Discussion Paper Series

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Regarding Fishery Aspects of the Nisga’a Final Agreement

Parzival Copes
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Mailing Address:

8888 University Drive, Burnaby, B.C., V5A 1S6, Canada

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REGARDING FISHERY ASPECTS OF THE
NISGA'A FINAL AGREEMENT

by PARZIVAL COPES
PRESENTED BY PARZIVAL COPES AT THE HEARINGS OF THE HOUSE OF COMMONS STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, HELD IN TERRACE, B.C., ON 15 NOVEMBER 1999.

The question before the Standing Committee, and specifically before the Panel Members at this Hearing, is whether the fishery provisions of the Nisga'a Final Agreement are such that they should be approved by the House of Commons.

Before I offer my opinion on the fishery provisions in the Nisga'a Final Agreement, I believe it is important to review briefly some of the relevant historical background. The Nisga'a form a distinctive community, that has retained its language, culture and kinship structure (Powell and Jensen 1988), despite well-known pressures in the past to assimilate Native Indians into the general population of Canada. Since time immemorial, the Nisga'a have lived, where they now dwell, on the Nass River. Prior to European contact they had a well-developed, resource-based economy that provided them amply with easily obtainable necessities of life, as well as a surplus for trade with their neighbours. This provided them with a high level of material comfort by the standards of their place and time. It also allowed them the leisurely pursuits of ceremonial feasting and gifting—the potlatch—and facilitated an impressive development in artistic expression.

Bountiful supplies of salmon were among the most important resources to the Nisga'a, as they were to many other aboriginal tribes living along the great salmon rivers of British Columbia. However, in the 1870s, in the interests of a newly established canning industry, the Canadian government severely restricted aboriginal river fisheries for salmon in B.C., limiting them to the supply of household needs, and outlawing the use of productive gears, such as weirs and traps (Copes and Reid 1995b). The tribes concerned were prohibited from selling or trading salmon, as they had done in the past. Their traps and weirs were destroyed (Copes 1995a, Helgeson 1906). Over the years their access to other resources of the lands and waters in their traditional territories were also severely restricted, contributing to their impoverishment and causing many of their communities to descend into social dissolution and despair (Copes et al. 1994). Not surprisingly, the courts have found the Canadian government in default of its fiduciary responsibilities towards aboriginal peoples in B.C. (Supreme Court of Canada 1996). They also have determined that B.C. tribes have wrongfully been prevented from exercising resource rights that are unextinguished, and that it is incumbent upon government to settle aboriginal claims to these resources (Supreme Court of Canada 1997). This is the context in which I will now offer my commentary.

My opinion regarding the support that should be accorded the fishery provisions of the Nisga'a Final Agreement is based on five considerations, which I shall put in the form of questions. The order in which I address these is one of expository convenience and does not necessarily imply any ranking by importance.

Question 1. Do the fishery provisions of the Agreement contribute significantly to historical justice
in restoring to the Nisga'a resources on which they have been strongly dependent in the past, but of which they were subsequently wrongly deprived by government action?

Answer 1. Based on the historical considerations I have outlined above, I consider the answer to this question to be a clear "yes."

Question 2. Are these fishery provisions likely to contribute meaningfully to economic viability for Nisga'a communities?

Answer 2. The Nisga'a live in a relatively isolated part of British Columbia, where unemployment in aboriginal communities is in the range of 45-86% (Pacific Northwest Employment Training and Development 1997), and where the obvious opportunities for economic development are primarily resource-based. Cultural history, local experience, developed skills, life-style customs, resource availability, and direct food-supply dependence all point to the salmon resource as a natural focus for economic activity. The Agreement provides for an annual average allocation to the Nisga'a of 26% of the allowable catch of Nass River salmon (Indian and Northern Affairs Canada 1999), which will offer only a modest amount of additional employment. However, it is anticipated that a further financial arrangement outside the treaty process will provide for funding to buy additional access rights in the commercial fisheries sector. In my view, the fishery provisions of the Agreement, or something of a similar nature, are an essential component in the quest for a viable economic base for the Nisga'a.

Question 3. Can the fishery provisions of the Agreement be reconciled with equitable treatment of other fishery stakeholders having an interest in the B.C. salmon resource?

Answer 3. The assignment of additional salmon catches to the Nisga'a at least in the short run involves a transfer of harvest allocations from other fishery sectors, and specifically from the small-boat commercial sector. As a former salmon fisherman in a family fishing enterprise, I am acutely aware of the implications. I am also concerned where most of my current work is devoted to research and speaking engagements in support of independent small-scale fishery sectors in Canada and elsewhere (Copes 1997, 1998a, 1998b, 1999b). I must emphasize that today's fishermen in B.C. are not responsible for the injustices committed by the confiscation of aboriginal fisheries a century ago. They should not have to pay for the restoration of these fisheries. Fortunately, a fair solution is at hand. There are two sources of additional fishing room for aboriginal communities that may be phased in fairly quickly without impinging upon the catches available to individual non-aboriginal fishermen. One source is additional production from government-funded enhancement operations. The other is the fishing room created by voluntary retirement of non-aboriginal fishermen prepared to sell their fishing licences to the government. Indeed, it has been the stated policy of the Canadian government that reallocation to aboriginal communities is to be achieved by these means. Provided that government is held to this commitment and applies it fully and fairly, reallocation may be achieved with equitable treatment of all stakeholders.

Question 4. Are the fishery provisions of the Agreement compatible with good resource
conservation standards or, better still, may they contribute to improved conservation?

**Answer 4.** Traditionally, aboriginal river communities made extensive use of weirs, traps, impoundments, dipnets and bag nets (Stewart 1977). All of these cause little loss of fish dying uncaught after being wounded by contact with gear. This is in contrast to what happens with hook-and-line, gaff and gillnet gears. A return to traditional conservation-friendly gears, that were previously outlawed, as well as experimentation with new ones, is being encouraged by fisheries managers and welcomed by many aboriginal communities. Making excellent use of new opportunities, a Nisga'a Fisheries Program, in collaboration with DFO, is using fishwheels. These allow capture and sorting of migrating fish, with live release of fish from identified weak stocks. This permits a greatly needed increase in spawning escapements of weak stocks, together with more effective culling of strong stocks, both contributing to improved conservation and larger sustainable catches (Copes 1999c). The Nisga'a Fisheries Program has been recognized by the award of the Department of Fisheries and Oceans Management Prize in 1995. The additional harvests assigned in the Nisga'a Final Agreement will permit the selective fishing program to be carried out on a larger scale, allowing further rebuilding of weak stocks, contributing to greater sustainable salmon catches from the Nass system. A most important conclusion can be drawn (Copes 1995a, 1999c). An initial allocation of some additional harvests to selective river fisheries may be used to fine-tune spawning escapements, while maximizing catches surplus to spawning requirements. Both will contribute to greater sustainable production of salmon from a river system. The greater catches that are then allowed may change the initial reallocation of harvests from a zero-sum game into a win-win outcome, with substantially greater total catches in which all stakeholder groups may share. In my opinion, we should applaud and encourage the Nisga'a in their selective harvesting program and support the fisheries provisions of the Agreement that will allow them further success in rebuilding Nass River salmon stocks, to the benefit of the resource and of all who depend upon it.

**Question 5.** Are the fishery provisions of the Nisga'a Final Agreement good for the people of Canada, including specifically the people of British Columbia? In other words, are they in the public interest?

**Answer 5.** Given positive replies to the preceding four questions, several important reasons for answering this last question affirmatively have already been established. Let me add a few further positive considerations. The Supreme Court of Canada has recognized the pre-existing rights of native peoples and has emphasized that acknowledgment of their aboriginal rights is the means by which their prior occupation of the land is reconciled with the assertion of Crown sovereignty over Canadian territory. The Nisga'a Final Agreement provides for settlement of Nisga'a aboriginal rights in respect of fisheries. It gives certainty regarding the process and terms whereby actual harvest allocations to the Nisga'a will be made from time to time, and thereby provides a matching degree of certainty regarding harvest resources available to other groups. The Agreement removes the open-ended priority entitlement of the Nisga'a to "food fish" and places the fulfilment of Nisga'a harvest entitlements at the same level of priority as commercial and recreational entitlements of other groups (Indian and Northern Affairs Canada 1999), thereby removing some of the greatest irritants to other stakeholders.
The Nisga'a Final Agreement is about recognizing the rightful entitlements and meeting the real needs of the Nisga'a people and most of my discourse has focussed on support of that proposition. My unequivocal conclusion is that the fisheries provisions of the Agreement deserve the full support of the House of Commons. However, in closing I would like to return to my broader concern with the public interest and particularly with my interest in the welfare of all of the fishermen of British Columbia (Copes 1998a and 1999b). I will do so by citing an obscure, yet potentially very important passage from *R. v. Gladstone* that is illustrative of the wisdom of the Supreme Court in recognizing the need to balance and reconcile group interests in our complex Canadian society. As it indicates, non-aboriginal groups may also appeal to the courts for recognition of fishery rights on the basis of economic and regional fairness, and in relation to historical reliance on the resource, a proposition that I have repeatedly raised and supported in both a Canadian and international context (Copes 1997, 1998a, 1998b, 1999a, 1999b). Here is the citation (my emphasis added):

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. With regards to the distribution of the fishery resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

West Vancouver, B.C.  
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Parzival Copes  
Emeritus Professor  
Department of Economics  
Simon Fraser University

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