PRB 99-2E

Library of Parliament / Bibliothèque du Parlement

THE NISGA'A FINAL AGREEMENT

Mary C. Hurley
Law and Government Division

9 February 1999
Revised 24 September 2001

PARLIAMENTARY RESEARCH BRANCH
DIRECTION DE LA RECHERCHE PARLEMENTAIRE

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

Page

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

THE NISGA'A FINAL AGREEMENT[1]

INTRODUCTION

The Nisga'a Nation pursued its claim to traditional Nisga'a territories in the Nass Valley in northern British Columbia for over a century. The Nisga'a Final Agreement, initialled by representatives of the Nisga'a Nation and the governments of Canada and British Columbia in August 1998 and ratified by the Parties between November 1998 and April 2000, thus represents the product of a lengthy process for recognition of Nisga'a land rights. According to political scientist Frank Cassidy, "[n]o people have asserted their rights for a longer period or with more force than the Nisga'a."[2]

This paper outlines the historical background to the Nisga'a Final Agreement, selected Final Agreement provisions, issues of concern arising during the ratification process, the ratification process itself, and judicial proceedings related to the Final Agreement. It is intended to provide a general overview of these elements, and does not purport to provide an exhaustive analysis of any of them.

BACKGROUND

A. General

As governor of the newly established colony of Vancouver Island, James Douglas made a series of 14 land purchases from Aboriginal peoples between 1850 and 1854. The Douglas Treaties cover approximately 358 square miles of land around Victoria, Saanich, Sooke,

---

(1) Early sections of this paper draw heavily on previous work by Jill Wherrett of the Parliamentary Research Branch.

(2) Frank Cassidy, "Aboriginal Land Claims in British Columbia," in Ken Coates, ed. *Aboriginal Land Claims in Canada: A Regional Perspective*, Copp Clark Pitman, Toronto, 1992, p. 19.

Nanaimo and Port Hardy, all on Vancouver Island.(3) In concluding the treaties, Douglas recognized Aboriginal title, consistent with the principles of the *Royal Proclamation of 1763*.(4)

The British Columbia mainland became a British colony in 1858. According to one authority, the British government began by acknowledging Aboriginal title in the mainland colony and assuming that Douglas would arrange for the cession of lands.(5) However, no treaties were concluded after 1859,(6) and Douglas took no further action to extinguish Aboriginal title.(7) Instead, he set up Indian villages and allocated land reserves, with most communities granted only limited acreage. Douglas also offered Aboriginal people an opportunity, similar to that offered to new settlers, to participate in the affairs of the colony, including the right to acquire Crown land and become farmers.

Vancouver Island and the mainland were united into one colony in 1866. Joseph Trutch, who had been the dominant Aboriginal policy maker in British Columbia since 1864, did not accept the existence of Aboriginal title and described Indians as savages incapable of holding

---

(3) While the word "treaty" was not used in documents, Douglas's land purchases have consistently been upheld as treaties by the courts (*R.* v. *White and Bob*, 1964; *R.* v. *Bartleman*, 1984; *Claxton* v. *Saanichton Marina Ltd.*, 1989). The Douglas treaties are similar in principle to those signed in Ontario in 1850.

(4) As described in the report of the B.C. Claims Task Force: "From the earliest days of its presence in North America the British Crown pursued a policy, set out in the Royal Proclamation of 1763, that recognized aboriginal title. Aboriginal land ownership and authority was recognized by the Crown as continuing under British sovereignty. An effect of the policy was that only the Crown could acquire lands from First Nations, and only by treaty. By the 1850s, the Crown had signed major treaties with the First Nations in eastern Canada. Ultimately, that process continued west to the Rockies, in advance of European settlement. In most of these treaties First Nations ceded title to the Crown in exchange for substantial land reserves and other rights." British Columbia Claims Task Force, *Report of the British Columbia Claims Task Force*, Ministry of Aboriginal Affairs, Province of British Columbia, 28 June 1991. The Report may be accessed *via* the website of the British Columbia Ministry of Aboriginal Affairs, at http://www.aaf.gov.bc.ca/aaf/pubs/bcctf/toc.htm.

(5) Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989*, University of British Columbia Press, Vancouver, 1990, p. 36.

(6) B.C. was not signatory to Treaty 8, which extended into northeastern B.C.

(7) A variety of explanations have been offered as to why no further treaties were signed. Cassidy, see footnote 2, states that Douglas ran out of funds and was unable to obtain additional resources from the British government (p. 13). Tennant, see footnote 5, considers this as one possibility, but notes that Douglas did have large sums at his disposal for the mainland colony. He suggests that Douglas altered his principles after signing the Vancouver Island treaties, to subscribe to a system that anticipated the assimilation of Indians and the abandonment of traditional communities for homesteads (Chapter 3, esp. p. 36-37).

concepts of land title and ownership.[8] The right of Aboriginal people to acquire Crown land was removed during his tenure. It was Trutch's position that Indian title had always been explicitly denied in the province; this doctrine was to endure for many years.

Under the Terms of Union governing British Columbia's 1871 entry into Confederation, the federal government assumed responsibility for Indians, consistent with subsection 91(24) of the *Constitution Act, 1867*, and the provincial government retained authority over land and resources. Although Aboriginal groups appealed to the federal government for larger reserves, and there was ongoing conflict between the federal and provincial governments on this issue, Ottawa did not press the province on the question of Aboriginal title or treaties. In 1874, 56 B.C. chiefs petitioned the federal Indian Commissioner for B.C. for implementation of a federal proposal that reserves contain 80 acres per family. Various other petitions and pleas were made during this period, including by the Nisg̲a'a, as outlined below.

In 1910 Prime Minister Laurier promised to take steps to address the land question, and in 1912 the federal and provincial governments established the McKenna-McBride Commission in order to settle their differences over Indian affairs and lands. The Commission's 1916 report focused narrowly on reserve size, rather than on fundamental issues of ownership and control of land. In 1920, the federal *British Columbia Indian Lands Settlement Act* implemented the McKenna-McBride recommendations. Then in 1927, a joint Senate-House Committee appointed to investigate Aboriginal claims in B.C. recommended that Aboriginal people receive an annual allotment of $100,000 in lieu of treaties. This recommendation, too, was implemented. The same year, an amendment to the *Indian Act* made it illegal for any person to accept payment from an Aboriginal person for the pursuit of land claims.

B. The Nisg̲a'a Land Question

In the 1860s, missionaries entered Nisg̲a'a territory, followed by non-Aboriginal fishers, farmers and loggers. Concerned about the influx of settlers, in 1881 the Nisg̲a'a sent a protest delegation to Victoria. In 1885, three Tsimshian chiefs from the Nass area travelled to

(8) Tennant (1990), p. 40.

Ottawa and met with Prime Minister John A. Macdonald to discuss land grievances. In 1886, Nisga'a in the Upper Nass refused to allow surveying by provincial crews, and began an organized land claim process.

The following year, Nisga'a and Tsimshian chiefs went to Victoria to discuss land and self-government issues with Premier William Smithe and federal and provincial officials. Premier Smithe dismissed their claims, characterizing Aboriginal people prior to contact as "little better than the wild beasts of the field."(9) The governments did agree to establish a public inquiry into the land issue, however, and, in 1887-1888, several hearings were held in Nisga'a territory, with Nisga'a representatives making detailed statements about their ownership of the land and their desire for a treaty. The subsequent report, however, dismissed Aboriginal groups' demands for the recognition of title and treaties.

Nisga'a society and politics evolved rapidly after 1888.(10) The Nisga'a Land Committee was formed in 1907(11) as a political organization devoted to the resolution of land issues. By 1908, reserves had still not been set aside for the Nisga'a, who were increasingly concerned about the absence of protection of Aboriginal interests from non-Aboriginal settlement and development on their land. In 1909, the Nisga'a Land Committee formed the Indian Rights Association with other north and south coast B.C. First Nations.

In 1913, the Nisga'a Land Committee petitioned British authorities, asserting both their right to be compensated for any lands they might agree to surrender and, more importantly in their view, the right to reserve other portions of their traditional lands for their own use and benefit on a permanent basis. Much of the land they wished to reserve, however, had already been sold by the province. The Nisga'a also declared that the coming of non-Aboriginal peoples into their territory must be in accordance with the terms of the *Royal Proclamation of 1763*. For the Aboriginal peoples of British Columbia, "the petition became an important political text and

---

(9) Quoted *ibid.*, p. 58.

(10) *Ibid.*, p. 85-86. For example, a Nisga'a newspaper provided a vehicle for organizing the land movement in the area and "revival meetings" (substituting for the outlawed potlatch) served as a platform for speeches on the land question.

(11) Some sources give 1890 as the year of the Committee's establishment.

political catalyst, as well as a symbol of the political struggle of all Indians for their land rights."[12]

In 1915, a Nisga'a delegation met with the Minister responsible for Indian Affairs and Duncan Campbell Scott, deputy superintendent general of Indian Affairs, to defend the petition. Nisga'a chiefs also asserted and explained their claim to title before the McKenna-McBride Commission, and lobbied in Ottawa over a six-week period in 1916. That year, the Nisga'a and 15 other tribal groups formed the Allied Indian Tribes of British Columbia, a province-wide organization for the pursuit of land claims.[13]

In 1924, 76 square kilometres of reserve land (cut from their traditional territories of almost 25,000 square kilometres) were allocated to Nisga'a communities. Claims-related political activity was effectively prohibited by the 1927 amendment to the *Indian Act*, which remained in place until 1951. During this period, the Nisga'a Land Committee was relatively inactive outside the community.

In 1949, Frank Calder, son of a founder of the Nisga'a Land Committee, was elected to the British Columbia Legislature; he used his position to speak out on Indian issues. In 1955, he re-established the Nisga'a Land Committee as the Nisga'a Tribal Council and became its president. The Council's purpose was to work toward resolving the land issue. In 1959, following discussion about launching a common claim with several other B.C. Aboriginal groups, the Nisga'a decided to pursue an independent claim.

THE *CALDER* DECISION AND LAND CLAIMS

In 1968 the Nisga'a hired lawyer Thomas Berger[14] to seek a court declaration that Aboriginal title to the Nass Valley had never been extinguished. The Nisga'a suit, known as the *Calder* case, was argued in the Supreme Court of British Columbia in 1969.[15] The Court accepted the province's arguments that the Nisga'a had no claim to title because the *Royal*

(12) Tennant (1990), p. 89.

(13) With the formation of this larger entity, the Indian Rights Association dissolved.

(14) Then NDP leader in British Columbia and a colleague of Frank Calder.

(15) *Calder et al.* v. *Attorney General of British Columbia* (1969), 8 D.L.R. (3d), 59-83.

Proclamation of 1763 did not apply in British Columbia and had therefore not recognized Aboriginal title in the province. The judge added that, even if title did exist, it had been extinguished implicitly by pre-1871 land legislation. The B.C. Court of Appeal unanimously upheld this ruling, commenting that at the time of white settlement, the Nisga'a were a primitive people with few institutions of civilized society and no notions of private property.(16)

The Supreme Court of Canada's 1973 ruling on the Nisga'a appeal represented a landmark for all Aboriginal groups with outstanding claims.(17) Members of the Court split on the question of whether the Nisga'a still had title to the land, but ruled that they had held title prior to the creation of British Columbia. *Calder* confirmed that Aboriginal peoples' historic occupation of the land gave rise to legal rights in the land that survived European settlement, thus recognizing the possibility of present-day Aboriginal rights to land and resources.

The *Calder* decision prompted the federal government to develop a policy to address unsettled Aboriginal land claims. Initially released in 1973, the first "comprehensive land claims policy" was adopted in 1976. It provided, *inter alia*, that only six land claims could be negotiated in Canada at any one time, and only one per province. In 1986, revisions to the comprehensive land claim policy allowed for a broader scope of subject matters to be negotiated within the land claim context, including, for example, offshore wildlife harvesting rights and resource revenue-sharing.(18)

Most significantly, comprehensive land claim agreements now benefit from explicit constitutional protection. By virtue of section 35 of the *Constitution Act, 1982*, the "treaty rights" that are recognized and affirmed under that provision explicitly include rights under existing or subsequently concluded land claim agreements. In addition, the current Liberal government's 1995 recognition of the inherent right of self-government as an existing Aboriginal right under section 35 also had and has consequential effects for comprehensive land claim

---

(16) *Calder et al.* v. *Attorney General of British Columbia* (1970), 13 D.L.R. (3d), 64-110.

(17) *Calder et al.* v. *Attorney General of British Columbia*, [1973] S.C.R. 313.

(18) Minister of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy*, Minister of Supply and Services, Ottawa, 1987. While the new policy allowed Aboriginal parties to retain some rights to land, it did not resolve Aboriginal concerns about loss of other rights under the federal requirement that Aboriginal title to lands and resources be surrendered in exchange for defined rights set out in a land claim settlement.

processes.(19) The inherent right policy provides for constitutional protection of the rights set out in self-government agreements as treaty rights under section 35, either in new treaties, as part of land claim agreements or as additions to existing treaties.(20)

Excluding the Nisga'a Final Agreement, 13 comprehensive land claim agreements or modern treaties have been concluded since the 1973 announcement of the federal government's claims policy, none of which currently provides explicitly for section 35 protection for self-government.(21)

THE NISGA'A FINAL AGREEMENT

A. Negotiation Process

The evolution in land claim policy developments was spanned by the Nisga'a land claim process.

Bilateral negotiations between the Nisga'a and Canada began in 1976 and, in 1989, the parties signed a framework agreement setting out the scope and process of, and topics for, negotiation. British Columbia was not yet a party to the process, as the provincial government maintained its longstanding denial of Aboriginal title and refused to play a role in land claim negotiations.

During the 1980s, however, the activities of local and provincial First Nation organizations, growing public support for Aboriginal issues and a series of court decisions in

---

(19) *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Minister of Public Works and Government Services, Ottawa, 1995.

(20) *Ibid.*, p. 8.

(21) The James Bay and Northern Quebec Agreement (1977); the Northeastern Quebec Agreement (1978); the Inuvialuit Final Agreement (1984); the Gwich'in Agreement (1992); the Nunavut Land Claims Agreement (1993); the Sahtu Dene and Métis Agreement (1994); seven Yukon First Nation Final Agreements and corresponding Self-Government Agreements based on the Council for Yukon Indians Umbrella Final Agreement (1993). Other developments in the area of comprehensive land claims are ongoing. For example, in May 1999, representatives of the Labrador Inuit Association and the governments of Canada and Newfoundland and Labrador initialled the Labrador Inuit Land Claims Agreement-in-Principle. In July 1999, the Labrador Inuit voted in favour of the AIP. In January 2000, the Dogrib Comprehensive Land Claim and Self-Government Agreement-in-Principle was signed by the Dogrib Treaty 11 Council and the governments of Canada and the Northwest Territories.

favour of Aboriginal people led the province to become more responsive to Aboriginal concerns.(22) In 1989, the Premier's Council on Native Affairs created by the then Social Credit government recommended that the province establish a specific process for the negotiation of Aboriginal land claims. In August 1990, the province – although continuing to reject Aboriginal title – agreed to join First Nations and the federal government in tripartite negotiations, and entered the Nisga'a process in October of that year.

In 1991, the three parties accepted the Report of the B.C. Claims Task Force established by their representatives, which outlined the scope and process for land claim negotiations in the province. Significantly, the newly-elected New Democratic Party (NDP) government recognized Aboriginal title and Aboriginal peoples' inherent right of self-government. Its endorsement of the Task Force Report enabled the establishment of the B.C. Treaty Commission and treaty process. It was in this context that the B.C. government began to participate in the Nisga'a negotiations although these predated and took place outside this process. Policy documents indicate some of the factors behind the then provincial government's desire to settle land claims:

> Settling aboriginal issues at the negotiation table – instead of in the courts – will benefit all British Columbians, not just aboriginal people. Treaties will bring certainty to land and resource use, help attract new investment for resource development, create social stability and put an end to costly legal battles between First Nations and the Province.(23)

Having begun in 1990, tripartite negotiations on the Nisga'a claim led to the conclusion of a new framework agreement in 1991. In 1992, the parties also signed an interim protection measures agreement regarding resources and land use. Between 1991 and 1995, federal and provincial negotiators held almost 200 consultation and public information meetings in northwestern British Columbia. Talks continued throughout this period, with various delays.(24)

---

(22) Report of the British Columbia Claims Task Force (1991).

(23) Then B.C. Ministry of Aboriginal Affairs policy document entitled, "Treaty Negotiations in B.C."

(24) These included the temporary suspension of negotiations in 1995 owing to an absence of agreement between the federal and provincial governments on implementation of the terms of the 1993 Canada-

In February 1996, negotiators for the three parties initialled an Agreement-in-Principle (AIP) which was signed in March by then federal Minister of Indian Affairs and Northern Development Ron Irwin, then B.C. Minister of Aboriginal Affairs John Cashore and Nisga'a Tribal Council President Joseph Gosnell Sr. On 4 August 1998, Nisga'a representatives and government negotiators initialled the Nisga'a Final Agreement (the Final Agreement).

B. Substance: Selective Summary Overview

The Final Agreement consists of 22 chapters that exhaustively define Nisga'a rights and responsibilities in relation to land, natural resources, governance, the administration of justice, the environment, taxation and numerous other matters.(25)

1. Chapter 2: General Provisions

This pivotal chapter includes the following stipulations:

- The Final Agreement is a treaty and a land claim agreement under sections 25 and 35 of the *Constitution Act, 1982* (s. 1).
- The Final Agreement does not alter the Constitution, including the distribution of powers between Canada and British Columbia, the identity of the Nisga'a Nation as an Aboriginal people under the *Constitution Act, 1982*, and sections 25 and 35 of that Act (s. 8).
- The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government (s. 9).
- Nisga'a Lands and Nisga'a Fee Simple Lands as defined in the Final Agreement are not "lands reserved for the Indians" under the *Constitution Act, 1867* or "reserves" under the *Indian Act* (s. 10).

(cont'd)

B.C. Memorandum of Understanding on cost-sharing. Information on this MOU is contained in a 1999 document prepared for the B.C. government by Grant Thornton Management Consultants entitled "Financial and Economic Analysis of Treaty Settlements in British Columbia," located at http://www.aaf.gov.bc.ca/aaf/pubs/thorntonapp.htm#a.

(25) The full text of the Final Agreement may be consulted at http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/docs/nisga_agreement.html.

- Federal and provincial laws apply to the Nisga'a and their lands, but the Final Agreement and settlement legislation prevail to the extent of any inconsistency between them and provisions of any federal or provincial law (s. 13).(26)
- If a Nisga'a law has an incidental impact in an area over which Nisga'a Government has no authority that is inconsistent with a federal or provincial law, the latter prevails to the extent of the inconsistency (s. 54).
- Subject to specified exceptions, the *Indian Act* ceases to apply to the Nisga'a, except for the purpose of determining "Indian" status (s. 18).
- The Final Agreement constitutes the "full and final settlement" with respect to the Aboriginal rights (including title) of the Nisga'a Nation (s. 22).
- The Final Agreement exhaustively sets out Nisga'a section 35 rights, which are: the Aboriginal rights (including title) of the Nisga'a Nation, as modified [into Treaty rights] by the Final Agreement, the jurisdictions, authorities and rights of Nisga'a Government, and the other section 35 rights (s. 23).
- The Nisga'a release to Canada any Aboriginal right, including title, that is other than the section 35 rights set out in the Final Agreement (s. 26), and release Canada and the province from any future claims whatsoever relating to any act before the Final Agreement takes effect that may have affected Nisga'a Aboriginal rights, including title (s. 27).
- Federal settlement legislation will provide that British Columbia law not ordinarily applicable to the Nisga'a will apply, subject to federal law and in accordance with the Final Agreement (s. 29).
- The Final Agreement does not affect the section 35 rights of any Aboriginal people other than the Nisga'a Nation (s. 33) and, should a superior court determine that such rights are adversely affected by the Final Agreement, the Parties will strive to remedy or replace the offending provision(s) (s. 34).

(26) Analogous provisions are found in other land claim agreements. See, for example, s. 3.1.22 and 3.1.23 of the 1992 Gwich'in Comprehensive Land Claim Agreement.

- If another treaty or land claim agreement adversely affects Nisga'a section 35 rights set out in the Final Agreement, additional or replacement rights or another suitable remedy will be provided by British Columbia and/or Canada (s. 35).(27)
- Unless explicitly subject to bipartisan consent, amendments to the Final Agreement require the consent of all three Parties (s. 36-40).

2. Chapter 11: Nisga'a Government

The Final Agreement's governance provisions:

- provide that the exercise of Nisga'a Government jurisdiction will evolve over time (s. 4);
- require the Nisga'a Nation to have a Constitution and specify its required contents (s. 9);
- require Nisga'a Government to consult with non-Nisga'a residents on Nisga'a Lands about decisions that "directly and significantly affect them," to provide that these individuals may participate in Nisga'a Public Institutions whose activities affect them, and avail themselves of appeal or review procedures in respect of administrative decisions (s. 19-21);
- provide that the Final Agreement prevails to the extent of any conflict with provisions of any Nisga'a law (s. 32);
- provide that if Nisga'a Government exercises its discretionary authority to make laws in specified areas, such laws will prevail over inconsistent federal or provincial laws: these areas include the administration and management of Nisga'a Government (s. 36), Nisga'a citizenship (s. 40), culture and language (s. 43), Nisga'a Property in Nisga'a Lands,(28) the Regulation and Administration of those Lands (s. 45 and 49), Nisga'a assets on Nisga'a Lands (s. 55),(29) the organization and structure for the delivery of health services on Nisga'a Lands (s. 84), child and family services on Nisga'a lands (s. 91),(30) adoption of Nisga'a

(27) Sections 34 and 35 did not appear in the AIP, and relate to potential difficulties arising as a result of overlapping claims by First Nations conducting separate treaty negotiations. See subsequent text under the heading "The Overlap Question."

(28) Under the Final Agreement, the Nisga'a Nation becomes fee simple owner of "Nisga'a Lands," as defined in Chapter 1.

(29) In the event of conflict between Nisga'a law concerning Nisga'a assets off Nisga'a Lands and federal or provincial law, the latter prevails.

(30) Nisga'a law-making authority in this area must provide for standards comparable to provincial standards.

children (s. 99), pre-school to grade 12 education of Nisga'a children on Nisga'a Lands (s. 101), the devolution of cultural property of Nisga'a citizens who die intestate (s. 116);

- provide that if Nisga'a Government exercises its discretionary authority to make laws in other specified areas, federal or provincial laws prevail to the extent of any inconsistency or conflict: these areas include public order, peace and safety (s. 62),(31) traffic and transportation (s. 74),(32) the solemnization of marriage (s. 76), provision of social services (s. 79), health services (s. 83),(33) intoxicants (s. 111), emergency preparedness (s. 123); and
- provide that Nisga'a Government may adopt federal or provincial laws in relation to matters under its jurisdiction (s. 129).

3. Chapter 12: Administration of Justice

Provisions in this chapter:

- state that in the event Nisga'a Government decides to provide policing within Nisga'a Lands by establishing a Nisga'a Police Service, it must make laws to establish that Service and a Nisga'a Police Board: these laws must include provisions that either conform to or are compatible with provincial laws in identified areas (s. 3 and 4);
- provide that the Nisga'a Police Board may exercise its functions only when the Lieutenant Governor in Council has approved its structure and appointed its members (s. 6);
- authorize the Minister with responsibility for policing in British Columbia to intervene in policing matters on Nisga'a Lands if she/he is of the view that such intervention is required to ensure effective policing (s. 19);
- stipulate that if Nisga'a Government decides to establish a Nisga'a Court to administer Nisga'a laws, it must make laws providing for judicial standards, supervision and appeal procedures (s. 33); and

---

(31) Criminal law is expressly excluded from Nisga'a Government authority.

(32) Nisga'a law-making authority in these areas is specified as being "to the same extent as [British Columbia] municipal governments have authority."

(33) Nisga'a Government is required to notify British Columbia and Canada of its intention to make laws in areas of social services, health services, child and family services, adoption and education, and to consult with Canada or B.C., at the request of either, on a number of specific topics in relation to which the parties may negotiate agreements (s. 27-29).

- provide that a Nisga'a Court must be approved by the Lieutenant Governor in Council prior to exercising any functions (s. 34), define the court's jurisdiction (s. 38-41), and provide for accused persons liable to a sentence of imprisonment under Nisga'a law to elect to be tried in the British Columbia Provincial Court (s. 43).

4. Other

Additional law-making authority is set out in various chapters of the Final Agreement, each of which sets out conditions under which and/or the extent to which that authority may be exercised. They include chapters relating to Forest Resources (Chapter 5), Fisheries (Chapter 8), Wildlife (Chapter 9), Environmental Assessment (Chapter 10) and Taxation (Chapter 16).

The Final Agreement also contains provisions relating to the transition from the *Indian Act*'s application to the Nisga'a in certain areas (Chapter 13), to relationships between the Nisga'a and regional government (Chapter 18), and to a dispute resolution mechanism to apply to conflicts among the Parties over the Final Agreement's interpretation, application or implementation (Chapter 19).

C. Issues Arising[34]

Under the terms of the Final Agreement, ratification by the three Parties was a precondition of its validity.[35] Throughout the ratification process, the Final Agreement sparked debate on a number of topics. Concerns raised include the following.

(34) Material under this heading was gathered, in part, from media reports of responses to the Final Agreement since August 1998.

(35) See Chapter 22, "Ratification."

1. The Constitutional Questions

a. Division of Powers

Provincial Liberal leader Gordon Campbell maintained that the Final Agreement amended the Constitution, creating an unconstitutional third order of government and affecting the fundamental rights of British Columbians. In his view, a province-wide referendum was required under the province's *Constitutional Amendment Approval Act*, a position shared by Bill Vander Zalm, leader of the Reform Party of B.C., and others. The then provincial Premier, federal negotiators, the Nisga'a and others rejected the notion that the Final Agreement amended the Constitution or necessitated a provincial referendum.

In July 1998, the then Acting Chief Commissioner of the B.C. Treaty Commission expressed the concern, shared by other observers, that, quite aside from the technicalities of the constitutional issue *per se*,

> A public referendum is the wrong tool to use for ratification of treaties, for these reasons:
> 1. The parties have agreed otherwise.
> 2. Treaties are about rights, not about voter preferences.
> 3. A referendum is too blunt an instrument to deliver meaningful input on an issue as complex as a treaty.
>
> …
>
> The referendum among the Nisga'a is another matter. Aboriginal rights are collective rights, held by aboriginal people, not by band councils or tribal councils. The treaty will not be legally binding until approved by those aboriginal people. And the federal government, which has a legal obligation to deal with First Nations in the context of a relationship of trust, needs the ratification of individual members in order to protect its own position. So, the fact that the treaty will be ratified by Nisga'a members is not an argument for ratification by voters at large, whose governments have the authority and responsibility to enter into treaties on their behalf.

In the view of the Acting Chief Commissioner, a referendum process would mark the end of the negotiation of modern-day treaties throughout British Columbia.(36)

---

(36) British Columbia Treaty Commission, *News Release*, "Referendum Is the Wrong Way to Ratify Treaties," Vancouver, 30 July 1998, accessible *via* the BCTC website, at http://www.bctreaty.net/.

Constitutionalists also differed on the issue of the Final Agreement's constitutionality. Mel Smith, a former consultant to previous B.C. governments, criticized the Final Agreement on constitutional grounds, while others, including Dean Peter Hogg of Osgoode Hall Law School, upheld the Final Agreement's constitutionality as consistent with section 35 of the *Constitution Act, 1982*.

b. *Canadian Charter of Rights and Freedoms*

Differing views were also expressed on the question of whether the *Canadian Charter of Rights and Freedoms* (Charter) applies to Aboriginal government. In his July 1998 legal opinion for the B.C. Liberal Party, Mel Smith considered it highly debatable whether a Final Agreement provision stating that the Charter applies to Nisga'a Government was effective, in light of the terms of section 32 of the Charter.(37) Smith questioned whether Nisga'a Government would be under federal or provincial authority within the meaning of section 32.

Other commentators have taken similar positions on the relationship between the Charter and the exercise of an inherent right of self-government. It has been argued that Supreme Court of Canada rulings establish that "the *Charter* [does] not apply to the independent exercise of governmental powers by bodies autonomous from the federal and provincial governments."(38)

---

(37) Section 32 provides that the Charter applies to "the Parliament and the government of Canada" and to the "legislature and government of each province" in respect of all matters within their respective authority.

(38) Kenneth Tyler, "Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: 'Partners in Confederation'," Paper prepared for the Continuing Legal Education Program of the Canadian Bar Association on the topic "The Inherent Right of Aboriginal Self-Government," Toronto, 1994, p. 23-24. Supreme Court of Canada decisions cited by Tyler discuss the scope of section 32 in the context of cases involving litigation between private parties and challenging university, hospital and college policies. The first of these, *R.W.D.S.U.* v. *Dolphin Delivery Ltd*. (1986), 33 D.L.R. (4th) 174, is frequently cited in relation to the application of section 32. In it, McIntyre J. stated: "Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the provinces in respect of all matters within their respective authorities." (p. 194) "It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government." (p. 195) "It would also seem that the Charter would apply to many forms of delegated legislation, regulations, Orders in Council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures. It is not suggested that this list is exhaustive." (p. 198) It is worth noting that the Charter has been found to apply to First Nation by-laws under the *Indian Act* and the *Cree-Naskapi (of Québec) Act*.

Some proponents of the section 35 inherent right of self-government have advanced different reasons for disputing the Charter's application to Aboriginal governments. A 1994 research paper prepared for the Royal Commission on Aboriginal Peoples (RCAP) reasoned that the language of section 32 did not encompass and should not be imposed on Aboriginal governments exercising their inherent section 35 right; that unilateral non-consensual imposition of the Charter would repeat events of the past "when Aboriginal peoples were often not given the opportunity to participate when important decisions affecting their constitutional rights were made";[39] that the right of self-government is protected by section 25 of the Charter,[40] which is "clearly intended to shield the rights of the Aboriginal peoples, and thus the right of self-government, not just from abrogation [destruction] but from derogation [limitation] by the Charter as well."[41]

Advocates for the view that the Charter applies to Aboriginal governments include Dean Peter Hogg and Mary Ellen Turpel. While conceding that the extent to which the Charter constrains Aboriginal self-government is unclear, Hogg and Turpel nevertheless conclude it is "probable that a court would hold that Aboriginal governments are bound by the *Charter*." In their view, since a self-government agreement requires a statute to indicate that it binds third parties, "[t]he statute implementing the self-government agreement probably constitutes a sufficient involvement by the Parliament of Canada to make the *Charter* applicable."[42] On the question of whether the Charter's section 25 "shield" might exempt the

---

(39) Kent McNeil, "Aboriginal Government and the *Canadian Charter of Rights and Freedoms*: A Legal Perspective," p. 3. The document is contained on the RCAP compact disk and may be obtained from the Library of Parliament's Reference Branch. In the Final Agreement, the Nisga'a agreed to the application of the Charter to their governments and legislation.

(40) Subsection 25(b) reads "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal rights or freedoms that pertain to the aboriginal peoples in Canada, including … any rights that now exist by way of land claim agreements or may be so acquired." It is generally agreed that section 25 serves as a shield that protects Aboriginal and treaty rights from adverse effects of Charter rights and, in particular, from challenge under section 15 of the Charter. The prohibition of racial discrimination in that section is not to be interpreted, that is, as an abrogation or derogation from Aboriginal or treaty rights.

(41) McNeil, note 39, p. 5.

(42) Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-government: Constitutional and Jurisdictional Issues" (1995), 74 *Canadian Bar Review* 187, p. 214. The article was originally prepared for the RCAP, and is also published in a RCAP volume entitled *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995).

exercise of Aboriginal self-government from Charter application, Hogg and Turpel consider blanket immunity unlikely, although "[t]he application of the *Charter*, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style … of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws which are different, for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the *Charter*."(43)

The 1996 RCAP Report's "intermediate solution" was founded on principles that: 1) in their relations with governments, including Aboriginal governments, all in Canada are entitled to the protection of the Charter's general provisions; and 2) the Charter should be interpreted, by virtue of section 25, so as to allow scope for Aboriginal distinctiveness. Although the *Constitution Act, 1982* did not provide explicitly for Aboriginal governments, "if section 35(1) is interpreted as recognizing the inherent right [of self-government], … section 32(1) should be read in a way that takes account of this recognition."(44) In the RCAP's view, the terms of section 32 allow for subjecting government bodies that are not explicitly named to the Charter. In addition, the Charter's application to Aboriginal governments is "tempered by the mandatory provisions of section 25," which preclude Charter interpretation that would undermine their basic powers. While section 1 of the Charter is available to Aboriginal governments, section 25 also "enables an Aboriginal government to argue that certain governmental rules and practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and traditions of the Aboriginal nation, and as such are justified."(45)

---

(43) *Ibid.*, p. 215.

(44) Report of the Royal Commission on Aboriginal Peoples, Volume II, Part One, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services, 1996), p. 231.

(45) *Ibid.*, p. 232.

2. The Cost Question

It was argued that negotiators misled the public by originally quoting a $190-million price tag for the Final Agreement, while the real cost was estimated at approximately $500 million when direct and indirect costs were factored in. Some critics placed the cost of the Final Agreement at over $1 billion.

Federal government documents(46) explained that under the terms of the Final Agreement, the Nisga'a will receive a total of one-time payments of $253 million, in 1999 dollars. This figure represents a capital transfer of $196.1 million to be paid over 15 years, principally by the federal government; $11.8 million, shared by Canada and B.C., for the purchase of commercial fishing vessels and licences; $40.6 million to be paid over five years for transition and implementation activities, including $30 million federal money for infrastructure and capacity development and training, and $10.6 million for activities such as fisheries studies, forestry training, preparation of Nisga'a laws, and so forth; and an estimated $4.5 million for forestry transition funding. In addition, Canada will pay $10.3 million for the establishment of a fisheries conservation trust and $3.2 million to B.C. to assist persons potentially affected by the Final Agreement; Canada and the province will share estimated costs of $3.1 million for surveying Nisga'a Lands and $30 million for purchasing third party interests.

The documents indicate that British Columbia's major contribution to the settlement costs is in the form of land, with "Nisga'a Lands" under the Final Agreement valued at approximately $108.6 million in 1999 dollars, forgone forestry revenues valued at $37.5 million, and approximately $40 million for paving the Nisga'a Highway. The total cost of the Final Agreement, including ascribed values, is quoted as $487.1 million in 1999 dollars, with the federal share being $255 million.

In addition, a three-way funding arrangement among Canada, British Columbia and the Nisga'a is set out in the Fiscal Financing Agreement (FFA), a renegotiable five-year deal that is one of several side agreements to the Final Agreement. The initial FFA provides for

---

(46) Department of Indian Affairs and Northern Development (DIAND), *Backgrounder*, "Financial Arrangements," "Nisga'a Final Agreement: Summary of One-Time Costs," May 1999, available *via* the DIAND website at http://www.inac.gc.ca/pr/agr/nsga/index_e.html, under the heading "Government of Canada Signs Historic Nisga'a Agreement."

annual transfers to the Nisga'a of over $32 million, 90% of which is already available under current arrangements with *Indian Act* Nisga'a First Nations. These moneys are to provide for program and service delivery related to health, social, education and other local services, as well as land and resource management. Nisga'a Government will contribute to the cost of program and service delivery under a second side agreement, an Own-Source Revenue Agreement (OSRA) that details how Nisga'a Government revenues such as commercial and investment income and taxation income will serve to reduce fiscal transfers from Canada and B.C. over time. The term of the OSRA is a minimum of 12 years; it may be continued for successive two-year periods.

3. The Democracy Question

Some observers branded certain of the Final Agreement's Chapter 11 self-government provisions undemocratic. Critics expressed concerns that the Nisga'a Constitution explicitly requires democratic accountability of Nisga'a Government only to Nisga'a citizens, that voting rights for Nisga'a Government are restricted to Nisga'a citizens, as determined by Nisga'a law, while Nisga'a Government is entitled to pass laws affecting non-Nisga'a residents on Nisga'a Lands.(47) The Final Agreement does not, however, prevent the conferring of citizenship under Nisga'a law on non-Aboriginal persons such as non-Nisga'a residents on Nisga'a lands.

The Nisga'a self-government structure was also criticized as instituting race-based government that is contrary to the notion of equality before the law and accords the Nisga'a "special status." It was further argued that the Final Agreement would introduce taxation without representation for non-Nisga'a residents. In fact, Chapter 16 of the Final Agreement, dealing with taxation, explicitly restricts Nisga'a Government's direct taxation jurisdiction to Nisga'a citizens on Nisga'a Lands. Chapter 16 does provide for the possibility of federal and/or provincial negotiations with the Nisga'a for the purpose of attempting to reach

(47) In this respect, it is worth noting that under the *Indian Act*, Indian bands have been authorized to establish their own membership codes since 1985, and that only band members are entitled to vote in band council elections. From an interpretive point of view, the fact that the Nisga'a Constitution must spell out accountability measures in respect of Nisga'a citizens does not signify that it is precluded from instituting additional accountability measures.

agreement on the extent, if any, to which that direct taxation authority might be provided in respect of non-Nisga'a residents on Nisga'a Lands.(48)

4. The Template Question

Some, including, initially, the then B.C. Premier, characterize the Final Agreement as a template for subsequent B.C. treaties. Critics suggest that as a result, treaty settlements will ultimately prove unduly costly for the province, and engender unduly numerous, complex and balkanized governmental structures.

The Nisga'a do not share the "template" view of the Final Agreement. Other B.C. First Nations, and other commentators also argue against the notion that the Final Agreement is or can serve as a template for subsequent modern treaties, given the vastly differing circumstances and geographical contexts of First Nations and their claims across the province.(49) Government spokespersons agree that the template characterization is incorrect, but add that certain provisions would likely be a common feature of future treaties. These most likely include the central "General Provisions." It is also worth noting in this respect that numerous provisions of the Final Agreement themselves reflect provisions relating to analogous substantive subject matters in previous comprehensive land claim agreements.

5. The Overlap Question

The Gitanyow First Nation has been engaged in negotiations under the British Columbia treaty process since 1993. Most of the territory claimed by the Gitanyow lies within

---

(48) Since 1988, the *Indian Act* has authorized First Nations to collect taxes on reserve land, including land leased to non-Aboriginal residents or businesses. First Nation property taxation by-laws must be approved by the federal Minister of Indian Affairs and Northern Development. Numerous British Columbia First Nations have enacted taxation by-laws since 1990. The B.C. *Indian Self-Government Enabling Act* of 1990 prevents double taxation by providing for provincial and municipal authorities to withdraw from taxing reserve lands when First Nation taxation by-laws take effect.

(49) By way of example, the governance chapter in the Sechelt Agreement-in-Principle, signed in April 1999, is not modelled on the Final Agreement. Under the Sechelt AIP, the first to be reached under the B.C. Treaty Commission process, Sechelt self-government will continue under existing self-government arrangements, as set out in the 1986 *Sechelt Indian Band Self-Government Act*, which are not constitutionally protected. The AIP may be consulted at the B.C. Ministry of Aboriginal Affairs website, at: http://www.aaf.gov.bc.ca/aaf/nations/sechelt/secheltaip199.htm.

the Nass watershed; under the terms of the Final Agreement, the Nisga'a hold title to portions of this territory. The Gitxsan(50) and Tahltan Nations also claim territory in the Nass watershed.(51)

In March 1998, prior to the conclusion of the Final Agreement, hereditary chiefs of the Gitanyow initiated court proceedings seeking declarations: (1) that in undertaking to negotiate a treaty with the Gitanyow under the B.C. treaty process, and in proceeding with those treaty negotiations, the federal and provincial Crowns are obliged to negotiate in good faith and to make every reasonable effort to conclude and sign a treaty with the Gitanyow; and (2) that for the federal and provincial Crowns to conclude a treaty with the Nisga'a "or to allow the designation for any purpose related to the Nisga'a Treaty over lands and resources in respect of which Gitanyow, Canada and British Columbia are involved in a treaty process until treaty negotiations with the Gitanyow are concluded" would be contrary to the Crown's duty to negotiate in good faith, significantly undermine the Gitanyow claim to "overlapping" territory in the Nass Valley and nullify the Gitanyow treaty process.(52)

In March 1999, Williamson J. of the British Columbia Supreme Court ruled on the first issue. He held that, while the federal and provincial Crowns were not under an obligation to enter into treaty negotiations with the Gitanyow, having done so their fiduciary obligations toward Aboriginal peoples resulted in "a duty to negotiate in good faith" that was binding on all Crown representatives. A declaration to that effect was issued.(53) In April, Canada and British Columbia appealed the ruling on the basis, *inter alia*, that subjecting the treaty process to court supervision could turn negotiations into an avenue for litigation.(54) Originally scheduled for May 2000, the appeal, like the second question raised by the Gitanyow,

---

(50) The Gitanyow are culturally Gitxsan.

(51) A discussion of overlapping claims in the Nass River watershed from the Gitxsan and Gitanyow perspective can be found in Neil Sterritt, "The Nisga'a Treaty: Competing Claims Ignored!," *B.C. Studies*, No. 120, Winter 1998-99, p. 73.

(52) *Gitanyow First Nation* v. *Canada*, [1999] 1 C.N.L.R. 66, par. 1 (B.C.S.C.).

(53) *Luuxhon et al.* v. *Her Majesty The Queen in Right of Canada et al.*, [1999] 3 C.N.L.R. 89, par. 70-75.

(54) DIAND, *News Release*, "Federal Government Concerned Decision Undermines Treaty Negotiation Process – Appeals *Luuxhon* Ruling," Vancouver, 21 April 1999, available online at http://www.inac.gc.ca/nr/prs/j-a1999/index_e.html.

remains in abeyance.(55) In November 1999, subsequent to the resumption of active negotiations in June of that year,(56) the federal and B.C. governments made the Gitanyow a land and cash offer.(57) Although the Gitanyow criticized the joint offer for failing to take adequate account of their concerns,(58) the parties have continued to negotiate,(59) with some progress apparently achieved in 2000 and 2001.(60)

The overlap issue affects many claims in British Columbia. In deciding a preliminary procedural matter in the Gitanyow case, Williamson J. noted that "myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims." In his view, "if the parties fail to deal with [this] conspicuous problem, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated settlements."(61)

In *Delgamuukw* v. *British Columbia*, the Supreme Court of Canada encouraged the negotiation rather than litigation of Aboriginal title claims, adding that "[t]hose negotiations should also include other Aboriginal nations which have a stake in the territory claimed."(62) The British Columbia Treaty Commission has also underscored the urgent need for governments and First Nations to address the sensitive overlap question.

---

(55) Correspondence with DIAND official, 20 September 2001.

(56) British Columbia Treaty Commission, *Annual Report 1999*, "First Nations in Stage 4, Agreement in Principle Negotiations: Gitanyow Hereditary Chiefs," June 1999, accessible *via* the BCTC website, at http://www.bctreaty.net/annuals/99stage4.html.

(57) B.C. Ministry of Aboriginal Affairs, *Treaty Negotiations Information Bulletin*, "Canada and B.C. Present Settlement Offer to Gitanyow," 29 November 1999, located at http://www.aaf.gov.bc.ca/aaf/gitoffernov27.htm.

(58) Suzanne Fournier, "Offer Insulting, Say Gitanyow," *Vancouver Province*, 30 November 1999, p. A15.

(59) British Columbia Treaty Commission, *Annual Report 2000*, "Status of Each Negotiation," June 2000, accessible *via* the BCTC website, at http://www.bctreaty.net/annuals/00status.html.

(60) British Columbia Treaty Commission, *Annual Report 2001: The Year in Review*, "Status of Each Negotiating Table," September 2001, accessible *via* the BCTC website, at http://www.bctreaty.net/annuals/2001%20Annual%20Report.pdf .

(61) *Gitanyow First Nation* v. *Canada*, [1998] 4 C.N.L.R. 47, par. 41 (B.C.S.C.).

(62) [1997] 3 S.C.R. 1010, par. 185-86.

> The First Nations Summit, Canada and B.C., in reviewing the treaty process as a result of the Delgamuukw decision, have agreed to examine the issue of overlaps. The Treaty Commission believes that experience in B.C. and elsewhere will lead the parties to conclude that it is essential to resolve issues relating to overlap claims early in negotiations, well before the parties agree to the contents of an Agreement-in-Principle.(63)

The BCTC proposed that "agreements in principle should be signed only if a number of key guidelines [in the area of overlapping claims] are met."(64) This position was reiterated by the Chief Commissioner of the BCTC in testimony before parliamentary committees considering federal ratification legislation.(65)

The general consensus among the Parties, the BCTC, First Nations groups and other experts in Aboriginal matters is that overlap situations are best resolved between or among affected First Nations prior to the conclusion of any land claim agreement. According to the Minister of Indian Affairs and Northern Development, current federal policy holds that despite the absence of an overlap agreement, a treaty may be concluded with a First Nation that is ready to settle where: 1) the group has held good faith negotiations with its neighbour(s); 2) measures to resolve the overlap have proved unsuccessful; and 3) the treaty explicitly provides that it will not affect any Aboriginal or treaty rights of any other Aboriginal group.(66)

6. The Extinguishment Question

The highly problematic "extinguishment" language of cession and surrender used in previous land claim agreements was not reiterated in the Final Agreement. According to some, essentially the same result flows from the "modified rights" approach in Chapter 2 general

---

(63) British Columbia Treaty Commission, *Annual Report 1998*, "Overlaps," located at http://www.bctreaty.net/annuals/98overlaps.html.

(64) British Columbia Treaty Commission, *Newsletter*, "Overlap Agreements a Must in Treaty Negotiations," Vancouver, October 1998, located at http://www.bctreaty.net/updates/oct98overlap.html.

(65) See, for example, Standing Senate Committee on Aboriginal Peoples, Issue No. 4, 23 February 2000, evidence of Miles Richardson, available *via* the Committee's website.

(66) *Ibid.*, Issue No. 7, 23 March 2000, evidence of Hon. Robert Nault, P.C., available *via* the Committee's website.

provisions referred to above dealing with exhaustive definition of section 35 rights and "release." This issue remains a pressing one for First Nations for which extinguishment or its equivalent ought not to be a pre-condition for treaty conclusion. The opposing view holds that the language is necessary because treaties must produce certainty and ensure finality.

In this respect, it should be noted that reports to the federal government have addressed the extinguishment issue. In 1995, both the federal fact finder mandated to explore alternative treaty models(67) and the Royal Commission on Aboriginal Peoples suggested that certainty might be achieved without extinguishment, with the latter recommending that the policy be abandoned in favour of one viewing modern treaties as instruments of co-existence.(68) The then Minister of Indian Affairs said that he would use these reports and other proposals in giving further consideration to the extinguishment issue. In April 1999, the United Nations Human Rights Committee recommended to the federal government "that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the [*International Covenant on Civil and Political Rights*]."(69) To date, no comprehensive new policy has been released, leaving a contentious issue for Aboriginal groups unresolved.

D. Ratification of the Final Agreement

The validity of the Final Agreement hinged on ratification by the Nisga'a, British Columbia and Canada.

---

(67) The Hon. A.C. Hamilton, *A New Partnership*, Minister of Public Works and Government Services, Ottawa, 1995. Hamilton advised that certainty could be secured by incorporating six essential elements in treaties, including: provisions detailing the land and resource rights of all Parties as well as the rights of others affected by the treaty; mutual assurance clauses in which the Parties agree to abide by the treaty; mutual statements that the treaty satisfies the claims of all Parties to the land covered by the treaty and that no future claims will be made except as they arise under the treaty; a dispute resolution process, and so forth.

(68) Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment*, Minister of Public Works and Government Services, Ottawa, 1995.

(69) *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/79/Add.105, 7 April 1999, par. 8. See also *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, E/C.12/1/Add.31, 10 December 1998. The documents may be accessed *via* the website of the United Nations High Commissioner for Human Rights at http://www.unhchr.ch/.

For the Nisga'a, ratification processes involving Nisga'a assembly consideration of the Final Agreement, followed by a referendum, were completed in November 1998. Members of the Nisga'a Nation endorsed the Final Agreement by a vote of 1,451 (61%) to 558 (23%), with 356 (15%) eligible voters not taking part in the vote.(70) Among Nisga'a opponents to the Final Agreement, a prominent concern appeared to be that too much territory had been conceded by Nisga'a negotiators in light of the area initially claimed.(71)

Ratification by Canada and B.C. required signature of the Final Agreement by an authorized Minister of the Crown, and the enactment of settlement legislation. On 30 November 1998, Bill 51, the Nisga'a Final Agreement Act, was introduced in the British Columbia Legislative Assembly. The ratification bill passed second reading on 13 January 1999, with detailed study in Committee of the Whole beginning the following day.(72) Following a government motion to end debate, the bill was passed on 22 April 1999.(73) Conflicting views on the constitutional issues referred to above, and other legal and constitutional questions, found frequent expression throughout the Bill 51 legislative process.

On 4 May 1999, then Minister of Indian Affairs and Northern Development Jane Stewart signed the Final Agreement on behalf of Canada. The federal legislative process began with the introduction in the House of Commons of Bill C-9, An Act to give effect to the Nisga'a Final Agreement, on 21 October 1999. On 1 November, the bill was referred to the House of

---

(70) Canada NewsWire, "Official Results of the Vote on the Nisga'a Treaty and the Nisga'a Constitution," New Aiyansh, B.C., 13 November 1998. With this vote, members of the Nisga'a Nation also accepted the Nisga'a Constitution provided for in Chapter 11 of the Final Agreement.

(71) In April 2000, the B.C. Supreme Court ruled that the interlocutory injunction application of a small group of Nisga'a seeking to prevent the coming into force of federal ratification legislation ought not to proceed while the bill was still before the Senate: *House of Sga'nisim, Nisibilada* v. *Canada*, 5 April 2000, [2000] B.C.J. No. 831 (Q.L.), affirmed by the British Columbia Court of Appeal on 20 April, [2000] B.C.J. No. 821. On 20 April, following the completion of ratification proceedings by Parliament, the B.C. Supreme Court denied the application, ruling that in the circumstances of the case, it "is not appropriate to take the extraordinary step of enjoining the executive from carrying out its statutorily authorized duties."

(72) The debates may be consulted *via* the website of the B.C. Legislative Assembly, at http://www.legis.gov.bc.ca/1998-99/hansard/, under the heading "Hansard Finals." Chapter 2 General Provisions, debated from 19-21 January 1999, and Chapter 11 Nisga'a Government provisions, debated from 13-20 April 1999, may be of particular interest.

(73) Adjournment of the Legislative Assembly coinciding with the appointment of a new Minister of Aboriginal Affairs interrupted examination of Bill 51 between 1 February and 29 March.

Commons Standing Committee on Aboriginal Affairs and Northern Development following a time allocation motion to limit second reading debate. Bill C-9 was reported back to the House of Commons without amendment following hearings in Ottawa and British Columbia from 3 November through 25 November, during which the Committee heard various contrasting views supporting and opposing the Final Agreement, primarily on legal and constitutional grounds. Several hundred amendments proposed by members of the then Reform Party having been defeated at report stage, Bill C-9 was passed by the House of Commons on 13 December, and introduced in the Senate the following day.

The Standing Senate Committee on Aboriginal Peoples to which the bill was referred on 9 February 2000 held hearings in Ottawa from 16 February to 23 March. Generally speaking, the evidence before the Committee addressed issues similar to those raised before the House of Commons Committee, in particular, the constitutionality of the Final Agreement, and actual or potential inequities arising from the unresolved overlap issue.(74) On 29 March, Bill C-9 was reported back to the Senate without amendments but with Observations urging the negotiating Parties to ensure that overlap issues are resolved to the satisfaction of concerned First Nations prior to the conclusion of land claim agreements with any of them. During the course of third reading debate, it was proposed that third reading be delayed for six months to enable the government to consider a reference to the Supreme Court of Canada on the constitutionality of the Final Agreement, as some witnesses before the Committee had urged. This proposal was defeated, and Bill C-9 adopted on 13 April 2000. The Governor General gave Royal Assent the same day.

The enactment of Bill C-9 by Parliament concluded ratification processes mandated by the Final Agreement, giving legal effect to the first modern treaty in British Columbia. The Final Agreement took effect on 11 May 2000, and will be implemented in accordance with the Implementation Plan agreed to by the three Parties. In the first year following ratification, for example, the Nisga'a Legislature (the Wilp Si'ayuukhl Nisga'a) adopted approximately 20 pieces of legislation as authorized by the Final Agreement.(75)

---

(74) Parliamentary proceedings relating to Bill C-9 can be consulted *via* each Committee's website according to the dates indicated.

(75) Edward Allen, "The Year So Far, the Year Ahead," *Hak'ak'a'a: The Key To The Nisga'a Nation*, Vol. 1, No. 1, July 2001, accessible *via* the Nisga'a Nation website, at http://www.ntc.bc.ca/July01opt.pdf.

E. Judicial Proceedings

On 19 October 1998, the British Columbia Liberals initiated proceedings in the Supreme Court of British Columbia against the federal and provincial governments and the Nisga'a Tribal Council seeking declarations, *inter alia*, that the Final Agreement:

- is unconstitutional because it establishes a Nisga'a Government with authority to make laws which, in certain areas, "prevail" over federal and provincial laws to the extent of any inconsistency or conflict;
- constitutes an unauthorized and unconstitutional derogation of the powers and authority of the B.C. Legislative Assembly and of the federal Parliament; and
- breaches the Charter guarantee of democratic rights by denying non-Nisga'a citizens any right to vote for, or to participate as members in, Nisga'a Government.(76)

The provincial Liberals contended that the Final Agreement's measures ought not to have been brought into effect by provincial and federal legislation until the adoption of resolutions to amend the Constitution by the Legislative Assembly and Parliament. They expressed their commitment to a "delegated, truly municipal-style of aboriginal self-government," and maintained that British Columbians are entitled to a "province-wide referendum on the basic principles for treaties."(77)

In February 1999, a B.C. Supreme Court judge concluded that the Liberals' court case should not proceed until legislation ratifying the Final Agreement had been adopted by both the provincial legislature and Parliament.(78) The case proceeded in May 2000 and, on 24 July 2000, Williamson J. dismissed the plaintiffs' application.(79) In essence, he made the following findings:

- Although the Aboriginal right of self-government had been diminished by the British Crown's assertion of sovereignty and after Confederation, it had never been extinguished.

---

(76) British Columbia Liberal Party, "Press Statement on Nisga'a Court Proceedings," Victoria, 19 October 1998.

(77) *Ibid.*

(78) *Gordon Campbell et al.* v. *Attorney General of British Columbia et al*., [1999] B.C.J. No. 233 (Q.L.).

(79) *Campbell et al.* v. *A.G.B.C./A.G.Can. & Nisga'a Nation et al.*, 2000 BCSC 1123.

- Sections 91 and 92 of the *Constitution Act, 1867* did not exhaustively distribute all legislative power to Parliament and the provincial legislatures, but only the powers previously held by the colonies. They did not, for example, interfere with the Royal Prerogative to negotiate treaties with Aboriginal groups, or supersede the constitutional Preamble, under which unwritten principles and values are fundamental to the Constitution.
- Aboriginal rights represented such unwritten principles under pre-Confederation imperial policy and after Confederation. Rulings of the Supreme Court of Canada

> [support] the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed . . . in 1867. The federal-provincial division of powers . . . was aimed at a different issue and was a division "internal" to the Crown.

- The Aboriginal peoples of Canada, including the Nisg̲a'a, had legal systems prior to contact that continued in diminished form. Since 1867, Canadian courts have enforced Aboriginal laws, demonstrating that a limited right to self-government persisted following the Crown's assertion of sovereignty.
- The Supreme Court of Canada has confirmed that under section 35 of the *Constitution Act, 1982*, treaty rights such as those set out in the Final Agreement, like Aboriginal rights, are not absolute. Section 35 rights may be infringed by Parliament or the provincial legislature, subject to the requirement that the Crown justify any such interference, consistent with the honour of the Crown.
- Thus, while section 35 guarantees and protects the limited self-government the Nisg̲a'a retained after the assertion of sovereignty, decisions taken pursuant to the exercise of this now-treaty right are subject to infringement.

> The [Final Agreement], negotiated in full knowledge of the limited effect ... of the constitutional promise of s. 35, itself limits the new Nisg̲a'a governments' rights to legislate...

As a result of these limitations, Nisg̲a'a governmental powers are neither absolute nor sovereign.

- The Final Agreement does not violate the voting rights provision in section 3 of the *Canadian Charter of Rights and Freedoms*: first, section 25 of the Charter shields Nisga'a treaty rights from erosion by other Charter provisions(80) and, second, the voting rights provision applies exclusively to elections to the House of Commons and provincial legislative assemblies.
- It is not unusual for citizens to be subject to laws without having had any participation in selection of candidates or candidacy for the institution that enacts the laws, as provincial residency requirements and other regulatory or administrative practices demonstrate.

The plaintiffs filed a Notice of Appeal of this ruling to the British Columbia Court of Appeal. However, in August 2001, the B.C. Liberals, in government and hence party to the Agreement since May 2001, abandoned their appeal.(81) The Liberal Government is following through on a controversial campaign commitment to hold a province-wide referendum on treaty principles within a year of its election.(82) Critics of the planned referendum process express concerns, among others, that it will foster increased polarization among the province's Aboriginal and non-Aboriginal residents, subject minority rights to the rule of the majority, exacerbate economic uncertainty, and is unlikely to produce useful guidelines.

There have been at least three other challenges to the Final Agreement's constitutionality:

- In a Statement of Claim filed in October 1998, a group of plaintiffs with interests in the B.C. fisheries(83) sought to overturn the Final Agreement or to force a referendum. The group argued, *inter alia*, that the Final Agreement purports to establish a government not authorized by the Constitution, fails to ensure that Nisga'a government is sufficiently

---

(80) See note 40 and accompanying text.

(81) The Final Agreement provides that "No Party will challenge, or support a challenge to, the validity of any provision of this Agreement" (Chapter 2, section 20).

(82) In August 2001, a committee of Liberal members of the Legislative Assembly was formed to solicit public opinion across the province on appropriate referendum questions, and to report back to the government by 30 November 2001. The NDP's 2 MLAs announced they would boycott Liberal committee proceedings and form a parallel committee, with First Nations representation, to conduct their own broad consultations.

(83) Including the B.C. Fisheries Survival Coalition, individual commercial fishermen, the Area C Salmon Gillnet Association and Reform Member of Parliament John Cummins.

responsible, and establishes a commercial fishery based on race. The case has not proceeded.

- In December 1999, a separate group of plaintiffs(84) launched a class action suit alleging, *inter alia*, not only that the creation of an unauthorized order of government is unconstitutional, but also that neither Parliament nor the B.C. Legislative Assembly has the authority to transfer lands and resources to the Nisga'a. The case has not proceeded.
- In March 2000, members of the Kincolith band of the Nisga'a Nation initiated a challenge to the Final Agreement, alleging, among other things, that it violates the Charter as well as the constitutional division of powers.(85) This proceeding is not the first to be commenced by the same litigants; in 1998, the British Columbia Supreme Court(86) and Court of Appeal(87) rejected their application challenging the legality of the Agreement-in-Principle. During the week of 17 September 2001, Canada, British Columbia and the Nisga'a Nation went before the province's Supreme Court seeking to have portions of the plaintiffs' statement of claim in the current action removed or amended.(88)

(84) The group includes a non-Aboriginal plaintiff, who may be joined by others in similar circumstances, claiming his rights as a home owner will be affected when his property is surrounded by Nisga'a-owned land, and the B.C. Citizens First Coalition.

(85) *Sga'nisim Sim'augit* v. *Canada, British Columbia, the Nisga'a Nation et al.*, also known as the Chief Mountain case.

(86) *Frank Barton and James Robinson* v. *Nisga'a Tribal Council et al.*, Kamloops Registry No. 24853, 31 July 1998.

(87) *Frank Barton and James Robinson* v. *Nisga'a Tribal Council*, CA025009 and 025019, 1 October 1998.

(88) Interview with DIAND official, 21 September 2001.