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DATE: August 26, 2003
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NAME: Nicole Schabus

FIRM: INET

FROM: Gitanyow Hereditary Chiefs

RE: Intervention of Indigenous Network
on Economies and Trade

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08/26/03 11:29

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August 25, 2003

Grant Aldonas
Under Secretary for International Trade
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Dear Sirs:

Re: Intervention of Indigenous Network on Economies and Trade on draft US Department of Commerce Policy Bulletin on Softwood Lumber

We are the Gitanyow Nation and our traditional territory is located in north-western British Columbia.¹ One of the critical issues that we have been faced with is the widespread logging throughout our Territory under licence from the British Columbia government with no consultation or accommodation of our aboriginal interests.

In December, 2002, the B.C. Supreme Court held that British Columbia had approved a transfer of shares of Skeena Cellulose Inc. ["SCI"] without consultation and that the decision was therefore not in accordance with British Columbia's constitutional obligations. Since that time, we have been endeavouring to come to agreement with British Columbia to accommodate our aboriginal interests.

Of particular interest to your Department is the fact that the share transfer excluded one of the forest tenures known as Buffalo Head Forest Products which is in the north of our territory. This tenure has been extensively logged. Although the provincial government of British Columbia requires tenure holders to fulfill silvicultural obligations at their own cost, many of these obligations have not been fulfilled in the case of Buffalo Head. Furthermore, the valuable timber has been mostly removed from that tenure leaving it as a significant

¹ We have attached a map of our Territory and our Submission to the Commons Committee of the Government of Canada in which our traditional governance is explained.

financial obligations of SCI. When the shares were transferred, this tenure was excluded.

This year the Ministry of Forests for British Columbia had an independent study done with respect to the outstanding silvicultural obligations in the Buffalo Head tenure. The Report concluded:

"Planting is required immediately on almost all areas identified. Focus should be concentrated on areas harvested in 1999 and later to prevent further silviculture liabilities. Sowing should be initiated as soon as possible. It appears that planting will likely be delayed until fall 2005 unless sowing can take place in 2003. In this situation brushing liabilities are likely to increase.

Brushing treatments must be carried out in 2003 as no treatments were carried out in 2002.....

The total cost to meet basic silviculture obligations is nearing four million dollars. 2

The effect of the failure to implement the legally required silviculture obligations on the Buffalo Head tenure has been an impact on the ability of the Gitanyow to be able to exercise their aboriginal rights and title which are constitutionally protected rights within that portion of their territory.

These are costs which the company which extracted the timber from this tenure has not had to bear. The obligation has now been left with the provincial Crown. However, there is no guarantee as to when or to what extent this portion of the Gitanyow Territory will be restored.

This is significant as well since Gitanyow is in the midst of negotiating a treaty with Canada and British Columbia to protect their aboriginal rights within their territory. Unlike most of Canada and the United States, few treaties were made with the aboriginal nations of British Columbia and since 1996, Gitanyow has been in Treaty negotiations.

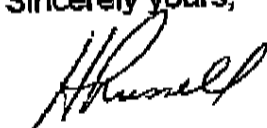
It is critical to First Nations in British Columbia that the effect of non-enforcement of silvicultural obligations not be allowed to continue as such non-enforcement is destroying aboriginal lands and resources with no compensation and is, in effect, providing a subsidy to companies operating in British Columbia.

In considering the revision of the US Department of Commerce's Policy on Softwood Lumber, we ask that you take into account the Intervention of INET and the example that Gitanyow has provided.

If you have any further questions or concerns, please contact Glen Williams, Chief

Negotiator, Gitanyow or Herb Russell, Assistant Chief Negotiator at the above address and phone number or at e-mail address info@gitanyowchiefs.ca or our legal Counsel, Mr. Peter Grant of Hutchins, Soroka and Grant at #900-777 Hornby Street, Vancouver B.C. Canada, V6Z 1S4. Mr. Grant's e-mail address is pgrant@hsgnativelaw.com and his phone number is 604-685-1229.

Sincerely yours,



Herb Russell
Assistant Chief Negotiator
Gitanyow Nation

cc. INET

**SUBMISSION TO THE HOUSE OF COMMONS STANDING COMMITTEE
ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT**

ON

BILL C-9 - AN ACT TO GIVE EFFECT TO THE NISGA'A FINAL AGREEMENT

BY THE GITANYOW HEREDITARY CHIEFS

November 16, 1999

Smithers, B.C.

Standing Committee on Aboriginal Affairs - Bill C-9

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SUBMISSION OF THE GITANYOW HEREDITARY CHIEFS
to
THE HOUSE OF COMMONS STANDING COMMITTEE ON ABORIGINAL AFFAIRS
AND NORTHERN DEVELOPMENT
on
BILL C-9, AN ACT TO GIVE EFFECT TO THE NISGA'A FINAL AGREEMENT

INTRODUCTION

The Gitanyow Hereditary Chiefs welcome the opportunity to address this Standing Committee on Aboriginal Affairs and Northern Development on Bill C-9, An Act to Give Effect to the Nisga'a Final Agreement. We also welcome the Committee and its new Chair, Ms Susan Barnes to Smithers, British Columbia.

PURPOSE OF THE SUBMISSION

The Committee's mandate is to hear submissions on Bill C-9. We intend to present our concerns, observations and recommendations regarding this Bill. However, these concerns, observations and recommendations must be understood in the context of the Nisga'a Final Agreement itself and the latter's impact on Gitanyow aboriginal rights and title. It is also important that this Standing Committee is aware of the history and status of the Gitanyow treaty negotiations as these are most directly related to the Nisga'a Final Agreement.

The Nisga'a and Government of British Columbia have already ratified the Treaty, and Bill C-9 has gone through a first and second reading in Parliament at a rather expedited pace. All this despite the Gitanyow's numerous attempts to bring their issues to the federal and provincial governments and to the Nisga'a with the aim of achieving a negotiated resolution. These attempts appear to have fallen on deaf ears. It is our hope that this Committee will not only listen to us but will hear us and assist us, even at this late stage, to right the continuing wrong to the Gitanyow people now being crystallized through Bill C-9.

The conclusion we have reached is that changes must be brought to Bill C-9 to ensure that the

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Gitanyow rights will be protected pending our treaty negotiations with Canada and British Columbia. Ultimately this will mean changes or clarifications to the Nisga'a Final Agreement. Our specific recommendations are elaborated upon below.

WHO WE ARE

The Gitanyow Hereditary Chiefs represent the Gitanyow with respect to their aboriginal rights, title and governance and other interests in the Gitanyow Territory and in their treaty process with Canada and British Columbia.

The Gitanyow are an Aboriginal people who have aboriginal rights, title and governance in and to approximately 6280 square kilometres of territory ("the Territory") in the mid-Nass River Watershed in Northwestern British Columbia. We have used and occupied, and continue to use and occupy, this Territory. The main community of the Gitanyow has a population of approximately 500, which includes individuals who make their home in the Gitanyow Territory although their territory may be elsewhere in Gitksan territory. Gitanyow members are members of a number of other *Indian Act* bands, most notably Kitwanga, Kitseguekla and Aiyansh. Combined, the membership total is over 2,000 members.

The Gitanyow comprises eight matrilineal units called Wilp (Houses). These Wilp hold title to the Gitanyow Territory on behalf of the Gitanyow people. Culturally Gitksan, the Gitanyow have strong blood ties to neighbouring Gitksan and Nisga'a communities. According to Gitanyow law, Gitanyow membership is not lost by migration from a Gitanyow village. Gitanyow members, regardless of residence in Gitksan or Nisga'a communities have, in accordance with Gitanyow law, continued to exercise their hereditary rights in the Gitanyow Territory.

A detailed history of the Gitanyow Wilp can be found in *Histories, Territories and Laws of the Kitwancool* (1958) a publication of the Royal British Columbia Museum edited by the eminent anthropologist Wilson Duff, and in *Tribal Boundaries in the Nass Watershed*, published by the UBC Press. *Tribal Boundaries in the Nass Watershed* was transmitted to the Nisga'a and to Canada and British Columbia through their respective Chief Negotiators in December of 1995. *Tribal Boundaries in the Nass Watershed*, supports the Gitanyow claim to those portions of the Gitanyow Territory affected by the Nisga'a Agreement. It documents the oral histories of both the Nisga'a and the Gitanyow as well as the historical record to establish boundaries between the Nisga'a and the Gitanyow on the Nass River that is, in the Gitanyow Territory. None of the parties to the Nisga'a Final Agreement have responded to the overwhelming evidence establishing

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that the Nisga'a had no aboriginal rights above the Kinskuch River watershed of the Nass River.

Tribal Boundaries documents the detailed evidence provided to Canada and British Columbia on Gitanyow historical use and occupation of our Territory. We urge the Committee to consult this important work.

GITANYOW AND NISGA'A "OVERLAP"

The Gitanyow have been very active and persistent in their attempt to have their aboriginal title, rights and governance in and to the Territory recognized. The Gitanyow have always been prepared to negotiate a reconciliation of these rights with Canada, British Columbia and the Nisga'a. The Gitanyow have been very active, for many years, in attempting to resolve their differences with their Nisga'a neighbours.

But what we have sought, what we expect and what we deserve from Canada, British Columbia and the Nisga'a is a negotiated not an imposed structure for reconciliation of the respective parties' rights.

Some of the key highlights of our efforts include:

- On November 7, 1977 the Gitanyow made a submission to the then federal Minister of Indian Affairs for the purpose of land claims negotiations.
- On April 21, 1981 the late President Peter Williams of the Gitanyow, made a speech at the 24th Annual Convention of the Nisga'a Tribal Council in which he confirmed the Nisga'a would not claim any part of the Gitanyow Territory.
- During the course of the early 1980s several meetings were held between the Gitanyow, Gitksan and Nisga'a to discuss agreements not to claim each other's territories.
- As recently as July 16, 1990 an overlap protocol was confirmed between the Gitanyow and the Nisga'a Tribal Council. This protocol became part of the Northwest Tribal Treaty dated February 11, 1991, which was signed, among others, by the Nisga'a and Gitanyow.

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- The Gitanyow continued in an their efforts to resolve differences with the Nisga'a through another draft agreement in April 1992.
- On November 10, 1992 the Gitanyow met with the Nisga'a in an attempt to resolve "overlap" issues.
- More recently alternative dispute resolution mechanisms have been attempted and have been unsuccessful.

In conclusion, the Gitanyow have attempted for the last 16 years to settle the "overlap" dispute both through direct dealings with the Nisga'a and through attempts to accelerate Gitanyow treaty negotiations to ensure a synchronization and coordination between Gitanyow treaty negotiations and Nisga'a treaty negotiations. Proposals to federal and provincial governments and to the British Columbia Treaty Commission ("BCTC") for remedies have produced no results.

THE NEGOTIATION OF GITANYOW ABORIGINAL RIGHTS, TITLE AND GOVERNANCE

The Gitanyow have been in the BCTC process since 1993. On December 15th of that year - the very day that the BCTC opened its doors for business - the Gitanyow gave formal notice to the governments of Canada and British Columbia of Gitanyow aboriginal rights, title and governance in and to the Territory by filing a Statement of Intent. The Statement of Intent was accepted by the BCTC on December 16, 1993. A Framework Agreement under this new treaty process was signed by the three negotiating parties on February 6, 1996.

The BCTC process was (and continues to be) the "only game in town" that Canada and British Columbia recognize for the discussion and negotiation of aboriginal rights, title and governance in a constitutional context. The Gitanyow have been extremely cooperative in accommodating this policy of governments, and this, despite these same governments signing a Nisga'a Agreement - In-Principle in February 1996 and later initialing a Final Agreement without the critical "overlap"

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issues with the Gitanyow being resolved.

The Gitanyow continue to engage in treaty negotiations with the federal and provincial governments, the latter having agreed to accelerate the negotiations in light of the disputes regarding the Nisga'a Treaty. In September of this year the Gitanyow submitted a Comprehensive Agreement-In-Principle to Canada and British Columbia. The latter have agreed to table an initial offer on November 29th, 1999. The Gitanyow have yet to obtain any substantive and concrete assurances regarding the issues we have with the impact of the Nisga'a Treaty on our negotiations. It is not even anticipated that this matter will be addressed in the joint federal/provincial offer.

HAVING TO RESORT TO LITIGATION

Immediately following the signing of the Nisga'a Agreement-In-Principle in February 1996, the Gitanyow notified Canada, British Columbia and Nisga'a governments of their objections to an obvious encroachment into the Gitanyow Territory and the impact on the Gitanyow, the Territory

and resources. Canada and British Columbia consistently reassured the Gitanyow that it was not their intention to affect Gitanyow rights or interests, yet they continued to refuse to bring necessary changes to the Nisga'a Treaty to accommodate Gitanyow concerns (see Appendix 4&5).

Consequently, the Gitanyow had no other option than to resort to the Courts to protect their interests before it was too late. The Gitanyow filed legal proceedings in the Supreme Court of British Columbia in March of 1998. Through these proceedings, the Gitanyow were seeking a declaration that both Canada and British Columbia have a legally enforceable duty to negotiate with the Gitanyow in good faith and that they had breached that duty in concluding the Agreement-In-Principle with the Nisga'a.

WHAT THE COURTS HAVE SAID

The law of Canada regarding the duty of the Crown in the case of overlapping assertions of aboriginal interests was clarified in late 1997 by the Supreme Court of Canada in the *Delgamuukw* case. The Supreme Court of Canada stated the following:

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As was said in *Sparrow*, s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed.

British Columbia and Canada attempted to have the Gitanyow proceedings struck out but were not successful. Mr. Justice Williamson of the Supreme Court of British Columbia, in his judgment of June 17, 1998, described the situation as follows:

The Gitanyow seize in particular upon the Chief Justice's observations that "negotiations should also include other Aboriginal nations which have a stake in the territory claimed". They submit that in binding themselves to conclude an agreement which complies with the principles set out in the already executed Agreement in Principle, Canada and British Columbia are "heading for a cliff". By this they mean that a final agreement, consistent with the principles to which they have already bound themselves, will result inevitably in a challenge by the Gitanyow to the Nisga'a agreement on the basis that the Gitanyow's aboriginal title and/or rights in respect of lands in the Nass valley, constitutionally protected by s.35(1) of the *Constitution Act*, have been violated.

Furthermore, Justice Williamson recognized this issue and found:

Considered in light of the overlapping claims of the Nisga'a and the Gitanyow for aboriginal rights in the Nass River valley, such an executed agreement can impose serious limitations upon the freedom of all parties to negotiate the Gitanyow claims. Such a limitation cannot be dismissed as hypothetical, surmised or imagined.

He also commented on the basic minimum of what the Crown's duty was:

Arguably, that duty is to conduct treaty negotiations in good faith in a manner which will take into account all aboriginal nations which have a claim in a specific area as suggested by Lamer, C.J.C. in *Delgamuukw*...

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Justice Williamson gave a serious warning to Canada and British Columbia and attempted to give them guidance in their conduct in the treaty negotiations:

...myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims...I think it inevitable that if the parties fail to deal with the conspicuous problem of overlapping claims, they may well face Court imposed settlements which are less likely to be acceptable to them than [sic] negotiated solutions.

This paved the way for the March 23, 1999 judgment of the Supreme Court of British Columbia concerning the duty of the Crown to negotiate with the Gitanyow in good faith. Mr. Justice Williamson in *Luxton v. The Queen* ruled as follows:

I conclude that the Crown in right of Canada and the Crown in right of British Columbia, in entering negotiations with the Gitanyow Nation, pursuant to the B.C. treaty process, has a duty to negotiate in good faith...

In general terms, the duty must include at least the absence of the appearance of "sharp dealing" (*Badger* at page 794) disclosure of relevant factors...and negotiations "without oblique motive"...

In short, two years ago all governments in Canada received instructions by the Supreme Court of Canada on how to deal with "overlaps" between aboriginal nations. Almost one and a half years ago, Canada and British Columbia were cautioned by the Supreme Court of British Columbia to address the issue directly in the context of the Nisga'a Treaty. This has yet to come to pass and here we are now at what purportedly is one of the final steps towards completing the ratification process for the enactment of the Nisga'a Final Agreement.

WHAT THE BRITISH COLUMBIA TREATY COMMISSION HAS SAID ABOUT THE OVERLAP ISSUE

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The British Columbia Treaty Commission process is the federal and provincial governments' forum of choice for the negotiation of treaties in British Columbia. A cornerstone of this process is the existence of the British Columbia Treaty Commission ("BCTC"). The BCTC was established with the express purpose of being an independent and impartial "keeper of the process" with the responsibility to oversee all treaty negotiations in British Columbia.

In its 1998 Annual Report, the BCTC expressly dealt with the issue of overlaps (Appendix 1.). It pointed out the extent to which the issue of unresolved overlaps is of major concern within the Province, including among others, the federal and provincial government's own advisory bodies:

Unresolved overlaps assume greater significance as the treaty process progresses. The issue has been raised with the Treaty Commission by the Treaty Negotiation Advisory Committee - - the province-wide advisory body to the federal and provincial governments-, the Union of BC Municipalities, the Select Standing Committee and various First Nations outside the treaty process.

It continues with the specific example of the Nisga'a and Gitanyow dispute, by stating:

The overlap dispute between the Nisga'a Tribal Council and the Gitanyow Hereditary Chiefs, now before the courts, underlines the potential for unresolved overlaps to delay completion of a treaty and to precipitate litigation. It has also focused attention on the need for established mechanisms to deal with unresolved overlaps.

Furthermore, the BCTC in its Report states:

The Treaty Commission believes that the experience in BC and elsewhere will lead the parties to conclude that it is essential to resolve issues relating to overlap claims early in negotiations, well before the parties agree to the contents of an Agreement in Principle.

The Report concludes by recommending guidelines to Canada, British Columbia and the First

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Nations Summit, including that:

...absent an overlap or other relevant agreement, other First Nations with an interest in the overlap join the First Nation, Canada and British Columbia at a common table to address issues arising out of overlapping territories...

What are the Principals to the BCTC process doing in response to this? If they intend to take up the BCTC recommendations, will a solution come in time to address our issues with the Nisga'a Final Agreement? The answer to the latter would appear to be "no", given the stage the parties are at in the ratification process.

SPECIFIC INSTANCES OF IMPACTS OF THE NISGA'A FINAL AGREEMENT ON GITANYOW TITLE, RIGHTS AND INTERESTS

So far we have spent a great deal of financial resources and time on the process and the legal issues at stake. We feel this is paramount for an understanding of what the Gitanyow are seeking to correct through our presentation today. The following is a summary of the impacts of the Nisga'a Final Agreement on Gitanyow title, rights and interests. A more detailed, although not exhaustive, analysis is contained in Appendix 2. to this Submission. Please note that on December 5th, 1996 we made a submission to a provincial Select Standing Committee On Aboriginal Affairs regarding the Nisga'a Agreement-In-Principle (Appendix 3). This submission explains in some detail the impacts of the Nisga'a Agreement-In- Principle on the Gitanyow. As of today these impacts and concerns have not been rectified in any meaningful way.

The Nisga'a Final Agreement adversely impacts on the Gitanyow by granting to the Nisga'a:

- > a fishery management regime over the entire Nass Watershed, which encompasses 84% of the Gitanyow Territory, with no provision for consultation with the Gitanyow or any other aboriginal first nation with aboriginal fishing rights in the Nass and no guaranteed protection of their rights;
- > complete governance rights over "Nisga'a Lands", which overlap on the Gitanyow Territory and includes the most productive, prime Gitanyow fishing sites on the Nass River, with no protection of Gitanyow rights;

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- ✓ } fee simple allotments of five areas in the Gitanyow Territory which are important sites for economic development, and include prime back country recreation areas for tourism (these areas are Meziadin Lake, Meziadin Junction, "Grizzly" Lake, Jade Lake and Kinskuch Lake in the Gitanyow Territory);

- ✓ } priority in hunting in a wildlife management area covering 80% of the Gitanyow Territory; and

- ✓ } renaming of principle geographic locations within Gitanyow Territory, which in both Nisga'a and Gitanyow cultures amounts to an affirmation of ownership.

NO CERTAINTY THROUGH THE NISGA'A AGREEMENT

Canada and British Columbia are seeking "certainty" through the Nisga'a Final Agreement. Yet despite this, Canada and British Columbia insist on consummating a deal with the Nisga'a which purports to recognize and entrench Nisga'a rights and Nisga'a presence virtually throughout Gitanyow Territory so as to compromise or at the very least conflict with Gitanyow rights and activities in Gitanyow Territory. They cannot achieve either legal or political certainty as long as the "overlap" issues are not dealt with in a very concrete way.

The Gitanyow Territory is well-known to Canada and British Columbia and was well known to them at the time of the execution of the Nisga'a AIP in 1996. Gitanyow have aboriginal title to and aboriginal rights over Gitanyow Territory. As a result no legal certainty will be achieved.

The Gitanyow actively use the entire Gitanyow Territory. The Gitanyow identity and social and economic system is integrally connected to their Territory. The Gitanyow have always and will continue to live by their tribal boundaries and will not live under Nisga'a law on their own Territory. Nisga'a treaty rights granted by federal and provincial governments, pursuant to the Final Agreement, in Gitanyow Territory will only create conflicts and uncertainty "on the ground" with respect to ownership, management and utilization of resources in the areas in dispute. As a

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result, no political certainty or security will be achieved.

BILL C-9, AN ACT TO GIVE EFFECT TO THE NISGA'A FINAL AGREEMENT

This Bill is just about the last step in the ratification process for the Nisga'a Final Agreement which will give it effect. We were not consulted on the content of the Bill and we were not given prior notice of the tabling of the Bill. For the Gitanyow this is just the latest in a series of discourteous acts towards us by the Government of Canada.

Having been placed in this position, however, while we may have a number of commentaries on the drafting and effect of some of the clauses in the Bill, we must primarily focus on those aspects of the Bill that directly relate to this issue. Secondly, we will identify some of the other clauses that we would take serious exception to were these to be considered "precedents" for subsequent federal or provincial legislation regarding other treaties. Our silence on other matters does not imply that we agree.

Section 5

This clause is problematic to the Gitanyow in that Parliament is decreeing that the Nisga'a Final Agreement is binding on all persons, which would presumably include aboriginal peoples not party to that Agreement. While Canada and British Columbia can be said to have represented non-aboriginal Canadians and British Columbians at the Nisga'a treaty table, they cannot be said to have represented the Gitanyow, particularly in regard to Gitanyow rights under s.35 of the *Canadian Constitution Act, 1982*. At very least, this situation would indicate the necessity of specifically including in the legislation a clause which would provide for the non-derogation and protection of Gitanyow rights.

Section 6

The wording of this clause can be read to provide for a situation where the Nisga'a Final Agreement would prevail over legislation adopted pursuant to a Gitanyow Treaty. This is not acceptable.

Section 7

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This clause reflects the negotiated "certainty" provisions of the Nisga'a Final Agreement. For the record, the Gitanyow state that this is not an acceptable model for us. Our model, which has been presented to both the federal and provincial negotiators and politicians is one based on a recognition of aboriginal rights, title and governance and a reconciliation of this with the rights and interest of non-aboriginal Canadians.

Section 11

The fashion in which this clause is drafted may cast some doubt as to whether judicial notice can be taken of other treaties not covered by specific legislative language. Although as a matter of practice courts have been taking judicial notice of treaties, this clause may cause some confusion as to whether this practice continues to apply to treaties other than the Nisga'a Final Agreement. We would recommend that, at minimum, the clause should specify that it is being included merely "for greater certainty".

Section 12

The Gitanyow offer the same observations here as those set out above regarding section 11, but in this case, with respect to Nisga'a laws and laws of other aboriginal governments.

Section 15

The Gitanyow are concerned that this type of clause reflects a move towards a wider scope of provincial law application to aboriginal nations and their lands. Pursuant to s.91(24) of the *Constitution Act, 1867*, Parliament has exclusive legislative authority over "Indians and Lands reserved for the Indians". Parliament through the enactment of s.88 of the Indian Act allowed for a limited application of provincial laws on Indian Lands - provincial laws must be laws of general application. Canadian Courts have been called upon on numerous occasions to further clarify the scope of s.88. Subject to the constitutional division of powers issues, section 15 would appear to be an attempt by Parliament to ensure greater application of provincial laws. The Gitanyow do not support this result.

Section 19

The effect of this clause is to ensure that the Federal Court of Canada does not have jurisdiction in regard to bodies or persons appointed by the Nisga'a government exercising jurisdiction and

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authority. We presume that this was included in the Bill to deal with earlier jurisprudence that has suggested that when a treaty is "approved, given effect to and declared valid" by an Act of Parliament, the treaty itself can be considered a federal law. Gitanyow would not accept a provision that would preclude it from choosing the Federal Court of Canada as an option in the event that it wished to challenge actions by entities or persons appointed by the Nisga'a government.

Section 20

This clause appears to be legislating with respect to procedures before the Supreme Court of British Columbia. The effect of this clause is to ensure that notice is provided to the Nisga'a government of any challenge to the Nisga'a Final Agreement or to the validity or applicability of any implementing legislation or Nisga'a law. It further would seem to enable the Nisga'a government along with the federal and provincial government (via their Attorney Generals' offices) to appear and participate in the proceedings as a party without having to intervene and justify its presence.

In essence, sections 19 and 20 certainly do little to facilitate access to the courts for anyone wishing to challenge actions taken under the Nisga'a Final Agreement.

CONSEQUENTIAL AMENDMENTS

The Gitanyow specifically highlight to this Committee Gitanyow concerns with the amendments to the federal *Fisheries Act*, in particular. Our concerns reflect the very core of the Gitanyow objection to portions of the Nisga'a Final Agreement as we have detailed previously in this submission.

For example, section 22 amends the *Fisheries Act* to provide that the powers and protections of a fishery officer or fishery guardian apply to fishery officers or fishery guardians enforcing Nisga'a laws. In addition, amendments are proposed to the *Fisheries Act* (section 33.1(2)) that would make the Nisga'a Annual Fishing Plan applicable to and enforceable against any person engaged in harvesting, sale or related activities contemplated by that Plan. As is provided at paragraphs 84 and 85 of the Fisheries Chapter of the Nisga'a Final Agreement, the subject matter covered by a

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Nisga'a Annual Fishing Plan is very broad, including authorized harvesting by persons other than Nisga'a citizens or Nisga'a Lisims government. This could seriously impact on Gitanyow fishing activities at Meziadin and other areas in dispute.

A further observation on proposed amendments to the *Fisheries Act* is the incorporation of paragraph 93 of the Fisheries Chapter of the Nisga'a Final Agreement in the Act. This paragraph of the Nisga'a Final Agreement provides that the Nisga'a may negotiate agreements with Canada or British Columbia concerning enforcement of federal, provincial or Nisga'a laws in respect of fisheries. While we don't oppose the principle, we object to it if it could be interpreted to apply to Gitanyow fishing within those portions of the Gitanyow Territory included in the Nisga'a agreement.

GITANYOW PROPOSALS REGARDING BILL C-9

In light of this entire presentation, the Gitanyow propose that the following minimum changes by way of additions be made to the Bill to ensure that Gitanyow aboriginal rights, title and governance are protected and that the "overlap" issues which have yet to be resolved be resolved once and for all.

As a matter of public record, we would like to state that our intention is not to deprive the Nisga'a people of their aspirations and entitlement to a negotiated settlement of their rights by way of a treaty process and to choose the terms of their treaties. What we do object to is that in doing so, the Gitanyow rights are adversely, and perhaps even irrevocably, affected. In this vein we offer the following recommendations with respect to Bill C-9:

1. The Addition of "Non-derogation" Language

The Bill should explicitly protect the rights and interests of aboriginal first nations whose territories are affected by the Nisga'a Final Agreement. Although the Nisga'a Final Agreement contains non-derogation language, and that language is given force of law by section 4(1) of the Bill, Parliament still thought it necessary to specifically, among other examples, refer to the Final Agreement being binding on all persons (section 5), repeat the conflict and inconsistency provisions of paragraphs 52 and 53 of the Nisga'a Final Agreement (section 6) and to repeat that the Nisga'a Final Agreement is a treaty and a land claim agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982* already included in paragraph 1 of Chapter 2 of the Agreement (section 3). If Parliament specifically selected these as reflecting fundamental aspects

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of the Final Agreement, we submit that the non-derogation language falls within this category.

Therefore, the Gitanyow proposal is that the Bill explicitly repeat paragraphs 33, 34 and 35 of the General Provisions of the Nisga'a Final Agreement. It should be noted that other federal legislation includes non-derogation provisions of this nature.

However, inclusions in Bill C-9 of paragraphs 33, 34 and 35 of the General Provisions of the Nisga'a Final Agreement is not entirely sufficient to rectify the Gitanyow issues. We note that the purported protection provided other aboriginal peoples by paragraph 35 is contingent upon Canada and British Columbia actually agreeing to conclude treaties with other aboriginal peoples that may be inconsistent or conflict with the Nisga'a Final Agreement. In addition, there is no provision in the Nisga'a Final Agreement requiring amendments to that Agreement should conflicts or inconsistency be identified. In fact, no amendment can be made without Nisga'a consent. We propose that Parliament, through Bill C-9, instruct the government of Canada and reassure the aboriginal peoples, neighbours to the Nisga'a, that the Nisga'a Final Agreement shall not be invoked as a bar to Canada concluding a comprehensive treaty with other aboriginal peoples containing those matters generally included in historic and modern treaties.

We propose the following addition to the Bill:

The ratification of the N.F.A. may not be invoked by Canada as a reason for not concluding a comprehensive treaty with any other aboriginal group.

2. The Suspension of the Coming into Force of the Nisga'a Final Agreement

Section 27 of the Bill provides that the Act comes into force on a day or days to be fixed by order of the Governor in Council. We submit that the following additions be made :

27(2) An Order of the Governor-in-council contemplated in subsection (1) will provide that the coming into force of those Chapters or paragraphs contained in the Nisga'a Final Agreement identified in the Order be suspended for such time as the overlap conflicts with the Gitanyow are resolved or the finalization of a Gitanyow Treaty, whichever is earlier;

*be read
with the*

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27(3) The Order of the Governor-in-council contemplated in subsection (1) will also establish a process through which Gitanyow, Nisga'a and British Columbia may participate with Canada in an effort to resolve the conflicts between the Gitanyow and Nisga'a arising from the Nisga'a Final Agreement, which process may include, if the parties agree, binding arbitration.

GITANYOW COSTS AND LITIGATION AND NEGOTIATION SUPPORT

If the Gitanyow concerns over "overlap" issues with the Nisga'a cannot be resolved through this legislative process, the Gitanyow request that this Standing Committee make strong recommendations in its Report back to Parliament that the Government of Canada support litigation costs to the Gitanyow of having to continue to protect rights and interests through the courts as well as increased negotiation costs due to the issues not being resolved.

CONCLUSIONS

The Gitanyow thank the Standing Committee for this further opportunity to put forward our concerns and issues. We have provided the Committee with concrete suggestions for how we see these being resolved, both through the legislative process and through further negotiation. It is not too late to correct the wrong done to the Gitanyow. This Committee can assist us in this endeavour.

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