

THE NISGA'A TREATY: *Competing Claims Ignored!*

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INTRODUCTION

THE LAND AREA CLAIMED BY THE NISGA'A in their treaty was greatly expanded at the expense of their tribal neighbours. In the prophetic words of Dr. Peter Williams, President of the Gitanyow, following an important meeting with the Nisga'a in 1984, "this is not an overlap the Nisga'a are talking about, it is an act of aggression."

This paper will demonstrate that the Nisga'a violate Nisga'a law by their claim to the entire Nass watershed, based on their own evidence that their uppermost boundary is between the Tchitin and Kinskuch Rivers on the lower Nass River. It will show that the provincial and federal governments have ignored established treaty policy and practice concerning the land, rights, and benefits negotiated in the Nisga'a Treaty.

Although the Nisga'a have based their treaty negotiations on a claim to 100 per cent of the Nass watershed, their territory actually extends only to an area near the mouth of the Kinskuch River. In the period from 1968 to the present, the Nisga'a have not presented any credible evidence to support their claim north of the Kinskuch River area. In fact, the record shows that Nisga'a elders early in this century provided contrary evidence that today's Nisga'a leaders have chosen to ignore.

A 300-page book lays out the evidence for all Aboriginal territorial holdings in the Nass watershed.¹ This paper is based on that book, and sets out the evidence for the legitimate boundaries – and a small

¹ Neil J. Sterritt, Susan Marsden, Robert Galois, Peter Grant, and Richard Overstall, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

overlap – between the Nisga'a, Gitanyow, and Gitksan in the vicinity of the Kiteen and Kinskuch Rivers.

THE PROVINCIAL POSITION

On 4 August 1998, the Nisga'a treaty was initialled in Aiyansh, British Columbia. Immediately prior to the signing, Premier Clark stated that 1,930 square kilometres of Crown land to be retained by the Nisga'a in fee simple represented 5 per cent of Nisga'a traditional territory.² This means that the province then believed the Nisga'a Nation held presumptive title to a land area of 38,000 square kilometres. Only one month later, however, the province downsized the Nisga'a entitlement to 24,000 square kilometres in their media campaign, thereby increasing to 8 per cent the land area retained by the Nisga'a under their treaty.³

The provincial statements served two important purposes. First, they told the citizens of British Columbia that there is little to fear from the treaty process because only a small portion of the land claimed by an Aboriginal nation will actually form part of a treaty settlement. Second, from a policy perspective, they are a signal to British Columbia's Aboriginal leaders that 5 per cent is the precedent that will apply to their negotiations, even though the Nisga'a got 8 per cent.

SERIOUS QUESTIONS

The land settlement raises three important questions about the Nisga'a treaty. *To how much land did the Nisga'a hold Aboriginal title? Did the Nisga'a claim more territory than they could prove title to? Did the Nisga'a obtain treaty rights, or other benefits, over land belonging to their Aboriginal neighbours?*

Legal Violations

Two issues are fundamental to the modern land claims treaty process: (1) the amount of land to which an Aboriginal nation claims to hold title and (2) whether that claim is exclusive of other claims. The resolution of competing claims for the purpose of obtaining certainty

² Allen Garr show, CKNW, Aiyansh, British Columbia, 4 August 1998.

³ British Columbia, *Your Guide to the Nisga'a Treaty* (Victoria: Ministry of Aboriginal Affairs, 1998).

has been a consideration in all modern treaties. Nevertheless, during their negotiations, the Nisga'a were neither required to prove the extent of their title nor to resolve overlaps. This violates both Aboriginal law and federal treaty policy. It also ignores guidelines set by the Supreme Court of Canada in *Delgamuukw* in December 1997 for establishing title and addressing overlaps.⁴

Geography

The Nass River watershed in northwestern British Columbia is at the heart of the Nisga'a claim and overlap. The Nass River flows south and west from Nass Lake through the rugged Coast Range Mountains to Mill Bay in the Nass estuary. The river is 384 kilometres in length, and the watershed contains 21,150 square kilometres.

A number of tributaries play a prominent role in the geography (and history) of the Nass River. Notable tributaries include the Tchitin, Kinskuch, Kiteen, Cranberry, Kwinageese, and Bell-Irving Rivers. There are two important creeks: Surveyors Creek and Treaty Creek. Meziadin Lake, an important salmon-spawning area, is situated about midway up the river. Bowser Lake, with a lesser salmon run, is located 233 kilometres from tidewater (Map 1).

Aboriginal Territories in the Nass Watershed

Four tribal groups claim territory in the Nass watershed between Nass Lake, at its headwaters, and Aiyansh: the Tahltan, Gitksan, Gitanyow, and Nisga'a peoples.⁵ The territorial claim of each is set out below (Map 1).

Tahltan Territory

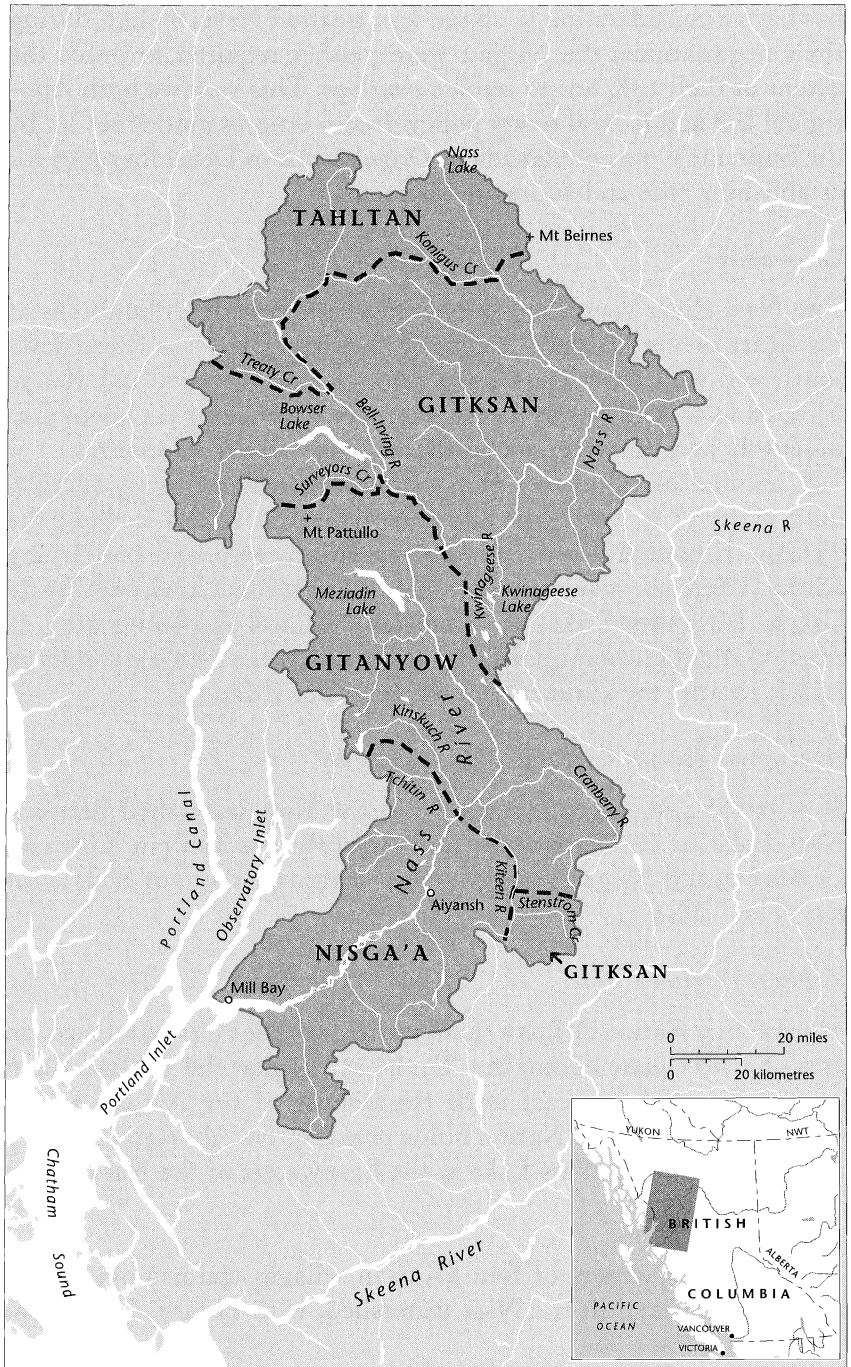
The Tahltan Nation claims a small territory in the Nass watershed, an area of 2,287 square kilometres. To the extent that the Tahltan claim was undisputed (at least until the details of the Nisga'a treaty surfaced), the Tahltan Nation holds presumptive Aboriginal title to this area, including Nass Lake at the headwaters of the Nass River.

Gitksan Territory

The hereditary chiefs of four Gitksan villages claim 9,053 square kilometres of land in the Nass watershed, with House chiefs from

⁴ *Delgamuukw v. the Queen* (1997) 1 CNLR 14 (SCC)

⁵ The Tsimshian Nation claims part of the Nass estuary.



Map 1: Aboriginal territories in the Nass Watershed.

the villages of Kisgaga'as, Kuldo, and Kispiox holding 8,513 square kilometres of land on the Bell-Irving River and the upper Nass, and chiefs from Kitwanga holding 540 square kilometres in the upper Kiteen River watershed.

The Gitksan-Tahltan boundary is contiguous all across the Gitksan's northern border, and it is mutually acknowledged to be so. The Gitksan-Gitanyow boundary is contiguous from the head of Surveyors Creek to the Nass River, and then it moves south to include the Kwinageese drainage system on the southeast. The Gitksan and Gitanyow acknowledge that this is their common boundary. About midway up the Kiteen, Gitksan chiefs from Kitwanga share a common boundary with Gitanyow chiefs (Map 1).

Gitanyow Territory

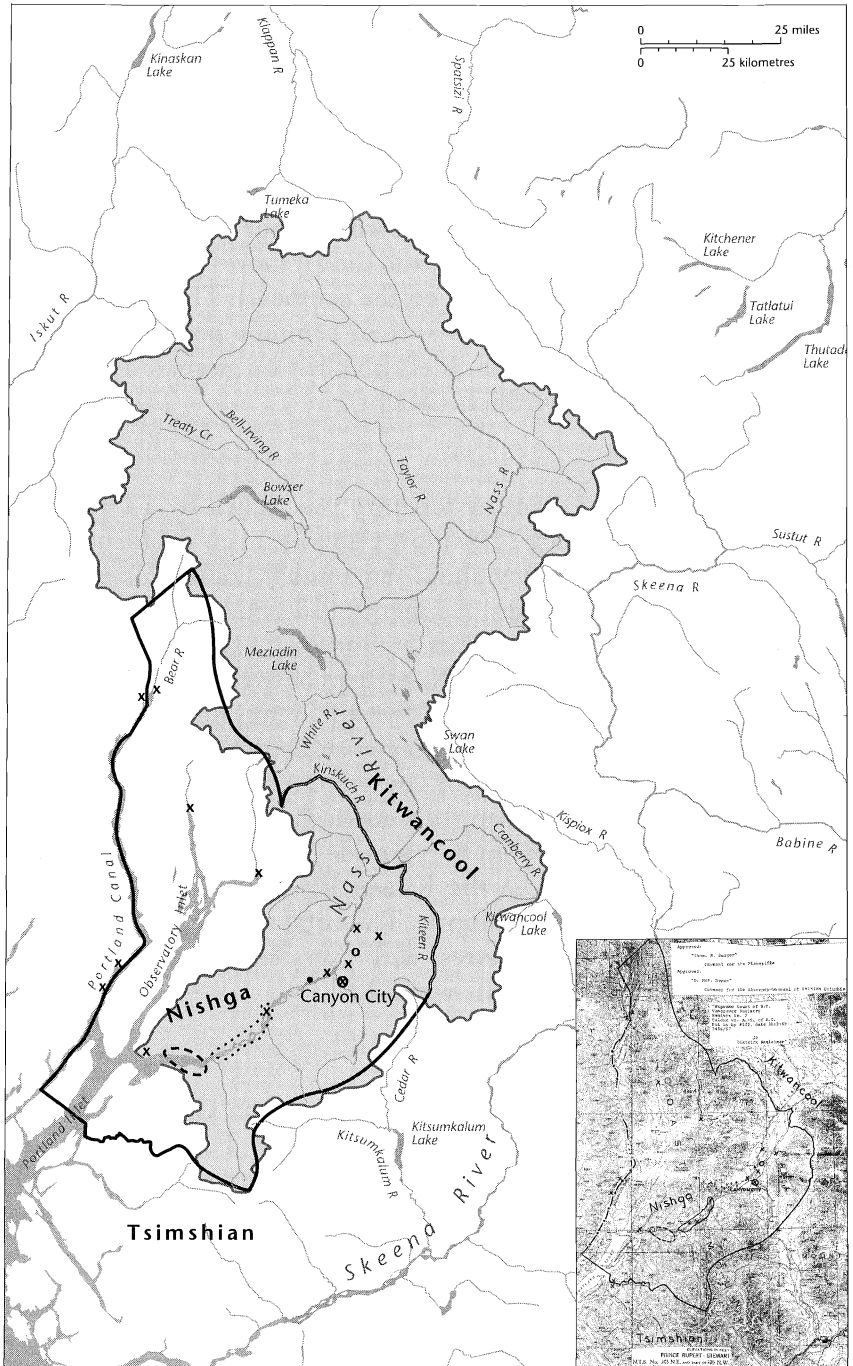
The earliest map of Gitanyow territory was drawn by a Gitanyow chief in 1875 and was followed by more elaborate maps drawn between 1910 and the present. They show remarkably consistent external boundaries and place names. As mentioned above, the uppermost Gitanyow boundary commences at Surveyors Creek. The lower Gitanyow boundary crosses the Nass River between the Tchitin and the Kinskuch Rivers, about twenty-five kilometres north of Aiyansh. From here, the boundary extends northwest between the Tchitin and Kinskuch Rivers to the height of land between the Nass watershed and Observatory Inlet. It then runs north through Bear Pass to the head of Surveyors Creek. From the east side of the Nass, the Gitanyow boundary runs southeast to the Kiteen River, then up the Kiteen River to Stenstrom Creek (Map 1). The total area of the Gitanyow claim is 6,280 square kilometres, with 5,294 square kilometres (84 per cent) lying within the Nass watershed.

Nisga'a Territory

In 1968, the Nisga'a set their boundary with the Gitanyow at the Kinskuch River, a few kilometres north of the Tchitin River.⁶ In *Calder*, the extent of the Nisga'a claim was defined on a map, which was submitted as evidence in court (Map 2). The Nisga'a then claimed an area of 4,303 square kilometres in the Nass watershed.⁷ In 1979, a

⁶ *Calder v. Attorney General of British Columbia* (1973). 1 SCR 313, map (Exhibit 2).

⁷ In this paper, the area of land claimed by the Nisga'a outside the Nass watershed is based on the 1998 Nisga'a-British Columbia assertion that the Nisga'a held Aboriginal title to 24,000 square kilometres. Therefore, 24,636 - 21,150 = 3,486 square kilometres.



Map 2: Nisga'a territorial claim. Calder (1968-73).

Nisga'a public relations document included a map that extended Nisga'a territory 120 kilometres beyond the Kinskuch River to north of Meziadin Lake.⁸ In 1995, another Nisga'a publication contained a map that revealed that the Nisga'a had further extended their border northwards, this time to the Tahltan border at Treaty Creek, some 254 kilometres beyond the Kinskuch River.⁹

The Nisga'a treaty reveals yet another boundary amendment, 274 kilometres north of the Kinskuch River to Nass Lake. In their preamble the Nisga'a say they have "lived in the *Nass area* since time immemorial [emphasis added]," and they define the *Nass area* as "the entire *Nass watershed*." This means that the Nisga'a based their treaty negotiations on a claim that engulfs the whole of their neighbours' territories. It also means that the federal and provincial governments negotiated treaty rights and other benefits based on this Nisga'a assertion. Several of the Nisga'a claims are presented in Table 1.

The amount of land claimed by the Nisga'a has increased nearly fivefold in thirty years. The Nisga'a claim has consistently expanded as they got closer to settlement, with the final claim bearing little resemblance to the first.

ABORIGINAL TITLE IN THE NASS WATERSHED

The Supreme Court of Canada in *Delgamuukw* has established that the proof of Aboriginal title is grounded in the history of the people, their legal system, and their connection to the land. The Court confirmed that the evidence that substantiates Aboriginal title may

TABLE 1
Nisga'a Claims (Nass watershed only)

Source of Claim	Claim (sq km)	Increase (as % of <i>Calder</i>)	River Distance (km)	Increase (as % of <i>Calder</i>)
<i>Calder</i> (1968)	4,303	n/a	111	n/a
<i>Lock Stock and Barrel</i> (1995) ¹⁰	17,829	414	364	328
Nisga'a Treaty (1998)	21,150	492	384	346

⁸ Nisga'a Tribal Council, *Citizen's Plus: The Nishga People of the Nass River Valley in Northwestern British Columbia* (Brampton, ON: Charters Publishing Co. Ltd., rev. 1980).

⁹ Nisga'a Tribal Council, *Lock, Stock, and Barrel: Nisga'a Ownership Statement* (New Aiyansh, BC: Nisga'a Tribal Council, 1995).

¹⁰ *Ibid.*

include oral history; knowledge of external boundaries; place names; genealogical information; and, of course, direct experience on the land as well as the written records of encounters with early explorers, government representatives, ethnologists, and other visitors. When doubt exists about an Aboriginal title claim, a rigorous review of oral and archival evidence should enable the accuracy of the claim to be assessed. Here, however, I will refer only to the early ownership statements of Gitksan, Gitanyow, and Nisga'a chiefs as evidence for the location of tribal boundaries and competing claims. I will focus on evidence regarding Aboriginal title at the Gitksan-Nisga'a boundary on the upper Kiteen and at the Gitanyow-Nisga'a boundary on the lower Kiteen and in the Tchitin-Kinskuch area.

Gitksan Evidence

In the Kiteen Valley, hereditary House chiefs from the village of Kitwanga state that they own territory on the east side of the upper Kiteen River and that the Nisga'a own territory on the west side. In the *Delgamuukw* case, several chiefs described the boundaries and place names of their Kiteen River territories. However, Gitksan chiefs made similar ownership statements years ago when Marius Barbeau and William Beynon gathered evidence of territoriality from Gitksan elders. Barbeau and Beynon conducted extensive ethnological research with Gitksan, Gitanyow, and Nisga'a chiefs between about 1915 and 1950. As a Tsimshian, Beynon spoke both Gitksan and Nisga'a. The excerpts below, from the Barbeau-Beynon files, are ownership statements made in the 1920s by Gitksan chiefs about their territories in the upper Kiteen watershed. There are no similar early Nisga'a claims to the east side of the upper Kiteen – the area covered by the description of the Gitksan chiefs.

Gitanyow elder, Edwin Haidzemxs, stated that the territory on the southern side of the Stenstrom Creek confluence with the Kiteen belongs to the Gitksan. This statement, and others to follow, demonstrate that the Nisga'a had no land entitlements east of the Kiteen River, contrary to their pretensions: "Ksa'anaxtami't [Stenstrom Cr.]. And the river is the property of [the House of] Kwinu, on the north side only. [The House of] Hlengwax owns to the other side."¹¹ Two Gitksan chiefs, Jim Lagaxnitz and Alfred Sinclair, also identified Gitksan place names and Hlengwax's territory in the upper Kiteen:

¹¹ Marius C. Barbeau and William Beynon. Northwest Coast Files (BF Series), 1915-59. (Ottawa: Canadian Museum of Civilization; 1924), BF 62.15.

“The creek falling in the Nass are Ksegudzo, ‘stream of Kudzo’ (above); Ksan’xteme’et [Stenstrom Cr.], ‘stream of cranberries.’ 18 miles in his ground from source.”¹² Another Gitksan territory, which borders Hlengwax (and extends to the headwaters of Stenstrom Creek), belongs to the House of Yal, from Kitseg yukla:

Sqa.Wogot, across birch (birch across trail) is a mountain hunting territory. Used formerly by Yel of this house. Still used by him. About 34 miles from the Skeena; below this is a hunting territory of Lelt through which the trail goes. Ten miles in width and about 24 miles [long]; on headwaters of Cranberry Creek.¹³

A territory belonging to the Kitwanga Frog-Raven chiefs – Lalt, Hakw, and Luulak – is situated further south at the headwaters of the Kiteen River: “Kselaxtselax[*gw*]ut, ‘waters of canyon creek,’ a creek flowing north to Kiteen.”¹⁴ Yet another territory of the Gitksan, which borders “canyon creek,” is described: “Two creeks flow from the mountain Tsom’altxut, flowing to the Nass. And they belong to Lengwox [Hlengwax]. Only the upper part of those creeks, not to the Nass.”¹⁵ Gitksan territory, as described by these early chiefs, lies within the area bounded by Stenstrom Creek, the upper Kiteen River, and the Skeena/Nass height-of-land east and south of the two creeks (Map 1).

Gitanyow Evidence

The evidence for the location of the Gitanyow boundary with the Nisga’a is to be found in their oral history, in the maps they have produced for more than 120 years, and in their boundary descriptions. In 1915, an early account of the Gitanyow-Nisga’a border was recorded at the McKenna-McBride Royal Commission (MMRC) hearings. Relying on a map drawn by a Gitanyow elder, Albert Williams (president of the Gitanyow) gave evidence for their boundary between the Tchitin and Kinskuch Rivers.

Q Who was it made this map?

A A man by the name of Sam Dowes [Samuel Douse].

Q Was he a surveyor?

A He is supposed to be a man that belongs to Kitwancool. He is an Indian and knows all about the land there.

¹² Ibid., 1923, BF 53.2.

¹³ Ibid., n.d., BF 63.31, Arthur McDames.

¹⁴ Ibid., 1924, BF 55, Solomon Harris.

¹⁵ Ibid., 1923, BF 53.11, Jimmy Laganits and Alfred Sinclair.

Q How many people live at the lowest point marked on the Nass River on this map, close to the boundary marked "A"?

A There is a big family lives there.¹⁶

The Douse map locates the most northerly boundary of the Nisga'a at the height of land between the Tchitin and Kinskuch Rivers.

In 1918, an Alaska Tlingit, Louis Shotridge, photographed a map (Map 3) that is probably the one described to the MMRC. At the lowest point on the Shotridge map (as with the Douse map) is written "SigitSazosqwit [Gitxsits'uuts'xwt]." This is a Nisga'a fishing village at the mouth of the Tchitin River. The Gitanyow-Nisga'a border is a short distance north of this village.¹⁷

In 1926, Michael Inspring Bright, a Gitanyow hereditary chief, produced a map showing creeks and fishing sites on both sides of the Nass River between the Nisga'a village of Aiyansh and Meziadin Lake. The map identifies, with few exceptions, the owner of each place name or fishing site and graphically illustrates the transition from Nisga'a to Gitanyow ownership between the Tchitin and Kinskuch Rivers. On Bright's map (as with the maps produced for the MMRC and in Shotridge's photograph), Gitxsits'uuts'xwt, at the Tchitin River, is listed as one of the last upriver Nisga'a sites.

Bright's purpose was "to make a statement that this territory and [H]ouses and creeks as designated on these maps as recorded are property of the Gitwinkul [Kitwancool] as conquered over the Tsetsaut [Tahltan] at Meziadin." Virtually all sites Bright recorded above Gitxsits'uuts'xwt belonged to the Gitanyow, including those along the Cranberry River and in the Meziadin Lake area.¹⁸

In 1957, the Gitanyow, with the help of Wilson Duff, produced a memoir that contains a map and a written description of Gitanyow territory:

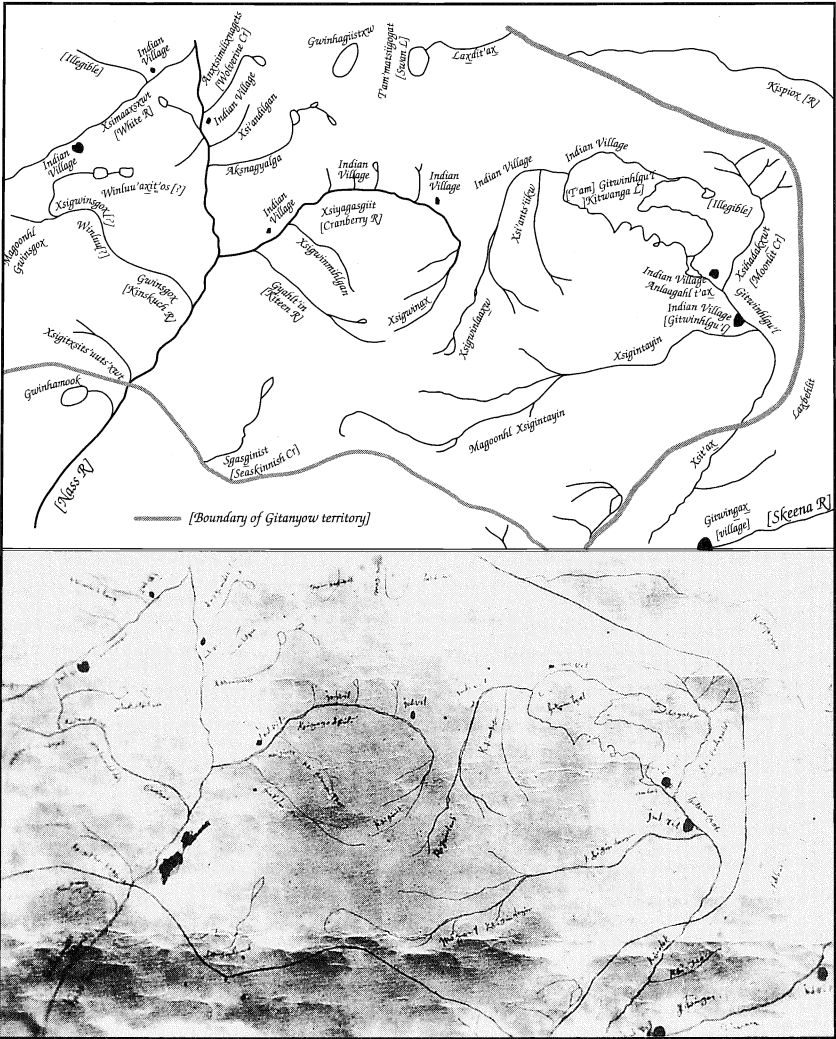
There is a piece of territory that starts at Mile 53 and goes on beyond the Nass River, following the mountain ranges. It includes all tributaries flowing easterly into the Nass River and west of Kinskuch River and northwesterly to Meziadin Lake, thence northerly to the headwaters of Cottonwood River (Surveyors Creek) near Bowser Lake.¹⁹

¹⁶ McKenna-McBride Royal Commission (1913-16), Babine Agency Hearings.

¹⁷ Louis Shotridge, "A Visit to the Tsimshian Indians: The Skeena River (Continued)," *University of Pennsylvania Museum Journal* 10, no. 3 (1919): 117-48.

¹⁸ Barbeau-Beynon Northwest Coast Files, 1926, BF 106.16. See also BF 62.5, 1939.

¹⁹ Wilson Duff, ed., *Histories Territories and Laws of the Kitwancool*, Anthropology of British Columbia, Memoir No. 4 (Victoria: BCPM, 1959).



Map 3: Gitanyow territorial map. Shotridge photograph (1918).

The Gitanyow map shows that their boundary encompasses the Kinskuch River and crosses the Nass River near Gitxsits' uuts'xwt. The memoir states that Gitxsits' uuts'xwt is at the Tchitin River confluence with the Nass and belongs to the Nisga'a chief, Sgat'iin. As for the northerly limit of Gitanyow territory, the "Cottonwood River" appears on government maps as Surveyors Creek, near Bowser Lake. The Gitksan and Gitanyow agree that Surveyors Creek is their boundary, with the House territory of Sgawil and Xsguig'mlaxhaa on the Gitksan side, and of Wiilitsxw and Txawok on the Gitanyow side (Map 1).

Gitanyow evidence of their territory has been consistent from the first documentary records to the present. These records are consistent with Gitanyow oral histories. In every instance, the Gitanyow state that the Nisga'a-Gitanyow boundary is near Gitxsits'uuts'xwt.

Nisga'a Evidence

The first major effort to obtain provincial and federal government recognition of the Nisga'a claim resulted in the drafting of a petition in 1908. The Nisga'a petition of 1908 describes a claim to "land in the Nass Valley, about one hundred and forty miles [224 km.] in extent, [which] is all needed by themselves as hunting grounds, timber and fishing grounds." The Nass River is 384 kilometres long. Some 160 kilometres of the upper Nass River watershed was not part of the 1908 petition claim.²⁰

In 1913, the Nisga'a prepared a second petition for presentation to the Privy Council in London. This document describes a claim in the Nass watershed to "the height of land surrounding the northwest end of Mitseah or Meziadin Lake." In this regard, the 1908 and the 1913 petitions are remarkably consistent, placing the "height of land" near Mount Pattullo north of Meziadin Lake, nearly 224 kilometres from tidewater. The documentary record from 1908 until 1986 suggests that the Nisga'a assumed that their territory ended north of Meziadin Lake and did not include the entire Nass watershed.²¹

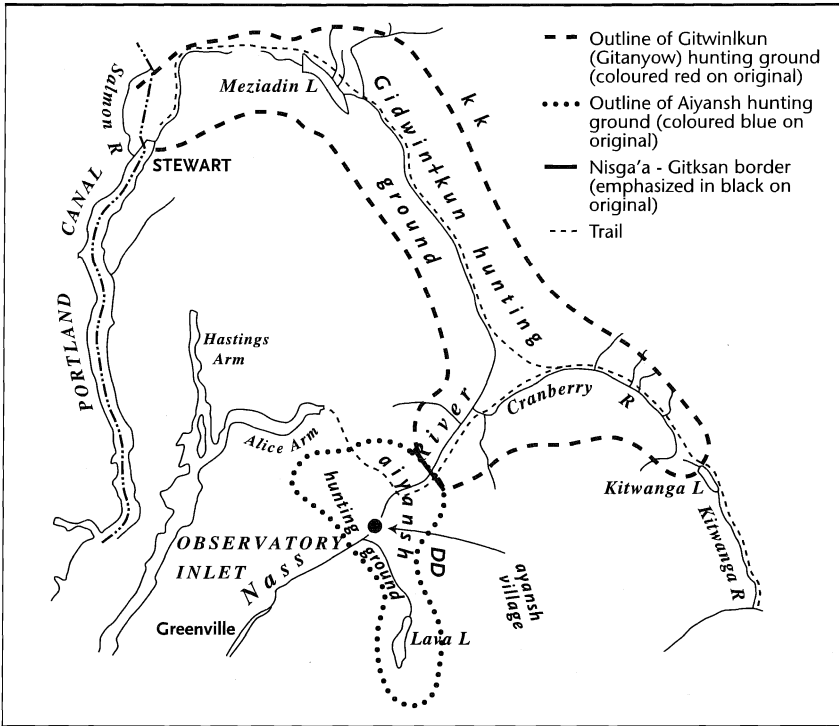
Nevertheless, a contradiction arises from the petitions. Given that the Nisga'a placed their boundary with the Gitanyow at the Kinskuch River in the *Calder* case in 1968, how is it that in the 1908 and 1913 petitions they placed the boundary at Mount Pattullo, some 110 kilometres further to the north, thus overlapping Gitanyow territory? How do the Gitanyow explain their boundary with the Nisga'a near the Tchitin River?

The contradiction arises because about half the chiefs and members of the village of Gitanyow (Kitwancool) relocated to Nisga'a villages between about 1890 and 1910. These Gitanyow leaders then became members of the Nisga'a Land Committee,²² which subsequently included the whole of Gitanyow territory in the Nass watershed as part of the Nisga'a land claim. However, this relationship was an uneasy one, as Gitanyow chiefs at Aiyansh in 1915 (with Nisga'a elders

²⁰ *Province*, 28 March 1908.

²¹ Friends of the Indians of British Columbia (FIBC), *Nisga'a Petition*, 1.

²² Gitanyow leaders appear in some of the early Nisga'a Land Committee photographs.



Map 4: Aiyansh and Gitanyow Hunting Grounds showing Nisga'a-Gitanyow boarder. E.N. Mercer, 1916.

present) made their own separate claims to the McKenna-McBride commissioners and put their boundary near the Tchitin River.²³

Other information provides evidence for locating the Nisga'a boundary near the Tchitin River. Sgat'iin is the leading Wolf chief of Gitlakdamix (near Aiyansh). In Bright's map, Sgat'iin is the owner of Gitxsits'uuts'xwt, at the Tchitin River.

In 1916, Sgat'iin chose his son-in-law, E.N. Mercer, as his personal emissary in a Nisga'a delegation to Ottawa. Mercer was a member of the Nisga'a Land Committee and a "Chief of Aiyansh." During his 1916 visit to Ottawa, he provided important evidence for the location of the Nisga'a boundary near the Tchitin River to the ethnologist Marius Barbeau. He produced a map (Map 4) showing the juxtaposition of Aiyansh with Gitanyow territory and explained its significance:

Our [Aiyansh hunting ground] extended from the Nass to Lava lake. The Gitwinku'n [Kitwancool] village is near Kitwanga Lake. It

²³ According to the Nisga'a, the Gitanyow formally withdrew from the Nisga'a land claims effort in 1926 (see Nisga'a Tribal Council, *Lock Stock and Barrel*, 15-17).

is called gitwinlku'n Lake ... Some of the Gitwinlkun live at Ayansh now, all year around. They began to come to Ayansh 15 years ago. Their hunting ground is from that lake down to the Nass River, also towards gitwanga.²⁴

On his map, Mercer clearly draws the Nisga'a-Gitanyow border below two river features: one of which is named – the Cranberry River – and the other of which, though unnamed, is clearly the Kinskuch River. Mercer also explained that the Gitanyow (Kitwancool) people won Meziadin Lake in battle:

The Gitwinlkun & Nass river people had fight Met'sia.dan Lake. Some other tribe inland lived at Meziadin Lake; the Gitwinlkul fought them, and since they won they have kept that place for hunting; These people [who fought the Gitanyow] were the lax'wiyip; they are of different language. They are the T'set'sa.ot [Tsetsaut].²⁵

Mercer is one of several leading Nisga'a chiefs who early in the century located the Nisga'a boundary near the Tchitin River.

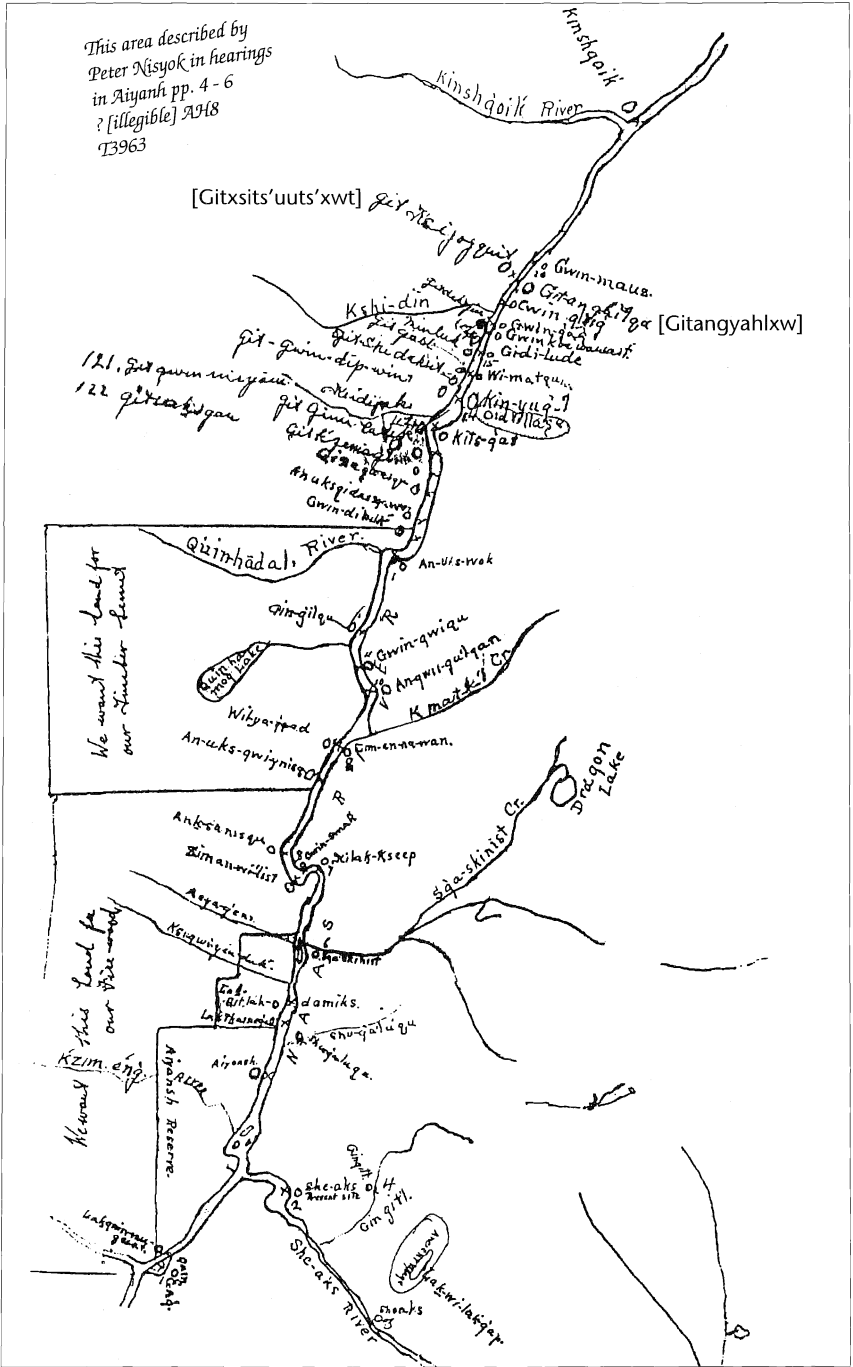
Peter Nisyok, a Nisga'a leader, was seventy years old when he made his ownership statements to the McKenna-McBride commissioners in 1915. His evidence includes a detailed listing of place names along the Nass River from near the present-day village of Aiyansh to slightly above the confluence of the Tchitin River. Nisyok's statement is illustrated with a map, leaving no question about his oral presentation or of the extent of Nisga'a territory in the Nass watershed (Map 5). On Nisyok's map (and in his statement) appear two place names – "gitksijo[s]qgwit [Gitxsits'uuts'xwt]" and "Git-anghilqa [Gitangyahlxw]" – at the "Kshi-din (Tchitin)" River, which shows that Nisga'a territory ends there.²⁶

The fact that two important members of the Nisga'a Land Committee drew maps to support their claim within three years of the 1913 petition and corroborated the Gitanyow claim and oral history demonstrates two things. First, the Nisga'a-Gitanyow boundary is located between the Tchitin and Kinskuch Rivers. Second, the 1908 and 1913 petitions incorporated territory north of the Kinskuch and Cranberry Rivers that belonged to the Gitanyow, not the Nisga'a. The only maps that show a Nisga'a claim to the entire Nass watershed

²⁴ Barbeau-Beynon Northwest Coast Files, 1916, BF 106.58.

²⁵ Ibid.

²⁶ McKenna-McBride Royal Commission, Nass Agency, Aiyansh, 1915.



Map 5: Nisga'a territory. Peter Nisyok map, 1915.

are those produced some eighty years later in *Lock Stock and Barrel* and in the Nisga'a treaty.²⁷

OVERLAPPING CLAIMS

An "overlap" occurs when different tribal territorial claims overlap. Usually such overlaps are narrow and definable. Prior to the Nisga'a claim in *Lock Stock and Barrel*, it was unheard of for one group to make a broad claim that encompasses the entire territory of one or several Aboriginal nations.

Overlapping Claims in the Nass Watershed

Historical evidence demonstrates a contiguous Nisga'a-Gitanyow boundary some twenty-five kilometres above the village of Aiyansh, near the Tchitin River confluence with the Nass. The boundary generally extends in a northwest direction along the height of land between the Tchitin and Kinskuch Rivers, and eastwards to, and up, the Kiteen River. Various statements of the Gitksan, Gitanyow, and Nisga'a suggest a small overlap along the Kinskuch and Kiteen Rivers.

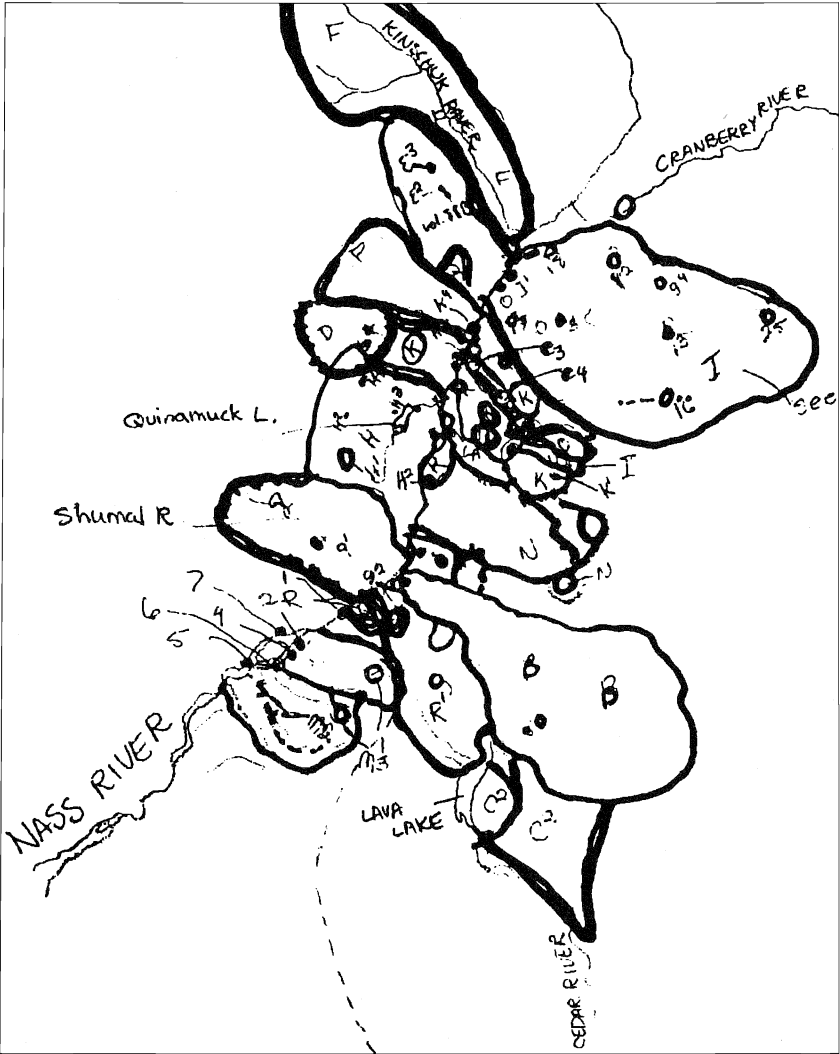
A number of prominent Nisga'a House chiefs made ownership statements about their territory along the Nass River north of Aiyansh to Barbeau and Beynon. In their statements, and on the map drawn by Barbeau (Map 6), the chiefs did not claim territory north of the Cranberry River on the east side of the Nass, and only one chief claimed territory north of the Kinskuch River on the west side of the Nass. In the 1920s, three Nisga'a leaders – Charles and Johnny Morven, and Minee'eskw – identified several place names and noted either the existence of a small competing claim, or a contiguous border, with the Gitanyow. The fact that these Nisga'a chiefs much debated the Kinskuch and Kiteen area indicates that the overlap is a very narrow one.

On the east side of the Nass River towards the Cranberry River, the Morvens identified Gwinstimoon (Mount Hoadley) and the Kiteen River as belonging to the Nisga'a House of K'eexkw and Tok:

Gwinstimoon ([looking] Like Humpback Salmon)

There is [a] trail following the mountain crests, the continuation of Gwinstimoon Range. The mountain range goes into the Gyihlt'in

²⁷ See Nisga'a Tribal Council, *Lock Stock and Barrel*, 1995, and Nisga'a Final Agreement, 1998.



Map 6: Nisga'a statements to Marius Barbeau (1927-29).

[Kiteen] River district. Groundhog and all kinds of animals in this mountain country. Trout on the upper reaches of the river.²⁸

The Gitanyow concur that Gwinstimoon belongs to the Nisga'a. The Morvens elaborate on their claim at the Kiteen River and acknowledge that chief Luuxon of Gitanyow owns the Cranberry River, thus placing the Gitanyow-Nisga'a border at, or near, the Kiteen-Cranberry confluence:

²⁸ Barbeau-Beynon Northwest Coast Files, 1929, BF 106.46.

Gyihlt'in (Fish Weir, Look at Trap)

Gyihlt'in ... is the name of the hunting ground and that is the name of the river ... The large river is named Gyihlt'in. The Cranberry River territory is [chief] Luuxoon [of] Gitwinhklul [Kitwancool, or Gitanyow], Ksiyagaskit [Cranberry River] (Newly/Down From Hills/Lies). [Places on this territory are] Wilsgayipt ... [etc.].²⁹

The Gitanyow acknowledge that the Nisga'a own territory on the south and west side of the Kiteen River, from Wilsgayip (where the Nass Forest Access Road bridge crosses the Kiteen River) to its source. They disavow any Nisga'a claim on the north and east side of the Kiteen, where the Morvens claim a berry ground on a mountain (unnamed on government maps) immediately north of the Kiteen River near Wilsgayip.

Wilbaxt'aahlgibuu (Where Up Towards Hill Sits (a) Wolf)

A trail goes from Gitangyahlkw [on the Nass River] to the berry and groundhog area, Anmaxlemgan ... The berry ground is called Wilbaxt'aahlgibuu, a mountain, (Where/Up Towards Hill/Sits/Wolf). Mountain goat, groundhog, marten, fox, etc. There is a house here at Wilsgayipt (Where/Across/Earth).³⁰

The Gitanyow also call this mountain Wilbaxt'aahlgibuu and claim it as their own. The Morvens' acknowledgment of Gitanyow claims in this area is documented in the Barbeau-Beynon record:

There is a controversy as to the ownership of portions of Tok ground, especially with the Gitwinhklul [House chiefs] Wudaxhayetsxw and T'ooxens. T'ooxens in the former years had married into the Nisga'a House. The Nisga' chief then gave as a wedding dowry to the Gitwinhklul the privilege of using portions of his hunting grounds for the benefit of his children. The rights of the dowry ended on the death of the Gitwinhklul man. But the Gitwinhklul still claim the privilege claiming that the right has never been extinguished. The present T'ooxens may not claim it. But the House of Wudaxhayetsxw claim it. They are Tsetsaut people in origin.³¹

At a minimum, evidence of some connection to the territory in dispute has to be shown in order to establish that an overlap exists. The

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid., BF 106.46.

Morvens' statement in the 1920s, unlike those of the Nisga'a leadership in recent years, provides some of the detail required to establish a competing claim – the origin of the dispute (in dowry); the law that may apply (amnigwoot), and the territory and House group involved. Note that it is “portions” of the House of Tok's ground, not the entire territory, that are at issue.

On the west side of the Nass, Sgat'iin's son, Minee'eskw, in 1927, set out the Nisga'a claim in the Kinskuch River area much as the Morvens had in the Kiteen River area:

House of Sgat'iin (Gwandemexs, extinct)

There was a man of the Laxgibuu [Wolf Clan] who married a woman of Luuxhon, Laxse'el [Frog-Raven Clan], Gitwinhku'l, and their child's name was Singewin. He grew up with the Laxgibuu on this territory. And when all the people were gone at the mouth of the Lisems for oolichan, Singewin stayed on the hunting territory of the Laxgibuu. And after that the Gitwinhku'l claimed it as their territory for the fact that Singewin had stayed while the others had gone away from it.³²

Minee'eskw also said that his father claims Gadiit (Kinskuch Peak), a low ridge situated immediately north of the Kinskuch River:

Gadiit

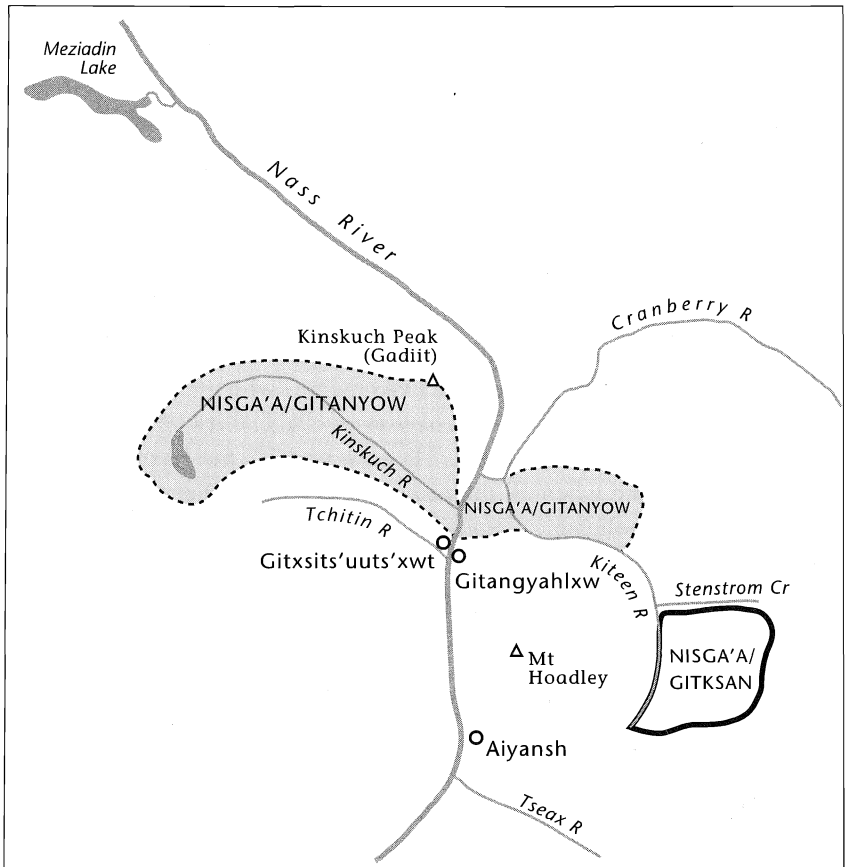
Sgat'iin has a territory towards the Medzeeaden [Meziadin Lake], Kaditt (meaning ?), S.W. of Medzeeaden ... for groundhog. Acquired at the same time as the other territory.³³

The Gitanyow name for Kinskuch Peak is also “Gadiit,” which shows that the area from the Gitanyow boundary near the Tchitin River to Kinskuch Peak is used by both Houses. This is the only evidence of a claim by the Nisga'a north of the Kinskuch. Meziadin Lake is some forty kilometers farther up the Nass River.

The Morven brothers and Minee'eskw, for the Nisga'a, provide the only House-based information that shows a narrow overlap with the Gitanyow (which has yet to be resolved) in the Kiteen and Kinskuch River area (Map 7). Since 1968, no comparable evidence has been produced by the Nisga'a Tribal Council for its claim to territory north of the Tchitin River.

³² *Ibid.*, 1927, BF 106.56.

³³ *Ibid.*, BF 106.19.



Map 7: Nisga'a-Gitanyow overlap (after Morven brothers and Minee'eskw [1920s]).

FEDERAL GOVERNMENT LAND CLAIMS POLICY

In 1973, following the *Calder* decision in the Supreme Court of Canada, the federal government established its policy on land claims and treaty negotiations. Tribal groups wishing to negotiate a "land claim" were required to submit to the federal government a map indicating their tribal territory and a brief statement justifying the claim. Most tribal groups ensured that their initial claim was broad and included all known territories. They intended to refine their claim with later research. If the federal government "accepted" the map and declaration, then the nation qualified for loan funding with which to conduct research and to prepare for negotiations.

Many tribal groups developed claims in this manner in the 1970s and 1980s. However, most BC claims languished until 1992, when

the BC treaty process was initiated. In 1992 the land claim maps of the 1970s were consolidated and compiled on a map produced by the British Columbia Treaty Commission. This map gave an exaggerated picture of tribal overlaps.

Several tribal groups qualified for land claims research funding in the 1970s, including the Gitksan, Gitanyow, and Tahltan. The Gitksan and Tahltan nations refined their claims based on extensive research with knowledgeable tribal elders and archival records. Gitanyow research affirmed the accuracy of their oral histories, knowledge of the land, and early maps.

The federal government has encountered competing claims (overlaps) during land claims negotiations in other parts of Canada. In such situations, the government requires that the nation at the negotiating table itself resolve overlaps with their neighbours. Furthermore, in order to compel parties to resolve an overlap, governments have excluded rights and benefits within the overlap area from the final treaty. Tribal, federal, and territorial governments recently addressed this matter in the Yukon, and the Yukon Final Agreement contains the following clause:

Prior to the ratification of a Yukon First Nation Final Agreement by the Yukon First Nation, any overlapping claim, right, title and interest, of other Yukon First Nations within its Traditional Territory as delineated [on a map] shall be resolved to the satisfaction of the parties to that Yukon First Nation Final Agreement.³⁴

There is also a schedule that severs the contested area until there is agreement between the nations involved:

All of the provisions of this Agreement shall apply in that part of the Traditional Territory of the ... First Nation which ... is included in an Overlapping Area *except the following which shall not apply ...* Special Management Areas; Heritage; Fish and Wildlife; Forest Resources [and] Economic Development Measures. (Emphasis added)³⁵

This list of exclusions corresponds exactly to the list of rights and benefits negotiated by the Nisga'a in Gitksan, Gitanyow, and Tahltan territory.

³⁴ The Umbrella Final Agreement between the Government of Canada, the Council of Yukon Indians and the Government of the Yukon. Ottawa, 29 May 1993.

³⁵ Champagne and Aishihik First Nations Final Agreement. Ottawa, 29 May 1993. White River. "Draft" Yukon First Nation Final Agreement, 1998.

The Delgamuukw Decision and Overlapping Claims

In the *Delgamuukw* decision, the Supreme Court of Canada instructed Aboriginal nations to take competing claims seriously and to deal with them when they arise in litigation. In direct reference to treaty negotiations, the Court stated: "Those negotiations should also include other aboriginal nations which have a stake in the territory claimed." *In other words, where an overlapping claim arises in treaty negotiations, the Aboriginal nation(s) affected must be part of the negotiations.* In treaty negotiations throughout Canada, the usual practice has been to "sever" from negotiations those parts of an agreement that are subject to a competing claim by another nation. This did not happen in the Nisga'a treaty negotiations.

On numerous occasions since 1968, Gitanyow and Gitksan leaders have met with the Nisga'a to try to resolve the Nisga'a claim to the upper Nass watershed. Finally, in 1995, under a joint Gitksan-Nisga'a overlap protocol, the Gitksan presented an exhaustive study of all known evidence bearing on the overlap issue to the Nisga'a leadership.³⁶ The report concludes that the Nisga'a boundary in the Nass watershed is between the Tchitin and Kinskuch Rivers. It was also presented to Canada and British Columbia, who were negotiating with the Nisga'a, and to the Gitksan and Gitanyow. Over three years have gone by and the Nisga'a have not responded.

The Gitksan and Gitanyow asked for a mediator to review the issue. The Nisga'a rejected all requests until after initialling their treaty in August. Only then, in the face of court action, did they agree to consider a mediated process with the Gitanyow. This would not have been necessary had the provincial and federal governments severed from Nisga'a treaty negotiations the area claimed by the Nisga'a that intrudes into Gitanyow, Gitksan, and Tahltan territories.

During the 4 August 1998 celebration, at which their treaty was initialled, both governments praised the Nisga'a for standing by their 1996 Agreement-in-Principle following the *Delgamuukw* decision in the Supreme Court of Canada. Certainly the Nisga'a leadership seriously considered the potential advantage of the title and overlap guidelines established for the first time in *Delgamuukw*. In light of its benefits, why did they not rely on *Delgamuukw* to advance their negotiations even further?

³⁶ See Sterritt et al., *Tribal Boundaries in the Nass Watershed*.

The answer seems obvious: the Nisga'a were unable to provide evidence that would meet the test for establishing Aboriginal title north of the Kinskuch River. By adhering to the *Delgamuukw* test, the Nisga'a would have been forced to their proper border between the Tchitin and Kinskuch Rivers. In other words, the Nisga'a obtained rights and benefits in their neighbours' lands that they would not have received if the provincial and federal governments had demanded of the Nisga'a "good faith negotiations" with their neighbours. Obviously, the Nisga'a had much to lose – the bargaining power of some 24,000 rather than 7,800 square kilometres – by abandoning their 1996 Agreement-in-Principle.

Implications of the Nisga'a Treaty

The evidence is clear that the provincial and federal governments have given to the Nisga'a an array of rights and benefits over Gitanyow, Gitksan, and Tahltan lands. This granting of rights and benefits is based on the assertion that "the Nisga'a Nation has lived in the Nass Area since time immemorial."³⁷

The failure of the provincial and federal governments to respond to the many Gitksan and Gitanyow submissions has had serious consequences for them, and for the Tahltans, in the Nass watershed. The treaty reveals that the Nisga'a have negotiated:

- "Nisga'a Lands" over Gitanyow territory between the Tchitin and Kinskuch Rivers.
- Five parcels of fee simple land in Gitanyow territory at Kinskuch Lake (7 hectares), Jade Lake (1 hectare), Meziadin Junction (2 hectares), Meziadin Lake (137.5 hectares), and Grizzly Bear Lake (5 hectares).
- Fee simple land in Gitksan territory at Kwinageese Lake (6 hectares). The territory belongs to the Gitksan House of Delgamuukw.
- Fisheries management over the whole of Gitanyow, Gitksan, and Tahltan territory.
- A "treaty right to hunt" in the whole of Gitanyow territory and in nearly 50 per cent of Gitksan territory.
- An extensive commercial recreation tenure in Gitanyow territory at Kinskuch, Jade, and the Niska Lakes. Three provincial heritage site designations: the first in Gitanyow territory where the grease

³⁷ *Nisga'a Final Agreement*, Preamble, 1.

trail crosses the Cranberry River; the second at Treaty Creek at the Gitksan-Tahltan boundary; and the third at Nass Lake in Tahltan territory. Not only do the sites violate Aboriginal law, they constitute revisionist history. For example, the Treaty Creek heritage site will commemorate an event to which the Nisga'a were not party.

- A provision to record seven place names within Gitanyow and Gitksan territory in the British Columbia Geographic Names System. For example, the Nisga'a will record the Cranberry River as "Ksi W'iipdalks" (water/of/cranberry), a recent, literal translation of the Euro-Canadian name by the Nisga'a. The documented Aboriginal Gitanyow, Gitksan, and Nisga'a name for the river is Xsiyagasgiit (water/down along/laying). The purpose of this effort, as with the heritage site designations and other place names now to be recorded in the British Columbia Geographic Names System, appears to be to establish a Nisga'a presence in parts of the Nass watershed where it does not exist.

SUMMARY

The provincial government is on record as stating that the Nisga'a have relinquished 92 per cent of their traditional territory. The Gitanyow, Gitksan, and Tahltan believe the legitimate Nisga'a claim is closer to 8,000 square kilometres than 24,000 square kilometres. That's based on the undisputed claim by the Nisga'a to 4,303 square kilometres in the Nass watershed and 3,486 square kilometres at Portland Canal and Observatory Inlet. At the expense of their neighbours, the Nisga'a wrongly inflated their claim.

Now to deal with the questions posed at the beginning of this paper. *To how much land did the Nisga'a have Aboriginal title?* Based on the evidence of their own knowledgeable elders in the early decades of this century, and accepting that the upper Nisga'a boundary is at the Kinskuch and Kiteen Rivers as set out in *Calder*, the Aboriginal territory of the Nisga'a is 7,800 square kilometres.

Did the Nisga'a claim more territory than they could prove title to? According to the publicity put out by the provincial government, the Nisga'a gave up 24,000 square kilometres. The Nisga'a, therefore, claimed more than three times their territory of 7,800 square kilometres.

Did the Nisga'a obtain treaty rights, or other benefits, over land in the Nass watershed belonging to their Aboriginal neighbours? The Nisga'a were granted by the federal and provincial governments fee simple lands in Gitanyow and Gitksan territories. They were granted fisheries management to Gitanyow, Gitksan, and Tahltan lands, and the "treaty right to hunt" in Gitanyow and Gitksan lands. In addition, they obtained commercial recreation tenure and the establishment of three heritage sites in Gitanyow, Gitksan, and Tahltan lands. Finally, they have obtained symbolic government recognition of their claim to the entire Nass watershed with the establishment of heritage sites and the recording of recently invented place names – none of which appear in the historic record of the Nisga'a themselves.

There are crucial lessons to be learned from the Nisga'a treaty experience. Aboriginal nations must use proper evidence and research methods to prove their boundaries when an overlap occurs. Territorial overlaps must be resolved before a treaty is concluded. It is not right to sacrifice the land entitlement of one nation to obtain a treaty with another nation. Finally, a binding third-party process is an absolute requirement when the Aboriginal parties cannot resolve an overlap.



Dancer Dennis Nyce representing Naxnok, or spirit beings, reproduced with permission. *Nisga'a: Peoples of the Nass River* (Vancouver: Douglas & McIntyre, 1993), 48.