

**Analysis of the May 2008 “Alternative Governance Model”
proposed to serve as treaty model
between Gitxsan, Canada, and BC**

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Submitted to: Gitxsan Government Commission

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TABLE OF CONTENTS

INTRODUCTION.....	1
BACKGROUND	2
A. IMPACT OF THE PROPOSED GOVERNANCE MODEL.....	3
A-1 LOSS OF COMMUNITY HELD LANDS	3
A-2 LOSS OF FEDERAL PROTECTION FOR GITXSAN LANDS	4
A-3 LOSS OF GITXSAN TIES TO HISTORY AND IDENTITY	5
A-4 LOSS OF FISHING SITES POSSIBLE	5
A-5 LOSS OF LANGUAGE THREATENED	6
A-6 LOSS OF MEMBERSHIP	6
A-7 LOSS OF BAND GOVERNMENTS.....	7
A-8 LOSS OF SPECIFIC RIGHTS	8
<i>Loss of protection against tax.....</i>	<i>8</i>
<i>Loss of protection against seizure of property.....</i>	<i>10</i>
A-9 LOSS OF PROGRAMS AND SERVICES.....	11
<i>Health Services</i>	<i>11</i>
<i>Social Development</i>	<i>12</i>
<i>Education.....</i>	<i>13</i>
<i>Housing.....</i>	<i>13</i>
B. NEGOTIATING PROCESS.....	14
B-1 EXERCISE OF FIDUCIARY DUTY TRIGGERED	14
B-2 FAILURE OF CURRENT PROCESS.....	16
APPENDIX	18
1. <i>Items Negotiable in Self-Government Agreements</i>	<i>18</i>

Introduction

This paper provides analysis of the impact of the proposed terms of a Gitxsan treaty with Canada and B.C. as put forward in "Alternative Governance Model: Gitxsan Reconciliation", dated May 15, 2008. The Alternative Governance paper, prepared by the negotiating team of the Gitxsan Hereditary Chiefs, proposes, among other things, that once a treaty is finalized:

1. Band Governments established under the Indian Act will disappear.
2. Membership in bands will cease
3. Reserve lands established under the Indian Act will be eliminated.
4. No treaty settlement lands will be selected.
5. Programs and services provided by Bands will be provided by the provincial and federal governments.¹
6. Gitxsan people will pay taxes

These proposals will have significant and long lasting impacts on Gitxsan members, communities and government, therefore the Gitxsan Government Commission ("GGC") has commissioned this report. The views expressed are not those of the GGC board of Directors, but is rather an independent analysis. However, the following discussion also summarizes some of the most critical issues raised by Gitxsan in attendance at a public forum held on July 24th, 2008 at Gitanmaax..

The GGC was established approximately twenty five years ago to assist the Gitxsan communities of Kispiox, Glen Vowell, Gitanmaax, Gitwangak, and Gitanyow to develop community infrastructure and deliver programs and services. The Chief Councillors of these bands form the GGC Board of Directors. At the outset it is important to note that Gitanyow conducts its own treaty negotiations therefore will not be directly impacted by the proposed change in the legal status of band members, governments and administrations. It is also understood that although Gitanyow is represented on the GGC Board of Directors, the Gitanyow Chiefs and Council do not take any position on the matter, viewing it as an internal Gitxsan matter.

¹ The Governance Model states: "The Gitxsan are not interested in the parallel society concept which drives the standard treaty model. Instead the preference is for governmental services to be delivered by governments (mostly provincial) as is usual in most of Canada. (It would be normal that the funds currently sent to Bands for this purpose by Ottawa would in future be sent instead to the provincial government to help fund the services and also to help guarantee an adequate delivery standard." (quote from page 5) "The laws and services currently supplied by Indian Act Councils can be better and more efficiently provided by federal and provincial entities as for all other British Columbians." (quote from page 3)

Background

Section 35 (1) of the *Constitution Act 1982* as well numerous court decisions including *Delgamuukw*, *R. v. Sparrow*, and *R. v. Sioui*, courts confirm that Aboriginal title and rights have not been extinguished and that the honour of the Crown requires Government to protect these rights from unjustifiable infringement. Canada has negotiated settlement of Comprehensive Claims for at least 20 years. In 1999 Canada also adopted a policy statement, *Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. At p.3 Canada states:

The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under section 35 of the *Constitution Act, 1982*.

The Policy provided for Canada to enter into self-government agreements either independently of, or in conjunction with land claims agreements and set out a wide variety of matters ranging from establishing governing structures, to language and culture, to health and social services. (See Appendix 1 for a more complete list of possible negotiation areas.) Many of these have been the responsibility of band councils and administrations.

Following the Supreme Court's *Delgamuukw* decision, the Hereditary Chiefs through their incorporated non-profit society, the Gitksan Treaty Society ("GTO") entered into negotiations with Canada and B.C. A Framework Agreement was signed on August 13, 1995. Section 5.1.1 of the Agreement provided for the following to be the subject of negotiation, (with possibility of amendment):

- Governance
 - Self Government (a) source (b) content
 - Intergovernmental Relations
 - Transition
- Lands and Resources
- Fiscal Relationships
 - Financial benefits
 - Royalty sharing
 - Taxation
- Eligibility and Enrolment
- Ratification

An Openness Protocol dated 03/08/1995 provides for public access to main table negotiations as well as information to be provided to communities in Gitxsan territory, including information sessions and forums.

It appears from the Alternative Governance Model that the GTO does not intend to enter into a self-government agreement and instead seeks to address only land / resource issues relating to co-jurisdiction and revenue sharing. According to the Model, the Hereditary Chiefs will be the only form of Government for the Gitxsan; that is Band governments while have assumed responsibility for community development and services to individuals and families, will be eliminated.

A. Impact of the proposed Governance Model

Implementation of the Alternative Governance Model could result in important losses to the Gitxsan people, losses that jeopardize their land and culture. Loss of these rights would need to be balanced, or outweighed, by benefits received in exchange for rights given up. As the Gitxsan people have not received any information on the benefits that would result from the proposed treaty, it is not possible to assess whether, from a legal perspective, there is a fair bargain.

A-1 Loss of community held lands

Upon entering into a treaty, Canada requires that the First Nation(s) are removed from the Indian Act, and that bands, band land, and membership in bands are discontinued. In their place, the First Nations negotiates a self-government agreement which provides for creation of settlement lands and governments to administer the settlement lands and represent settlement constituents. According to the Alternative Governance Model, the Gitxsan chiefs will not seek a self-government agreement or the creation of settlement lands. Instead, the Hereditary Chiefs and GTO propose that Gitxsan people take on an identity that is no different than any other non Gitxsan, that is, in effect assimilate into the Canadian public, except where the exercise of aboriginal rights and accommodation and compensation for use of land and resources is at issue.

² See *A Dictionary of Law*, ed. Elizabeth Martin (Oxford University Press, Oxford, 1997); *Jowitt's Dictionary of English Law*, Second Edition, ed. John Burke (Sweet and Maxwell Ltd., London, 1977).

³ Wikipedia, an online encyclopedia. Fiduciary.

⁴ *Guerin v. the Queen* [1984] 2 S.C.R. 335

⁵ *Sparrow v. The Queen* [1990] 1 S.C.R. 1075 at 1108.

A-2 *Loss of Federal protection for Gitxsan Lands*

Section 92(24) of the *Constitution Act 1867* gave the Federal Government the power to make laws over "Indians and lands reserved for the Indians". As noted by the Supreme Court of Canada in *Delgamuukw* [1997] 3 S.C.R. 1010, and *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816 • (2002), 213 D.L.R. (4th) 193 as well as in more recent lower court decisions⁶, Indian lands "extends beyond existing reserves and encompasses all lands set aside for the use and benefit of Indians, including lands held pursuant to aboriginal title". Canada has a fiduciary obligation to protect these lands and that the honour of the Crown is to be upheld in dealings with these lands. Further, Aboriginal title and rights are protected under section 35(1) of the *Constitution Act 1982*.

Under the Alternative Governance Model it appears that land will be transferred to provincial jurisdiction and become part of the B.C. land holding (Torrens) system. Therefore, the current 'protected "status of Gitxsan reserve lands will be lost as provincial lands will apply with no special provision for First Nations status. For example Section 371 (1) of the *Land Title Act* states:

371 (1) For the purpose of applying the Torrens system to Indian land the registrar is not under any duty to take notice of, act on, inquire into or give effect to any enactment of Canada or to any law of a band or its council that

(a) relates to the registration of title to, rights in, claims against or estates or interests in land, whether legal or equitable, or the creation, conveyance, transmission, inheritance, devolution or enforcement of them,

(b) creates a trust or fiduciary duty in the band to hold land for the use and benefit of itself and its members, or

(c) expressly or by necessary implication requires the registrar to perform a duty or exercise a power that the registrar would not otherwise be required to perform or exercise with respect to the land if it were not Indian land.

Under subsection (b) the Registrar is not obligated to take into consideration any enactment of Canada or any law by a band that creates a trust or a fiduciary duty to hold the land for the use and benefit of its members: In effect, this section prevents a First Nation who has a treaty from taking steps to prevent the Land Title Act from applying to treaty land.

⁶ *Chingee v. Attn. Gen. et al.* (2002), [2003] 1 C.N.L.R. 24 • (2002), 8 B.C.L.R. (4th) 149

A-3 *Loss of Gitxsan ties to history and identity*

In *Delgamuukw*, evidence put forward by the Gitxsan established that for centuries before the British arrived, Gitxsan lived in at least eight villages. Later, when Reserve Commissioners laid out reserves in the area, the Commissioner encouraged the Gitxsan to identify lands where either village sites or fishing sites were located in order that these would be protected as land was taken up by settlers. A total of 27 reserves were created, ranging in size from 1,150 Hectares or 2,842 acres for Kispiox No. 1, and 1,052 Hectares or 2,600 acres for Gitanmaax No. 1, to 7.6 Hectares or 18 acres for Squin-Lix-stat No. 3 (Specific claims settlement for Gitwangak Band nearing completion). The Alternative Governance Model proposes that these lands, being reserve lands under the *Indian Act*, would be given up; that is would no longer be held separate and apart for the use and benefit of present and future generations. As the lands will no longer be under federal jurisdiction under the *Indian Act*, it appears that Gitxsan band lands will become part of the B.C. land holding system. Upon coming under the B.C. *Land Title Act* Gitxsan lands will lose their distinctive legal identity. Gitxsan ties to specific locations will be lost; for example land on which the historic villages of Kuldo and Gitsegas are located will no longer be protected through designation as Indian reserves that are under the care and control of Band Councils, or that are protected to some degree as a result of occupancy by Gitxsan residents.

In the longer term, other communities will also likely lose their Gitxsan identity. That is, if lands are not protected and become registered under the B.C. Land Titles Act, there is a very strong possibility that non-Gitxsan will be able to own land within former reserve boundaries. Land which have special value, for example, due to agricultural or scenic value will attract higher market values and will likely be alienated first, leaving the less attractive and unproductive lands in Gitxsan hands. As Gitanmaax shares borders with the village of Hazelton, there will likely be strong demand and interest in Gitanmaax band land considering the limited land base of Hazelton. There will also likely be interest in Gitwangak reserve lands considering its location at the Highway 38 junction. In summary, there will be negative economic and social impacts in the short term. However, there will be more serious impacts in the long term as future generations of Gitxsan will lose ties to, and identity with, Gitxsan communities.

A-4 *Loss of fishing sites possible*

Lands where fishing sites are located will not be protected and may be alienated under the B.C. *Land Title Act* due to transfer and or sale to non-Gitxsan. As land bordering rivers are generally more saleable on the open market these lands will likely be sold first. As a result, access to fishing sites may be lost if the new owners not wish anyone to go through their property. While this may be seen as an infringement of the Aboriginal right to fish, it would probably not result in a successful court challenge as Gitxsan will be seen to have freely given up the right

(assuming that the majority of Gitxsan voted in favour of this type of treaty settlement).

A-5 Loss of language threatened

Reserve based communities have served as a stronghold where culture and language have been able to survive, due in part to the isolation as well as the necessary “critical mass” of speakers coming into day-to-day contact. However, when non Gitxsan take up residence and ownership of Gitxsan communities there is a potential loss of this critical mass resulting in further threats to the language as day-to-day language use declines. Language and culture are intimately connected; therefore, a loss of language further endangers connection to culture.

A-6 Loss of membership

Currently the vast majority of Gitxsan people are registered with Gitxsan bands, including Kitwangak, Kitsegukla, Gitanmaax, Glen Vowell, and Kispiox. Other Gitxsan will also be registered members of Hagwilget and Gitanyow as well as other bands in B.C. and the rest of Canada. Gitxsan members of non-Gitxsan bands can elect not to be part of a Gitxsan treaty and therefore will not lose their status. However, Gitxsan registered with Gitxsan bands will lose status under the Indian Act. While all First Nations who vote to accept land claims settlement do lose their status under the Act, they are enrolled as members of a First Nations government. However, under the Alternative Governance Model the Hereditary Chiefs and GTO propose that band membership will cease, and will not be replaced with any other affiliation other than that of a Canadian citizen who has ties to specific Gitxsan houses.

It is not known what percentage of Gitxsan participate in the feast system, know who their chiefs are, and what their rights and responsibilities are. It is known that there is a portion of the Gitxsan population who have lost connection to their traditional form of government and community, due in good part to the impact of the residential schools. These individuals have been able to maintain their identity and connection to Gitxsan culture through membership in Gitxsan bands. Without band membership, these individuals and their descendants will lose their identity as Gitxsan unless there is a concerted effort to bring individuals back into Gitxsan houses.

Band membership has also allowed individuals who do not have a voice in the feast system, or who oppose decisions of the Hereditary Chiefs to have a forum to express their views. Band membership allows Gitxsan people the right to exercise the democratic right to participate in government. For example, the majority of Gitanmaax band members voted that the GTO is to no longer represent them in treaty negotiations. In the long term, unless there are options available for individual

expression in the feast system which allows individual voice as it relates to the exercise of government power, the Gitksan will lose democratic rights protected under the Constitution and Charter of Rights.

A-7 Loss of Band Governments

Under the Alternative Governance Model the GTO proposes that band administrations be shut down and that federal and provincial governments take over responsibility for Gitksan people. This approach is not consistent with *Delgamuukw*; it fails to recognize the importance of First Nations self government in all aspects of community life; and it also fails to recognize the serious economic social and cultural impacts that such action will have on Gitksan membership.

In *Delgamuukw*, Gitksan hereditary chiefs gave evidence that recognized that Band Councils played an important role in providing for the well-being of Gitksan people. Witnesses testified that band councils were responsible for activities related to governance on reserve lands while hereditary chiefs were responsible for rights and title off reserve.

Witnesses also gave evidence that it was possible for a hereditary chief to have "two hats"; that is, hold the position of hereditary chief as well as elected chief. As noted by MacEachran J., in his decision:⁷

"It was suggested in the evidence, and in argument, that the band councils are the *alters ego* of the Hereditary Chiefs but I am also unable to express any opinion on that question. Some very senior hereditary chiefs are heavily involved in the Band system, and I suspect the elected Band Councils are as representative of the total Indian populations in their areas as the Hereditary Chiefs. I believe these councils are independent of the chiefs although I have no doubt they respect the chiefs in the sense that one renders unto the holder of an office that which is appropriate."

Band Councils have played an important role in protecting Gitksan Aboriginal rights, for example, by passing fishing bylaws intended to protect and regulate fishing rights, but also defending Gitksan rights in various court actions.⁸

⁷ *Delgamuukw*, v. B.C. (1991), 79 D.L.R. (4th) 185 • [1991] 3 W.W.R. 97 (B.C.S.C.)

⁸ *Wale v. B. C. (A. G.)*, [1991] 1 S.C.R. 62 • [1991] 2 W.W.R. 568) Plaintiffs in the Style of Cause are: Chief Howard Lawrence Wale (on his own behalf and on behalf of all the members of the Gitanmaax Band), Chief Glenford Williams (on his own behalf and on behalf of all the members of the Gitwangak Band), Chief Arthur Lawrence Wilson (on his own behalf and on behalf of all the members of the Kispiox Band), Chief Daniel Michell (on his own behalf and on behalf of all the members of the Moricetown Band), and The Gitksan-Wet'suwet'en Tribal Council Association)

When considering the impact of the loss of band government under the Alternative Governance Model it is important to recognize that band councils receive their authority in part from the *Indian Act*; legislation long recognized as being colonial, outdated and repressive. However, First Nations governments also take their authority from aboriginal people’s inherent right to self-government. The fact that band councils carry out some of their responsibilities under delegated legislation and adhere to democratic principles does not make them any less a valid and representative Gitksan government.

Band Councils have historically played an important role and today play an increasingly vital role, in protecting and promoting the interests of Gitksan citizens, particularly those who live on reserve. Band Councils and administrations have a role in building strong communities; in acting as a safety net for those most in need of help; and advocating with other levels of government for the delivery of programs and services that accommodate Gitksan needs and culture. One example of this is the role that Band Councils have in providing education through band-operated schools on reserve and advocating for more responsive and culturally appropriate education in provincially operating schools.

A-8 *Loss of Specific Rights*

Loss of protection against tax

Section 87 of the *Indian Act* provides that an Indian or band is not subject to taxation, or levy in respect to personal property situated on reserve. Income earned on reserve is deemed to be property for purposes of Section 87. Registered Indians do not pay federal or provincial sales taxes on personal and real property on a reserve. The federal Goods and Services Tax (GST) does not apply to on-reserve goods or to those goods acquired by a Registered Indian off-reserve, if the goods are delivered to a reserve by the vendor or the vendor’s agent. Most provincial sales taxes are applied in a similar fashion.

There are conditions to be met in order to qualify for the tax benefits afforded by Section 87. Most importantly, a status Indian must prove their Indian status to the persons they do business with. The Certificate of Indian Status (or status card), which is issued by Indian and Northern Affairs Canada, proves registration under the *Indian Act* and is the only document recognized for this purpose.

The protection of property provided for in Section 87 flows not from the Act itself, but rather in recognition of the unique constitutional and historic place of First Nations in Canada. The courts have held that the exemption is intended to preserve the entitlements of Indian people to their reserve lands, and to ensure that the use of their property on their reserve lands is not eroded by taxes or actions of government.⁹

⁹ The question of the purpose of ss. 87,89 and 90 has been thoroughly addressed by La Forest J, in the case of *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 985, 71 D.L.R. (4th) 193 [1990] 3 C.N.L.R. 46. La Forest J. expressed the view that the purpose of these sections was to preserve

Analysis of the May 2008 "Alternative Governance Model"

The Gitksan Reconciliation model proposes that Gitksan people will pay taxes and thereby give up this right. This clause appears to be a standard treaty provision in B.C. treaties, is made more palatable by assurances that by the time First Nations individuals are required to begin paying tax, for example in twelve years time, they will be more prosperous and on the same footing as other Canadian taxpayers.

The following is the current Federal, Provincial and Regional District Property Assessment formula's that would be applicable to the Gitksan:

- The lowest federal tax rate (in 2007) for income of up to \$37,178. The next rate is 22% for income over \$37,178 up to \$74,357. A person earning \$60,000 would pay the 15% rate on the first \$37,178, and 22% on the remaining income.¹⁰
- As part of Personal Income Tax, the *Income Tax Act* charges provincial income tax to individuals. The taxation rate varies with income, as follows:
 - i. The first \$35,016 of taxable income is taxed at 5.24%,
 - ii. the next \$35,017 of taxable income is taxed at 7.98%,
 - iii. the next \$10,373 is taxed at 10.5%,
 - iv. the next \$17,230 of taxable income is taxed at 12.29% and
 - v. any taxable income over \$97,636 is taxed at 14.7%.¹¹
- Provincial Sales Tax (PST) is imposed under the Social Service Tax Act. PST is currently charged at a rate of 7% on goods and services.¹²
- Provincial and municipal governments (taxing authorities) pay for public services through property taxes, which are based on assessed value. BC Assessment determines the market value of properties and sends property owners a Property Assessment Notice. Then, tax authorities determine the property tax rate they will set to raise the revenue needed to pay for public services. The tax authorities apply this rate to the assessed value of properties and send property owners a Tax Notice.¹³

Ultimately, the payment of taxes will result in a lower annual net income, thus less disposable income, for the Gitksan taxpayer. Considering the extremely high unemployment rate, and low levels of income in the area, the amount of taxes generated will not be large, however individual Gitksan will encounter difficulty with the increased financial burden.

the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize. The corollary of this conclusion was that the purpose of the sections was not to confer a general economic benefit upon the Indians (at pp. 226- 7):

¹⁰ Canadian Tax and Financial Information at [Http://www.taxtips.ca/tax_rates.htm](http://www.taxtips.ca/tax_rates.htm), Accessed August 23, 2008

¹¹ British Columbia at http://www.sbr.gov.bc.ca/individuals/Incometaxes/Personal_I, Accessed August 23, 2008

¹² BC Taxes at <http://www.bcadventure.com/adventure/planner/customs.htm> , Accessed August 23, 2008

¹³ BC Assessment at <http://www.bcassessment/bc.ca>

Property Assessment taxes would become applicable to the Gitksan as the mandate proposes that there would be no lands set aside as reserves and that the Indian Act would no longer apply. Essentially, this means that former Gitksan reserves would be akin to, or integrated into, local municipalities. Regional Districts provide the administrative and political framework for municipalities within its geographical boundaries. The Taxes realized by property assessments are used to finance water, sewer, transportation and other essential services. More significantly, if there is default on Kitimat Stikine property assessment taxes, it may result in civil litigation seeking foreclosure and court imposed sale of the property involved in the default. The seizure and sale of reserve property is not possible under the Indian Act as discussed in the section below.

Loss of protection against seizure of property

Section 89(1) of the *Indian Act* protect reserve lands from falling into the hands of third parties, that is, parties other than the band and its members or the Crown. Section 29, for example, states that reserve lands are not subject to seizure under the legal process, and Section 89(1) provides that the Real and personal property of Indians or Bands located on reserve cannot be used as security or collateral: it is exempt from seizure by anyone other than an Indian or a Band.¹⁴

The intent of these provisions is to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society to ensure that Indians are not dispossessed of their entitlements.¹⁵ The Gitksan Reconciliation model proposes abolishing the *Indian Act* and reserve lands, thus former Gitksan reserve lands would be akin to, or integrated into, local municipalities and; therefore, the land base would have no such protection from third parties as afforded by the Indian Act.

An example of the implications resulting from the loss of Section 29 and 89(1) is as follows. An individual takes a loan from a Bank, puts up their home and property as collateral, is then not able to pay the loan, defaults, and the Bank then can seize and sell to anyone that is able to pay the sale price. A second example is, an individual owes money to a third party, cannot make payments, garnishment proceedings initiated by the third party to realize on debt owing, and wages of the individual can be garnished. If garnishment proceedings are inadequate or unsuccessful to satisfy debt, then seizure and sale can be initiated.

Generally, 89(1) have widespread support within reserve communities as it insulates the community from third party interests. At the same time, it acts as a barrier to First Nations economic development as it stands in the way of projects that seek loans from

¹⁴ . Section 89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.¹⁴

¹⁵ Mitchell v. Peguis indian band, [1990] 2 S.C.R. 85

banks or other outside sources, because the land and related assets cannot be pledged as collateral to secure the loan.

A-9 Loss of Programs and Services

The federal government has jurisdiction and responsibility for all programs and services delivered on reserve. This includes community infrastructure including water, housing, as well as social services, health, and education. Most of the funding can be viewed as discretionary in that they flow from policy. (Only education is an obligation that flows from the Indian Act.) In the past INAC had full control of all decisions and spending. However, with devolution, band administrations, with the support the GGC, has assumed responsibility in these areas. The following section discussions some of the impacts of a transfer from federal to provincial authority.

Health Services

The Canadian health care system provides insured health services to all its citizens, and Health Canada provides First Nations with additional direct and indirect health care funding based on proven Indian Status under the *Indian Act*. Direct payments go to the band or service provider while indirect payments are government-to-government funding transfers. Funding for health care are:

1. Insured health services that include basic hospital, physician, and ambulance services
2. Funding transferred from the Federal to BC Government for: (i) Medical Services Plan (MSP) payment for health insurance and (ii) payment of hospital, physician, and ambulance services
3. Funding for non-insured health benefits include prescription drugs, dental care, vision care, medical supplies and equipment, short-term crisis intervention mental health counseling and medical transportation for eligible First Nations people and Inuit ¹⁶

Once Gitksan membership lose their status under the Indian Act, their access to care changes and unless specific health care provisions are negotiated, changes and out-of-pocket expenses can make health care unaffordable. Like other Canadians, the Gitksan people who hold a valid BC Care Card have access to the insured public health services. But, the Gitksan would not have access to additional supports and services currently available to Status Indians. The results could only be a worsening of the existing poor health which is also related to unemployment and poverty.

Under the proposed Governance Model, the personal health care costs could include:

¹⁶ First Nations, Inuit and Aboriginal Health. Non-Insured Health Benefits for First Nations and Inuit. Website accessed on August 23, 2008 at <http://www.hc-sc.gc.ca/fniah-spnia/nihb-ssna/index-eng.php>

Analysis of the May 2008 "Alternative Governance Model"

1. Monthly insurance cost for a BC Care Card, paid by the individual, their employer, or by government for individuals on social assistance.
2. Certain hospital or physician costs not covered by the BC Care Card; for example, hospital care that is not medically necessary, like extra daily costs for a private hospital room.
3. Complete, partial, or no payment for listed drugs and certain medical supplies: access to PharmaCare requires a valid BC Care Card and personal costs based on income level.¹⁷
4. Flat fee of \$80 for ground ambulance services with a valid Care Card. With no MSP health insurance the cost is \$530, Helicopter service \$2,746/hr and Airplane service \$7/statute mile¹⁸
5. Payment for local travel and costs for a medical escort, including living expenses in a city
6. Dental care costs, paid by the individual or paid through an employment benefits package¹⁹

It should not be assumed that the BC Government would fully adopt and continue the Federal Non-Insured Services Program. Continuation of this funding and services depends upon: (i) the Federal Government retaining special responsibility for Gitksan who are no longer Status Indian; (ii) the BC Government accepting the Gitksan as a unique group that receives special treatment; and, (iii) the BC Government agreeing to implement the existing Non-Insured Health Services Program.

Social Development

Indian and Northern Affairs Canada currently funds social development programs and social assistance for registered Indians living on reserve. The Social Assistance program that is implemented on-reserve reflects the Provincial welfare system in terms of financial support rates and eligibility criteria. However, band social workers tend to take a more lenient and compassionate approach to assessing need as they know family and individual circumstances more intimately. This approach will likely cease with the provincial Ministry assuming responsibility for Gitksan people. Therefore, fewer people may be deemed eligible and duration of social assistance payment would be more restrictive. Thus, Band administrations could no longer serve as safety net for the Gitksan people.

¹⁷ BC Ministry of Health. Welcome to BC PharmaCare. Website accessed on August 23, 2008 at <http://www.health.gov.bc.ca/pharme/>

¹⁸ Ministry of Health BC Ambulance Service. Backgrounder – Ambulance Fee Changes, September 12, 2007. Document accessed on August 23, 2008 at <http://www.health.gov.bc.ca/bcas/news/moh/2007/0101-001106bg.pdf>

¹⁹ Considering the high employment rate in Gitksan villages, it is expected that most will not have benefits from employment and therefore will be individually responsible for all that B.C. does not provide.

Education

Education of First Nations children living on reserve is the responsibility of Canada under sections 114 to 119 of the *Indian Act*. The loss of education funding for elementary and post-secondary students would negatively affect both groups of learners. As designated funding ceases to flow to the bands, elementary students would fall under the jurisdiction of the local School District. Thus, the existing band operated schools could be closed as the District is actively closing schools in order to balance its budget.

INAC funding of Gitksan children in public schools will cease. Currently Bands, through GWES, negotiate a tuition/ service agreement with the School District with the objective of obtaining more culturally appropriate education, including for example, providing Gitksan language education. Without the agreements it is likely that the school board will place Gitksan cultural education at a very low priority. As there is a strong link between provision of culturally relevant education programs and services to educational attainment, Gitksan children will be in danger of losing ground in terms of performance and completion.

At the post-secondary level, students would have to pay their own tuition, purchase books and supplies, and pay living expenses in an urban environment. These negative changes would likely result in even lower levels of achievement in the field of education. Such negative change has a ripple effect, resulting in continued and greater poverty, and continued poor health.

Housing

Registered Indians have several options for housing assistance from DIAND and the Canada Mortgage and Housing Corporation (CMHC). DIAND provides funding to support on-reserve housing-related activities, including the construction of new houses and renovation of existing units. Program administrators are First Nation councils or their designated housing authorities who establish comprehensive, community-based housing plans to meet the needs of their members. These plans include the allocation of available funding, the establishment of programs, policies and procedures and the planning and implementation of housing projects. Currently, \$31,249.00 housing subsidy is provided to Gitksan status Indians as the financial basis for new housing construction.

Despite considerable public assistance, Aboriginal housing needs remain acute. Some of the reasons for this situation are: rapid population growth, shortage of available capital, rapid deterioration of housing stock caused by severe overcrowding, or lack of maintenance. INAC reported that, in March 2005, almost one-quarter (21.9% or 21,200 houses) of the almost 96,800 houses in First Nation communities are in need of major

repairs and about one in twenty (5.7% or 5,500 houses) need to be replaced.²⁰ The availability and access to affordable housing in Northwest British Columbia, particularly the Hazelton area, is generally below average, at best.

The Gitxan Reconciliation Model proposes to abolish the *Indian Act* and thereby terminate the housing benefits available to Gitxan registered status Indians. Given the state of the local economy, high rate of unemployment and high rate of social assistance dependency, it is very unlikely that the average Gitxan person could afford to build new homes or renovate existing homes. The cost of building would be the responsibility of the homeowner with access to the limited financial assistance that is available generally to other British Columbia citizens via financial institutions and provincial government housing initiatives. The result, to the Gitxan, could be a shift of the general housing status for First Nations from acute to critical. This could cause a ripple negative affect to the health and psychological well-being of the Gitxan individual and the Gitxan community in general.

B. Negotiating Process

B-1 Exercise of Fiduciary Duty Triggered

Fiduciary Duty

In broad legal terms, a “fiduciary” is “one who holds anything in trust,” or “who holds a position of trust or confidence with respect to someone else.” Hence, a “fiduciary relationship” is one in which someone in a position of trust has “rights and powers which he is bound to exercise for the benefit” of another.²¹

The hallmark of a fiduciary relationship is when one party holds a position of power over another who is more vulnerable due to that exercise of power therefore the courts will hold a fiduciary to the highest standard imposed at either equity or law. A fiduciary is expected to be extremely loyal to the person to whom they owe the duty (the “principal”): they must not put their personal interests before the duty, and must not profit from their position as a fiduciary, unless the principal consents. The fiduciary relationship is highlighted by utmost good faith, loyalty and trust, and the word itself originally comes from the Latin *fides*, meaning faith.²²

²⁰ Indian and Northern Affairs Canada. First Nations Housing. Website report accessed on August 23, 2008 at http://www.ainc-inac.gc.ca/pr/info/info104_e.html

²¹ See *A Dictionary of Law*, ed. Elizabeth Martin (Oxford University Press, Oxford, 1997); *Jowitt's Dictionary of English Law*, Second Edition, ed. John Burke (Sweet and Maxwell Ltd., London, 1977).

²² Black's Law Dictionary at p. 626.

The origin of Fiduciary law is founded in the British Common law. Fiduciary law applies when where the interaction in question is one of sufficient social and/or economic importance or necessity resulting in an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary. A fiduciary relationship generally has three general characteristics: The Fiduciary has scope for the exercise of some discretion or power; can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the power.

Examples of fiduciary relationships in society are: parent – child; corporate officers/directors - corporation; doctor – patient; financial advisor – client; lawyer-client; government-citizen. The Courts are still expanding and further defining relationships that evoke and apply the principles of fiduciary law. In 1984,²³ the Supreme Court of Canada considered the relationship between the Government of Canada and First Nations. The Court found that the Crown has a fiduciary relationship with Aboriginal peoples, arising from the fact of original occupation, and historic relations reflected in the *Royal Proclamation of 1763*. Fiduciary duties are particularly triggered in the aboriginal rights and title protected under section 35 of the *Constitution Act, 1982*. In numerous Supreme Court decisions the relationship between the Government and aboriginals is defined as trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.²⁴ The courts have also held that a fiduciary relationship will not give rise in all circumstances to a fiduciary duty as it will depend on the specific circumstances involved. However, when property and rights are being negotiated on behalf of First Nations people, a fiduciary duty is clearly present.

Should events take place which have the effect of terminating aboriginal ties to the land, the Federal Crown is under a duty to act as protector and intermediary.

“The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal native, or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is unalienable except upon surrender to the Crown.”²⁵

Failure to rectify a breach of fiduciary duty will result in a finding of a breach of fiduciary obligation. In *Blueberry v. Canada* [1995] 4 S.C.R. 344, the Supreme Court of Canada found a breach by the Department of Indian Affairs when the officials failed to correct an error after becoming aware of it. At para. 115, McLachlin J. stated, “In my

²³ *Guerin v. the Queen* [1984] 2 S.C.R. 335

²⁴ *Sparrow v. The Queen* [1990] 1 S.C.R. 1075 at 1108. , *Wewaykum Indian band v. Canada*, [2002] 4 S.C.R. 245

²⁵ *Guerin v. The Queen* supra at 376, 13 D.L.R. (4th) 321

view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians.”

While Canada has a fiduciary duty to First Nations, particularly when First Nations land is involved, the Hereditary and elected Chiefs also have a fiduciary duty to Gitksan people since they hold land and resources for the benefit of Gitksan people. Where negotiators propose to terminate Gitksan ties to land and communities, will be held to a very high standard of conduct as a fiduciary.

Band Councils have a fiduciary duty to band members.²⁶ Band Councils hold funds intended for the use and benefit of members; have authority to spend revenue monies formerly held under trust by the Department of Indian Affairs,²⁷ and are responsible for decisions related to band land. For example, Indian and Northern Affairs Canada requires a valid Band Council Resolution be in place prior to approving a taking of reserve lands under section 35 of the *Indian Act*. As a result, Band Council will be held to a high standard in the exercise of their duties, Band Councils have a legal obligation to exercise its powers fairly and with an even hand, and is not entitled to make arbitrary decisions that benefit one group of members to the exclusion of another group.²⁸ The Gitksan Government Commission, in its capacity as administrator of funds intended for Gitksan bands and band members, and as advisor to band councils and band administrations, also has a fiduciary obligation to act in the best interests of its member bands.

As discussed earlier the Hereditary Chiefs also have a fiduciary obligation to Gitksan in that they are negotiating communal aboriginal title and rights, individual rights including identity, and individual property rights.

More importantly, the Crown’s fiduciary obligation is also triggered since proposed negotiations will include transfer of reserve lands to provincial jurisdiction and the removal of registered Indian status from the Gitksan people

B-2 Failure of Current Process

The Hereditary Chiefs and GTO have been in treaty negotiations for over 13 years and have borrowed at least 13 million dollars on behalf of Gitksan people. It is common knowledge that for the most part, these negotiations have produced few if any concrete results or benefits to Gitksan people.

²⁶ *Gilbert v. Abbey*, 1992, CanLII 921 (BC S.C.), [1992] 4 C.N.L.R. 21 (B.C.S.C.). *Assu v. Chickite*, (1998), [1999] 1 C.N.L.R. 14, Robert Reiter, *The Law of First Nations*, Juris Analytica Publishing Inc: Edmonton, 1996 at p. 450-451

²⁷ Indian Band Revenue Moneys Order, SOR/90-297

²⁸ *Medeiros v. Echum* (2001), 39 Admin. L.R. (3d) 50 • (2001), [2002] 2 C.N.L.R. 172

Analysis of the May 2008 “Alternative Governance Model”

Gitksan members have had little if any direct involvement with negotiations. In fact, Gitksan people became aware of the proposed terms of a treaty in the Alternative Governance Model through newspaper and T.V. advertisements. Many Hereditary Chiefs also only became aware of the proposed treaty terms in the same way.

It appears that the Parties (including Canada and B.C.) have not adhered to the Openness Protocol. It should be noted that the Hereditary Chiefs have a greater obligation to Gitksan people than simply information sharing, or consulting, as they act as fiduciaries or Agents of the Gitksan people, in negotiating Aboriginal Rights and Title.

There is a line of court decisions that confirm that when there is a possible infringement of aboriginal rights, government has a duty to engage and involve First Nations and protect against unjustifiable infringement. There is another long line of court decisions which state that the Crown has a fiduciary duty to protect against loss of band owned land and resources held in trust by Canada and that a failure to protect will result in damages paid to the band involved.

The two lines of cases, first on the duty to consult, and second on the duty to protect and act in the best interests of First Nations, provide a solid legal foundation for protecting Gitksan interests in treaty making. That is, should the Hereditary Chiefs and the GTO refuse to engage Gitksan people in discussions on the Alternative Governance Model, then the Crown (Canada and B.C.) can be put on notice that Gitksan view the proposed treaty as a breach of their aboriginal rights and title. Band Councils may also notify INAC of their opposition to the removal of reserve lands held in trust for the Band.

It may be that the Provincial and Federal Governments will take the position that Gitksan will have the opportunity to express their views once a treaty is put to a referendum. A referendum is required to ratify a treaty, and is also required under the *Indian Act* since the proposed treaty will eliminate reserves and other assets owned by bands. Considering the failure of the GTO to inform Gitksan of the proposed treaty; the financial burden that continued borrowing for treaty negotiations places on Gitksan people; the opposition expressed by community members at the July 24, 2008 public forum; and the results of the Gitanmaax referendum; there is a strong legal foundation to challenge continued funding of the GTO.²⁹

²⁹ The cost of negotiating can be extremely high. For example, The Secretary Treasurer of the Nisga'a Lisims Government in his 2008 annual report reported that The Nisga'a Nation borrowed \$50 million for treaty negotiations to be repaid over a 14 year period. The total loan repayment amount plus interest charges at the end of the repayment period will be about \$84,300,000. accessed August 24, 2008 at www.nnkn.ca/node/14

Appendix

1. Items Negotiable in Self-Government Agreements

Matters which are open to negotiation in Self Government Agreements under Canada's Self Government Policy:³⁰

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- policing
- property rights, including succession and estates
- land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation in respect of direct taxes and property taxes of members
- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands

³⁰ The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government at www.ainc-inac.gc.ca/pr/pg/sg/ply.e.html accessed August 23, 2008.