

Aboriginal Self-Government

in BC

The Nisga'a
Agreement-in-Principle

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*At 8:27 a.m. our canoe arrived.
The journey our forefathers began well
over a century ago ended this morning.*

*Joe Gosnell, President of the Nisga'a
Tribal Council, February 12, 1996.*

In early 1996, the Nisga'a Tribal Council ("NTC") and the governments of British Columbia and Canada signed an Agreement-in-Principle ("AIP" or "agreement")¹ which, if ratified, will settle Nisga'a claims to land and self-government in British Columbia. The AIP emerges from more than a century of political activism by the Nisga'a, as they sought recognition of their claims to land and self-government in the form of a treaty. It also emerges in a judicial climate which seems likely to recognize self-government as an existing aboriginal right, should this issue be litigated. This paper will focus on the legal basis for self-government and on the self-government provisions of the AIP.

Despite the probable legal basis for self-government, many British Columbians met the announcement of the AIP with criticisms and fears. And apart from the agreement itself, a number of politicians and columnists denied that any

¹ *Nisga'a Treaty Negotiations Agreement-in-Principle*, 15 February 1996. Issued jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council.

² Many aboriginal groups across Canada were also critical of the AIP, but this paper, while acknowledging these concerns, seeks instead to address fears of non-aboriginal groups.

form of aboriginal self-government should be accepted.² These sentiments may be unrealistic given the legal status of aboriginal rights, and create a negative environment for current negotiations. A constitutional aboriginal right of self-government likely now exists, and the Nisga'a agreement represents a positive approach to the implementation of this right.

What is self-government?

A definition of aboriginal "self-government" is difficult to formulate, as the term has been used to describe a diversity of political arrangements. Fundamentally, self-government arrangements grant aboriginal people some degree of decision-making power in specified areas. Recently, in *Delgamuukw v. The Queen* ("*Delgamuukw*")³ the Gitksan and Wet'suwet'en people claimed ownership and jurisdiction, including self-government, over a territory in central British Columbia. In dissent, British Columbia Court of Appeal ("BCCA") Justice Lambert articulated the plaintiffs' claim for self-government as a claim for "a right of self-regulation of themselves and their institutions,"⁴ and likened it to the self-regulation practised by a forest company, ranching company or Hutterite community.⁵ To further understand what is meant by "self-government," it is also useful to look at an example. The Sechelt Indian Band has had a successful form of self-government since 1984, with a band constitution, jurisdiction over land, and various other powers, and this model shares a number of features with the proposed Nisga'a arrangement. In contrast, most aboriginal groups want much more power than either of these models provides. For these groups, self-government is inherent, rather than "contingent" on the will of Parliament,⁶ meaning that aboriginal peoples should be recognized as independent sovereigns forming a "third order of government" that is similar in status to provincial governments. The envisioned Nisga'a form of self-government is much more moderate than these proposals.

Self-government is critical to aboriginal culture. The plaintiffs in *Delgamuukw* argued that self-government is necessary "in order to determine their development and safeguard their integrity as aboriginal peoples" and "to preserve and enhance their social, political, cultural, linguistic and spiritual identity."⁷ It is understood that "political participation is an essential component of community life [and that] self-government is instrumentally valuable to realize group identity."⁸ The spiritual aspect of aboriginal sovereignty is also important: "the right to political self-determination is married to the spiritual right to govern... these two concepts cannot be divorced from one another."⁹ In the words of the Nisga'a, self-government means the ability to control their own "lives and destiny."¹⁰ Thus, self-government provides a vehicle for making decisions that affect the cultural identity of an aboriginal people, and likewise increases aboriginal participation in the Canadian political system.

3 *Delgamuukw v. The Queen*, [1993] 5 Western Weekly Reports 97 (British Columbia Court of Appeal).

4 See above at 348.

5 See above at 360.

6 M. Asch, "Political Self-Sufficiency" in D. Englestad, and J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Ontario: House of Anansi Press, 1992) 45 at 47.

7 *Delgamuukw*, see note 3 at 149.

8 P. Mackelm, "Normative Dimensions of the Right of Aboriginal Self-Government" *The Report of the Royal Commission on Aboriginal Peoples, Aboriginal Self-Government, Legal and Constitutional Issues* (Ottawa: Canada Communications Group, 1995) 1 at 27.

9 C. Etkin, "The Sechelt Indian Band: an Analysis of a New Form of Native Self Government" (1988) 8 *Canadian Journal of Native Studies* 73 at 75.

10 Nisga'a Tribal Council, *Nisga'a Government* (Nisga'a Tribal Council, 1993).

The courts may well establish a right of self-government with a scope far exceeding that envisioned in the AIP.

A Legal Aboriginal Right of Self-Government

The Supreme Court of Canada has recently clarified, and in some cases expanded, the scope of constitutionally protected aboriginal rights. While no decision has yet dealt directly with the right of self-government, recent cases suggest that, faced with the issue, the court would decide that there is such a right. For this reason alone, it makes sense to begin negotiating self-government agreements. The courts may well establish a right of self-government with a scope far exceeding that envisioned in the AIP.

The Nisga'a have sought resolution of the issues of aboriginal rights and self-government for over a century. British Columbia's position when it entered Confederation in 1871 was that there was no aboriginal title in the Province. Eventually, after a long history of activism against the Province's position, the Nisga'a brought an action to the Supreme Court of Canada in *Calder v. Attorney General of British Columbia* ("Calder"),¹¹ seeking a declaration that "the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory... has never been lawfully extinguished."¹² Although the claim was dismissed on other grounds, six of the seven judges found that aboriginal title is a legal right pre-existing European contact, and does not need government recognition to exist. The decision immediately enhanced the legal and political credibility of aboriginal claims.¹³

Since 1982, section 35(1) of the Constitution Act, 1982 ("section 35(1)") has further strengthened aboriginal claims, serving as a firm constitutional foundation for aboriginal rights. It reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Supreme Court of Canada first considered the scope of section 35(1) in *R. v. Sparrow* ("Sparrow"),¹⁴ in the context of aboriginal fishing rights. The court held that although the government may regulate aboriginal rights, it must justify any regulation that impairs an "existing" aboriginal right. The court emphasized that "s. 35(1) is a solemn commitment that must be given meaningful content,"¹⁵ and set out a four-part test for analyzing aboriginal rights. Supreme Court of Canada Chief Justice Lamer summarized this test in *R. v. Gladstone* ("Gladstone"):

first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the Constitution Act, 1982; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.¹⁶

In order to justify infringement, the government must show a valid legislative objective. It must also show that it acted honourably and in the best interests of the aboriginal people; in accordance with its previous decision in *Guerin v.*

The Queen,¹⁷ the Supreme Court in *Sparrow* added that "the honour of the Crown is at

11 *Calder v. Attorney General of British Columbia*, [1973] Supreme Court Reports 313 (Supreme Court of Canada).

12 See above at 313.

13 D. Sanders, "The Nishga Case" (1973) 19 B.C. Studies 3 at 18.

14 *R. v. Sparrow*, [1990] 1 Supreme Court Reports 1075 (Supreme Court of Canada).

15 See above at 1108.

16 *R. v. Gladstone*, [1996] 137 Dominion Law Reports (4th) 648 (Supreme Court of Canada) at 658.

17 *Guerin v. The Queen*, [1984] 2 Supreme Court Reports 335 (Supreme Court of Canada).

stake in dealings with aboriginal peoples.”¹⁸ *Sparrow* reveals a broad and liberal treatment of aboriginal rights by the Supreme Court.

A central issue in the *Sparrow* test is whether, if “existing,” a right of self-government has been extinguished. When considering the claim for self-government in *Delgamuukw*, the BCCA applied the standard set in *Sparrow*: that “the sovereign’s intention must be clear and plain if it is to extinguish aboriginal rights.”¹⁹ None of the judges found that aboriginal rights had been extinguished in British Columbia, either implicitly or explicitly; however, the majority rejected the claim to self-government on the basis that the Constitution Act, 1867 had exhaustively distributed jurisdiction, leaving no room for a “third order of government.” The validity of this finding is discussed below. The decision in *Delgamuukw* is on appeal to the Supreme Court of Canada, and a look at recent Supreme Court decisions may be helpful in anticipating a possible outcome.

In 1996, the Supreme Court elaborated on the *Sparrow* framework in several cases dealing with aboriginal rights under section 35(1). In *R. v. Jones*; *R. v. Gardner*²⁰ the aboriginal appellants were charged with operating a gaming house contrary to the Criminal Code. They argued that section 35(1) encompasses an aboriginal right of self-government, including the right to regulate gambling. The Supreme Court assumed without deciding that section 35(1) includes self-government claims, and stated that “claims to self-government made under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard.”²¹ The standard referred to is that in *R. v. Van der Peet* (“*Van der Peet*”),²² a contemporaneous case dealing with fishing rights, which held that in order to be an aboriginal right an activity must be an element of a tradition, custom or practice integral to the distinctive culture of the aboriginal group claiming the right.²³ The court in *Van der Peet* added that the activity must have been a “defining feature of the culture in question” prior to European contact.²⁴

These statements indicate a modification of the more liberal *Sparrow* approach to aboriginal rights. No longer is the “integral” nature of the activity a factor, but rather a criterion. In addition, in *Sparrow* the relevant time for considering the nature of the right was at the time of sovereignty, whereas *Van der Peet* moved this date back to the time of European contact. Further modifications of *Sparrow* are evident in *Gladstone*, another of the 1996 decisions. For example, *Sparrow* set out a series of questions to determine whether there has been a *prima facie* infringement of section 35(1) rights: is the limitation unreasonable? Does it impose undue hardship? Does it deny to the holders of the right their preferred means of exercising that right?²⁵ In *Gladstone*, the court modified this approach, saying that the “questions asked by the court in *Sparrow*... only point to factors which will indicate that... infringement has taken place.”²⁶ These recent decisions indicate a possible weakening of aboriginal rights under section 35(1).

However, while the 1996 cases provide a more stringent test for

Recent decisions indicate a possible weakening of aboriginal rights under section 35(1).

18 *Sparrow*, see note 14 at 1114.

19 See above at 154.

20 *R. v. Gardner*; *R. v. Jones*, [1996] 138 Dominion Law Reports (4th) 204 (Supreme Court of Canada).

21 See above at 212.

22 *R. v. Van der Peet*, [1996] 137 Dominion Law Reports (4th) 289 (Supreme Court of Canada).

23 See above at 212.

24 See note 22 at 213.

25 *Sparrow*, see note 14 at 1078.

26 *Gladstone*, see note 16 at 669.

Historical and legal analysis indicates that constitutional space for aboriginal self-government still exists.

determining whether rights will be recognized and affirmed under section 35(1), they do not affect the basic propositions to be derived from *Sparrow* and *Calder*. Aboriginal people will have to establish that self-government was integral to their communities prior to European contact, and that the right was “existing” in 1982. If the right has not been extinguished through clear and plain legislative enactments, it will then fall to the government to justify infringement according to the relatively rigorous standards described above. These legal issues provide a necessary background for discussion of the controversy surrounding self-government, and in particular, the self-government provisions of the AIP.

The Agreement-In-Principle

Despite the probable legal basis for self-government, and despite the relatively moderate arrangement envisioned in the Nisga'a AIP, some non-aboriginal British Columbians remain critical of the AIP self-government provisions. They argue that the AIP is constitutionally unworkable, that it gives too much power, that it is racist or divisive, and that it is financially too generous. They also fear implementation of a new political structure that they see as untested and untried. Through an examination of the AIP, it becomes apparent that these arguments may be unfounded, and that the agreement will benefit both aboriginal and non-aboriginal people in the province. Several of the criticisms advanced are discussed in turn below.

“Aboriginal self-government is unworkable within the Canadian constitution.”

In *Delgamuukw*, the Province argued successfully before the BCCA that constitutional jurisdiction is now exhaustively distributed between the federal and provincial governments, leaving no constitutional space for aboriginal governments. The majority of the BCCA stated that “a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867.”²⁷ In dissent, however, Justice Lambert denied that enactment of the Constitution Act, 1867 constituted a clear legislative intent to extinguish the right of self-government. Is the principle of exhaustion sufficient to show a clear and plain intent to extinguish the right to self-government, under the test for section 35(1)?

Historical and legal analysis indicates that constitutional space for aboriginal self-government still exists. In 1993, the Royal Commission on Aboriginal Peoples noted that a number of enactments before 1867 distributed powers without extinguishing aboriginal powers of government,²⁸ and that legislation both before and after 1867 assumed that aboriginal governing structures survived past confederation. Moreover, the Constitution allowed for overlapping and concurrent powers; even after 1867, federal and provincial powers were considered to be concurrent with the powers of the English Parliament. Finally, section 129 of the Constitution Act, 1867 stated that laws and powers existing before 1867 presumptively remained in force.²⁹

²⁷ *Delgamuukw*, see note 3 at 163.

²⁸ Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa, 1993) at 33.

²⁹ See above at 34.

Following the test in *Sparrow*, then, there was arguably no “clear and plain” intention in the Constitution Act, 1867 to extinguish aboriginal rights.

While many concepts of constitutional law appear incompatible with aboriginal self-government, the recognition of aboriginal rights and the enactment of section 35(1) requires that they be reconsidered. Doctrines such as the principle of exhaustion, which were developed before the enactment of section 35(1), should not be used to prevent the expression of long-standing aboriginal rights.³⁰ Recognizing jurisdictional powers in a third order of government would complicate judicial decision-making, requiring more than an “either/or” approach to division of powers. However, the need for a new approach should not preclude self-government arrangements which provide for concurrent powers.³¹ Constitutionally, then, aboriginal self-government with concurrent or overlapping jurisdiction should not be precluded.

The enumerated powers and jurisdiction set out in the AIP have been the focus of numerous attacks. For example, the AIP provisions have been described as a “a major divestment of power from the Legislature of British Columbia to what is to be in effect the legislature of the Nisga’a central government.”³² In some areas Nisga’a government powers do seem to intrude into provincial jurisdiction. However, many of the powers required for effective self-government are within federal jurisdiction, through section 91(24) of the Constitution Act, 1867 and the Indian Act.³³ In addition, conflicts with provincial jurisdiction already exist because the Indian Act affects areas of provincial authority, such as education, health services, preservation of natural resources, management of fish and game, laws regarding public order and safety, control of intoxicants and taxation.³⁴ The Province also delegates authority to bands in areas such as child welfare.³⁵

Pragmatically, the AIP lists agreed-upon powers and authorities and provides for conflict resolution. Where Nisga’a law is inconsistent with a federal or provincial law, the AIP specifies which shall prevail. Federal or provincial laws are paramount in areas such as public order, peace and safety; traffic and transportation; social services; health services; and intoxicants. In other areas, such as government administration, management and operation, culture and language, and Nisga’a lands and assets, Nisga’a laws are paramount. Nisga’a laws also prevail in key cultural areas such as adoption, child and family services, and pre-school to grade 12 education. The fact that Nisga’a Government will hold powers similar to provincial and federal governments in some areas will not represent a significant divesting of powers from either the Province or Canada, but exemplifies the cooperative nature of the agreement.

The AIP recognizes that sharing of powers is integral in a federal country such as Canada. While the Nisga’a emphasize the need for authority in crucial areas, they agree that “there are many areas of jurisdiction that may best remain with the federal and provincial governments.”³⁶ Because of the large number of relatively small bands in British Columbia, many bands cannot provide a full range of services to their members without cooperation from other levels of government.³⁷ Fortunately,

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30 P. Hogg & M.E. Turpell, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" in *The Report of the Royal Commission on Aboriginal Peoples, Aboriginal Self-Government, Legal and Constitutional Issues* (Ottawa: Canada Communications Group - Publishing, 1995) 375 at 382, 383.

31 J. Olynyk, "Approaches to Sorting Out Jurisdiction in a Self-Government Context" (1995) 53 *Toronto Faculty of Law Review* 235 at 241.

32 J. Duncan, Reform Party Canada Indian Affairs critic, quoted in "The new South Africa: B.C.'s Nisga'a settlement is condemned as racist" (1996) 11 *Western Report* 18. Found in Canadian Business and Current Affairs Index, screen 14.

33 R.S.C. 1985 c. I-5; see generally Olynyk, see note 31 at 241.

34 J. Taylor & G. Paget, "Federal/Provincial Responsibility and the Sechelt" in Hawkes, D., ed., *Aboriginal Peoples and Government Responsibility, Exploring Federal and Provincial Roles* (Ottawa: Carleton UP, 1987) 297 at 323.

35 See above at 323.

36 Nisga'a Tribal Council, see note 10.

37 Taylor and Paget, see note 34 at 300.

“We’re building racial walls inside our province.”

– B.C. Foundation for Individual Rights and Equality

Canadian governments have a history of cooperation; “[i]n many fields of common jurisdiction, formal agreements have been entered into to ensure that both orders of government [i.e. federal and provincial] work together in pursuit of common goals.”³⁸ Aboriginal governments can enter this network of governmental cooperation, using existing techniques for organizing these relationships.³⁹

“The AIP gives too much power to Nisga’a Government.”

Critics have argued that the AIP is too generous, and that it gives the Nisga’a more power than is rightfully theirs. However, the agreement is moderate, and considerate of the needs of all people in the province. While accommodating the need for self-government, it falls short of more extreme models envisioned by many aboriginal groups. It emphasizes principles of accountability and democracy, and contains a number of checks and balances.

Although it will be constitutionally entrenched through section 35(1), the proposed Nisga’a Government is essentially municipal in nature, rather than being an independent third order of government. The AIP creates a relatively autonomous government, comprising the Nisga’a Central Government and four Village Governments called New Aiyansh, Gitwinksihlkw, Greenville and Kincolith. As mentioned previously, this proposal is similar to the Sechelt model of government, which involves extensive intergovernmental cooperation. The Nisga’a will adopt a constitution similar to those of other local governments; for example, it will provide for establishment of subordinate elected bodies, for the enactment of laws, and for measures of financial accountability.

The Nisga’a political structure will also be democratic and accountable. The constitution comes into force only “upon its approval by at least 70% of those participants 18 years of age and older who vote in a referendum,”⁴⁰ and may only be amended with approval of “at least 70% of those Nisga’a citizens who vote in a referendum.”⁴¹ In addition, Nisga’a elders are to have a role “in providing guidance and interpretation of the *Ayuuk*⁴² to Nisga’a Government.”⁴³ An aspect of the AIP which has particular significance to the Nisga’a is protection of communal land: the constitution must “provide for the prior approval of any disposition of Nisga’a Lands that does, or could result in a change of ownership.”⁴⁴ Land granted under the agreement is thus protected from loss and managed at the discretion of the Nisga’a Government.

The AIP is also moderate in that it gives rights to non-Nisga’a residing on Nisga’a land. They are to be “consulted about Nisga’a Government decisions which directly and significantly affect them”⁴⁵ and are to have “means of participating in subordinate elected bodies whose activities directly and significantly affect them.”⁴⁶ By contrast, a 1983 federal report, known as the “Penner Report,” recommended that in areas of exclusive jurisdiction, aboriginal governments should exercise powers over all people within their territorial limits. That report argued that non-aboriginal people “do not share in the ownership of the assets administered by that government and

38 Hogg and Turpell, see note 30 at 396.

39 See above at 397.

40 *Nisga’a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga’a Government, paragraph 11, page 68.

41 See note at paragraph 12, page 68.

42 *Ayuuk* is defined by the Nisga’a Agreement-in-Principle as “the traditional laws and practices of the Nisga’a Nation.” See note 1 at Definitions, paragraph 2, page 1.

43 *Nisga’a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga’a Government, paragraph 10(e), page 67.

44 See above at Nisga’a Government, paragraph 10(j), page 67.

45 See above at paragraph 22(a), page 70.

46 See above at paragraph 22(b), page 70.

thus have no right to a voice in such matters.”⁴⁷ The voting rights given to non-Nisga'a are especially notable because non-aboriginals living in Sechelt do not have these rights. Again, despite fears expressed by critics, the agreement does not represent a significant loss of power to non-Nisga'a British Columbians, even those most directly affected by it.

While satisfying the widespread aboriginal demand that “aboriginal forms of decision-making and accountability must be reflected” in self-governing bodies,⁴⁸ the AIP also ensures accountability to the wider provincial community. For example, it establishes mechanisms to “appeal or seek review of administrative decisions of Nisga'a Government institutions which affect their interests.”⁴⁹ The Supreme Court of British Columbia will also have jurisdiction over Nisga'a Government decisions, but only after “all mechanisms for appeal or review established by Nisga'a Government have been exhausted.”⁵⁰ Presumably, the Nisga'a government will set up an appeal body to provide for more specialized treatment of issues than is available in the traditional courts. Although this initial process cannot be bypassed, the Supreme Court will remain a safeguard, particularly during the transition period when new mechanisms are first established. The two systems will work together, more effectively including aboriginal people in the existing Canadian system.

“The AIP creates special rights for aboriginal people and sets up racial walls within the province.”

Some critics argue that the AIP's self-government provisions segregate aboriginal people from other Canadians, thus creating a form of apartheid.⁵¹ Greg Hollingsworth, founder and president of the B.C. Foundation for Individual Rights and Equality, a B.C. group that opposes special rights for natives, claimed that by negotiating self-government agreements “we're building racial walls inside our province.”⁵² Jack Weisgerber, B.C. Reform leader, called the AIP “totally unacceptable,”⁵³ and B.C. Liberal leader Gordon Campbell called for “one law for all British Columbians.”⁵⁴

However, aboriginal people value self-government in part because it enhances their ability to participate in Canadian society. Far from being divisive in nature, the AIP allows political participation of both Nisga'a and non-Nisga'a living on Nisga'a land. In much the same way as other Canadians participate in decision-making through local municipal governments, the Nisga'a will be able to make a greater political contribution in areas of concern to them. Further, since self-government acts to end relationships of dependency, it works to strengthen rather than weaken or fragment Canada.⁵⁵ In the words of the NTC:

Let us say it loud and clear, so that there can be no misunderstanding: the Nisga'a want to be a part of Canada. We do not want to be an independent state. To [be a part of Canada], it is essential that the federal and provincial governments recognize our right to pass our own laws, to create our own institutions, and to manage and protect our land and resources.⁵⁶

“Let us say it loud and clear, so that there can be no misunderstanding: the Nisga'a want to be a part of Canada. We do not want to be an independent state.”

-Nisga'a Tribal Council

47 Canada, House of Commons. *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983) at 110.

48 P. Kulchyski, “Aboriginal Peoples and Hegemony in Canada” (1995) *Journal of Canadian Studies* 60 at 66.

49 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga'a Government, paragraph 19, page 69.

50 See above at paragraph 20, p. 69.

51 See for example “Constitutionally Entrenched Apartheid: A tentative agreement between B.C. and the Nisga'a carves out a sovereign Indian ‘homeland’” (1996) 11 *Western Report* 12 at 12.

52 “The new South Africa: B.C.'s Nisga'a Settlement is condemned as racist” (1996) 11 *Western Report* 18. Found in *Canadian Business and Current Affairs Index*, screen 9.

53 “Nisga'a Agreement 110 Years in the Making” (1996) 13 *Windspeaker* 3. Found in the *Canadian Business and Current Affairs Index*.

54 “Backlash Threatens Long-Sought Nisga'a Treaty” (1996) 20 *Catholic New Times*. Found in *Canadian Business and Current Affairs Index*, screen 29.

55 Canada, House of Commons, see note 47 at 41-42.

56 Nisga'a Tribal Council, see note 10.

Since the implementation of self-government in Sechelt, more young Sechelt people are pursuing higher education, fewer are dropping out of school, and rates of alcohol and drug abuse have declined.

Critics of self-government express fears about provisions they call “racist” for creating “different laws and different regulations for different people.”⁵⁷ The Nisga’a Government will have some powers over Nisga’a citizens beyond its geographical limits, and over non-Nisga’a residing on Nisga’a land. For example, the Nisga’a and Provincial Government are to negotiate agreements for kindergarten to grade 12 education, affecting both “persons other than Nisga’a citizens residing on Nisga’a Lands”⁵⁸ and “Nisga’a citizens residing outside of Nisga’a Lands.”⁵⁹ However, “portable rights” are not conceptually unfamiliar to Canadians; for example, aboriginal people already have portable treaty rights to education off a territorial base. As a result, conflict-of-laws principles already exist to govern such situations.⁶⁰ Powers granted in the AIP extend beyond Nisga’a land where necessary to enhance and promote aboriginal culture, such as in education and adoption. Similar arrangements already in place elsewhere in Canada demonstrate that these AIP provisions are reasonable.

Finally, the AIP enables the Nisga’a to participate meaningfully in the Canadian economy. The Nisga’a Nation and the four villages will be separate legal entities, with the capacity, rights, powers and privileges of a natural person, and thus they may enter into contracts and agreements; acquire, hold and dispose of property; raise, expend, invest and borrow money; and sue and be sued. In the past, the Nisga’a were prevented from entering the contractual relationships necessary for economic development, because the common law did not recognize Indian bands as legal entities. This simple provision in the AIP is a significant step towards financial autonomy for the Nisga’a, and thus greater social and economic integration in the province.

“We’re paying too much.”

Perhaps the most zealous opposition to the agreement arises from the issue of funding. Under the AIP, Canada and British Columbia agree to make a capital transfer of \$190 million to the Nisga’a Central Government, with \$175.5 million of this to come from the Federal Government. It goes without saying that self-government, like any public enterprise, cannot succeed without adequate funding. This transfer benefits all British Columbians because a final resolution of the Nisga’a claim means greater economic and political stability. The AIP, if ratified, will “indemnify Canada and British Columbia from liability for claims and actions initiated after the effective date, relating to or arising from the aboriginal claims, rights, titles and interests of the Nisga’a people it warrants that it represents in this Agreement.”⁶¹ Thus, ratification of the AIP will benefit the province for reasons of certainty. As ratification cannot be achieved without funding, the capital transfer is essential.

Self-government also has the potential to foster greater aboriginal self-sufficiency and a corresponding decline in the need for social assistance provided by other levels of government. Since the implementation of self-government in Sechelt, for example, more young Sechelt people are pursuing higher education, fewer are dropping out of school, and rates of alcohol and drug abuse have declined.⁶² These

57 “The new South Africa: B.C.’s Nisga’a settlement is condemned as racist”, see note 52 at screen 10.

58 *Nisga’a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga’a Government, paragraph 54(a), page 76.

59 See above at paragraph 54(b), page 76.

60 Hogg and Turpell, see note 30 at 394.

61 *Nisga’a Treaty Negotiations Agreement-in-Principle*, see note 1 at General Provisions, paragraph 19, page 7.

benefits of self-government have a positive impact on the province as a whole, both socially and economically. Locally funded and managed programs are effective and important to the realization of self-government. Commenting on this issue, Sechelt Band Chief Stan Dixon said that

transfers give better value to these funds by allowing the elected Government of the Sechelt Indian Band to allocate these resources to advance progress in our community where we want to see progress made and not where some Ottawa officials think we should.⁶³

For this reason, public funds may be spent more effectively under self-government than they are at present.

Critics of the capital transfer ignore the significant compromises made by the Nisga'a in return for the benefits conferred by the AIP. First, the specified land base of approximately 1,930 square kilometers represents only a small percentage of traditional territory, and the Nisga'a have agreed to foreit their claim to the rest. Second, the Nisga'a ceded their tax-exempt status, a concession fiercely criticized by other Canadian aboriginal leaders, who emphasize that aboriginal people have already given up land which constitutes their share of the tax base many times over.⁶⁴ To some extent, the funding provided under the AIP redresses concerns such as these.

“Aboriginal self-government is untested and untried.”

Fears have also been voiced about an “untested and untried form of government” being entrenched in the Constitution of Canada.⁶⁵ However, if an aboriginal right of self-government is judicially recognized under section 35(1), it may be futile to deny its existence, and it is important to recognize that any court-imposed right of self-government would also require innovation. Further, the proposed arrangement is not entirely novel; similar structures are in place municipally, and a similar self-government model has been tested and tried successfully in Sechelt. Importantly, the Nisga'a will not be required to undertake all the responsibilities of government immediately. Transition provisions in the agreement allow for a gradual assumption of powers, duties and obligations. In any case, to the extent that the AIP is novel, this is a necessary result of recognizing rights that have previously been ignored.

Moreover, it is politically astute to negotiate rather than litigate. First, even if a right of self-government is protected by the courts under section 35(1), the details will have to be negotiated, which may be difficult to conduct in good faith in the aftermath of a court battle. Second, negotiation allows all stakeholders have an opportunity to contribute to the discussion, with the result that all parties have a greater sense of ownership of the final outcome. Following the signing of the AIP, “then” British Columbia Premier Michael Harcourt stated, “It’s important to have the people of British Columbia understand the document, see the details, give feedback... I think we should let the people of British Columbia be heard now.”⁶⁶ In

62 Etkin, see note 9 at 80.

63 See above at 83-84.

64 “Nisga'a Agreement 110 Years in the Making”, see note 53.

65 “The new South Africa: B.C.’s Nisga'a settlement is condemned as racist”, see note 52 at screen 14.

66 “B.C. government unwilling to sell Nisga'a deal to the public”, *Canadian Press Newswire Electronic Text* (15 February 1996). Found in the Canadian Business and Current Affairs Index.

contrast, court-mandated self-government would mean limited opportunity for public participation and imposition of requirements based on narrow legal principles.

A further advantage of negotiation is that it minimizes costs, both financial and human, and reduces government spending on legal fees. Critics are concerned about the expense and potential litigation implicated in self-government as described in the AIP, stating for example that “[n]egotiators have left many of the self-government provisions vague.... All of this presents an eternal feast for lawyers and the possibility of endless litigation.”⁶⁷ Litigation is always a possibility, but future disputes can also be solved through negotiation in the same way the AIP was reached. The courts have been reluctant to involve themselves in the issue; for example, the majority in *Delgamuukw* held that the matter is “ripe for negotiation and reconciliation.”⁶⁸ For these reasons, it is preferable that self-government be reached through negotiation between all levels of government.

In summary, self-government agreements must realistically exist within the legal and political reality in Canada. While legal decisions provide useful baselines for any negotiation, it is generally accepted that the complex and specialized issues which arise in the context of self-government may be better addressed through negotiation than by the courts. The Nisga'a AIP clearly represents a positive negotiated outcome, and as such should be ratified.

Conclusions

The Supreme Court of Canada has not yet settled the issue of self-government. However, recent cases indicate that some form of this right would be recognized under section 35(1) of the Constitution Act, 1982. Therefore, the question of whether self-government agreements should be negotiated must now defer to the question of how best to implement aboriginal self-government.

Yet, the self-government provisions of the AIP continue to be widely criticized, despite the relatively moderate nature of the agreement. Through discussion of recent legal decisions and an examination of the provisions of the Nisga'a AIP, this paper has addressed some of the opposition to the proposed Nisga'a Government, which to some extent has clouded support for a positive agreement reached through lengthy negotiation. Negotiation may be preferable to a court-directed approach when dealing with issues of such great political and emotional implications, and the agreement that was reached in this case is moderate and reasonable. To accept self-government under the AIP is not to accept segregation of a portion of the population, but to better include the Nisga'a in British Columbia.

⁶⁷ “The New South Africa: B.C.’s Nisga’a settlement is condemned as racist”, see note 52.

⁶⁸ *Delgamuukw*, see note 3 at 153.