

Appraising the Nisga'a Final Agreement  
Outline Notes  
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Attempt a brief economic analysis, or cost-benefit analysis, examining development prospects, looking forward rather than to the history.

I. Elements of policy analysis. Appraisal of public policy demands clarity on:

- A. Initial conditions—where are we (against context of history)?
- B. Option of 'no policy change'—costs of inaction?
- C. Baseline path—where are we going, in the absence of action? Certainly will not be the status quo—status quo not achievable again
- D. Accounting stance—from whose perspective?
- E. Question to be addressed—a financial impact analysis, a cost-benefit analysis, and a costing of the negotiated package are all different questions

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A. Initial position:

Start from Parliamentary democracy, Charter world, affirmation of group, collective and aboriginal rights, equal recognition of peoples

Contested initial distribution—clouded, uncertain title; uncertain relationship between Crown and aboriginal title; Supreme Court of Canada recognition of 'burden' of aboriginal title upon Crown title

Recognition of alternative modes of governance—corporate governance, co-operative rules of governance, community rules of governance, etc.—for economic and social activities

B/C. Status quo is not achievable; inaction (or rejection of negotiated settlement) will be very costly:

Loss of certainty in investment climate, loss of settled relationship

Loss of confidence in negotiation as method to deal with continuing disputes and exercise of discretion in adaptive management in changing world

D. Accounting stance—Crown in right of Canada—all Canadians, Nisga'a and non-Nisga'a.

E. What question?—Real economic flows, management of real resources, not financial ‘cost’ of package or budget impacts, are the important questions

Consider the core components of the treaty:

Capital transfer

Fiscal finance agreement (ongoing program funding as with territorial financial agreements)

Own-source revenue provisions (resource management, taxation)

One-time investments (capacity-building, infrastructure, etc.)

Land and tenures transfers (negotiated agreement on rights)

Compensation to third parties

From an economic perspective, can expect:

better resource management as a result of clarity in rights, improved incentive systems;

more effective program delivery as a result of alternative service delivery structures under community control;

vastly improved health and social outcomes as a result of improved community control and individual sense of agency;

better climate for joint management and ongoing resolution of differences around the exercise of discretion in continuing adaptive management in a changing world;

certainty for local and foreign investment, innovation, and economic activity;

stimulus to regional activity from cash transfer inflow;

## CONCLUSION

Underlying issue should be justice, fairness, social foundation for future development and cooperation in the tiered system which is the Canadian federation.

NFA is not income support, not mobility program, not to be judged as an employment program. It is about negotiating consensus on our understanding of the initial distribution of endowments and rights; it is thus about redistribution of wealth and claims. Such agreement is essential in any case; if economic transition forces further mobility away from traditional economic activity and out of the region, that is an issue to be faced by policy in the future. The need to confront the issue of cultural survival in a global economy should not block attempts to negotiate consensus on the interpretation and understanding of present rights. The one thing that is sure is that Nisga’a economic prospects will be better after implementation of the NFA, even if problems of structural adjustment and urbanization remain.

I take it as my task to **assess the Nisga'a Final Agreement as an episode in public policy**—to appraise its merits as the outcome of a public policy process, with particular attention to provisions relating to the environment and stewardship. This task thus entails attempting to assess the performance of our governing structures by examining “rationally” the result or outcome which has flowed from a long political, bureaucratic and negotiating process. [I should say, at the outset, that I do not claim that the ‘reasoned’ or ‘rational’ consequential approach is the only, or necessarily the best, way to appraise or justify public policy action bearing so substantially on issues of justice, identity, rights and distribution, not to mention history and culture. But it is my task here, as I understand it, to attempt such a reasoned examination.]

In attempting to evaluate or assess public policy, it is **essential to be clear on the criteria and the backdrop against which the appraisal is to be conducted**. In particular, it is absolutely crucial to be clear on:

a) The starting point—the initial state, or the initial conditions, in more technical terms; the initial distribution of endowments or claims, the initial understandings about the pre-existing balance of rights, obligations and responsibilities. Where are we now?

b) The baseline path, or present trajectory—the future consequences of present inaction, or of what one sometimes calls a “no policy change” posture or decision. “No policy change” is always an option in principle—but it is a discretionary choice—one possible action. We have to examine the likely consequences and costs of this policy direction just as we appraise others. Where are we headed?

c) The impossibility of the ‘status quo’. In a rapidly changing world of vast uncertainty, such as we inhabit, the status quo is unlikely to be an option. Certainly the stance of ‘no policy change’ will not deliver the status quo, the existing state of affairs. We cannot appraise any policy action against an imaginary world in which things just remain as they are, or as they were in some more golden age. People’s beliefs, expectations, perspectives change, just as the external natural world and global economy change around us.

d) The ‘accounting stance’ for the analysis—on whose behalf, or from whose perspective, is the analysis being undertaken? Who is the client in light of whose interests we are performing the assessment?

e) The specific question to be addressed—the particular performance or action to be assessed. This question might be one of financial impact analysis, or of cost-benefit analysis, or of success in negotiating strategy (BATNA), and these are all different questions.

Failure to be clear on a number of these points has led to a great deal of nonsense being bandied about on cost estimates and other nightmare scenarios. I’d like to go through these initial questions quickly, one by one, to set the stage for a reasonable assessment of the NFA.

A. The starting point or initial position.

We live in a world in which Canadian public policy has considered and rejected the principles of the 1969 White Paper on 'Indian policy'. Our world is a Charter world with an explicit Constitution which entrenches Parliamentary democracy and recognizes and affirms existing aboriginal and treaty rights, and provides for equal recognition of people as individuals, as well as equal recognition of peoples. Parliamentary democracy is representative democracy; it is not deliberative democracy and it is not direct democracy.

We live in a world in which the Supreme Court of Canada has established that unextinguished aboriginal rights and title may exist and has set out tests by which its existence might be demonstrated. Where it exists, aboriginal title constitutes "a right to the land itself" in the words of the Delgamuukw decision. Where it exists, aboriginal title is inalienable and is held communally.

For those who believe in the rule of law, this context has to be taken as the foundation for any appraisal of a current policy initiative. This is the starting point from which negotiations begin. We may, any of us, have reservations about the Charter and the Constitution, about the enshrining of collective and group rights and differential treatment of individuals on the basis of racial or genetic characteristics. We may deplore the abandonment of a liberal ideal on which the 1969 White Paper was largely based. But the fact is that debate is over. We live in a Charter world—pretty much all around the world—and the Canadian Constitution is what it is. That is our starting point, and we cannot expect negotiators attempting to thrash out modern treaties to alter those initial conditions. We cannot appraise the NFA except against that starting point, and we cannot blame the negotiators if they did not emerge with a treaty which would be a constitution for a different world.

[I cannot resist noting that failure to appreciate that we in Canada presently live in a Parliamentary democracy is the elementary source of some of the silliest commentary around this issue. Perhaps the silliest of all criticisms is the accusation that the NFA is tainted because the process which has been followed is fundamentally undemocratic. The editors of David Black's community newspapers have toed the line pretty consistently on this one, with the editorial appearing in the Oak Bay news on October 22, 1999 being perhaps the outstanding example, although the posture of the BC Liberal Party comes close. [On the failure of consultation, one should perhaps ask COFI or other industry people how many meetings they have attended since 1991 to ensure the voice of their companies is well reflected in this negotiated outcome.] Contrary to the rhetoric, this negotiated outcome is the product of the most open and extensive consultative process yet attempted, subject to the longest legislative debate on any single issue in the B.C. legislature, subject to ratification in votes of elected legislators in both provincial and federal legislatures. Both the equality provisions of the Charter and the problem of 'Parliamentary dictatorship' may be deeply troubling issues, but they are deep systemic questions, hardly to be fought out on the backs of the Nisga'a people. To confuse appraisal of the NFA with these more philosophical issues is to commit a serious displacement error.]

But leave that aside. The overwhelming feature of our starting point is that the land question is presently unresolved. The existing balance of rights is still to be determined. Current title to land and resources in Canada is clouded, contested, unclear. There is no agreed distribution of initial endowments. The negotiation of modern treaties, including NFA, is fundamentally to arrive at a mutual understanding—a consensus—on the balance of existing rights.

It is interesting to note that the need and the plea to clarify the rights—ownership, property, possession, access, use, management rights—is the main message from almost all contemporary work on resource management and environmental stewardship. An interesting example with application in British Columbia is the just-published NRC Press book containing the report of a Royal Society of Canada panel on Global Change and Canadian Marine Resources. The key policy message emerging from the three year's work of that panel was the need to clarify the rights, and reduce the ambiguity and uncertainty, and hence to establish the necessary incentives for conservation, stewardship and effective investment in resources.

That's principally what the negotiators were asked to do on our behalf, as I understand the situation, and it's against that goal that the outcome must finally be appraised.

Against that goal, the “socialism” argument also seems silly. When resource use rights or tenures are held by hundreds of thousands of individuals represented by hundreds of fund managers buying paper positions in corporations run by managers quite beyond the control of the owners of the enterprise, we see this as promoting economic development. If the operation were bought by a credit union like Pacific Coast Savings, running on different rules of governance, this would be unlikely to occasion great distress. If the same resource rights were held by a cooperative, running on cooperative governance rules rather than corporate governance rules, it would probably still be okay. Why then, if tenures or management rights transfer to a smaller community-based group operating where they live, according to rules of community governance, subject to the scrutiny of all their neighbours and fellow citizens, should these operations suddenly become “socialism” and bad for economic development?

One wonders what kind of schizophrenia is generated for these critics of community-based management by the formation of Iisaak Forest enterprise, a joint venture of Macmillan Bloedel and Mamook Development Corporation, a development arm of the Nuu-chah-nulth Tribal Council. If there were a switch of 2% of the shares, from 51:49 for Mamook to 51:49 for MacBlo, will this swing us from socialist disaster to responsible harvesting in the free enterprise tradition? If the Nisga'a form their own Nisga'a Lisims Development Corporation to carry out all the activities, will the threat of socialism recede? The point is, obviously, that it is not the structure of rights or ownership which dictates the merit of the enterprise, it is the incentives and the peer pressures as well as the financial constraints which shape the ongoing management decisions and hence the effectiveness of resource allocation and the ongoing sustainability of the enterprise.

More generally, one can note that for some purposes—producing airplanes, for example—corporate

rules of governance based on hierarchy and authority, with close monitoring of performance against explicit assignments, is possible and appropriate. For some other purposes—judging the appropriate balance between family responsibility and risk to a child, discretion and authority must be delegated substantially to responsible individuals, and voluntary sector modes of governance might be appropriate. For group action in complex settings, community-based modes of governance might be key, as with fisheries management or environmental monitoring and forest stewardship. The point is that different modes of governance may be elected by the same community for different purposes. They must be judged instrumentally, not ideologically.

B and C. The ‘baseline’ and the impossibility of the status quo.

I can skip over these two elements of the appraisal quickly, simply with the observation that we have to appraise the decision to proceed with the NFA against the baseline of a decision not to do so, or to do something else. We cannot stay where we are in policy terms without expecting to see a vast deterioration in the situation, with continuing and increasing unrest, uncertainty and hesitation in making investment or indeed any other economic or social commitment in BC or in Canada. The status quo is not good enough, but even the status quo is more than we can hope for in the absence of a clear resolution of the issues our governments and negotiators were asked to address.

D and E. The question to be asked and the accounting stance to be adopted.

My assigned task is to concentrate on these two aspects in the appraisal of the outcome of the Nisga’a negotiations, and I’d like to concentrate on what for the economist is the fundamental question, the effectiveness of the resulting resource allocation, or the Cost-Benefit Analysis. I will argue that the financial impact analysis which has often been offered as a substitute for a proper cost-benefit analysis is not terribly relevant to an appraisal of the treaty. It is obviously interesting for the Government of BC to calculate the net inflow of dollars into the region or the province. But it is not a significant question for a Parliamentary Committee representing the people of Canada in a judgement about the intrinsic merits of the NFA.. And I will also leave to others the appraisal of the negotiators in finding the best negotiated outcome (the deal that could be got) as against the Best Alternative to a Negotiated Agreement (BATNA), for any one of the parties.

So far as economic content is concerned, for purposes of present discussion, we can see the NFA as having only a few basic components:

- 1) Capital transfer (\$190 million over 15 yrs)—an agreement on an exchange of assets in recognition of a settling and clarification of claims. The Nisga’a will have to decide how this wealth transfer will be safeguarded and reinvested to assure a sustainable future. This is very much the same problem as with the Alberta Heritage Fund or the re-investment of returns from a depleting mine.
- 2) Program funding to ensure standards of program delivery roughly comparable to those

delivered by other means to non-Nisga'a in the same region. This is simply reshaping current program structures to reflect some of the contemporary strictures about effective alternative means for service and program delivery. It represents a reorganization of delivery of government services through a fiscal arrangement much like territorial financing agreements, in line with devolution arrangements or subsidiary provisions in tiered federal regimes elsewhere. Provision for greater local control.

- 3) Own-source revenue arrangements for earnings from the resources on Nisga'a lands. (Land and resource transfers—transfer of management rights) These arrangements achieve a variety of community-based management possibilities for resource management decisions closer to the ground and more reflective of community perspectives.
- 4) Own-source revenue from taxation of Nisga'a citizens on Nisga'a lands, with the possibility of inter-governmental cooperation through tax administration of tax collection agreements, just as with other possibilities for administrative agreements or delegation under memoranda of understanding.
- 5) One-time investments in infrastructure and capacity building
- 6) Compensation to third parties for transfers of tenures

So I go to the issue of Cost-Benefit Analysis and the appropriate accounting stance. Should we do the analysis from the perspective of all Canadian residents (The Crown in Right of Canada), or all BC residents (the Crown in Right of BC), or from the perspective of the non-Nisga'a taxpayer in BC (or in Canada)? I argue that most of the hyper-inflated cost estimates around, and most of the scary scenarios advanced to frighten listeners, are based implicitly on the perspective of the non-Nisga'a taxpayer (and even for that they're mostly wrong, but that's a later story).

The Nisga'a have been trying for over a century to negotiate their way into a role as citizens within Canada, based on a sharing with a vast inflow of new immigrants of rights to territory which previously they had to share only with small neighbouring First Nations. "We have always said that one of our fundamental goals is to negotiate our way into Canada." (NTC Presentation to Standing Cttee, Nov. 4) It seems to me sad to do the cost calculations as if the Nisga'a still cannot be regarded as citizens, as part of our community, but must still be regarded as 'them', not 'us'. [Because the negotiations were nation-to-nation negotiations, it is not unreasonable to see the negotiators for Canada acting, in effect, in the interests of Canadians other than Nisga'a. But Parliamentary consideration of the treaty and its costs ought still to speak for all Canada, I suppose.] But note well that it is this issue which dictates how we calculate costs. If we include Nisga'a among us, then the appraisal is easier, because no assets and no funds disappear as a result of the treaty. The only costs are the transactions costs of negotiating the treating, arriving at agreement, and administering the new institutions created. If we insist on treating Nisga'a as them, not us, then we have a more difficult task in appraising the outcome of the negotiations, because the transfer of cash to the Nisga'a is a transfer outside the accounting unit or family, and

must be counted as a cost, while the inflow or increased rights from Nisga'a must be counted as a benefit.

It is important to be clear about the meaning of the word 'cost', and the distinction in economics between transfers and costs. Perhaps the single most important proposition in economics is the principle that "The cost of something is what you give up to get it." What is given up when paper claims or titles or rights to an asset change hands? The fish still swim, the forest remains, both grow at the same rate, though the management regime change. The impact of new management regimes is not felt just because the players change, but only when the new actions of new players result in better (or worse) returns of fish or stewardship of forests. Then real benefits (or costs) may be claimed—and of course then the new outlook will be reflected in new valuations of the rights or titles.

The point is that transfer of rights to existing stocks is a redistribution of existing wealth; real cost or benefit flows are generated through changes in the utilization of those stocks, not through the transfer itself.

For the Crown in right of Canada, therefore, including Nisga'a as citizens, the negotiated outcome does not itself create costs. There is a capital transfer payment of \$190 million over 15 years, which must be regarded as a compensation payment for the transfer of clear rights to a vast body of land. The Nisga'a have reduced rights to land, and more cash; the Crown has increased rights to land, and less cash. Neither land nor cash has disappeared. For the Crown, representing us all, this is a transfer. It is not a cost. Even from the perspective of the non-Nisga'a taxpayer, there is not a cost as a result of this transfer itself. The taxpayer is not worse off. The taxpayer has more land (that is to say, recognition of the taxpayer's rights to land, represented by Crown title, have been strengthened or increased, in compensation for which a cash payment is made. Just exactly as with Macmillan-Bloedel in BC, a compensation payment is made to recognize the transfer of rights of access to land and resources (of rights to Nature, created neither by us nor by the corporations which claim access). What is the appropriate compensation payment is a matter for negotiation, but whatever the outcome it leads to a transfer of rights, not a disappearance of any wealth.

If we concentrate on a proper CBA, then, which is what matters for economic development prospects, we find, as benefits:

**Rights are clarified.**

There is less uncertainty surrounding investment decisions, more assurance of clear claims on returns to good management decisions. The major barrier to effective utilization of natural and human resources in British Columbia has been removed.

There is greater stimulus to conservation and resource stewardship for all participants, because tenures are clearer and more secure. Note that, contrary to some claims, the fact that some resource revenues now flow to Nisga'a government rather than BC government does not mean

that other taxpayers are worse off. To the extent that Nisga'a revenues enable Nisga'a government to finance services otherwise provided by the BC government, non-Nisga'a taxpayers might in fact find themselves better off. In a tiered (federal) system, intergovernmental financial flows may enable a more efficient division of governmental services, permitting regional differentiation within a common overall framework.

**Governance, resource management and program delivery are improved**

Incentives are well aligned with overall social objectives; compliance is increased. On the resource management/environment issues, we can argue, as noted above, that the NFA is consistent with all current advocacy of better stewardship through community-based decisions and local adaptive management. There is a tricky issue here around the unsolved problem of the link from local discretion to global coordination, and the reconciliation of local discretion with the ultimate accountability and responsibility of the Minister of DFO, for conservation in particular. But the priority to conservation is reflected in the terms of the treaty and its associated fisheries agreement. {Could note basic problems with Marshall decision, and with trade obligations under WTO, but probably not time here.]

**Decisions on program delivery are made closer to home, more responsive to the client.**

Accountability is improved; the Indian Act no longer intrudes. Clear responsibility and authority over resources are established. The evidence is overwhelming that such local control and sense of agency through self-government is a major contributor to individual and community health, to reduced suicide rates and improved health and welfare, to social capital and social cohesion. These continuing benefits are ultimately the justification for the treaty's program provisions.

**On the cost side, it seems that actual real economic (resource) costs are small:**

There are **transactions costs** for all parties, and the ongoing frustrations of living in a still more complex tiered federal system. (But we have most of that already.)

Costs of maintaining the **negotiations apparatus** (of course these costs are also incomes to the 'Indian industry', so to the extent these are lawyerly resources that would otherwise be unemployed, one might be tempted to start counting even these costs as an economic stimulus)

We might see some '**creative destruction**' in premature scrapping of some existing capital invested by current tenure holders in resource extraction activities—but this is likely to be relatively small to non-existent, given the extensive transition provisions which are likely to encourage an orderly building of capacity in Nisga'a operated activities and an orderly phasing down or substitution of activity from current contractors (or, in many cases, continued contracting with existing operators who simply work under revised tenure arrangements with a new tenure-granting entity).

From the perspective of the region, or the Crown in Right of BC, the injection of the cash transfer from outside the province, through the cost-sharing agreement, has to be treated as an unmitigated benefit and immense stimulus to regional economic development.

From the perspective of the non-Nisga'a, non-corporate taxpayer, the best way to view the NFA is as a shift of tenures, rights, and access from one private collective operating on corporate rules of governance to another collective operating on community rules of governance. The general rules of the Canadian constitution seem to apply pretty much as fully to Nisga'a as a collective entity as they do to MacBlo or BC Packers, and probably more than they do to Weyerhaeuser or Mobil-Exxon or Monsanto-Celera-Cargill. So it can't be feared that the switch of tenure rights to the Nisga'a entails giving up any control of public resources which we can now exercise. If the transfer of resource rights is not a question of economic costs or benefits, but simply a redistribution of claims on existing assets, then it should be appraised as what it is—a negotiated redistribution of wealth, coupled with an agreed reorganization of governance and government service delivery.

As a redistribution of wealth, we should apply the “gold standard tests” of measures of redistribution. These, other things equal, would prefer transfers from individuals with higher income and wealth to people with lower income and wealth, rather than the other way round. They would endorse redistribution toward low income regions from higher, rather than the contrary. Again it must be emphasized that such redistribution is not the purpose of the NFA, but it is one implication of adopting this policy option, or one consequence of pursuing this line of public policy, and as such it counts as a positive feature in the appraisal of measure, a point in favour of the treaty, even though not its purpose.

Two odd propositions have to be dealt with here, it seems, in considering what costs should be counted and what incentives are appropriate. In a panel just about a year ago, John Richards, referring to some of his earlier work published by the C.D.Howe Institute, advanced the odd proposition that the crucial flaw in the Nisga'a Final Agreement is that it creates disincentives deterring Nisga'a from leaving the region to pursue the greater economic opportunities offered by urban life. The puzzling consequence of this argument is that the greater our advances in productivity or economic development in the region, the more successfully we improve earnings prospects and the quality of life in the community, the greater the disincentive to leave, and the more we must view these developments negatively. The greater the improvement in well-being locally, in coastal or remote communities, the worse the barrier to adjusting to what in the past has been the economic imperative of urbanization and concentration. In the limit, we would seem to have the argument that a settlement agreement which recognizes the title of non-Nisga'a residents of the Nass Valley to their fee simple holdings delays the migration to the urban centres which the logic of the market dictates, and must therefore be a bad thing. Or, similarly, a government policy to address the brain drain by offering higher salaries and research opportunities for the top researchers—or even for corporate executives in software firms—is misguided because it creates a disincentives for these folks to migrate south to the greater economic opportunities offered. The philosophy that the dynamics of the market are so inevitable that we must attempt no measure to alter them leads to strange conclusions. Some optimism about the prospect that we may exercise some discretion to influence our fate seems warranted. [Shakespeare help me here]. I hope I'm not wrong in invoking the speeches of Charles Taylor in support here—modernism need not mean convergence.

The less profound, but still puzzling, error is the set of calculations whereby Robin Richardson adds \$131 million to the estimated 'cost' of the NFA because Nisga'a enterprises with forestry tenures may become eligible for funding from Forest Renewal BC. These costs to the taxpayer, he argues, warrant compensation from Canada. Thus the expenditures, already in the estimates for FRBC, must be counted a new cost to the taxpayer if they flow to Nisga'a enterprises for investment in the Nass valley, but can be treated as positive investment expenditures if they flow to Interfor or even Weyerhaeuser, and do not raise concerns about costs to the taxpayer. What is going on here?

## **Conclusion**

**“We” are not “giving” “them” anything.**

A negotiated agreement has achieved consensus on explicit recognition of the balance of rights and responsibilities which ought now to be accepted as prevailing among the three parties negotiating on a nation-to-nation basis.

If we attempt to appraise the NFA from a property rights/economic incentives/Cost-benefit analysis perspective, therefore, we find that we have invested in modest transactions and negotiation costs in order to achieve a dramatic clarification in the present regime of property, use and management rights around access to resources, and perhaps significant increase in the effectiveness of government program delivery.

The Supreme Court of Canada confirmed the present clouded regime of rights and title, and enjoined Canadians and governments to negotiate to a consensus about a balance which could be considered just, fair and right in the context of history. The costs of arriving at a negotiated consensus have not been trivial, but they have been astonishingly misrepresented. Those costs pale into insignificance against the benefit of achieving a settled certainty around the resolution of a historical injustice, so that citizens in Canada and BC, on Nisga'a lands and off, can move forward with their economic activity, and their lives.

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