however, your own constitution could contain these details: put it in the 'Namgis constitution that the environment has inherent rights, that it is the sustainer of your heritage and culture.

Claims of Aboriginal Rights in Water

Water title is very hard to deal with: There is no precedent in Canada that addresses the existence of aboriginal title to water or submerged lands – as you can imagine, it is hard enough for the courts to deal with land claims – water is something they don't want to go near. The Ahousaht case comes the closest.

Question: What's happening to the Nuu-chah-nulth-aht First Nations who won the Ahousaht case?

Ditidaht and Pacheedaht – what I have heard - the rumour out there is that 2 of the 5 nations are close to being bankrupt based on all the money spent on the case. I can't confirm that as I don't know. Even if you win with litigation, courts will award what is called "costs": in plain English, you would think that if you spent \$7 million you would get back \$7 million. What you win back is a small fraction of what you paid – the courts very rarely compensate you if you do win.

First Nations have had some success in establishing some aboriginal rights to fish for food, social and ceremonial purposes. In many of these cases, the courts have ordered a new trial on infringement to allow the parties to negotiate the quantity and location issues. [e.g. Gladstone, Ahousaht]

To date, no aboriginal group has succeeded in proving full-scale commercial fishing rights. Where commercial rights are proven, they are species specific. [Gladstone,]

Some new cases regarding water rights are working their way through the Alberta courts, but there have been no decisions yet. While basic principles suggest that Aboriginal title to water exists, the British Columbia Supreme Court recently expressed doubt that Aboriginal title to submerged lands is legally tenable [Ahousaht].

The "occupation" (proof that they occupied the land claimed at the date of sovereignty: 1846) and "exclusivity" (proving that its occupation of the land was exclusive in 1846) branches of the test for Aboriginal title would make proving title to water difficult.

What have the courts done?

Despite the existence of Aboriginal title as a constitutional principle, no court has declared that a First Nation has aboriginal title.

- The Delgamuukw case was sent back for a second trial; over \$14 million dollars were spent by the First Nations.
- In the Tsilhqot'in case, after 300 days of trial the court provided extensive – but non-binding – reasons in order to facilitate negotiations.

Question: Where did the \$14 million come from – was that First Nations money?

Yes it mostly was the FN money – there are provisions in the Canadian legal system for “advance cost orders” which means in rare circumstances you can apply to a court in advance and say that this case is so important nationally that the other side should be paying. My colleague won one of those for a Treaty 3 constitution case, but they are difficult to get.

In many cases, after a finding that a First Nation has Aboriginal rights, courts order a new trial on the issue of infringement. This was seen recently in Ahousaht, where the court went so far as to find that Canada had infringed the First Nations' fishing rights, but ordered a new trial on whether the infringement was justified.

Question: Do the courts have a clear definition of our rights? There seems to be no recognition of our Big House laws in our territory. I see that as undermining our rights.

There is some case law since 1992 where they fleshed out those kinds of questions – from the white legal perspective I could quote you some definitions from past cases, but if you look at it from your perspective, I'd say no they don't. The closer the courts can come to some white way of looking at your rights, that's about as concrete as you get.

E.g. to a white person, the right to hunt is defined as taking a certain number of animals in a specific region. To a First Nations person, they may see this right more broadly; to include accessing the land, the right to pass down teaching about the animals and hunting techniques, the right of the community in sharing and consuming the animals, etc. The courts aren't there yet in Canada.

The court processes are all based on white, legal perspectives, which can differ from First Nations perspectives and definitions: the Big House laws may not be recognized at all or in the way you want them to be.

The most power in the Canadian system to shape your own destiny in my view is through the Treaty process – its not just because of your constitution – its also because of the power you'll have on your treaty settlement lands. The closest you are going to get to your way of managing yourselves and others is through the powers of the treaty. I am not saying that to pretend that its perfect – its not – it's a negotiation – but there are no limitations within reason that you can bring to the table – while in a court case you are talking about very narrow sorts of things.

There is a trend in Aboriginal rights decisions that First Nations obtain favourable rulings, but those rulings often do not impose any large consequences for the Crown. E.g.

- *Sparrow*: the case was sent back for trial to determine if the claimant had an aboriginal right.
- *Côté*: aboriginal rights were proven, but the infringement was justified in part.
- *Gladstone*: an aboriginal right was proven, and the matter was sent back to trial.
- *Delgamuukw*: the case was sent back to trial to determine if the claimant possessed aboriginal title.
- *Tsilhqot'in*: the judge declined to rule on Aboriginal title, but provided comments about aboriginal title to facilitate negotiations.
- *Ahousaht*: aboriginal rights were proven, but a new trial on infringement was ordered, to take place after negotiations if necessary.

The courts prefer negotiated solutions. In the Ahousaht case, after the First Nations proved that they had fishing rights, the court stated: “The parties now have an opportunity to consult and negotiate the manner in which the plaintiff’s aboriginal right to fish and sell fish can be accommodated and exercised.” The court ordered that the First Nations and Canada consult for at least 2 years before returning to the court.

Other Factors to Consider

The Crown/Government puts your rights, culture, history and people on trial when you go to court. They will use any tactics they can to drag out cases and make your costs higher. White judges essentially will be deciding your rights and your culture in court.

Expense: Title cases can cost millions of dollars; rights cases hundreds of thousands to low millions of dollars, and in the end, be in no better position that you’re in at Treaty, because courts like negotiations – so even if you win, they will do things like restrict the right for two years to work it out.

Litigation is extremely time-consuming – cases take years to bring to court, and with appeals can go on for a decade or more. The Crown/Government will use any tactics they can to drag out cases - they use court procedure and rules to fight at every step of the litigation process, raising costs higher.

A win in court does not require the Crown/Government to reimburse all costs paid by the First Nation.

Judges are not experts in these issues: “courts have sufficient difficulty determining what happened a few months or years ago, never mind a few centuries ago” [Ahousaht]

The law is always changing in aboriginal rights and title cases, and can be a moving target. Decisions usually push for negotiation and on far more narrow issues than in treaty process.

Courts are reluctant to upset the status quo, and are reluctant to impose actual concrete solutions.

Litigation is adversarial and often has no meaningful outcome. Litigation is normally used where no alternatives exist, and can sometimes increase leverage for negotiations, but litigation makes Crown less likely to be reasonable.

Summary and Discussion

The time when litigation becomes critical in my view is when there is no alternative – as an example – I work with clients in Alberta who are in the middle of the oil sands – their rights are being wiped out every second – they have no choice but to fight in court for their existence.

Litigation has its own uncertainties and challenges – there is some value in it when you are pushed into a corner, but the process and expenses are very demanding.

There are a limited number of options to treaty. Right now, the Treaty process has the most power in the Canadian system to shape your own destiny. It provides you with your own constitution and power on your lands. A treaty is not perfect – it is a negotiation, but there are no limitations to what you can bring to the table in Treaty.

Questions:

Can you talk about what happened with the Nanaimo First Nations?

The Nanaimo band and claims have been moved up closer to the front of the line - out of over 1100 claims in Canada now, they are now at about 15. Based on the Douglas Treaty, which is an extinguishment treaty, the Nanaimo band has the right to fish, hunt on un-occupied lands and to their enclosed fields around their village sites. 62 acres of downtown Nanaimo was set aside a reserve, as was Departure Bay and around the old foundry. They are implementing the Douglas Treaty. The Douglas Treaty text is historic and has very little detail, but Canada is living up to its historic obligations with respect to that treaty.

Why not let all other First Nations battle some more cases out in courts and then let their cases bring strength to what we are trying to do? We could then study the positive cases to bring forward alternatives?

The government has a “litigator-negotiate” policy, and it varies from one nation to the next. If the other First Nations win, their findings might be able to be applied to your cases, but there is no guarantee of that. Bits and pieces of other

court cases may help other First Nations, but they still must negotiate their own issues.

What about making direct deals with industry? I work with another First Nation and we are not in the treaty process, we are working with industry and the private sector to create real jobs, we write up MOU's. We are not in Treaty but we are getting some of our rights recognized, and helping with economic development and jobs for our people as well.

The 'Namgis has a referral and review process now – we get a notification on any activities that are to happen on our lands, and have been capitalizing on the opportunities that make sense, and taking decisions to Council for approval and partnership details.

E.g. Western Forest Products Tree Farm License 37 covers most of the 'Namgis territory. We now have 'Namgis monitoring what happens there, if there are any culturally modified trees. We are in negotiations with WFP for how we'll operate when 'Namgis gets the land.

In some of your examples, the courts have stressed "negotiations" - has that turned into meaning anything?

In the 1990's, treaty settlement lands were very few. Today, laws and consultations have given First Nations leverage, and negotiators now say that First Nations now cannot negotiate a treaty that gives them less rights and less leverage than the courts are giving them now. Reconciliation and co-management agreements are now on the table, so things are better than they were.

However, a terrible example of how these decisions can get overturned is the Mike Mitchell case from the 1990's in Quebec: The Mohawk argued that they had a right to trade certain goods across the Canada / US border. The First Nation case was won at the federal court and the court of appeal. However, the Chief Justice at that time, Beverley MacLaughlin, decided that she would interpret their historical trade routes as being East – West trade rather than North-South.... So, even though the Mohawk people go across to New York and have for thousands of years, she decided that everyone else got it wrong and the evidence showed it was east-west trade. And so the case was thrown out. If the government gets too scared about the impacts of a potential First Nations win, they'll narrow the decisions or conjure up something to refute it.

What about our rights to commercial fishing? If the Ahousaht fisheries case goes to the Supreme Court, will that benefit us and other First nations?

The government will say that only the First Nation directly involved will get those specific rights. However, if the Supreme Court upholds the case, it will make it somewhat easier to argue about broader types of rights.

If the Ahousaht case is upheld in the Supreme Court, it could help everyone, as certain kinds of fish species might be included as was the case with the Sparrow decision – and so that would be important; however an unfettered right to fish will never be agreed to. The government does not want to grant an unfettered right to any First Nations to fish. It's a numbers game, not a species game. The

courts will always say – “someone’s got to manage the fish” – so probably DFO will always be involved.

One role that the ‘Namgis might have in this case if it goes to the Supreme Court is by asking for “intervener status”. The Court has to give you permission to intervene. This would give you a chance to make comments and argument to make sure the best parts of your evidence are preserved, and to make sure that the court understands that the decisions the court make doesn’t only affect the nations on the west coast – it also affects you.

What about the Nisga’a treaty? They were given only 5% of the total territory they claimed. Is that the “going rate” of what the government is willing to give up? We have a tiny territory - if we only got 5%, where would we live?

With a treaty, even if only 5% of a territory was claimed and won, you would have some say in what happened in the other 95%. Involvement in every land use decision that goes on. Anytime the government is going to make a decision, we’d be involved.

What about the rights and benefits of off-reserve band members. Like medical, education, business licenses?

With a treaty, all recognized ‘Namgis members would get the same rights – it is up to you how you determine this designation, but it would be part of your constitution, and all on and off-reserve members would vote on treaty. Block funding would go to the ‘Namgis government directly, and you would be responsible for how it is spent. Some funding would still be directed by INAC.

What about capacity building and jobs?

Capacity building funding would be secured before the treaty is signed. Again it would be your decision as to how you would spend the money allocated to you. The ‘Namgis are better situated than many other FN as you have many resources and skill sets in your community. Honey and Harry are both well regarded researchers in their fields.

Question: Is it worth going to court as an amalgamation of many different tribes in order to strengthen our case and help prove ancestry and continuous occupation?

It might strengthen a case to do this but then you need to accept less of what you negotiate as you’ll have to share the rights or title you might win with the other bands.

Request: *More involvement of our members is very important – I feel like the members’ voice is not being heard. It’s always the same few who come to meetings. There has been talk of holding an AGM for years now but we don’t see one happening – can we have an AGM this year?*

This is a council decision – there has been talk of council going to the community and hearing from people directly. Our Facebook page is also a way for members to provide input and have conversations about issues.

Concern: *We have a Constitutional Development committee but there has been a lot of turnover recently – this is a concern.*

Eric is a resource person to that committee – agrees it needs a bit more structure.

Question: Has there been an inventory of the community? We need a measuring stick of all the needs for jobs but also all the skills that exist in our community members.

Two years ago there was an inventory done of the entire community including skills assessment; we are also ahead of any land and resources opportunities on our territory before they happen.

Question: The money we will get from INAC will be reduced over time when we start to make our own money from our own projects, and we'll have to make up the difference. How can we make sure we won't go broke quickly?

Fiscal arrangements are an important issue to do your homework on before you go into negotiations. Programs have to meet a certain criteria level to provide services to citizens. Once you have your “own source revenue” ‘Namgis will contribute to programs as we can.

‘Namgis needs to be able to say we can supplement programs and services to this amount. Right now our accountants do tax planning to structure corporations to avoid taxes in the future. There will be new implementation funding to help ‘Namgis take over programs now being delivered by government. Some programs you may want to let the government continue to run for you – but you will decide this during the negotiations.

Question: If we wanted to get out of the Treaty negotiation process, is that an option? What would an exit strategy look like?

There are various options – one would just be to “down tools” and adopt a watching brief. A disincentive to getting out of the treaty process would be that all the money spent would have to be paid back, and all the land that has been put on the table during negotiations would shift back to the old owners.

When Nanaimo walked away from the negotiating table, the City of Nanaimo bought all the land it could buy, so their original land claim deal is not doable now.

Announcement:

The BC Assembly of First Nations has just produced a Governance Tool Kit. A hard copy of the tool kits will be made available on line on their web site:

<http://www.bcafn.ca/>

Request: *Can we get as a community a detailed list of what we will get by going to treaty and what we will be giving up? What will health, education, forestry, fishing rights look like? It needs to be in plain language so that we can all understand it.*

Request: *Please make the meeting minutes more accessible – we would like them on the web site, and also mailed out as hard copy to the older members. I am not on Facebook, my family has never received any minutes; my aunties don't have a computer.*

Meeting adjourned at 9:20 PM