

ARTICLE

A PRAGMATIC APPROACH TO FEDERALISM IN THE ABORIGINAL CONTEXT: LESSONS FROM THE *NISGA'A FINAL AGREEMENT*

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INTRODUCTION.....	60
PART I: OVERVIEW OF THE NISGA'A FEDERATION.....	61
PART II: RECOGNIZING VOICE	62
PART III: AVOIDING PRESCRIPTIVENESS	65
PART IV: ACCOUNTING FOR MULTIPLE AND COMPLEX IDENTITIES..	68
CONCLUSION	70

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Recent developments such as the Idle No More movement and the Truth and Reconciliation Commission's Final Report have emphasized the need to reconsider Canada's relationship with First Nations. Implicit in this exercise are questions surrounding Aboriginal governance. This essay builds on calls for federalism to provide a means of self-government. It draws on the 1998 *Nisga'a Final Agreement* (the "Final Agreement" or the "1998 Agreement")—a self-governance treaty with engrained federalist traits—and argues that in the Aboriginal context, traditional state-based conceptions of federalism should yield to what the author terms a 'pragmatic model of federalism.'

A pragmatic approach to federalism must promote historically marginalized voices, avoid prescriptiveness, and cater to multiple and complex identities. In promoting marginalized voices, the framers of Aboriginal federal arrangements must prioritize the community's traditional governance structure and its expectations. Moreover, the voices of important non-elected actors should be fostered through institutional channels. The pragmatic approach must also avoid prescriptiveness. Normative measures of assessment are to be used cautiously and existing conceptions of federalism should not overshadow alternative governance structures. Finally, discussions about future Aboriginal federal arrangements must reflect and accommodate the various identities that are present in First Nations communities and in Canada more broadly.

INTRODUCTION

Known for its open areas and scenic beauty, northwest British Columbia is also home to an unconventional federalist model. Tucked away in the remote Nass Valley lies a self-governing Aboriginal nation, complete with a central government and constitutive units. Both in law and in fact, the Nisga'a Nation straddles the line between an autonomous federation and a member of the Canadian state. Its organization offers a rich layering of governance structures and intergovernmental relations.

At a time when federalism is being promoted as a viable model of Aboriginal governance,¹ the Nisga'a Nation stands as a largely untapped source of lessons. This article draws on Nisga'a legal structure in contending that traditional state-based conceptions of federalism should, in the Aboriginal context, be set aside in favour of a more pragmatic model. This model—be it applied to imagining new federal arrangements or assessing existing ones—must recognize historically marginalized voices, avoid prescriptiveness, and take into account the variety of Aboriginal identities.

Part I offers an overview of Nisga'a governance structure and holds it out to be both a valuable and under-studied example of federal-style self-government. Indeed, the Nisga'a Nation illustrates two complementary concepts: the prospect of reallocating powers from Ottawa and the provinces in a federal manner, as well as various means of recognizing federal arrangements within Indigenous communities themselves. The text then turns to the three areas that should be borne in mind when framing future debates on the adequacy of federalism in the Aboriginal context: recognizing voice (Part II), avoiding prescriptiveness (Part III), and accounting for multiple and complex identities (Part IV). Considering voice involves drawing on traditional models of governance and the distinct expectations of those whom the new arrangements will affect. It should also extend to providing institutional channels for important non-elected actors such as elders. Avoiding a prescriptive approach to federalism is similarly multifaceted. The normative lenses through which the merits of a federation are assessed should be used cautiously so as to take into account the realities of the Aboriginal context, and existing

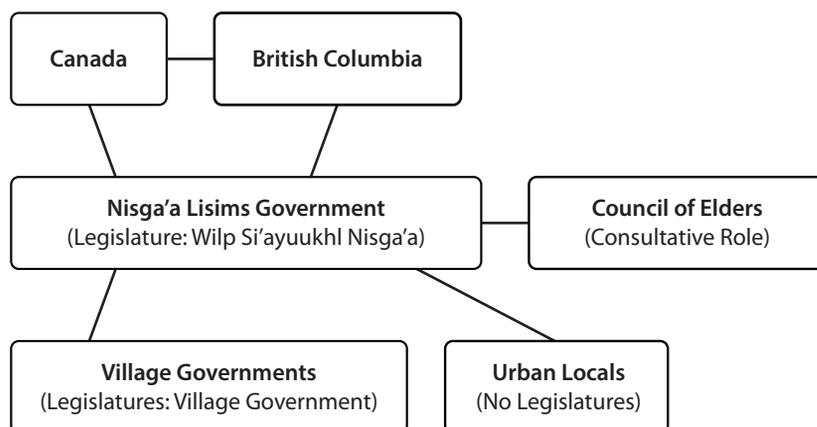
1 Pathways to Aboriginal Self-Governance in Canada" (2006) 36:4 *American Rev Can Studies* 568; Ian Peach, ed, *Constructing Tomorrow's Federalism: New Perspectives on Canadian Governance* (Winnipeg: University of Manitoba Press, 2007).

models of federalism should not overshadow distinct ways of structuring the federation. Accounting for diversity allows the discussion about future federal arrangements to reflect the complexities of shared identities, which may be more pronounced among Aboriginal peoples in Canada.

PART I: OVERVIEW OF THE NISGA'A FEDERATION

The Nisga'a Nation's federal dimensions were crystallized as a result of negotiation between Aboriginal leaders of the Nass Valley and the governments of Canada and British Columbia, which culminated in the *Nisga'a Final Agreement Act*.² It took over 20 years for the parties to achieve consensus on a new form of self-government. The ensuing governance structure bears several federalist traits, both internally and in relation to the Canadian and British Columbian governments.

Table 1 – Governance Structure of the Nisga'a Nation



Legislative powers in the Nisga'a Nation are divided between two orders of government: the Nisga'a Lisims Government and the four village assemblies. While the central government may make laws with respect to citizenship and culture, for instance, the village governments are responsible for local matters such as traffic and transportation in their respective jurisdictions. Moreover, the *Final Agreement* assigns a number of shared competences to the central and village governments.³ The councillors from each village government sit in the central legislature, but officers of the Nisga'a Lisims Government do not sit in the villages' assemblies.

The Nisga'a government includes two further organs in addition to the central and regional legislatures. Urban Locals are groupings of Nisga'a citizens, residing off Nisga'a land in select British Columbian municipalities (Vancouver, Prince Rupert/Port Edward and Terrace), who elect representatives to the central government but cannot legislate alone. Similarly, the non-elected Council of Elders provides guidance on legislation and constitutional amendments without legislating unilaterally. As signatories to the *Nisga'a Final Agreement*, British Columbia and Canada continue to influence Nisga'a governance by enacting and enforcing applicable laws (e.g. criminal law) and negotiating transfer payments.

2 Nisga'a Final Agreement Act, SC 2000 C-7 [Nisga'a Final Agreement].

3 *Ibid* at c 11.

The division of power between a central government and regional legislatures invites us to view the Nisga'a Nation as a federation. While the Nation does not describe itself as such, or make any explicit mention of the federal nature of its governance structure in official documents, it does allude to the similarities between its governance model and that of the Canadian federation on its website. "Much like the Canadian federal and provincial government systems," it explains, "the Nisga'a Nation has both a national and local governments."⁴

It is common academic practice to analyze so-called federations in disguise on the same footing as self-proclaimed federations.⁵ Doing so allows for a richer understanding of intergovernmental relations where power is shared between several decision-making bodies. Applying this practice to the Nisga'a Nation creates a multi-level federal model: the Nisga'a Lisims Government and the Village Governments form a distinct federation within the broader Canadian Federation. In this sense, the following analysis discusses both the prospect of federal design within Aboriginal communities and of reallocating powers currently held by Ottawa or the provinces in a federal fashion.

There are several reasons why the Nisga'a Nation serves as a model for future debates on federalism in the Aboriginal context and as the anchor for this article. First, it is an established federal-style self-governance agreement. With the *Nisga'a Final Agreement* approaching the 20-year mark, the Nation's governance structure has evolved beyond the transitional phase and offers a look at the long-term effects of the *Final Agreement's* provisions. Second, while the subject of some criticism,⁶ the Nisga'a Federation offers measurable markers with which to assess its success. The latest implementation report published jointly by the Nisga'a Lisims Government, the Province of British Columbia, and the Government of Canada suggests that indicators such as enrolment and completion rates of post-secondary education are steadily rising and that the Nisga'a are satisfied with the services they receive in areas such as healthcare.⁷ However, the Nisga'a Federation has been the subject of limited scholarly attention and remains understudied. This paper therefore aims to publicize lessons that have come to light since the *Final Agreement's* signing in 1998.

PART II: RECOGNIZING VOICE

Adopting a pragmatic model of federalism for future self-governance discussions should involve recognizing voices both past and present. That is to say, the opinions of historically marginalized actors should be heard and acknowledged in decision-making. At the planning stage, when deciding whether to pursue federalism, parties should be conscious of the particular Aboriginal group's expectations and whether it has a history of divided power. If federalism is deemed to be appropriate and such a governance structure is enacted, a place must continue to be made for traditional voices at all levels.

4 Nisga'a Lisims Government, "About", online: <www.nisgaanation.ca/about-3> archived at <<https://perma.cc/8JHS-YPHH>>.

5 See e.g. Jean-Michel Josselin & Alain Marciano, "How the Court Made a Federation of the EU" (2007) 2:1 *Rev Intl Organizations* 69 depicting the European Union as a federation; Derek Powell, "Constructing a Developmental State in South Africa: The corporatization of intergovernmental relations" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Toronto: Oxford University Press, 2015) portraying South Africa as a federation; Thomas O Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Enquiry*, 2nd ed (Toronto: University of Toronto Press, 2015) at 129–131 applying a federalist lens to the Kingdom of Spain.

6 See e.g. Joseph Quesnel & Conrad Winn, "The Nisga'a Treaty: Self Government and Good Governance: The Jury is Still Out" (2011) 108 *FCPP Policy Series* 1 at 12.

7 See Nisga'a Lisims Government, *Nisga'a Final Agreement Implementation Report 2011–2012*, (New Aiyansh, BC, 2014).

As the tired adage ‘history is written by the victor’ suggests, there are many ways of retelling the past and some voices resonate louder than others. Aboriginal peoples have been the victims of voice appropriation since the arrival of European settlers, and voice appropriation is closely tied to delegitimization.⁸ The histories of Aboriginal peoples have been independently recounted by non-Aboriginal academics, journalists, and politicians for years.⁹ Legal precedent can be equally misleading. Many landmark cases portray Aboriginal peoples as passive bystanders holding rights at the mercy of the Crown.¹⁰

Indeed, approaching Nisga’a history from the Canadian or British Columbian government’s view may conjure up a big bang or revolutionary moment beginning in 1973. That year, the Supreme Court of Canada rendered a landmark decision in *Calder et al. v Attorney General of British Columbia*.¹¹ Six judges agreed that the Nisga’a held Aboriginal title over their land, although three judges found that title had been extinguished. Spurred by the recognition of potential Aboriginal rights to resources and land, the Canadian government reviewed its Aboriginal land claims policy and began negotiating with the Nisga’a Tribal Council in 1976.¹² British Columbia formally joined negotiations in 1990.¹³ From this perspective, the land claims that set in motion the current federation spawned rather abruptly in 1973.

Yet, relying on the official narratives produced by courts and governments eclipses the Nisga’a tradition of shared power and the fact that their land claims stretch back to the Nation’s first contact with European settlers.¹⁴ Attempts to reclaim control over the land through negotiation can be traced as far back as 1887, when Nisga’a Chiefs travelled to Victoria for an audience with the Premier to request self-government.¹⁵ In 1913, the Nisga’a petitioned the Privy Council for “the right to decide for ourselves the terms upon which we would deal with our territory.”¹⁶ Hence, a historical account that includes Aboriginal voice reveals a deep-seated desire among the Nisga’a to regain control over their land and to govern it according to their traditional federal structure.

Federal structures have always existed among the Nisga’a and formed a pivotal part of the Nation’s governance; the history of the Nisga’a people is that of four distinct clans to which membership follows maternal bloodlines.¹⁷ Hence, no entity has ever held a monopoly on land ownership or decision-making. The division of power among the clans leads one observer, Tracie Lea Scott, to conclude that “[i]n Nisga’a Society [...] there

8 See Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 16–19.

9 *Ibid* at 23.

10 See e.g. *St Catherines Milling and Lumber Co v R*, [1887] 13 SCR 577, 1887 CanLII 3. For a more in-depth discussion of this point, see Tracie Lea Scott, *Postcolonial Sovereignty?: The Nisga’a Final Agreement* (Saskatoon: Purich, 2012) at 25 [Scott].

11 *Calder et al. v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

12 See Indigenous and Northern Affairs Canada, “Chronology of Events Leading to the Final Agreement with the Nisga’a Tribal Council,” online: <www.aadnc-aandc.gc.ca/eng/1100100031295/1100100031296> archived at <<https://perma.cc/T46M-4K95>> [Indigenous and Northern Affairs Canada].

13 *Ibid*.

14 See Daniel Raunet, *Without Surrender Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas & McIntyre, 1984).

15 See Indigenous and Northern Affairs Canada, *supra* note 12.

16 Quoted in Jim Aldridge, “The 1998 Nisga’a Treaty” in Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen’s University Press, 2015) at 138.

17 See Raunet, *supra* note 14 at 29. For an historical understanding of the wider geographical divisions in the area, see Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

was never a single central authority.¹⁸ In addition to shared jurisdiction among clans, political power was further divided between houses (*wilps*) and their leaders.¹⁹ Despite the recentness of the 1998 *Agreement* and the *Nisga'a Constitution* (the “*Constitution*”), Nisga'a narratives evidence that these documents are founded on a long-standing division of power among the nation's leadership.

It should be self-evident that the architects of new federations must take into account the voices of those who will be directly affected by the proposed governance structure. In light of the negotiation process with Canadian and British Columbian governments, the Nisga'a did not have an uncontested say in shaping their internal federal arrangements, nor in carving their place within the broader Canadian federation. Nonetheless, the lead-up to the *Nisga'a Final Agreement* exemplifies the importance of listening to often marginalized voices in order to assure the federal arrangement's success. During the heat of negotiations in the 1990s, government authorities held over 250 public consultation meetings²⁰ and regrouped 31 organizations to create the Treaty Negotiation Advisory Committee.²¹ This commitment to canvassing the opinions and expectations of stakeholders allows the *Final Agreement* to be seen not as Aboriginal peoples bowing to outside political pressures, but rather as the Nisga'a independently choosing to enter the Canadian political arena.²²

The importance of involving the voices of those most directly affected by new federal arrangements is reflected in the ratification process that enabled the Nisga'a Federation's implementation. After negotiations were concluded, 72% of Nisga'a voters cast their ballots in favour of the *Final Agreement* and its federal arrangements.²³ For what it is worth, the Chief Federal Negotiator's assessment of the *Nisga'a Final Agreement* lends further credence to the idea that the federation is a product of the Nisga'a people's choosing. W. Thomas Mallow asserts that the *Final Agreement* corresponds to the Nisga'a's wish of being full partners in the Canadian Federation.²⁴ Consulting with stakeholders whose voices have historically been marginalized suggests that the Nisga'a Federation will correspond to Nisga'a expectations and that it will benefit from their support once implemented.

The long-term success of a federal arrangement in the Aboriginal context may depend on the continued centrality of voice. As such, a pragmatic approach to federalism should include formal consultative mechanisms at all levels of government. Federations, especially newer ones, are dynamic. The voices that are so important in shaping the original agreements on which they rest should be prominent in the governance arrangement's evolution.

18 Scott, *supra* note 10 at 103.

19 *Ibid.*

20 See Indigenous and Northern Affairs Canada, *supra* note 12.

21 See W Thomas Molloy, “A Testament to Good Faith: The Process and Structure of the Nisga'a Negotiations: A Federal Negotiator's Perspective” (2004) 11 Intl J on Minority & Group Rights 251 at 255 [Molloy].

22 See Scott, *supra* note 10 at 102.

23 See Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law*, 2nd ed (Markham, LexisNexis, 2008) at 299. For a greater understanding of the ratification process, including the reaction in British Columbia more broadly, see Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006) at 124–36.

24 See Molloy, *supra* note 21 at 258. See also Tom Molloy with Donald Ward, *The World Is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000).

In many Aboriginal communities, elders play a greater role in the transmission of knowledge than in the wider Canadian population. The *Nisga'a Constitution* recognizes this fact through the Council of Elders.²⁵ Those who sit on the Council provide opinions and guidance to the Nisga'a Lisims Government, and must be consulted prior to passing constitutional amendments. By creating a dedicated and permanent body of elders, the *Constitution* ensures that the voices of a group that would likely not be recognized in traditional state-based conceptions of federalism may resonate through official channels.

Aboriginal federal arrangements also differ significantly from many state-based models in that their clout is substantially weaker than that of the provincial and national governments with which they interact. The display of competitive federalism often observed between Ottawa and the provinces is ill-suited to self-governing Aboriginal nations. As communities with comparatively small populations, limited resources, and no competences attributed in the 1867 *Constitution Act*,²⁶ Aboriginal groups can seldom impose their orientations or policies on Canadian governments. Forms of cooperative federalism with formal consultative requirements offer a means of offsetting this power imbalance between federal actors.

The negotiators of the *Nisga'a Final Agreement* were acutely aware of Aboriginal federal arrangements' fragility. Without formal consultative mechanisms, the Nisga'a Federation could be severely impacted by unilateral decisions made in Ottawa or Victoria. The *Final Agreement* consequently prescribes co-operation with members of the wider Canadian Federation. One major example is British Columbia's obligation to consult the Nisga'a before amending provincial laws that may affect them.²⁷ Such consultative arrangements help to ensure that the voices in new Aboriginal federal arrangements continue to be heard as the Federation and provincial and Canadian governments evolve.

PART III: AVOIDING PRESCRIPTIVENESS

There exist as many models of federalism as there are federations. Each federalist country has adapted the way in which powers are divided between its orders of government so as to reflect its unique history and needs. This practice must imperatively be followed in the Aboriginal context. Canada's First Peoples have unique needs and expectations. It would be misguided for those designing new forms of self-government to model them too closely on established governance structures. A pragmatic approach to federalism in the Aboriginal context must strive to adopt a wider normative lens that is conscious of corrective justice objectives—a framework stressing the return of that which was acquired wrongfully, such as land and institutional power. The pragmatic approach must also ensure that existing models of federalism do not overshadow distinct ways of structuring novel federations.

Those debating the shape of new and potential federations in the Aboriginal context may be tempted to adopt a narrow liberal view of acceptable governance structures. Such a normative perspective would align with the idea that any differential treatment of individuals runs counter to the basic tenets of equality and fairness. Yet, the narrow liberal view fails to capture the historical disadvantages of Aboriginal peoples and the potential usefulness of corrective justice. The foundational works of two Canadian scholars, Alan C. Cairns and Will Kymlicka, may help reconcile the importance we attribute to equality concerns and the needs of many Aboriginal communities.

25 See *The Constitution of the Nisga'a Nation*, 1998, s 27 [*Nisga'a Constitution*].

26 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (Part VI of the Act, *Distribution of Legislative Powers*, only attributes competences to Parliament and to the provincial legislatures).

27 See *Nisga'a Final Agreement*, *supra* note 2, c 11, s 30.

Cairns and Kymlicka promote a wider understanding of fairness, bearing in mind the unique history of Aboriginal nations as Canada's First Peoples. In his seminal book, Cairns describes Aboriginal peoples as "citizens plus."²⁸ His model "recognizes the Aboriginal difference fashioned by history and the continuing desire to resist submergence."²⁹ Similarly, Kymlicka has addressed group-differentiated rights, history, and the fact that national minorities were forced into the state through colonization.³⁰ Cairns and Kymlicka invite us to assess new and potential Aboriginal federations in Canada with a view towards corrective justice.

The concept of fairness within the *Nisga'a Constitution* also respects historical context. The *Nisga'a Constitution* contains provisions that distinguish Nisga'a citizens and non-citizens, yet it "cherishes the unique spirit, respects the dignity, and supports the independence of each individual."³¹ For example, non-citizens residing on Nisga'a land and Nisga'a citizens alike must obey local laws of general application (e.g. traffic regulations).³² Only Nisga'a citizens, however, are eligible to elect the representatives that make these laws; non-citizens are limited to a right of consultation for decisions that directly and significantly affect them.³³ Kymlicka might answer this charge of legislated inequality by analogizing group-differentiated rights to states. Even in liberal democracies, citizenship allows for distinctions in rights, including political entitlements.³⁴ Non-citizens may wish to acquire a country's citizenship, but this willingness is dismissed by virtue of not being "born into the right group."³⁵

The Nisga'a Nation maintains a tight and culturally-based control over who may become a citizen. Entitlement to citizenship rests on being a Nisga'a participant, which in turn requires Nisga'a ancestry.³⁶ Exceptions are limited to matters of adoption and marriage between a Nisga'a citizen and another Aboriginal individual.³⁷ This tight centralized control over who may become a Nisga'a citizen limits opportunities for outsiders to enter the Federation and maintains a socio-demographically homogenous citizenry. In the same stroke, however, this restrictive control over citizenship is necessary to maintain the very *raison d'être* of an Aboriginal federation. Unlike ordinary federal states, federalist arrangements in the Aboriginal context are created to allow culturally distinct groups to self-govern. If outsiders are permitted to claim citizenship in Aboriginal federations, they could quickly outnumber the Aboriginal population. Fairness in this context appears to be served by tight controls over who may reap the benefits of citizenship.

28 See Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000). For the original author who coined the term, see HB Hawthorne, ed, *A Survey of the Contemporary Indians of Canada* (Ottawa: Queen's Printer, 1966) [Cairns]. For further analysis of the term, and a discussion of the evolution to "Citizens Plural", see also Paul LAH Chartrand, "Citizenship Rights and Aboriginal Rights in Canada: From 'Citizens Plus' to 'Citizens Plural,'" in John Erik Fossum, Paul Magnette & Johanne Poirier, eds (Brussels: PEI Peter Lang, 2009). The Nisga'a Tribal Council has itself appropriated the term "citizens plus" (see Nisga'a Tribal Council, *Citizens Plus* (New Aiyansh, BC: Nisga'a Tribal Council, 1976)).

29 *Ibid* at 9.

30 See Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 11, 118 [Kymlicka].

31 *Nisga'a Constitution*, *supra* note 25, s 9.

32 See Indigenous and Northern Affairs Canada, "Nisga'a Final Agreement – Issues and Responses – Governance," online: <www.aadnc-aandc.gc.ca/eng/1100100031319/1100100031321> archived <<https://perma.cc/XH9S-VRU6>>.

33 See *Nisga'a Constitution*, *supra* note 25, s 12(1); *Nisga'a Final Agreement*, *supra* note 2, c 11, s 19.

34 See Kymlicka, *supra* note 30 at 124.

35 *Ibid*.

36 See *Nisga'a Constitution*, *supra* note 25, s 8; *Nisga'a Final Agreement*, *supra* note 2, c 20, s 1.

37 See *Nisga'a Final Agreement*, *Ibid*.

Some might argue that the *Nisga'a Constitution's* penchant for elders' participation in decision-making creates a hierarchy among the citizenry itself. The Council of Elders plays a prominent role in the Nisga'a federation's governance and its membership is restricted to Nisga'a chiefs, matriarchs and respected elders.³⁸ While many Nisga'a citizens may never serve on the Council of Elders, the body's role corresponds with the citizens plus model. A chief concern outlined by Cairns is having a group tasked with providing advice over traditional Nisga'a values (for instance, as they apply to the *Constitution*, language and citizenship).³⁹ Although the *Nisga'a Constitution* provides for differential treatment of citizens and non-citizens and between citizens themselves, these initiatives fall within the bounds of liberal society.

Avoiding a prescriptive approach to federations in the Aboriginal context also means that labels should be used cautiously. While all state-based federations' governing structures vary in some respects, they can usually be categorized according to established criteria (e.g. monarchical or republican executive power, civilian or common law tradition, etc.). These labels may be a poor fit for Aboriginal communities that wish to include traditional or other means of governance in their federalist arrangements.

In designing the exercise of executive power within the federation, the framers of the *Nisga'a Constitution* adopted an unconventional, somewhat hybrid design occupying a middle-ground between presidential and parliamentary models. On the one hand, the *Constitution* prescribes a degree of separation between the legislative and executive branches that is more akin to a presidential model of governance. It does not provide any indication that, as would be the case in a parliamentary system, the executive's loss of the legislature's support would entail the government's collapse. Moreover, the leader of the Nisga'a Lisims Government holds the title of president. On the other hand, the *Constitution* does not prevent the executive branch from playing a direct role in the legislative process, as is the case in presidential systems.⁴⁰ Instead, the Nisga'a Nation's legislative house encompasses all officers of the Nisga'a Lisims Government, including the members of the executive branch.⁴¹ The president and other members of the executive therefore directly fashion the legislative process. The separation of legislative and executive branches is also absent in the Nisga'a Village Governments as the *Nisga'a Constitution* does not provide for an executive body.⁴²

Only by sidestepping the conventional labels of presidential or parliamentary systems were the Nisga'a able to craft a model that fits their needs and expectations. The governance structure bears neither the instability of the British-descended parliamentary system, nor the restrictive separation of power emblematic of presidential arrangements. In considering the needs of other, often small, Aboriginal communities, federal design appears to be best served by a non-prescriptive approach.

Another aspect of avoiding prescriptiveness in relation to Aboriginal federal designs involves allowing room for growth. In negotiating new federal agreements, stakeholders should support the gradual development of powers previously delegated to the province or the Canadian government. Doing so would ensure that new Aboriginal federations are neither restricted to a small set of powers nor saddled with an inordinate number of responsibilities at the transitional stage.

38 See *Nisga'a Constitution*, *supra* note 25, s 27(1).

39 *Ibid*, s 32(2).

40 See Hueglin & Fenna, *supra* note 5 at 50.

41 See *Nisga'a Constitution*, *supra* note 25, ss 31(2), 36.

42 *Ibid*, s 42.

The *Nisga'a Final Agreement* anticipated that the Federation would grow organically and might wish to exercise additional powers as it developed. For instance, the *Final Agreement* allows the Nisga'a Nation to establish its own courts, police service, and other institutions.⁴³ By 2010, the Nisga'a Lisims Government had enacted more than 28 pieces of legislation.⁴⁴ As the Nisga'a Nation continues to become more independent and to legislate in the areas over which it is responsible, it may wish to exercise greater control over its affairs by creating its own court. When contemplating future federal arrangements in the Aboriginal context, it is worth bearing in mind that communities such as the Nisga'a Nation may develop quickly under self-governance agreements and require flexibility in the federal division of powers to grow organically.

PART IV: ACCOUNTING FOR MULTIPLE AND COMPLEX IDENTITIES

Federalist arrangements in the current Canadian Aboriginal context must operate within a pluralist society. Not only are the federations anchored in a wider governance structure regrouping scores of different peoples, but Aboriginal Nations themselves exhibit significant diversity. Cairns has outlined this latter point through his treatment of reduced otherness and multiple identities. The opposite of assimilation, he explains, is often viewed as parallelism: a paradigm based on the two-row wampum model, which stresses the endurance of differences and nation-to-nation respect.⁴⁵ Such a binary view of 'us and them' does not reflect contemporary Aboriginal realities. As Cairns explains, "Aboriginal societies, like all other societies [...] are penetrated societies. They should not, therefore, be viewed as if they were whole societies with only minimal relations with the Canadian society."⁴⁶ A pragmatic approach to federalism in the Aboriginal context must distance itself from the two-row wampum model and adopt a pluralist view with regard to matters of identity.

On paper, the *Nisga'a Final Agreement* describes the Nisga'a as "the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga'a Indians of the Nass Area, and their descendants."⁴⁷ Being united in culture is at the heart of what it means to be Nisga'a. The restrictive rules attributing citizenship through matrilineal ancestry further compound this idea. Yet, shared culture should not be conflated with shared identity. Some citizens of the Nisga'a Nation have, in past years, demonstrated a strong attachment to the wider Canadian Federation. In *Chief Mountain v British Columbia (Attorney General)*,⁴⁸ members of the Gingolx village contested the constitutional validity of the *Nisga'a Final Agreement*, claiming that it violated their rights as Canadian citizens under the Canadian constitution.⁴⁹ This recent Supreme Court of British Columbia case demonstrates the multiple identities that members of an Aboriginal community hold. On the one hand, residents of the Gingolx village relied on their

43 See *Nisga'a Final Agreement*, *supra* note 2, c 12.

44 See Ross Hoffman & Andrew Robinson, "Nisga'a Self-Government: A New Journey Has Begun" (2010) 30:2 Can J Native Studies 387 at 398 [Hoffman and Robinson].

45 See Cairns, *supra* note 28 at 91–92. The two-row wampum model is said to reflect agreements in early Indigenous-settler relations according to which harmonious relationships would be achieved by Aboriginal and European groups coexisting without interfering in each other's laws or customs.

46 *Ibid* at 101.

47 *Nisga'a Final Agreement*, *supra* note 2, c 1, s 12.

48 *Chief Mountain v British Columbia (Attorney General)*, 2011 BCSC 1394, 2011 BSCS 1394 (CanLII) [*Chief Mountain*].

49 See Hoffman & Robinson, *supra* note 44 at 399.

attachment to the Canadian state to ground their legal challenge.⁵⁰ On the other hand, even Canada and the Nisga'a Nation—the parties defending the federal arrangements—stressed that the *Final Agreement* is an expression of the Nisga'a people's desire to participate in Canadian society.⁵¹ Many within the Nation hold multiple identities as both Nisga'a and Canadian citizens.

Acknowledging the diverse identities that make up any Aboriginal community means that a pragmatic approach to federalism must avoid isolationism. The governance structures should not be designed to segregate members of the community from the wider Canadian federation. Future federal arrangements in the Aboriginal context must simultaneously grant communities greater agency to manage their affairs while enabling its members to identify with various groups.

Concretely, accommodating these multiple identities can be facilitated by combining the more traditional model of territorial federalism with that of ethno-federalism. While the former divides powers and grants rights according to geographical divisions, ethno-federalism does not depend on physical demarcation. Members of select groups are granted rights by virtue of their ethnic identity. The *Nisga'a Final Agreement* created three Urban Locals, where Nisga'a citizens living away from the Nass Valley may participate in the political life of their nation while simultaneously identifying, for instance, as a Vancouverite. Although Nisga'a Urban Locals are limited to three British Columbian municipalities, one could imagine an arrangement where a member of the Aboriginal community residing anywhere in Canada may maintain their political ties. In this sense, a member of the community who leaves the land traditionally held by her nation would not be forced to forsake one identity in order to integrate a new one.

Accounting for multiple identities behoves the architects of future federations in the Aboriginal context to be mindful of diverse groups that occupy every part of Canada. New and complex federal arrangements can easily be mischaracterized or misunderstood, and it is incumbent upon those who promote them to explain and promulgate distributions of power carefully.

While the *Nisga'a Final Agreement* and its federalist dimension have had a pacifying effect, in that they quelled over 100 years of grievances from the Nation's leadership, it has also sparked confrontation with non-Aboriginal and Nisga'a actors alike. Lawsuits challenging the validity of the *Nisga'a Final Agreement* have brought tensions to light as recently as six years ago.⁵² To this day, the Government of Canada's website attempts to assuage fears among non-Aboriginals that the Nisga'a have been granted race-based rights.⁵³ From an Aboriginal perspective, federal arrangements may constitute a renewed and subtler confrontation between Canada and First Peoples. At least one Indigenous scholar contends that self-government agreements are but a renewed manifestation of colonization contributing to assimilation and imposing non-Aboriginal governance structures.⁵⁴ Future

50 It should be acknowledged that reading the case does not confirm whether villagers launched the lawsuit because of a deep attachment to Canada or merely as an instrumental means of countering an agreement they perceived to be unfavourable. It is also not clear whether the village association behind the legal action speaks for the majority of Gingolx residents.

51 See *Chief Mountain*, *supra* note 48.

52 See *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123, 189 DLR (4th) 333; *Chief Mountain* *supra* note 48.

53 See Indigenous and Northern Affairs Canada, *supra* note 32.

54 See Taiiaki Alfred, *Wasdse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009). For a critique of federal arrangements' assimilative tendencies in the United States, see Jeff Corntassel & Richard C Witmer, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood*, American Indian Law and Policy Series, vol 3 (Norman, OK: University of Oklahoma Press, 2008).

federalist arrangements in the Aboriginal context must not only be fair to those who will be directly affected, but they must also be seen to be fair by members of the wider Canadian federation who do not identify with the Aboriginal group.

CONCLUSION

At a time when First Nations leaders and governments are considering means of expanding Aboriginal peoples' agency, federalist arrangements stand out as a way of implementing self-government. This article has argued that imagining new federal models and assessing existing ones requires setting aside traditional state-based conceptions of shared rule in favour of a pragmatic federalist approach. The Nisga'a Nation—a successful, yet understudied incarnation of Canadian Aboriginal federalism—offers a number of lessons.

A pragmatic approach to federalism must promote voice. Each Aboriginal community's traditional governance structure and its expectations must be taken into account. In addition, institutional channels may permit important non-elected actors' voices to resonate fully in government. New federations in the Aboriginal context must avoid prescriptiveness. Insiders and outsiders alike should be cautious in applying normative measures of assessment and may consider using a corrective justice lens. In the same vein, the architects of future federations must avoid resorting to existing federal models in a way that would overshadow alternative governance structures. Finally, successful federal arrangements will need to reflect and accommodate the multiple identities that are present within Aboriginal communities and in the wider Canadian population.