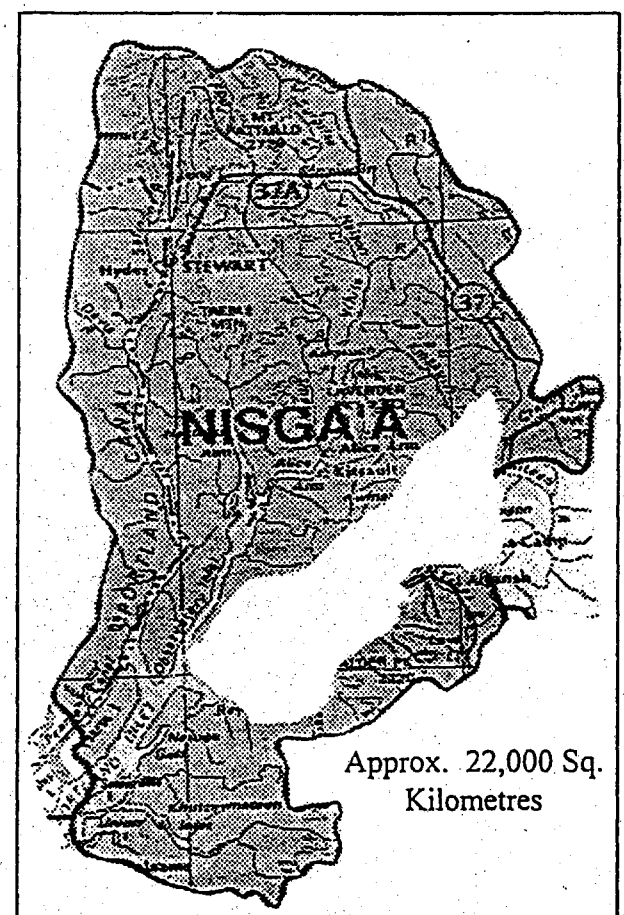
Modern Land Claim Agreements



Approx. 22,000 Sq. Kilometres

Nisga'a Ceded/Traditional Lands

Approx. 1900 Sq. Kilometres

Nisga'a Settlement Lands

Based on UBCIC *Sovereign Indigenous Nations Territorial Boundaries Map.*
Nisga'a Settlement Lands based on information in Nisga'a Final Agreement.

Through The Nisga'a Looking Glass

UNION OF B.C. INDIAN CHIEFS

MODERN LAND CLAIMS AGREEMENTS THROUGH THE NISGA'A LOOKING GLASS

Our Aboriginal Title is an inherent and inalienable relationship between the Peoples and the Land. This sacred connection has been retold in our creation stories, guiding the relationship between the supernatural beings, our Peoples, and the Lands as a reminder of our promise to live in balance and to honour our responsibilities.

Since contact Indigenous Peoples have strived to honour our sacred responsibilities and maintain the legacy of our ancestors in the face of a colonial government which has steadfastly refused to acknowledge our existence as Peoples and Nations, and has sought to sever our connections to the Land and our Cultures. In trying to achieve a recognition of our existence, Indigenous Peoples have sought to negotiate treaties and land claims agreements with Canada, in the hopes that through these agreements our existence as Peoples would be recognized, and we could honour our responsibilities to the Land.

Self Determination is the inherent right of a Peoples to determine their own future and destiny according to their own laws, traditions and systems of governance. Decolonization is a process through which Indigenous Peoples who have been subject to the laws and control of another Peoples (for us, Canada) must go through in order to reclaim and fully practice our right of Self Determination.

Many Indigenous Peoples have sought to Decolonize through negotiating land claims agreements or treaties. To measure the success of these efforts, we must measure what is achieved in the modern land claims agreements, what the current state of law is (existing rights that Indigenous People have under Canadian law) and what our rights flowing from our inherent Sovereignty is (the rights that Indigenous People have right now under *our own laws*, if we choose to practice and honour them).

The Nisga'a Agreement provides a clear picture of the federal and provincial governments' intentions in entering into modern treaties, and the mechanisms they will employ. The Nisga'a Agreement must be measured between the Indigenous desire to achieve Self Determination and De-colonization and Canada's desire to assimilate Indigenous Peoples into Canada, as a minority interest group with no unique features as a "Peoples" or status at international law.

Aboriginal title and rights flow from the land, and the historic relationship that Indigenous Peoples have had with our Lands. The certainty language of modern land claims agreements will flood the land with Crown title, and forever dam the flow of

rights from the Land to the people. Crown title will replace aboriginal title. No title or rights will ever flow from the Land again. Instead, all rights will flow from the written Agreement.

Treaties, at International law, are Agreements entered into between and amongst Nations. They represent the agreements made between sovereign powers, and are interpreted and enforced through international tribunals or courts. Modern land claims agreements will not be treaties in the International sense. Instead, modern land claims agreements will be domestic contracts that will be interpreted in domestic courts according to Canadian laws.

All treaties or Agreements with Canada (and B.C.) must be measured against our existence as Peoples with an inherent right of Self Determination and our obligation to protect and use the Land and Resources. Throughout this paper we have used our inherent right of Self Determination as a measuring stick against which all modern land claims agreements must be measured against.

CERTAINTY

Canada and B.C. have said that the purpose of treaties or modern land claims agreements is to achieve "certainty." The purpose of "certainty" is to "exhaustively and completely set forth" all aboriginal and treaty rights. Rather than simply accepting the existence of Aboriginal Title as ownership and jurisdiction over Land and resources, certainty limits and defines Aboriginal Title and Rights, so that they fit with Canadian laws and ideas about Land.

Aboriginal title to lands and resources existed at the time that the Crown asserted sovereignty. This title was never extinguished. This is why Crown title is uncertain and remains subject to Aboriginal Title. Consequently, there is an air of illegality about any transactions the Crown makes or authorizes with respect to Lands and Resources. These transactions do not acknowledge that Indigenous Peoples own the Lands. This policy violates the legal principle that, "You cannot give that which you do not own."

The Crown's willingness to negotiate land claims requires a promise on the part of Indigenous Peoples that they will not fully practice their rights. Canada's negotiating stance is: "We will recognize your rights, but only if you first tell us how you will exercise them, and only if you promise that your rights will not interfere with our interests." This is certainty.

As domestic contracts, each party agrees to give something in exchange for something in modern land claims agreements. In order to gain "certainty" Canada and the

Province are willing to grant a limited recognition of land ownership (under Western property notions) to a reduced portion of an Indigenous groups' traditional territory and a limited recognition of Self-Government (subject to Canadian and provincial laws). In exchange the Indigenous group release all title and rights not specifically set out in the Agreement, and surrender their right of Self-Determination in exchange for Self-Government and Self-Administration.

Canada and B.C.'s sovereignty, or ownership of Land and resources, is not challenged, Canada and B.C. do not have to "prove" their title or jurisdiction - it is simply assumed, and Indigenous groups are given limited recognition of their ownership and jurisdiction of a small parcel of their former traditional territory.

TITLE

Modification of Aboriginal Title and Rights

Instead of the traditional "extinguishment" language ("cede, release and surrender") the language of new treaties will not be so blunt. Aboriginal title and rights will not be extinguished outright; Instead, they will be defined and limited out of existence. Aboriginal Title and Rights are reduced and transformed ("modified" in the language of the Nisga'a Agreement) into the treaty rights set forth in the Agreement.

Compare these definitions of the words used, all from *Websters* dictionary:

Extinguish, definitions include

1. "to bring to an end: to make an end of";
2. "to reduce to silence or ineffectiveness";
3. "to cause to be void: NULLIFY"; and
4. "to get rid of usually by payment"

versus

Modify, definitions include

1. "to make less extreme: MODERATE";
2. "to limit or restrict the meaning of...";
3. "to make basic or fundamental changes in, often to give new orientation to, or to serve a new end"

Modern land claims agreements, re-define and re-create aboriginal title and rights. In the Nisga'a Agreement this is done through clauses which

- convert and reduce *all existing aboriginal or title rights* of Nisga'a into those contained within the Agreement;
- ensure that the Agreement will be the "full and final settlement" of all aboriginal title or rights;
- release all rights not listed in the Agreement to Canada; and
- exhaustively set forth all the Section 35 rights of the Nisga'a, including the manner of their exercise, and all the limitations to those rights to which the Parties have agreed.

No aboriginal title or rights will survive exclusion from the written Agreement. All aboriginal rights and title will be transformed into contractual or treaty-rights. Any stray rights not listed (for example, because of oversight, or because they were not thought of at the time of the Treaty) will not survive their exclusion from the Agreement. Modern land claims agreements will be the Noah's Arc of Aboriginal Rights: Any title or rights not on the arc, and nailed down with words in the Agreement, at the time of the treaty will not survive.

Modern day treaties are intended to be the "full and final settlement" of aboriginal title and rights, and will not be open for re-negotiation if another Indigenous group negotiates a better deal.

In the Nisga'a Agreement, there are only two clauses which would allow for a re-negotiation. First, where Canada or B.C. enter a treaty with another group in northwest B.C. which infringes upon the Nisga'a's treaty rights, they will negotiate to provide replacement rights to the Nisga'a. Second, if Canada or B.C., within twenty years, enter into a treaty in northwest B.C. which allows tax immunity to continue for another Indigenous group, they will negotiate a similar immunity for Nisga'a.

Canada and B.C. ensure the protection of their citizens under modern land claims agreements. Third party interests are explicitly recognized and protected from an infringement that may result from the recognition of an aboriginal right. Indigenous groups will agree to recognize those rights regardless of how those rights were granted, and of the fact that they were not involved in the granting of those rights. Nisga'a, for example, recognize forestry tenures, fee simple ownerships, and road and utility rights of way.

LANDS

Modern land claims agreements will effectively extinguish all Aboriginal Title. All Aboriginal Title of the Indigenous group will be reduced and transformed into fee simple title over a reduced area of land. Crown ownership over the totality of their traditional territory is recognized, the Indigenous group will agree not to practice the

obligations and responsibilities to their traditional territories as their own laws and traditions might dictate. The Indigenous group's jurisdiction over land and resources will not be governed by traditional laws except for within those areas that are permitted under the Agreement.

The Nisga'a Agreement extinguishes all Aboriginal Title of the Nisga'a Nation to the entirety of their traditional territory, and converts Nisga'a original title to "fee simple" title. Nisga'a settlement Lands will be approximately 1990km ^{2}, or roughly 8% of the Nisga'a original traditional territory. Provincial Crown title is recognized over 100% of the area which was formerly Nisga'a's traditional title lands, including Nisga'a settlement Lands.

B.C. and Canada are guaranteed the right to expropriate Nisga'a Lands for public purposes. Nisga'a retain all mineral rights contained within the 8% parcel of Nisga'a settlement Lands. B.C. owns all of the mineral rights within the rest of the Nisga'a's former traditional territory. B.C. owns all submerged lands within Nisga'a Lands, except for the former Indian Reserves.

Western systems of Land ownership are designed to ensure that Land can be easily bought and sold. To do this the "Torrens System" developed which divides the Land into parcels and creates a "Registry of Titles" which lists each piece of land, who owns it, and who can make claims against it. The Torrens Systems makes it easier to treat land as a commodity by ensuring that the person who is registered "on the books" is the absolute legal owner of the land, with the absolute right to sell or make other use of the land.

The Nisga'a can choose to have the Provincial Torrens System apply to parcels of Nisga'a Lands to register indefeasible title under the *Land Title Act.* No title or interest in the land which is contrary to the title registered in the provincial system is valid. Even where an individual has been in possession, and has lived on and occupied the land for a long time, this person will have no rights to the land (and no right to sue or bring legal actions) once the land is registered in the provincial registry in another person's name.

ACCESS

Although ownership of treaty settlement lands may be recognized in an Indigenous group, Canada and B.C. will ensure that they, and the public, have broad rights of access to those lands. Indigenous laws will not interfere with the Crown's use of settlement lands.

An important feature of modern land claims agreements will be that they will not allow any recognition of Indigenous Peoples which could challenge Canada's territorial integrity or sovereignty. Indigenous Peoples will not acquire recognition as sovereign nations, instead they will be clearly limited to a domestic interest group. Canada will maintain full military and national defence rights over any treaty settlement lands.

In the Nisga'a Agreement, Nisga'a agree to allow governments and public access to Nisga'a Public Lands. Nisga'a guarantee Canada and B.C. a right of access to Nisga'a settlement Lands "to deliver and manage programs and services, to carry out inspections under law, to enforce laws, to carry out the terms of this Agreement, and to respond to emergencies." The public will be allowed access to Nisga'a settlement Lands for "temporary and non-commercial purposes", such as hunting. Access is subject to Nisga'a laws so long as Nisga'a laws do not interfere.

Canada and the Minister of National Defence have full authority to carry out activities related to national defence and security on Nisga'a Lands, in accordance with federal laws of general application.

ROADS AND RIGHTS OF WAY

At present, by virtue of our aboriginal title, Indigenous Peoples have been able to challenge the use and access of the Crown, public utilities, and third parties to our traditional territories, where it would interfere with our preferred use of our Title Lands. For example, Indigenous Nations were able to prevent the twin tracking of the Fraser-Thompson corridor because of the injurious results it would have to the fishery and Title lands.

Where trespass or use has occurred without our consent, we have been able to seek damages and compensation, as well as to have some say in the continued access. In modern land claims agreements, Indigenous groups move from their position of the power grounded in Aboriginal Title, towards contractual acquiescence to the use and occupation of their settlement lands by B.C. and Canada.

In the Nisga'a Agreement, B.C. is entitled to a total rights of way area of 800 hectares of Nisga'a settlement Lands. Nisga'a will grant to B.C., or public utilities (including BC Hydro and BC Tel) rights of way on Nisga'a Lands for public purposes. If they do not agree with the request, Nisga'a must prove that the impact and compensation offered are not reasonable.

The users of the rights of way will honour Nisga'a laws provided that these laws do not interfere with the purposes for which the right of way was granted, or impose more stringent standards than federal or provincial laws.

B.C. maintains its ownership, jurisdiction and control of the main highway corridor going through Nisga'a settlement Lands. The Nisga'a Highway is in addition to B.C.'s total rights of way area. Nisga'a will grant B.C. rights of way for all secondary provincial roads. B.C. has agreed to consult with Nisga'a about such mundane matters as traffic regulation on the Highway and secondary roads.

Nisga'a have control over all other roads within Nisga'a settlement Lands (these are essentially the roads within or servicing existing reserve lands), they will be responsible for paying for the maintenance and upkeep of these roads.

RIGHTS

Interpretation: A different species of Section 35 rights

Although modern land claims will be acknowledged as treaties rights under Section 35 of the *Constitution Act, 1982* which "recognizes and affirms" existing aboriginal and treaty rights, they will be a different species of Section 35 right. The benefit of having rights recognized under Section 35 is that Canadian Courts have read Section 35 to protect Aboriginal peoples and their rights.

Presently, courts interpret Section 35 so that

- ambiguous expressions in treaties are resolved in favour of the Indians;
- treaty provisions are given a fair, liberal and large interpretation;
- the honour of the Crown is assumed when interpreting treaties (Courts assume that the Crown intended to act honourably toward aboriginal peoples, and with the best interests of the aboriginal peoples in mind, while entering treaties); and
- any suggestion of "sharp dealing" (unfair bargaining) is not sanctioned.

Further, Canadian Courts require that aboriginal rights to resources are granted a high priority in considerations by Canada and B.C. Following the *Sparrow* decision, the aboriginal fishery can only be limited for conservation purposes. These principles of interpretation will be removed from modern treaties, and the protective features of Section 35 will not operate. The provisions of the Agreement will replace the current legal rules (the common law) about aboriginal about treaty rights.

Under the Nisga'a Agreement, Nisga'a rights to fish and wildlife are reduced and only equal to commercial and recreational interests. Clauses which remove common law protection include:

There will be no presumption that doubtful or ambiguous expressions or terms are to be interpreted in favour of any particular Party or Parties.

Nisga'a agree that the Crown has no consultation obligations respecting the Section 35 rights of the Indigenous group other than those obligations set out in the Treaty.

The Section 35 rights set out in the Treaty will be interpreted solely on the basis of the rights set out in the treaty, without any distinction based on whether the right is a modified aboriginal right or a new treaty right.

The provisions of modern land claims agreements freeze aboriginal rights so that if Canadian courts recognize or expand aboriginal rights in the future (for example, by recognizing a commercial interest in wildlife, or a guaranteed and priority access to water) Nisga'a, and other Indigenous groups who allow their rights to be defined through treaties, will not benefit.

International vs. Domestic Dispute Resolution:

At present, as sovereign nations at International law, Indigenous Peoples have the right and freedom to bring disputes with Canada before an impartial international body for independent review and adjudication.

By agreeing to restrict these disputes to the confines of Canadian laws and interpretations, Indigenous treaty groups will forever revoke their right to approach the world community as a sovereign peoples to seek justice.

Under the Nisga'a Agreement a three stage dispute resolution process is established. First, the parties will have informal discussions, then they will discuss the disagreement with the assistance of a neutral third party, finally, disputes will be sent to binding arbitration. Any disputes about Nisga'a rights will go to domestic Canadian courts. Nisga'a rights will be restricted to the contract-rights they have negotiated, and not the rights of a sovereign peoples.

Consent vs. Consultation:

It is a fundamental principle of our Sovereignty and Nationhood as Indigenous Peoples that we have the power to accept or reject proposals or development plans which will impact our Peoples or our Lands. Our consideration of any proposals or development plans must be held up to the legacy and birthright we have inherited from our ancestors and are entrusted to protect, maintain and pass to those yet unborn. It is our sacred responsibility and obligation to honour our Peoples by giving careful consideration to the impact that any proposal or development plan will have on the legacy we will pass to our future generations.

In *Delgamuukw* the Supreme Court stated that the consent of the aboriginal peoples with title is required before certain actions or measures could be taken. *Delgamuukw* envisioned a situation in which Indigenous groups were fully and meaningfully involved in deciding to what uses their aboriginal title lands would be put. In some circumstances, where aboriginal title, or the uses to which Indigenous peoples choose to put their land, would be severely impacted by a land use decision, Indigenous consent is necessary.

Both our own responsibilities to our Lands and Peoples, and the Supreme Court of Canada, have recognized that Indigenous Peoples have the power and right to decide to what uses our Aboriginal Title Lands and Resources will be put. Canada and B.C. have attempted to reduce this right to a form of "consultation" or "co-management" which is essentially the right to advise and offer an opinion, with no real say or power over Land or Resource use decisions.

The consent of an aboriginal group to actions regarding lands over which they have aboriginal title will not apply to the new treaties unless this is specifically set out in the agreement. And, in any case, the consent, or even involvement, of the aboriginal group will only apply to those settlement lands identified in the Agreement.

In the Nisga'a Agreement, Canada and B.C. have negotiated out of the necessity to fully and meaningfully (perhaps, to the point of obtaining consent) consult the Nisga'a over land use decisions in the Nisga'a's former traditional territory. "Consultation" is defined in the Agreement as a notification of proposed plans, together with a consideration of any comments which the Nisga'a have on the situation. Consultation under the Agreement does not involve any meaningful decision making power recognized in the Nisga'a, and falls far short of requiring Nisga'a consent. At best, Nisga'a achieve a right to participate in co-management committees (often on an advisory basis, with ultimate decision making power resting with B.C. and Canada).

Who can treaty away aboriginal title?

Aboriginal title is a collective interest, which is held in trust by all members of an Indigenous Nation. Canadian law recognizes that aboriginal title is a communal (shared) interest in the Land. A majority vote (no matter how high the percentage) cannot give one group the ability to extinguish the title and rights of all of the Indigenous Peoples who hold title.

It is not "practical" to be bound by Indigenous Peoples' traditions with respect to making decisions about Aboriginal Title. Canada and B.C. recognize that Indigenous Peoples, collectively and with a common mind, will never agree to cede their

traditional territories; Therefore, in modern land claims agreements, the need for consensus among Indigenous Peoples is replaced with the need only for approval of a simple majority of those who vote.

It is not practical to respect the right of Indigenous Peoples to decide their own futures on a collective basis. Indigenous laws have to be replaced with Canadian laws in order to achieve ratification and approval of the new treaties.

Canada and B.C. recognize that the illegality of current modern land claims processes rests in the fact that Indigenous citizens are not fully or meaningfully involved or informed in the negotiations. Modern land claims agreements will address this area of uncertainty by having the Indigenous group promise that they (i)have the legitimate right to treaty on behalf of all of their peoples, and (ii)will pay any costs Canada and B.C. should incur if they do not have a legitimate right to treaty.

Indian vs. Indian:
Divide and Conquer Strategy Continued

In the Nisga'a Agreement, Canada and B.C. have exacted a legal promise from the Nisga'a that they have the right to enter into the Agreement on behalf of all Nisga'a. Nisga'a promise that, in the event that Nisga'a citizens do not agree with the terms of the Agreement, and bring law suits in the future (claiming, for example, that the Nisga'a government had no right to extinguish their title over their traditional territory), Nisga'a agree that they will cover any costs to Canada and B.C. The result of this clause is that Nisga'a citizens will be suing the Nisga'a nation, and any dollar settlement will come from the Nisga'a peoples themselves, and not from government.

The only reflection of traditional law will be the incorporation of Nisga'a laws to identify and enroll Nisga'a citizens for voting purposes. A person is eligible to be enrolled under the Agreement if that person is of Nisga'a ancestry and their mother was born into one of the Nisga'a tribes (or they are the descendent or adopted child of such an individual), or they are married to a person of Nisga'a ancestry and have been adopted according to the customs of the Nisga'a tribes.

Compensation for Past Wrongs
The Supreme Court of Canada, in *Delgamuukw*, stated that aboriginal title has an economic component and that government will be liable to provide compensation in the event of an abrogation or breach of aboriginal title.

Modern land claims agreements will represent the "full and final settlement" for past wrongs, and will contain clauses which preclude Indigenous treaty groups from bringing any legal actions for past wrongs or compensation for the value of lands and

resources taken from their territories. All past claims for compensation, and any future claims for compensation, are all reduced into the terms of the Agreement.

In the Nisga'a Agreement, the Nisga'a release Canada, B.C. and all other persons from all past or future actions or claims based on the abrogation or infringement of their aboriginal title or rights, once and for all time.

Breach

Canada has a very poor history of breaking the treaties and other promises or agreements it enters into with Indigenous Peoples. There is not one Indigenous Nation in Canada who is satisfied that Canada has honoured its obligations made through treaties. With this dismal track record, we have to ask: "Why treaty with Canada, when it has not honoured any of the other treaties it has entered into?"

Modern land claims agreements will contain language in which all parties agree not to challenge the "validity or enforceability" of the Agreement. This means that if the Indigenous group, in the future, do not think that the Agreement was a fair deal, they have agreed not to go to Court to challenge it.

Certainty language will also require that the parties agree that if one or more parties breaches the agreement, and do not keep the promises they made under the Agreement, the other Parties must keep their promises. The Nisga'a Agreement contains the following:

> A breach of the Treaty by any Party will not relieve any other Party from its obligations under the Treaty.

This clause suggests that Nisga'a may be forced to honour their agreements (ceding aboriginal title and rights to all areas not included under the Agreement) if Canada and B.C. do not honour the obligations they made. For example, if B.C. decides that it cannot afford to make the payments required under the treaty, or if they minimize the co-management agreement provisions of the agreement, Nisga'a will not get their lands and rights back.

RESOURCES

Indigenous Peoples have always maintained a sacred responsibility to care for and protect the resources that have sustained us from time immemorial. Our jurisdiction and authority over matters of commerce, trade and resources is evidenced within our traditional forms of governance by recognizing which family, clan, or tribe has the right to harvest, hunt, fish or trap within specific areas within our Lands; and by granting or denying permission to those outside our Nations to access and use our

resources; and by engaging in the exchange of goods like copper, fish and grease amongst ourselves or with other Nations. These actions clearly demonstrate Indigenous authority and jurisdiction over our economies.

Canada and B.C. continue to view the aboriginal right to resources as equivalent to a "right to eat". In modern treaties, Indigenous groups will be restricted from participating in the "economic mainstream" and limited to a "domestic" use of resources. Modern land claims agreements will require that Indigenous groups relinquish all ownership and authority of resources on their traditional territories to the Crown. Ownership of resources will be restricted to treaty settlement lands, with limited authority to harvest and manage resources within the allocations set out in the modern treaty.

No ownership of resources will be acknowledged which might give rise to an overall economic benefit of Indigenous Peoples. Indigenous treaty groups will only be entitled to an economic benefit from the resources on the same basis as individual Canadians or British Colombians.

WATER

In every society water is essential to life. Water is an integral component of Aboriginal Title, because it is water which allows for all life upon the Land. Throughout history, Indigenous Peoples have had their access to and use of water restricted.

Canada has developed a means of regulating and allotting water allocations. In B.C. the province has assumed the right to regulate and allot water allocations through the *Water Act* which operates on a "first come, first served basis." The older the water licence, the more certain is the right to access water. The *Water Act* ignores the fact that Aboriginal Title encompasses a right to water.

Modern land claims agreements will cement the provincial government's assumption of jurisdiction over water. Historical allocations of water which have prioritized access to settlers and denied Aboriginal Title to water will be accept by the Indigenous treaty group.

B.C. owns all water within Nisga'a settlement Lands. B.C. will reserve to Nisga'a a water allotment of 300,000 cubic decametres for domestic, industrial and agricultural purposes. All existing senior water licences (issued prior to March 22, 1996) must be filled before the Nisga'a will be allowed to take from their water allocation. Nisga'a must apply for licences from B.C. in order to make use of the Nisga'a water reservation.

FORESTS

Indigenous Peoples have always viewed forests as a form of "living cathedral" which provides so much of the necessities of life for our Peoples. The logs to build pithouses and bighouses, the material for canoes and masks, the fibre which we use to weave our clothes. Forests are also been sacred places, gardens for medicines, and the home of wildlife. As Indigenous Peoples, our responsibility to caretake the land includes our responsibility to preserve the total value of the forests. Never, have we failed to see the forest for the trees.

Modern land claims agreements reduce forests to trees which can be economically exploited and sold. Ownership of trees and forests will vest with the provincial government who will have the responsibility for regulating the logging and sale of the trees.

In the Nisga'a Agreement, Nisga'a will own all forest resources upon Nisga'a Lands, while the province acquires ownership and control over all forest resources within the rest of the Nisga'a's former traditional territory. Nisga'a ownership of the forest resource, is subject to existing forest tenures on Nisga'a Lands which will continue for five years.

The Nisga'a may make laws regarding the harvest of timber, subject to meeting provincial forest standards, but have very little control over the manufacture or sale of timber. B.C. laws regarding timber scaling and timber marks will apply to timber harvested on Nisga'a lands. For the first five years, a Forest Transition Committee, comprised of one member from Nisga'a and B.C., will manage the forests on Nisga'a Lands.

Fish and Wildlife:

Indigenous jurisdiction will be reduced to the right to pass laws regarding their own internal harvest of these resources subject to the number allocations allowed by Canada and B.C. Features which Canada and B.C. will require within modern land claims agreements are:

- The Indigenous harvest of these resources will be for "domestic purposes," which grants a right to eat, but not to found an economy upon these resources.
- The harvest will be subject to conservation, health and public safety requirements. The right to restrict the harvest for these purposes, allows the Crown fairly broad powers to restrict Indigenous harvests (night hunting, for example, may be found to threaten public safety).
- Under the *Sparrow* decision, Canadian Courts decided that the aboriginal rights to these resources are afforded a high priority and is subject to conservation measures. Modern land claims agreements will eliminate the *Sparrow* priority, and make the

Indigenous harvest equivalent to that of other Canadians. For example, if a recreational or commercial fishery is not allowed on a particular run, the Indigenous treaty group will not be allowed to harvest fish from that run either).

- Indigenous Peoples will retain the right to trade or barter these resources among themselves, or with other aboriginal peoples, but not with any non-aboriginal people. Any commercial sale of these resources must be according to federal and provincial laws.
- "Management Committees" (comprised of Indigenous, and federal and/or provincial representatives) will be established for these resources which will allow some Indigenous participation in resource management. The Indigenous group will make recommendations for their harvest to these Committees. These Committees will either approve or disapprove the "Management or Harvest Plans", and then forward them to Canada or B.C. Canada or B.C. will have ultimate authority to approve the Management or Harvest Plans.

Nisga'a recognize Canada and B.C.'s ownership and jurisdiction of the resources, and in turn get an "allotment" of these resources. Nisga'a can pass laws regarding the manner in which the Nisga'a will harvest their resource allocations, and these will prevail over federal and provincial laws. Management Committees are established for these resources which allow the Nisga'a to "co-manage" these resources. The Committees make recommendations to Canada or B.C. who retain ultimate authority to make management decisions.

Canada's gun control legislation will apply in full force to the Nisga'a, although they can opt to administer the Firearms Act themselves, as other aboriginal peoples will be allowed to do. Federal and provincial laws will prevail over all Nisga'a laws in areas which allow for an economic benefit from resources, such as the sale of furs, hunting and angling guiding.

Canada and B.C. agree that they will "consult" with Nisga'a before taking any policy decisions or actions which will impact the Nisga'a harvest of these resources. If Canada or B.C. establish regional management bodies within the Nass Area, they will consult with the Nisga'a and, if practical, allow for Nisga'a participation on these bodies.

Fisheries:

The overall fish entitlement is held by the Nisga'a Nation communally and they cannot sell or give away this entitlement, although they can allow non-Nisga'a to harvest their allocation.

An Annual Harvest Agreement, approved by Canada, will set out the manner in which the fish are to be harvested, to what degree and whether fish harvested can be sold.

Federal and provincial laws concerning the sale of fish will apply to the Nisga'a fish allocation.

Wildlife and Migratory Birds:
The Nisga'a may harvest wildlife and migratory birds within the "Nass Wildlife Area", a portion of their former traditional territory lands. B.C. can "designate species" where it decides it is necessary to set harvest limits for conservation purposes. For these species, a total allowable Nisga'a harvest will be established. For species which are non-designated, Nisga'a have a right to harvest that wildlife for domestic purposes.

ECONOMIC ELEMENTS OF RESOURCES

Modern land claims agreements will not recognize that Indigenous Peoples, as sovereign nations, have the right to an economy based upon the access to and use of resources. Modern land claims agreements will specifically set out the economic uses to which the Indigenous treaty group will be allowed to make of resources. Where the Indigenous treaty group are allowed an economic access to resources, this is subject to federal and provincial laws. Canada and B.C. also ensure the protection of their own citizen's economic interests (for example, the Indigenous group will agree to "non-competition" clauses which protect existing local industries).

The Nisga'a Agreement protects the existing B.C. forest industry. Nisga'a agree to not establish a timber harvesting facility (aside from for their own use, or for value-added manufacturing) to process timber harvested on Nisga'a Lands, for a ten year period, unless as a joint venture with an existing timber manufacturing facility. Nisga'a promise to make timber harvested on Nisga'a lands "reasonably available" to local mills.

Forest Tenures and Processing
B.C. agrees, in principle, to grant Nisga'a Nation a forest tenure for an annual cut of up to 150,000m^3, outside of Nisga'a Lands, harvested according to federal and provincial laws. Nisga'a will pay all applicable fees (i.e., stumpage fees) for these trees. B.C. will only grant this timber tenure if it meets local employment needs, local public interests, and provides economic opportunities for the region. If Nisga'a want a Tree Farm Licence, the tenure must include a portion of Nisga'a Lands.

Participation in the General Commercial Fishery:
Canada and B.C. will provide funds to enable Nisga'a to increase its participation (through purchasing vessels and licences) in the general commercial fishery. Nisga'a participation will be on the same basis as other commercial fishers, and will be subject to federal and provincial laws. The amounts provided will be as follows: Canada:

5.75 million and B.C.: 5.75 million. (Nisga'a can spend up to 3 million for other fisheries activities).

Processing Facilities:
The Agreement protects existing fish processing plants. Nisga'a agree that they will not "establish a new fish processing facility capable of processing more than 2,000 metric tons of round weight per fish year, within eight years of the effective date, except as agreed to by the Parties."

SUBJUGATION TO DOMESTIC LAW

"Negotiating Space in the Basement of the Master's House"

Modern land claims agreements do not result in any restructuring of Canada. Canada was formed on Denial: Denial of the existence of Indigenous Peoples and Nations; Denial of our right of Self Determination; Denial of our Title to our traditional territories. Canada's existence is based upon the denial of the prior (and continued) existence of Indigenous Peoples. Instead of challenging this history, modern land claims agreements are Indigenous Peoples "negotiating space in the basement of the Master's house" - negotiating into a state which makes no changes to its structures and laws to allow for our unique Indigenous reality.

Indigenous Peoples have the right of Self Determination. These rights are inherent and inalienable. This right of Self Determination is not granted or given from any other power or government, but flows from the fact that we, as Indigenous Peoples, exist. The right of Self Determination is part of who we are. Self Determination is not only a right, it is a responsibility to live as a People: to promote and enhance our unique heritage, and to protect the lands upon which we came into being.

As a Peoples, we believe that we were given certain teachings when we were placed upon the earth. These teachings have to do with our responsibilities in our relationships with others and the manner in which we should fulfill our obligations to our own future generations. We carry, in each of us, this legacy and this obligation. These are the principles of our own laws which set out our right of Self Determination.

Modern land claims agreements will not recognize Indigenous groups' right of Self Determination. Instead, Indigenous groups will negotiate for a right of self government and self administration (the right to implement and administer laws and programs) as allowed by the federal and provincial governments. Traditional governance structures will be transformed into corporate structures.

Through modern land claims agreements, Indigenous Nations agree to follow federal and provincial laws, to reconstitute their systems of governance and land ownership

under Canadian laws, and to subject their traditional laws to the treaty-Agreement and domestic laws.

Federal and provincial laws apply to the Indigenous treaty group and its governments, institutions, citizens, and lands. These agreements will not evidences the right of Self Determination of an Indigenous Nation, rather the Indigenous treaty group will "negotiate into Canada" in a position much the same as a domestic municipality. International laws and covenants relating to the self determination of Indigenous Peoples will not apply.

Indigenous governance powers and jurisdictions are the hybrid combination of an Indian Band and a B.C. municipality, with land "ownership" rights equivalent to a private citizen.

The Nisga'a Agreement does not establish or recognize any separate order of Indigenous government, or require Canada or B.C. to make any changes in their Constitution, or to make constitutional room for the Nisga'a as a self determining People. The Agreement does not alter federal or provincial division of powers. The Canadian Charter of Rights and Freedoms applies to the Nisga'a government. Nisga'a have negotiated into Canada at the status quo.

Nisga'a have the right to practice their culture and use their language "in a manner consistent with this Agreement." This means that the oral histories, traditions, and laws of the Nisga'a are only valid if they do not conflict for the powers allowed for in the Agreement.

The Nisga'a Nation and Nisga'a Village are separate and distinct legal entities with the capacity and rights of a natural person, including the right to contract, buy and sell property, sue and be sued. (This is the legal description of a corporation, and the powers of a corporation). Each level of Nisga'a government will be bound by the Agreement, the Nisga'a Constitution and Nisga'a laws.

The Agreement will prevail over any Nisga'a laws. Nisga'a governments have the principle authority, as defined in the Agreement, over Nisga'a Government, citizenship, culture, language, Lands, and assets. Nisga'a Government can make laws these areas, and Nisga'a laws will prevail over federal and provincial laws.

In many areas, Nisga'a can make laws, subject to meeting federal or provincial standards. Examples are child and family services, solemnization of marriages, and K-12 Education on Nisga'a Lands

Nisga'a Government can prescribe penalties for the violations of its laws, including penalties, imprisonment and fines but these cannot exceed the penalties for summary convictions under federal and provincial laws (currently, this is approximately 6 months in jail and a $2,000 fine). Nisga'a Government has no authority over criminal law.

Nisga'a Nation can, at its own cost, provide police services on Nisga'a. Nisga'a police services will be governed according to standards substantially the same as provincial standards. B.C. reserves the right to step in and reorganize Nisga'a policing.

Nisga'a Nation is not authorized to establish places of confinement, other than jails or lockups operated by the police force.

Nisga'a Government can establish a court to administer Nisga'a laws, but B.C. must approve the Court's structure, procedures and method of selection of judges. The Nisga'a Court is bound by the same sentencing principles and can impose the same remedies as provincial courts, but it "may apply traditional Nisga'a methods and values, such as using Nisga'a elders to assist in adjudicating and sentencing, and emphasizing restitution."

If a person is eligible to receive a prison sentence under Nisga'a law, they can elect instead to be tried before a provincial court. Nisga'a cannot impose on non-Nisga'a citizens any penalty or sanction that would not be imposed by courts elsewhere in Canada, without that person's consent.

INDIAN ACT TRANSITION

Although Indigenous Peoples have long recognized that the *Indian Act* is an oppressive Act, at the same time we have realized that the *Indian Act* is one of the only pieces of federal legislation which explicitly binds the Canadian government in its fiduciary obligations to Indigenous Peoples.

Recently the federal government has proposed amending the *Indian Act* to give more control over land management and internal governance matters to Band councils. Indigenous Peoples fought these amendments realizing that the federal government was trying to devolve its fiduciary obligations in exchange for granting limited "Self Government" rights to Indigenous Peoples. We have long held the position that the federal fiduciary obligations towards Indigenous peoples can only be devolved upon the attainment of Self Determination and the recognition of our sovereign Nationhood.

Modern land claims agreements, instead of ensuring that the federal government continues to uphold its obligations to Indigenous Peoples, will divest the federal

government of these responsibilities. In exchange for the devolution of all federal fiduciary obligations, Indigenous Peoples acquire a limited form of Self Government and Self Administration.

Generally, the *Indian Act* no longer applies to the Nisga'a Nation or its citizens.

Nisga'a Indian Bands are transformed into Village Governments under the Agreement, and the former Indian Bands and Indian Reserve Lands will cease to exist.

All rights, title, interests, assets, obligations and liabilities of the Nisga'a Tribal Council are transferred to the Nisga'a Nation and the Nisga'a Tribal Council ceases to exist.

CAPITAL TRANSFERS AND LOAN REPAYMENTS

Indigenous Peoples have held the historic position that it is morally reprehensible to suggest that our Nations should have to borrow from the wealth created from our Aboriginal Title lands in order to "negotiate" for Canada to recognize Aboriginal Title.

A "money for land" exchange will be at the hear of all modern land claims agreements. Canada and B.C. will pay the Indigenous treaty group money through modern land claims agreements. These capital transfer amounts are intended to be payment in exchange for the Indigenous group having agreed to limit and define their Aboriginal Title and Rights. The money will also be used to help the Indigenous treaty group establish governance structures which will look like other municipal government structures within Canada and to deliver federal and provincial programs and services.

These amounts will be held in Nisga'a settlement trusts will be established under federal and provincial. Funds from the settlement trusts can only be invested in limited investments, and can be loaned at low rates of interest to Nisga'a governments, or loaned interest-free or at a low interest to Nisga'a citizens for residential housing, educational or small business purposes. Trust funds cannot be used to establish or carry on business activities. The distributions from the trust can only be made to benefit of the Nisga'a.

Nisga'a will repay, with interest, the negotiating loans it received from Canada. The total amount of the negotiating loans is not set out in the Agreement, but is in excess of twelve million dollars.

FISCAL RELATIONS

> The government says its trust obligations are like a pitcher of water. As Bands and Tribal Councils take on greater administrative responsibility for programs and services, the water is poured from the pitcher. Eventually, when Indians assume full administrative responsibilities, the pitcher will be empty and all Federal trust obligations will terminate, as will Indians' special legal status in Canada. Program administration wholly defines the substance of the trust relationship. There are no ongoing Crown obligations to Indian Nations in this scenario, protective or otherwise. (UBCIC: Treaty - Making and Title: a Non-Extinguishment Alternative for Settling the Land Question in British Columbia, 1989)

Canada's colonial history has given rise to fiduciary obligations on the part of Canada. Legally, this fiduciary should operate as a form of protective interest in which Canada is obliged to guard the rights and interests of Indigenous Peoples. This fiduciary duty can only be devolved upon the attainment of Self Determination, or with the consent of the Aboriginal Peoples. At present, Canada has a fiduciary duty to protect aboriginal title lands, and a general duty to provide for the health and welfare of Indigenous Peoples, in areas such as the provision of education and health services. It is a primary goal of Canada, in entering into modern land claims agreements, to devolve its fiduciary obligations towards Indigenous Peoples, while ensuring that Indigenous Peoples deliver and self-finance the programs and services set by Canada.

Indigenous treaty groups, having agreed to transform their status into one of a domestic municipal government, have none of the features of sovereign nations with independent economies.

Fiscal Financing Arrangements:
Every five years the parties will agree upon fiscal financing agreements by which Canada and B.C. will provide funds to enable Nisga'a to carry out agreed-upon public programs and services to Nisga'a and, where agreed, non-Nisga'a citizens. The levels of funding provided will be comparable to funding generally available in northwest B.C. The recognition of Nisga'a jurisdiction in certain areas does not create or imply a financial obligation on the part of Canada or B.C.

Nisga'a citizens are eligible to participate in programs operated by B.C. and Canada for the public, to the extent that Nisga'a has not assumed responsibility for those programs and services under a fiscal financing arrangement.

The funding for Nisga'a Nation and Villages "is a shared responsibility of the Parties and it is the shared objective of the Parties that, where feasible, the reliance of the Nisga'a Nation and Nisga'a Villages on transfers will be reduced over time." The

long-term goal is to have Nisga'a self-finance the programs and services which it delivers.

Own Source Revenue Agreements:
A main goal of the modern land claims agreements is to ensure that Indigenous Peoples become "self sufficient" in providing agreed upon federal and provincial programs and services. In the Nisga'a Agreement a formula is set out to determine Nisga'a "own source revenue", and how these will be applied to finance programs and services. Ultimately, this own source revenue will be used to reduce federal and provincial payments for programs and services, starting on the effective date of the treaty and fully phased in over twelve years.

TAXATION

Indigenous Peoples have always been tax exempt. The basis of the tax exemption has been the fact that we should not be forced to pay taxes to support the programs and services of a government which has oppressed us and denied us access to our Lands and Resources.

Modern land claims agreements, in converting Indigenous Peoples into Canadian citizens, will require Indigenous Peoples to pay taxes, for sales, income, and property.

The Nisga'a on the other hand, have now agreed to directly tax their own citizens on their own settlement lands for government purposes. However, this does not limit Canada or B.C.'s powers to impose taxes.

The tax immunity granted by section 87 of the *Indian Act* will eventually not apply to Nisga'a citizens. After eight years Nisga'a citizens will have to pay all transaction (sales) taxes, and after twelve years they will have to pay all other taxes (income and property taxes, for example). Nisga'a citizens have no immunity from taxes leveled by Nisga'a governments on them.

Nisga'a Nation or Villages is not subject to capital or real property taxation on lands for which there are no improvements, or designated improvements (such as public buildings, public works and forest resources. A transfer of capital to the Nisga'a under this Agreement is not taxable, but Nisga'a Nation and Villages are subject to taxation arising from a disposition of capital.

If, within 20 years of the Agreement, Canada or B.C. enter into another treaty in northwest B.C. which provides for a broader tax exemption than that allowed in this Agreement the parties will negotiate and attempt to reach an agreement to provide the

Nisga'a Nation and Villages with a similar tax exemption. Theoretically, no tax exemption will be granted to Nisga'a citizens.

Amounts paid to Nisga'a participants under this Agreement are taxable if they can be considered a distribution of capital transfer. If Nisga'a give treaty payments to their members these amounts are taxable when they are received.

SUMMARY

The net impact of the certainty language in modern land claims agreements, and evidenced in the Nisga'a Agreement, is the creation of a double standard with regard to title and interests in the land. Canada, the province, and third parties have their rights and interests recognized and protected. These rights are not defined or in any way limited by the Agreements. The Indigenous group, on the other hand, have all of their rights reduced to the written word of the Agreement. Their Aboriginal Title to their traditional territories, ceases and is replaced with fee simple title. Their Right of Self Determination ceases and is replaced with the right to self-government and self administration under Canadian law.