

Nisga'a Land Title System Considerations and Challenges

Submitted to: Nisga'a Lisims Government Executive

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The Nobel Prize-winning economist Hernando de Soto makes a clear link between the way in which people hold title to land and their ability to generate capital for economic development. His view that third-world countries and their citizens are crippled by their inability to use the title to land as a means of raising capital is true of Canadian First Nation communities as well. This is understandable in the case of Indian Bands under the Indian Act, but should not be the case for the Nisga'a Nation or its citizens.

Yet Nisga'a citizens are not able to benefit from the equity in their homes, and Nisga'a Villages are unable to capitalize on their assets. For these reasons, it is suggested that a review of the legislation related to the Nisga'a Land Title system (including the *Nisga'a Land Title Act*, the *Nisga'a Village Entitlement Act* and the *Nisga'a Nation Entitlement Act*) is timely. The Nisga'a Land Title system, in order to work for the Nisga'a Nation, needs to:

- Give lending institutions the security they need in order to be willing to enter into mortgages on Nisga'a Lands,
- Allow Nisga'a citizens to benefit from the equity in their homes, and
- Support Nisga'a entrepreneurs in developing a strong local economy.

A brief summary of the system itself and some of the issues for consideration follows.

The Nisga'a Final Agreement and the Nisga'a Legislation

Nisga'a Final Agreement

At the time of the Nisga'a Final Agreement, the Nisga'a Nation granted a fee simple interest in all lands in the four Nisga'a Villages to the Nisga'a Village Governments. These are the lands that are registered in the Nisga'a Land Title Office, along with any charges registered against the land.

The most common charges registered against Nisga'a fee simple land are Nisga'a Village Entitlements and Nisga'a Nation Entitlements, although there are also a few leases registered, and a handful of mortgages, all of which are guaranteed by the Nisga'a Nation.

Torrens System vs. Registry System

Nisga'a Lisims Government uses a modified Torrens land title system, rather than a registry system. The primary difference between the two systems is that a Torrens system is more accurate, and can be relied upon by prospective purchasers and lending institutions, facilitating the use of land to generate capital. The Province of British Columbia uses a Torrens land title system, for the same reasons.

Objectives of the Nisga'a Land Title System

The Nisga'a Land Title system was intended to accomplish a number of objectives set out during the negotiation of the *Nisga'a Final Agreement*. These included:

1. Ensuring that Nisga'a Land is not alienated from Nisga'a ownership and control
2. Giving certainty to Nisga'a citizens about their holdings of Nisga'a Lands
3. Ensuring that records are kept to a standard that would allow them to be recorded in the provincial Land Title system at a later date

Another very important issue that was discussed during negotiations was the issue of the ability of Nisga'a citizens to mortgage their holdings in land in order to raise capital. Ultimately, however, the negotiating position emphasized the need to ensure that title to Nisga'a Lands could not be alienated –

a goal that was not compatible with the ability to enter into a mortgage under the legislative regime of that time.

Now, nearly seven years after the effective Date of the *Nisga'a Final Agreement*, it is clear that the Land Title system is effective in ensuring that Nisga'a Land remains within Nisga'a ownership and control. Going forward from May 11, 2000, it has also given certainty to Nisga'a citizens about their holdings on Nisga'a lands. Records are kept to a standard that would be acceptable to the Province of British Columbia, should the Nisga'a Nation choose to use the Provincial land title system at a later date.

The Nisga'a Land Title system, however, has not been effective in facilitating the generation of capital to support the economic objectives of Nisga'a citizens, Nisga'a Villages or the Nisga'a Nation generally.

The inability of the Land Title System to support economic development for Nisga'a Citizens also means that it does not clearly support and further the vision of the Nisga'a Nation as articulated by Wilp Si'Ayuukhl Nisga'a. The Nation's goals of sustainable prosperity and self-reliance for all Nisga'a citizens should be clearly expressed in the way it holds and develops its land base, and Nisga'a legislation with respect to the Land Title system needs to be considered in terms of how well it is serving the Nation's vision.

There are a number of reasons that the way in which Nisga'a citizens hold land is not meeting the Nation's economic development objectives, a few of which are set out here:

Lack of ability to obtain a mortgage from a lending institution

Nisga'a citizens are currently unable to access mortgage funds on the basis of their Nisga'a Village Entitlements. There are a number of reasons for this, including the fact that lending institutions, in that they are not an "eligible recipient" of a Nisga'a Village Entitlement or Nisga'a Nation Entitlement, can not foreclose on a mortgage, should there be a default. With no way of ensuring that they will be paid back, they are understandably reluctant to enter into a mortgage.

Currently all mortgages registered against Entitlements are guaranteed by the Nisga'a Nation, which is not financially sustainable in the long term, and does not support individual economic development or entrepreneurship. In addition, the fact that the Villages, rather than individual Nisga'a citizens, own the fee simple interest in all of the land makes obtaining funds even more difficult for citizens.

Complexity of the system

In order to ensure that records are kept in a way that is legally defensible and meets all required standards, it is necessary to use complex application systems and rigorous standards of accuracy. The effect of this is that the system is very difficult and expensive for the average citizen to use, and can be very intimidating. This is evidenced by the fact that less than 10% of the people that make enquiries about using the land title office ultimately register a transaction. The Land Title Office has worked hard to simplify forms and processes, but staff of the Land Title Office cannot give direct advice to applicants due to legislative restrictions.

It is interesting to note that the provincial land title system has the same complexities, but in the case of the province there is an established network of professionals (lawyers, notaries and title search agents) that undertake this work for a fee. In the Nisga'a context, there is no such network of support services, and this lack can be viewed as either an impediment or an employment opportunity.

Role of Village Governments

Currently Village Governments own all of the land within Nisga'a Villages, and the granting of a new Nisga'a Village Entitlement or Nisga'a Nation Entitlement is entirely at the discretion of the Village Government. There are, in most cases, few policies to guide village governments in this respect, and eligibility requirements vary from village to village. This is a hold-over from the Indian Act, and is inconsistent with the objective of supporting Nisga'a citizens in developing independent economic advancement.

In other areas of the province, municipal government exercise their jurisdiction not by owning all of the land, but rather by establishing laws with respect to how the land can be used and what activities are permitted on it. This creates certainty for individual property owners and supports economic development for both the individual and the community.

Restrictions related to renting and leasing

Under the current legislative structure, Nisga'a citizens do not own their lots in fee simple, but rather hold an Entitlement to the lot. The ownership remains with the Village Government. This creates a number of issues that work against Nisga'a citizens as homeowners. It is unclear, for example, whether a holder of a Nisga'a Village Entitlement is legally able to rent or lease their house to someone else without the direct involvement of the Village Government. If a house is rented, it is unclear how, or if, the Residential Tenancy Act applies, giving homeowners and tenants little certainty about their rights.

Looking Forward

The Nisga'a Nation, unlike other aboriginal governments, has the ability to revise its land title systems in any way it wants. Unlike other First Nations, who have neither ownership nor jurisdiction of their lands, the Nisga'a Nation can make its own decisions about how it wishes to own and administer its lands, and can implement those decisions in any way it chooses. It is this combination of fee simple ownership and legislative jurisdiction that makes the Nisga'a Land Title system a "best practices" model for other aboriginal governments. Those aspects of the system that are hindering the economic aspirations of Nisga'a citizens can be fixed, and those that clearly support economic development can be retained. For the Nisga'a Nation, it is simply a matter of redefining its objectives and then amending its legislation and administrative processes accordingly.