

## Case Study: Creating Indigenous Property Rights: The Nisga'a Landholding Transition Act

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### Introduction

A significant factor that explains indigenous poverty is the lack of enforceable property rights on Indian reserves.

Canada's Indian Act of 1876 recognizes the unique land ownership systems of its indigenous peoples. While the act preserved a scarce land base for native inhabitants, it locked these communities out of the modern economy by denying them access to commercial credit. The Indian Act states that the Crown (federal and provincial governments) holds title in trust and benefit to reserve lands, which are under federal jurisdiction under Canada's Constitution for Indians. Reserve lands could only be alienated to the federal government and are not subject to seizure, attachment, lien, or collateralization.

Leasing arrangements on reserve lands exist, but these do not generate as much value as fully transferable property rights. Observers long recognized that the Indian Act land system reduced land values and promoted low value land use. Peruvian economist Hernando de Soto said Canada's indigenous people face a problem common to many developing countries: the indigenous people possess land, but it is dead capital, meaning it cannot be leveraged in the wider economy.

### Who are the Nisga'a?

The Nisga'a Nation is an indigenous community in rural northwest British Columbia (BC), Canada's westernmost province. There are reportedly 6,400 Nisga'a citizens, although a small proportion of that number lives on Nisga'a territory. Sources say the word Nisga'a comes from a combination of two Nisga'a words: *Nisk'* meaning "top lip" and *Tlak'* meaning "bottom lip." The term derives from the Nass River Valley, where the Nisga'a live. Nisga'a Nation consists of four villages, which are regional governments, and a central government named Nisga'a Lisims Government (NLG) that is based in the community of New Aiyansh.

Unlike much of Canada, most of British Columbia did not sign historic treaties. As a result, the Nisga'a sought a negotiated settlement over land and governance for over 100 years. The Nisga'a, the federal government, and British Columbia signed the Nisga'a Final Agreement in 1999. The Nisga'a are signatories to a modern treaty, Nisga'a Treaty, that came into effect in 2000.

The Nisga'a Treaty grants limited self-government in enumerated areas to the Nisga'a government, although many governmental powers and responsibilities are concurrently held with the federal and BC provincial governments. The treaty was controversial during its negotiation and adoption because Nisga'a law had supremacy in several legislative areas.

### What's Happening?

Nisga'a Nation made history when, in a voluntary move, it passed a law granting fee simple property rights to its members. Nisga'a citizens who obtain fee simple title to their residential property under the law will be able to mortgage their property as security for a loan. They also may transfer, bequeath, lease, or sell their property to any person, whether they be Nisga'a or not, or even indigenous or not.

In October 2009, the Wilp Si'ayuukhl Nisga'a (WSN), the legislative body of NLG, passed the Nisga'a Landholding Transition Act. The Nisga'a Nation is developing a Torrens-style land title system to register fee simple interests. At present, registration will occur in a Nisga'a land title office.

Nisga'a sources claim, "It is believed to be the first Torrens-type, fee simple land title system established by an indigenous government anywhere in the world." It is uncertain if this claim is true, but it is true for Canada.

The NLG dealt with concerns about the potential erosion of the Nisga'a land base by including an important caveat. Although Nisga'a citizens who obtain fee simple title to their property under the act will be able to transfer their property to any person, the property will always remain part of the Nisga'a Lands and be subject to Nisga'a laws under the Nisga'a Final Agreement. This means fee simple holders will be subject to zoning and land-use regulations adopted by Nisga'a governments. Although the Nisga'a government shows interest in future expansion into commercial property, at the moment the legislation only applies to residential properties.

The move is not as radical as some claim and is in fact quite limited. Fee simple ownership only applies to residential properties. The lands affected are lots within Nisga'a villages zoned for residential use and are less than 0.2 hectare (approximately half an acre) in size. The total amount of land affected is approximately 100 hectares, or .05 percent of Nisga'a Lands.

The legislation recognizes two means of obtaining fee simple. The first is a Nisga'a village entitlement to a lot for a citizen at no charge. This meant if the lot qualified – did not have a mortgage, met size requirements, and was residential – the entitlement holder could accept or decline the offer. The second method is for an entitlement holder to request a lot. The village is required reasonably to consider the request, and appeals are available if the request is denied.

### **History of the Legislation**

The decision to move toward individual fee simple rights was not one the Nisga'a government entered lightly or without deliberation, although the issue remains controversial today.

At a roundtable discussion in 2006, the WSN considered ways Nisga'a citizens could hold their residential properties. Nisga'a sources say the meetings identified the current restrictive system of Nisga'a Village Entitlements and Nisga'a Nation Entitlements as barriers to economic development. Over the next three years, Nisga'a living in the four Nisga'a villages and in Vancouver, Prince Rupert, and Terrace were consulted. The Nisga'a have what they call urban locals in these three communities, which provide representation for urban-based Nisga'a citizens. Numerous legislative options were considered by the Nisga'a Lisims Government, culminating in the introduction of the Landholding Transition Act.

In 2007, a report was prepared by the Nisga'a government for the executive regarding these community discussions. While there was support for unrestricted ownership of land, concerns were raised by community members over the potential loss of the land base. After community discussions, the executive brought forward legislation to create the possibility of unrestricted fee simple on residential lots in Nisga'a villages, which led to the passage of the aforementioned law in 2009.

At present, the Nisga'a government is developing and passing consequential amendments associated with the move, including appropriate zoning laws and revisions of land title systems.

### **Undemocratic Change?**

Some Nisga'a opponents of the move criticized the democratic nature of the change. Nisga'a officials, however, point out that the Nisga'a Constitution requires a referendum be held if a disposition of more than 40 square kilometers is made by the Nisga'a Nation or a disposition of more than 10 square kilometers is made by a Nisga'a Village. Officials argue the Constitution does not require a referendum because the total amount of land that the proposed legislation affects is approximately one square kilometer.

### **Implications**

As a result of the Nisga'a move, other Canadian First Nation communities are engaging in a substantive discussion about property rights for their own reserves. Manny Jules, an indigenous leader from British Columbia, has engaged other native communities in a discussion about a First Nations Property Ownership Act, which the Nisga'a move inspired. This proposed voluntary legislation

would allow participating Indian bands to opt-into a legislative regime in which land title could be transferred from the Crown to a willing First Nation government, which could then choose to transfer that land to individuals.

While some indigenous scholars and activists have directed intense criticism toward the Nisga'a move, other Indian bands are monitoring the change. The Assembly of First Nations (AFN), the body purporting to represent on-reserve Indians, has been cool towards the idea, not expressing a clear opinion on the matter. At a conference on the topic of Aboriginal property rights held in Vancouver, British Columbia in October 2010, several Indian bands expressed an interest in opting into the First Nations Property Ownership Act.

The eyes of the indigenous community and many other interested observers are fixed on the Nisga'a Nation as it embarks on this historic experiment. If the Nisga'a are successful in leveraging fee simple to improve their business climate and standard of living, the case for indigenous property rights in Canada may be bolstered and alleviate some of the apprehensions some communities have over such a system.

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## Recommendations

Observers should adopt a 'wait-and-see' approach to the Nisga'a fee simple plan. The limited and voluntary nature of the plan suggests Nisga'a governments are adopting a conservative and incremental approach. The Nisga'a are wise to include education and support for Nisga'a citizens who wish to assume fee simple ownership. An understanding on the risks of ownership and foreclosure would be crucial. Native communities would benefit by seeing the advantages, challenges, and potential pitfalls of full property ownership before embracing it.

Native communities under the Indian Act should consider the benefits of adopting the First Nation Property Ownership if (or when) it becomes a legislative option. The First Nations Tax Commission, which is spearheading the initiative, should proceed in galvanizing support for the bill and helping to make it a reality.

As currently conceived, the legislation is flexible and can be tailored to specific native realities. Some communities may not be ready for full property rights or may deem certain parts of the reserve inalienable or only available for sale to First Nation members. Lessons from the Nisga'a case study may help these communities in developing their own property regimes.

## Reference List

Nisga'a Lisims Government. (2011). *Nisga'a individual landholding project*. Retrieved January 19, 2011, from <http://nnkn.ca/content/nisgaa-individual-landholding-project>