

# Self Government — The Nisga'a experience

Speaking Notes for **Jim Aldridge**  
Partner, Rosenbloom & Aldridge law firm

# Speaking Truth to Power III

March 14 – 15, 2002

Self Government: Options and Opportunities



**BC Treaty  
Commission**

203 – 1155 W. Pender St., Vancouver, B.C. V6E 2P4. Tel 604 482 9200. Fax 604 482 9222. [info@bctreaty.net](mailto:info@bctreaty.net). [www.bctreaty.net](http://www.bctreaty.net)



The topic of this session is inherent and delegated models of governance and the Nisga'a experience. I prepared my notes with this question as a starting point: *Why are the Nisga'a government provisions included in the treaty rather than delegated through ordinary legislation?*

As everyone knows, the *Nisga'a Treaty* represents the culmination of the three parties' efforts to agree on the content of the Nisga'a Nation's rights that are recognized and affirmed in Section 35 of the *Constitution Act*. The treaty is based upon the premise that the parties did not have to agree on the detailed nature and content of a First Nations pre-treaty rights in order to reach agreement on the First Nations treaty rights. It exhaustively sets out the Nisga'a Nation Section 35 rights, including rights to land resources and, indeed, to self government.

The parties agreed that the Nisga'a final agreement would include certain law-making authority. In order to agree upon the subject matters over which Nisga'a government would have legislative authority under the treaty, though, it was neither necessary nor desirable to attempt to determine or set out in advance the subject matters over which the Nisga'a Nation had exercised authority as an integral part of their distinctive culture — to use the phraseology from the case law — at the time of contact.

Moreover, the Supreme Court of Canada has made it very clear that the claims to self government made in litigation must not be framed in what they call 'excessively general terms', or else they will not be cognizable — arguable — under Section 35. The Supreme Court of Canada of course made those observations in the *Pamajewon* case and reiterated them in its decision in *Delgamuukw*.

In other words, notwithstanding any general aboriginal right of self government that might exist, depending upon one's view, any lawsuit seeking to enforce the right must identify the specific power sought to be exercised, and the First Nation will bear the burden of proving that authority over that subject matter was integral to its distinctive culture at the time of contact, in accordance with the *Van Der Peet* test. This is the burden that case law has placed upon the shoulders of First Nations and other aboriginal people seeking to establish self government.

If First Nations seek to establish a range of self-government powers through litigation, such as those set out in the Nisga'a Treaty, they will be faced with proving — and the Crown with defending — those claims, First Nation by First Nation, authority by authority, territory by territory and establishing the proper relationship of laws in each case. I suggest that this approach is quite properly rejected in favour of negotiation, under which the parties can agree to the appropriate law-making authority for a modern treaty without being faced with the burdens attendant upon the litigation process. It was similarly unnecessary and undesirable to determine the nature and extent of Nisga'a aboriginal rights to harvest fish or wildlife, or the nature and extent of Nisga'a aboriginal title to land. It was not necessary to agree about what the Nisga'a had, in order to reach agreement about what they would have in the future.

The agreement sets out the parties' determination of what rights to lands and resources the Nisga'a should have in the future, despite any disagreement that might exist about the extent of their aboriginal rights. Similarly, the parties mutually determined the subject matters over which the Nisga'a should have authority, and the terms under which they would exercise that authority, despite any disagreements that might have existed between them about the extent of the inherent right of self government. In this way, agreement was achievable, and of course was achieved.

A consequence of this approach is that it was and is unnecessary to agree whether jurisdiction over a particular subject matter is the continuation of an *inherent* aboriginal customary or traditional authority on the one hand, as asserted by the Nisga'a, or an expression of a *necessary jurisdiction* as it might be viewed by the federal or provincial governments. Because the constitutional protection under section 35 for all law-making authorities as for other treaty rights is the same, it is irrelevant whether the source of a particular right or authority derives from the inherent right of self government, or whether it derives from the federal government or that of the province. The parties didn't have to agree on that in order to reach agreement.

As you know, the provisions setting out Nisga'a Government authorities and responsibilities are included throughout the entire agreement. For example, the powers and responsibilities in respect of land are set out in the Lands chapter, those in respect of fish and wildlife set out in those chapters, and so on and so forth.



The *Nisga'a Treaty* clearly sets out each subject matter in respect of which the Nisga'a Nation may make laws, and for each subject matter it sets out the relationship between those laws and federal and provincial laws. It achieves a far greater degree of detail than could ever be achieved by way of litigation.

That's the background, but when considering the discussion now — particularly in light of the challenges that were brought against the treaty — it's necessary to distinguish between a number of related but distinct concepts. These concepts include **delegation**, **constitutional protection**, and the **relationship of laws**. These are related but distinct concepts. So let's start with delegation and the inherent right of self government.

This question, as Greg Poelzer [Chair, Political Science, University of Northern British Columbia] just went through, is a question about the source of the self-government powers: *where do they come from?* It's not a question about the extent of the powers, nor is it a question about the constitutional protection afforded to those powers. It's a question of where do they come from — what's the source? Now, pause to note, as we all know, this is of course the question now proposed to be asked in the new set of referendum questions announced by Attorney General Geoff Plant earlier this week. It's an odd question because in asking whether or not self government should be delegated — should be like local government delegated from the federal and provincial government — is literally a question about what do the citizens of British Columbia think the source of aboriginal self-government power should be. I'll come back to this.

I suggest that's not really what they think they're asking. What they really think they're asking is whether or not those powers should be constitutionally protected. But the question of delegation is not a question necessarily of constitutional protection, it's a question of the source. As Greg correctly said, delegated power is power given or assigned by some other authority. Municipalities exercise powers delegated by the province, territories exercise powers delegated by the federal government. The extent of the powers can be quite substantial or very limited. But the source of the authority is ultimately the Crown and Parliament, or the legislatures.

To say that First Nations have the inherent right of self government is to say that the source is somewhere else. It is to say that it comes from the First Nations themselves — that it is based upon their existence as organized societies in this country for thousands of years. It inheres in them as political communities. The source of the authority is their ancestral inheritance, and it pre-dates the arrival of Crown sovereignty. The inherent right of self government is a fundamental part of Canada's constitutional reality and, I submit, always has been.

Now, arguments have been made about that, of course, and the most current argument and the one that we were involved in, was in the context of the lawsuit referred to a few times yesterday brought by Mr. Campbell, Mr. Plant and Mr. De Jong when they were members of the opposition. And in the lawsuit, again referred to yesterday, the plaintiffs argued that there was no room for aboriginal self government because sections 91 and 92 taken together exhaust the set of all powers. Allow me to read from the conclusion of Mr. Justice Williamson's decision. And I emphasize — it's been mentioned yesterday but it's worth emphasizing again — what I'm going to read to you is the law of British Columbia today, and will remain the law of British Columbia until such time — unless and until — it's overturned by a higher court.

So in his conclusion Mr. Justice Williamson said the following:

*[178] The plaintiffs say that s. 35 of the Constitution Act, 1982, although it may afford constitutional protection to aboriginal title and to some aboriginal rights, may not clothe self-government or legislative powers with such status. They say this is so because any right to self-government was extinguished at the time of Confederation when the Constitution divided legislative power between Parliament and the provinces, leaving no powers for aboriginal people and their governments.*

In other words, they drew a little circle, just like Greg had up there, and they said in 1867 the fathers of Confederation got together and they had all these powers and they dealt them out — here's Section 91 powers for the federal government, here's Section 92 powers for the province — and the First Nations didn't make it to the party.

Oh dear, there's none left, they're all gone. Oops, we extinguished. We must have extinguished, there's nothing left. So if you're going to have any power it's going to have to be something that we dealt to the federal government or that we dealt to the provincial governments, and if they're going to give it to you, that's delegation. That's their argument.

Back to His Lordship's decision.



*For the reasons set out above... — through the body of the decision — ...I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly.*

That is the law of British Columbia. The right was not extinguished. The cards were not all dealt. Aboriginal people have the inherent right to self government. It is protected by Section 35, and it cannot be extinguished. The Supreme Court of Canada has said that the purpose of section 35 of the *Constitution Act* is to reconcile the prior presence of aboriginal peoples with the sovereignty of the Crown. Why should this reconciliation require aboriginal peoples to agree in their treaties that their only authority has its source in the Crown? Why should aboriginal people be forced to agree, as a price of entering into a treaty, that their only authority must originate from the Crown rather than their prior presence in Canada?

In any event, as I've said, the law of British Columbia today is that there is an inherent aboriginal right to self government. That legal fact cannot be changed by any referendum, or indeed by any provincial law. That's a question of source. But as I suggested earlier, what I think is really the issue — and having sat through and argued the litigation, what I know is the issue there — was not really the source, but rather the constitutional protection of the powers. The rights in the Nisga'a Treaty are recognized and affirmed by section 35 of the *Constitution Act*. This is a statement about the protection of the rights, not their source or content. But it is this fact that seems to give rise to some people's concerns. These concerns are not easy to understand.

Constitutional protection does not mean that the treaty provisions cannot be amended. Remember the phraseology during the debate: cast in constitutional concrete. The only thing that phrase has going for it is alliteration, not accuracy. An amending formula is included in the treaty. Of course the procedure requires the consent of the parties, but this should not mean, as has been suggested, that amendments will be impossible, or as difficult as some people have suggested. If there should prove to be a genuine need for an amendment, why should we not assume that the Nisga'a Nation would be as willing to recognize the problem as either Canada or British Columbia would be?

The proposal that the self-government provision should somehow be excised from the treaty and denied constitutional protection is really nothing more than a proposal that Canada or British Columbia should be able to alter the treaty unilaterally, without the consent of the Nisga'a Nation. This of course would defeat the entire purpose of the agreement. Certainly no one has suggested that the Nisga'a should have authority to unilaterally amend the treaty. It is impossible to perform such an excision. The self-government provisions are integral to all the chapters of the Nisga'a agreement.

For all of these reasons, during the negotiation process the Nisga'a Tribal Council, as it then was, consistently maintained that they would not enter into any treaty unless it included their rights to self-government, with the same constitutional protection for those rights as for the existing aboriginal rights that they had prior to the effective date, and the same constitutional protection that the remainder of their treaty rights will now have after the effective date.

Agreement on this essential point was one of the major elements in the Agreement in Principle (AIP) in 1996, and without it no AIP would have been achieved. It must also be recognized that it is a fact that the Supreme Court of Canada has ruled that rights protected by section 35 are not absolute. The court has ruled that aboriginal and treaty rights can be infringed, if the infringement is justified and consistent with the honour of the Crown. What will amount to justification for the infringement of a constitutionally protected land claims agreement has, thankfully, not yet been ruled upon and hopefully won't be. I say that, of course — people say, well, let's let the courts rule on it. Well, the courts won't rule on that until such time as a government purports to infringe a right in a land claims agreement, and the courts have to decide whether it's justified. But there is no doubt that the test for justification that the courts will develop and impose on modern treaties is no doubt going to be far more stringent than the test as it is applied in *Sparrow* and in other aboriginal rights cases. But the fact remains, the court has said that section 35 is not absolute.

Canada and British Columbia agreed to the detailed content of Nisga'a self government. They say that they are interested in negotiating agreements on self government that are not constitutionally protected. But why should either of those governments be able to infringe, alter or ignore their agreements in a way that they cannot justify, or in a way that violates the honour of the Crown? That's constitutional protection.



The third point that I'll speak on more briefly, but if people want to ask more about it later I'll be happy to address it, is the relationship of laws and concurrent jurisdiction — the question of which government's laws prevail over the others. Some people have raised concerns with the fact that in many areas Nisga'a laws will prevail over federal and provincial laws. That's a separate question from source, and a separate question from constitutional protection.

As Greg Poelzer said, in the federal system, there's a rule. If the two governments each enact a valid law within their own area of jurisdiction, then if there's a conflict, guess who's law wins? Federal government laws win — this is the federal paramourcy doctrine.

Under the *Nisga'a Treaty*, all powers are concurrent, therefore there will often be areas in which Nisga'a laws and federal/provincial laws deal with the same subject matter. A key part of the negotiations was determining which government's laws prevail in respect of each and every area over which Nisga'a Government has jurisdiction. Nisga'a laws prevail generally in respect of matters that are internal to Nisga'a lands and people, such as decisions about Nisga'a language, culture, lands and treaty entitlements. In some cases Nisga'a laws must comply with provincial standards in order to be valid. If those standards are met, then Nisga'a laws prevail.

Federal and provincial laws prevail over matters of broader application, such as peace, order, public safety, construction of buildings, health services, environmental protection. Some opponents of the treaty, and indeed the plaintiffs in the *Campbell* case, have said that if there's any inconsistency in laws, federal or provincial laws must always prevail over First Nations laws. That's part of what they mean by delegation, incidentally. What they say is, if there's inconsistency or conflict, federal or provincial laws must always prevail.

Why is this dominance so important? Why do they insist that First Nations must always be subordinate to federal or provincial governments? The Nisga'a agreed to concurrent or shared jurisdiction. But in respect of internal matters, this necessitated rules to prevent Nisga'a laws from being overridden by any number of federal or provincial laws enacted for general application. And these rules also provide the Nisga'a with protection against a future — or hopefully not present — federal or provincial government who might wish to interfere without justification in these internal matters.

So, to conclude, as I've said it is the law of British Columbia today that the inherent right to self government has never been extinguished. That's not a debating point any more. It is therefore constitutionally protected by section 35. The provincial government wants to negotiate treaties in which the inherent right is replaced by delegated powers. They want the source not to be aboriginal people themselves, but the Crown. They want to replace a constitutionally-protected right that First Nations have today, with one that can be changed by an ordinary act of legislation. They want to enter into agreements on self government that are not constitutionally protected, that the appropriate level of government can break, without showing a valid legislative objective and without having to show justification in accordance with the honour of the Crown.

I ask, why would any First Nation agree to such a thing? Ironically, of course, the entire issue of self government is a matter of federal, not provincial jurisdiction anyway. But of course, the province doesn't let that stand in its way. And of course the federal government, whatever other concerns people may have about its policy, does recognize the inherent right of self-government and is willing to include it in treaties.

People used to argue to us before the treaty that constitutional protection of land claims agreements or treaties is unnecessary. The argument went like this: The Crown will always honour its agreements. Governments will not set aside its contracts. Surely in light of recent events no one will make that argument any more. The Nisga'a have the constitutionally protected treaty right to self government, which reflects their aboriginal right to self government and continues it.

Other First Nations in British Columbia have the constitutionally protected aboriginal right to self government. Given this, is there any point in the referendum question asking whether this should be replaced by a delegated self government with no constitutional protection? Surely to ask that question is to answer it.

The plaintiff's case in the *Campbell* decision was that reconciliation could only proceed on the footing that Parliament or the legislature must be free at any time to infringe or nullify the exercise of any aboriginal powers of self government recognized by treaty without justification. This is a contention that, viewed in the light of our history and the development of our constitutional law, simply cannot be supported.