

A Phase One Agreement Proposal to the Governments of Canada and British Columbia

February 9, 2011

Purpose

Treaty negotiations have been continuing for many years now. There have been some achievements but we remain far away from any overall agreement. It is important for all of the parties to show some tangible and significant progress soon. The public expects governments to do better in addressing the problems of First Nations, and our talks could present a major opportunity.

This document describes an area within the overall negotiations where actual agreement might be reached within a year on important matters, given good will on all sides and a firm commitment to a completion date.

The words, “Phase One” imply a beginning, to be followed in due course by one or more further phases on the way to a full and final reconciliation.

The focus on a much smaller part of the overall talks for the purpose of early agreement is in no way intended to sideline, foreclose or delay progress in other areas under discussion. But for the time being we might devote additional effort to what follows.

Background Part I - Historical

The Gitksan have lived in our traditional territories since time immemorial. We developed our own language and a strong and distinctive society. We prospered, supporting ourselves from our own efforts and the resources of our lands and waters using principles built into our ayookw.

We are determined to regain our former ability to support ourselves through our efforts and our lands. We are determined to again become the free

people we used to be. To this end we finally commenced negotiations with the new governments that have come to dominate our world. What follows are first a progress report and then a new approach.

The Gitksan Nation has been actively involved in settlement talks with Canada and British Columbia since the 1980s. In these talks the Gitksan have been led by the Gitksan Hereditary Chiefs. On behalf of the Gitksan nation, the Chiefs are holders of the aboriginal rights and title within our 33,000 square kilometers of traditional territory.

From the beginning the Chiefs have rejected what has come to be known as the Standard Treaty Model, a settlement package which includes land involving only a small part of the traditional territory, some cash and a new small Indian government continually reliant upon federal support. By contrast, the Chiefs have claimed a role in all of their territories, a wish to become self-supporting and a wish to cease to be Indians and instead live as Gitksan Canadians, making our contribution and adding value to Confederation.

Negotiations made some progress and in 1994 a “self-government” arrangement was actually initialled by Canada but never implemented. In 1996 British Columbia left the talks since the Gitksan would not buy into the Standard Model. . It was time again for guidance from the courts.

After more than a decade of litigation, the existence of aboriginal title was confirmed in the *Delgamuukw* judgement by the Supreme Court of Canada on December 11, 1997. The Court confirmed that Gitksan oral evidence on their traditional laws, history, societal organization, traditional territory and historical occupation of that territory must be given independent weight on its own terms. The Court then elaborated on the content of aboriginal title and summarized the basic aspects of aboriginal title as follows:

“First, aboriginal title encompasses the right to exclusive use and occupation of the land; second, aboriginal title encompasses the right to choose to what uses the land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.¹”

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 166

In the oft-quoted concluding paragraph, the Court was encouraging the parties to reconcile their interests through negotiation rather than litigation. Chief Justice Lamer specifically noted that “the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”

On September 15, 1998, the Hereditary Chiefs of the Gitksan, on behalf of the Gitksan, entered into a bilateral *Reconciliation Agreement* with the Province of British Columbia. That Agreement sought to establish a framework for a negotiated process for reconciling Gitksan Title and the assertion of Crown sovereignty over Gitksan Traditional Territory. To date the objectives of that agreement have not been achieved.

From 1998 to Spring of 2008 discussions with Canada and British Columbia to obtain recognition of Gitksan rights failed to yield satisfactory results. In May of 2008, negotiators for the Gitksan tabled a re-stated version of our long-time approach which came to be known as the Gitksan Alternative. This proposal seeks to reconcile Gitksan interests by removing the Indian Act from the Gitksan people and (aside from status Indians) from the Gitksan territory.

Since this plan would also impact the Reserve system in the territory (except for non-Gitksan status Indians) it is opposed by some of those who obtain their importance and/or income from Band governance.

Canada and B.C. see these internal concerns, however large or small they may actually be, as a reason to move very slowly. In addition these proposals are different than anything else they have considered elsewhere. As a result, we have made insufficient progress.

We cannot allow this stalemate to continue. The Crown is under a moral obligation to find a reconciliation. We must find a way to make a breakthrough. The current stagnation has no place in “good faith” negotiations.

Background Part II – Short term essentials for the Gitxsan

The instructions of the Supreme Court of Canada call for reconciliation of governments with the fact and reality of the pre-existence of Gitxsan society. All of our measures must advance this goal. In so doing we wish to add value through cooperation, rather than subtract value via contestation. We will be very open to new governmental ideas in this regard. We need more imagination.

What all parties need to do is to show some progress in reaching agreement.

For governments, agreement will lead to enhanced certainty over lands and resources and the unlocking of development potential, plus recognition and partial fulfilment of the fiduciary and honour responsibilities.

For the Gitxsan our proposal will yield money for investment, capacity growth and economic opportunity. It will provide some fee simple lands identified at this initial stage plus a role in management of our traditional lands and a share in resource revenues. We contemplate that the Phase One give and take will be partial on all sides of the table, with further reconciliation efforts required in the future. The goal of Phase One is not a full and final settlement, but rather to show significant, tangible progress and kick start economic development.

The short term arrangements must be consistent with the reality that the Gitxsan have followed a well-developed system of traditional laws (*Ayookw Gitxsan*), including a sophisticated governance and land tenure system, for thousands of years. The *Delgamuukw* case is clear that this history must be given an independent weight and recognition. (See, in particular Paras. 92 - 107.) .

Further, the fundamental aspects of aboriginal title must be accommodated, including the right to choose the use to which the land is put and to share in the economic benefit from that land, (Para. 166)

These basic elements of Gitxsan aboriginal rights and title have been re-affirmed in subsequent cases, such as *Yal* (2002).

The arrangements that we wish to make must take into account the detailed work we have done on land use , and the Gitxsan Resource Management Authority (GRMA - see “Capacity”, below). The capacity growth should include funding for GRMA and land use, as per Para. 166. We have had some engagement with the Integrated Land Management Bureau, but there has been neither funding to implement nor powers to bind other agencies.

The short term measures should be such as to advance boundary certainty, and the recognition of certain initially identified lands as Gitxsan individual or collective fee simple

It is part of our goal for an interim measure that economic opportunities should be identified for each of our nine watersheds, and all of the above should be consistent with and supportive of our *Delgamuukw* rights.

We note the other obvious requirement of reaching an initial arrangement: We must be able to sit across the table from people who have an actual mandate to negotiate, at least within the parameters of the package we will propose. The federal and provincial Cabinets should deliver this, and very soon. If this is not quickly achievable we may have to consider other paths.

Background Part III – Gitxsan capacity

From time immemorial we have governed ourselves through a cohesive and comprehensive set of Gitxsan laws that included our basic interactions between our people, the land and all its resources. Our feast system plays a central role in the transactions under the Gitxsan Ayookw, and provides internal transparency and accountability under our system of governance. We have our clans and we had our villages prior to the Indian Act, which made them mostly Reserves. (The Chiefs wish to begin a restoration pilot project at Kisgegaas, the subject of another proposal.)

In order to do business with governments we have established structures consistent with Canadian ways. The Chiefs speak collectively through the body known as the Gimlitxwit. We have established nine watersheds for more regional matters, and set up trusts and agreements among them for accountability.

We have spent a great deal of money developing detailed Gitxsan policies on lands, fish, water, minerals, forestry and oil and gas. We are ready and have the capacity to harmonize with government policies in these areas. To date our requests for detailed discussion of such harmonization have not been answered.

We are establishing a Gitxsan Development Corporation to act as an overall holding company for initiatives we are developing or contemplating in forestry, energy, transmission lines, the fishery and so on. The planning is well advanced. However the financing is missing, and is essential.

Our oral history and proof of historical occupation of our territory has been set out in great detail in *Delgamuukw* at trial, including our own territorial affidavits. The Supreme Court of Canada has directed that our evidence be given independent and equal weight to common law ideas of property. We have also engaged the top provincial expert (Kathleen Shoemaker) to assemble all other available strength of claim evidence. We are not resting on this file.

Using funds provided by governments we are assembling a draft voters list, almost a census, of the Gitxsan people as an indispensable tool for two communication of options and proposals, and ultimately for the ratification of major agreements. We will be ready for this.

Noting that governments have raised possible Charter issues on our longer term plans we have sought and received the advice of our own Counsel and have also engaged Roger Tassé, the former Deputy Minister of Justice for Canada and important draftsman of the Charter.

We have a long term working agreement with Canada in respect of salmon. We have a short term forestry agreement with British Columbia, but see no progress on a long term forestry agreement (LTFA) and on obtaining certain rulings from the forestry appeal process. We had hoped the LTFA would be our “test bed” for cooperation with the province on resources and have done our best to make that happen.

To advance and manage all of the above, we have a capable team of administrators and negotiators all working under the oversight of the Gimlitxwit. We have the capacity and are ready to make practical deals and agreements and now seek to do so.

We value the relationship we have with our current federal and provincial negotiators. At the same time, we have invested heavily in capacity, beyond the investments of governments. This includes dedicated advisors on the economic, Indian Affairs, strength-of-claim and legal aspects of our relationship. We now call upon our colleagues around the table to increase their advisory team (and we acknowledge with thanks efforts to date such as in the municipal field) to a level fully commensurate with our own new resources in order to make further and rapid progress. Nothing but good could come of this.

Background Part IV – Political

In recent years we have developed and maintained ties with senior figures at the political level. We are confident that our general approach has their support. The challenge is to bring to them a set of practical proposals that fit the current political climate.

We are aware that the political situation in Ottawa is unsettled and may remain so for some time. Therefore we have designed our current proposal as one that, while important, will be seen as quite routine as far as the involvement of the federal government is concerned.

The situation with the provincial government is different. British Columbia will very soon have a new Premier. He or she will be looking for imaginative opportunities, for new ways to meet old problems that have been difficult to solve. Reconciliation with aboriginal peoples has to be very high up on this list.

We believe that the new Premier will be looking for a “win/win”. He or she will need a demonstration project that is clearly in the interests not just of one aboriginal group, but of all of the province and its social and economic needs. That means a demonstration project that creates wealth as well as social goods.

But the creation of wealth does not come without investment. We believe the next Premier will recognize that. We have crafted an investment opportunity that he or she will be able to see, not just as a meeting of governmental responsibilities to First Nations (though that is crucial), but as genuine economic development.

We focus on this political concept because we recognize that under our system imaginative progress in the public sector must have the backing of First Ministers. If we can convince the Premier of our plan, that political support will very much help to get it done. And Premiers can talk to Prime Ministers as required. That First Minister support was the only way the precedent of the Nisga'a agreement was possible, and we hope to do the same for the Gitxsan in an even more modern manner.

So we look upon our proposal as a major political opportunity.

The new proposal to governments

We have considered the idea of doing an initial and partial settlement centering on progress on the certainty of title, with B.C. as the holder of most claimed Crown lands and with the essential support of the federal government in respect of aboriginal rights, the honour of the Crown and economic development for aboriginal peoples. We have reason to believe that British Columbia would be open to this limited approach based on several recent bilateral "reconciliation" agreements with other nations. We would hope, given that our approach would be much greater in scope than the bilaterals (especially in terms of early benefits to the Gitxsan people) that the federal government would play its role.

What are the elements of this new proposal?

First of all, we must simplify what is on the table now. That is not to say that we wish or are prepared to abandon any part of our Alternate Governance Model which was presented in good faith and remains our long term goal. The proposals we now submit will not foreclose any of these long term policies, but will shift the short term focus.

Unlike the Gitxsan Alternative, our Phase One proposal would not suggest any changes at this time to the Reserve system. Band governments, programs and Reserve lands would not be affected or involved at all.

The question of Status would not be involved.

Intergovernmental financial questions on program responsibility would not need to be dealt with at this time.

Local government and transitional questions would simply not be involved, at least at this stage.

These matters could be and would be left for discussion in the future. So current negotiations would become a lot simpler.

What the new plan would propose is now outlined. Begin first with the interests of the parties.

Conceptually, some of the big things that we as a nation want in an interim agreement are:

- Economic development
- accommodation of Gitxsan decision making on administrative and operational issues re management of the territory, and a share of resource revenues;
- appropriate recognition of Gitxsan fee simple lands (both individual and collective); and
- money to acknowledge responsibilities of governments and build the future.

What the Province wants above all else is certainty of title and of the rules of the game, to foster economic development. Governments also wish to acknowledge fiduciary responsibilities and the honour of the Crown. There is a consistency of objective here.

The Gitxsan Hereditary Chiefs hold aboriginal rights and title. They are the owners, in trust for the Huwilp and people. Therefore we are in a position (with the assent of the Gitxsan people) to give the province what it wants above all else, i.e. a measure of title certainty to be negotiated and to assist the federal government in living up to its side of the reconciliation duty.

On the other side of the table, the province is in a position to give us much of what we seek at this Phase One stage as to lands and resources. The federal government is capable of giving its assent in the matter of defining rights insofar as the initial agreement would do so, and in making at least a portion of the Capital Transfer which is common to all agreements settling the land question. This acknowledges two of the main things that Canada wants, namely to foster economic development for the people that have

suffered for so long under the Indian Act and to recognize some of its liabilities for past mismanagement of its fiduciary responsibilities. This would also assist in increasing education and other opportunities for young people – e.g. the Gitxsan Training Initiative, a unique approach to the problem of skills training.

By way of a relatively simple agreement we could confer certainty for governments re economic development, at least for a given time and in defined areas, all to be set by negotiation. Economic development is a prime objective for all of us. The definition of rights and title might be full or partial. Again, this would be for negotiation.

The extent in time and space of the certainty we will be willing to provide will reflect the extent to which governments are prepared to show sincere and tangible evidence of a wish to meet their duty of reconciliation. The arrangements might be limited in time, or they might be “evergreen”. The arrangements might include detailed and binding consultation protocols during the Phase One period. Investment projects entered into under these rules would need to be grandfathered as to certainty. And we would expect that the confidence and development built by the Phase One experience should lead to further and deeper reconciliation sooner than otherwise might be the case. Full reconciliation and certainty for all parties remains our goal.

We note that the approach we have taken with British Columbia on forest agreements have been described as “interim”, “short term” and “final”. The phased approach is not new.

We point out that none of this is possible unless governments provide a mandate for negotiators. We believe the limited scope of Phase One and the focus on economic development should make such a mandate possible in the near future.

The ratification on our side would involve a vote of the Gitxsan people, and the question would be a simple one. The Gitxsan people would be asked to agree with the new benefits we hope to negotiate in exchange for giving governments greater certainty.

The question would simply be to bless a clarification of intangible rights in exchange for very tangible benefits which would then flow to the Gitksan nation.

The ratification by B.C. and Canada might involve some legislation, but this is usual with many First Nation agreements.

What is needed now

What would this involve on the part of the Gitksan and governments? The following, all subject to negotiation but in principle:

- a) Negotiations on our interim economic proposals for the province.
- b) Agreement with governments on boundaries. Our boundaries are strong. We point again to the very detailed testimony re boundaries at trial in *Delgamuukw*, all on the record, and the rules set out by the SCC in Paras. 92 – 107 requiring proper respect in aboriginal law for such oral history. None of the interveners in our court battles have challenged our boundaries as set out in our oral history, giving us exclusive use and occupation as set out in our *adawak*. Our current strength-of-claim research will assist as well.

We request that governments cooperate with us in this task. These problems were solvable in the Nisga'a Treaty context and our evidence is stronger.

- c) A definition of exactly what we mean by our role in land management, which includes a share of resource revenues, employment for Gitksan, etc.. The arrangement should clearly outline responsibilities for resource management, with dispute resolution machinery. We need governments to grant negotiators a mandate to negotiate this. Other models exist, as do the Gitksan resource policies.

- d) A specification of some – not all at this stage - Gitksan fee simple lands, individual and collective, for the purposes of the initial agreement. No reference would be made to existing Reserve lands at this time, though of course we consider them to be fully under aboriginal title, even if temporarily vested in the Crown federal.

We emphasize the following: We view the recognition of certain fee simple lands purely as an accommodation of our economic, cultural and residential requirements. This will not in any way diminish our overall just claim to rights and title. These matters will only be fully resolved in a full and final agreement at some future time.

e) Negotiations on a Capital Transfer – see above.

Nothing we need to ask for is novel, though the scale will be larger than usual. In addition, everything we ask for in the way of infrastructure will be of significant net economic value to the province as well as us.

These things should include annual capacity payments for resource management, etc., as, for example on a much smaller scale, the Haida Interim Agreement. We believe that such capacity payments should be sufficient to fund such essential management tools as the GRMA and land use discussions.

We believe governments should facilitate important economic developments to generate jobs and revenues from the territories of the Gitksan nation. We emphasize that all nine watersheds must benefit from this.

One leading example would be the development of hydro generation at Cascadero Falls, both by lending us the money required for our share of the equity plus arranging for B.C. Hydro to enter into a contract to purchase the electricity generated at usual rates for this sort of project. We will furnish details of the economic viability of this project.

Whether developed by us alone or in partnership with our neighbours, Cascadero is very important to this initial agreement, as we see it. And after payback of financing it will provide the Gitksan with a reliable and significant cash flow for economic, social and cultural purposes. This is very central.

Moreover the Cascadero development will preserve a key transmission line after the shutdown of Kemess and make possible the development of other mineral resources in the area which will otherwise remain locked up for the foreseeable future. We put a very great emphasis on this as an economic driver and will have specific proposals.

In referring to Cascadero specifically we do not imply that as a limit. We must vigorously seek economic development and other benefits that apply to all of our nine watersheds. Other proposals – roads, etc. – can be developed. All of these are also for the overall provincial good. We will look forward to working with governments on possibilities that met the test of clear economic cost/benefit ratios.

The above would allow the governments to calculate exactly what certainty will cost them and what (far greater) benefits it would yield. We would have the grounds, finally, for a real negotiation where each side has the ability to deliver in a timely manner.

Finance

The usual approach in the Standard Treaty Model, based on the 1993 federal-provincial MOU, is that Ottawa provides the Capital Transfer and continued funding for the Indian government, while B.C. provides the settlement lands.

Under our Phase One plan, B.C. would provide the initial lands – nothing different here except as to quantity and fee simple status for our lands.

However, as is usual with other settlements that provide certainty, we would ask Canada to provide a portion of the Capital Transfer at this time. Ottawa's participation as to Capital Transfer at this time does make sense. Consider the following.

While governments have never been prepared to characterize any part of the Capital Transfer as being compensation for past damages, those damages are an underlying legal reality and a latent obligation which an agreed capital transfer will discharge, potentially partially now and fully sometime in the future.

Ottawa more usually characterizes the capital transfer as being for the sustenance and economic development of the nation concerned. To the extent Ottawa is prepared to view the Capital Transfer in terms of funding economic development for the Gitxsan people, it makes sense to do that at the same time as we reach a Phase One agreement with B.C. and Canada

As a matter of fairness and equity it should be recognized that the economic benefits that have been derived over many, many years from the extraction of our resources with no compensation to us have gone to both governments and not at all to the Gitxsan Nation. The province has received stumpage, royalties, etc.. Both governments have shared in the much larger revenue from the taxation of wages in the industries and sales taxes generated by the economic activity. The taking of all of this money from our lands engages the fiduciary responsibility and the honour of the Crown.

We understand that the federal government has a lengthy process for appropriating funds and we would seek to begin significant economic development much more quickly. We suggest that B.C. might be prepared to voluntarily recognize that difficulty and advance some money upon the execution of the new plan, particularly if they could characterize funds being advanced to us as (zero interest) loans to be repaid from the Capital Transfer which will eventually be received from Ottawa. We would undertake to repay the loan from that eventual Ottawa source. That could get us some reasonable and essential money up front to work with.

Conclusion

For the past almost three years our focus has been on the Gitxsan Alternative and how to better move that plan along.

However the pace has been too slow. The Gitxsan people are properly impatient with the continuation of poverty, unemployment, suicides and all of the other sad manifestations of the Indian System we seek to escape.

Our new proposal for an initial settlement would give lands, revenues and influence over development now to advance the needs of the nation.

It will be our purpose now to consult widely with the Gitksan people about this new approach as to concept and details, and to open discussions with the two governments based on that plan.

We all seek the same things – reconciliation, and a better life for the Gitksan people. We wish to add value to Canada. Our approach is not just for the Gitksan people, but the strategic benefit of everyone living in our part of British Columbia.

We wish to underline that we approach this new initiative in a spirit of constructive cooperation. We believe it has opportunities for governments as well as for us. It offers governments a way to experiment. No one is really content with the precedents and outcomes of the Standard Treaty Model. The Gitksan are open to new relationships that governments might find useful.

Reconciliation is the goal. We believe this proposal is an important step on the way.