

THE SELF GOVERNMENT LANDSCAPE



WHY SELF GOVERNMENT?

*This article was written by the Treaty Commission with the participation of University of Northern British Columbia Professor Greg Poelzer, whose paper *Inherent vs. Delegated Models of Governance*, as well as several other papers on self government, is available at www.bctreaty.net*

Purpose

First Nations were self-governing long before Europeans arrived in Canada. In 1876, the *Indian Act* came into effect, undermining traditional governance systems and imposing regulations on aboriginal peoples' lives that, to a lesser extent, continue to this day. First Nations, for more than 100 years, have demanded the right to govern themselves according to their own traditions – to be free of the *Indian Act*.

Aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed in Section 35 of the *Constitution Act, 1982*. However the full scope of First Nation governance powers, potentially recognized and protected by the constitution, remains unresolved by the courts. Consequently, the obligations, rights and responsibilities of the governments of Canada, BC and First Nations with regard to law-making remain unclear.

We can continue to resolve the scope of First Nation governance powers through the courts, on a case-by-case basis, or we can do so through treaty negotiations. A negotiated resolution, which takes into account the interests of all of the parties, rather than a solution imposed by the courts, is obviously the preferred approach.

The act of treaty making gives recognition to First Nations on their traditional territories as legitimate governments representing the interests of their constituents. Treaty negotiations afford us a unique opportunity to clarify the obligations, rights and responsibilities of each government and establish a new relationship among First Nations and the governments of Canada and BC.

After treaties, First Nations will have agreed ownership and jurisdiction over portions of their traditional territories and the resources within them. Self government is the principal means by which First Nations formalize their relationship to those lands and resources today and preserve their traditions, language and culture. First Nations will once again have the autonomy to make decisions about their lives and their futures.

Under the BC treaty process, it is intended that each First Nation has the opportunity to negotiate a self government arrangement to meet its unique social, cultural, political and economic needs.

The BC Claims Task Force, established in 1991 to make recommendations for a made-in-BC treaty process, envisioned that the self government arrangements within the treaty would have constitutional protection. Constitutionally protected self government, as in the Nisga'a treaty, is passed as Canadian law. Constitutional protection ensures that self-governing powers established by the treaty would be very difficult to take away.

Approaches Vary

Self government for First Nations in British Columbia and in other parts of Canada has taken and will take, many forms.

The *Nisga'a Final Agreement* is the first modern comprehensive treaty with constitutional protection. Amendment requires the agreement of all three parties – the treaty cannot be revoked unilaterally. It clearly spells out the continuing obligations, rights and responsibilities of each of the governments to the agreement.

The agreement sets out all areas where Nisga'a government can make laws. There are 14 areas in which Nisga'a laws prevail on Nisga'a lands and for Nisga'a citizens. Eight of these areas have little consequence for non-Nisga'a citizens, including, among other things, some Nisga'a government institutions, citizenship, culture and language and the licensing of aboriginal healers. Nisga'a laws prevail in six other areas of jurisdiction which have implications for non-Nisga'a citizens and neighbouring communities. These include, for example, education and forestry. Although Nisga'a laws prevail in these areas, the laws must meet or exceed federal and/or provincial standards. In other words, Nisga'a jurisdiction is qualified to ensure harmony with the laws of Canada and British Columbia.

The *Sechelt Indian Band Self-Government Act* (1986) and the Westbank First Nation Self-Government Agreement (1998), which has not been ratified, differ from the *Nisga'a Final Agreement*. In both cases self government authority is delegated from the federal and/or provincial governments.

Sechelt self government is the result of negotiations among the three governments and the federal and provincial governments passing legislation to create Sechelt government. Through an agreement in principle reached at the treaty table in 1999, Sechelt sought to leave its 16-year-old self government arrangement in place.

Westbank self government takes its form from an agreement between the First Nation and the Government of Canada, but is explicitly not a treaty. The Westbank self government agreement represents an interim or incremental approach to self government while treaty negotiations are continuing with the governments of Canada and BC. An interim or incremental approach allows a First Nation to gain some self government powers now in order to achieve community goals and build further capacity for self reliance.

Although Westbank self government does not have constitutional protection, the proposed agreement with Canada cannot be changed without the consent of both parties.

Scope of Governance Negotiations

While governance provisions are being actively negotiated at some treaty tables, no self government arrangements have yet been concluded under the BC treaty process. Governance negotiations typically address First Nation law-making powers, their source of authority and harmonization with the laws of Canada and British Columbia.

The Principals have agreed to consider incremental governance arrangements that would serve as building blocks for a final self government agreement. In this way, through interim measures agreements, the parties in individual negotiations can test governance arrangements before they are finalized through treaty negotiations.

Self Government Powers

Specific law-making powers to be exercised by First Nations will vary from treaty to treaty as each First Nation is likely to negotiate self government arrangements that meet its unique social, cultural, political and economic needs.

While specific First Nation law-making powers are a matter for negotiation, the parties have made some assumptions around their potential scope. For example, it is anticipated that self government will be exercised within the existing Canadian constitution. Therefore, aboriginal peoples would continue to be citizens of Canada and the province or territory where they live, but may exercise varying degrees of jurisdiction and/or authority. Also, it is anticipated the *Charter of Rights and Freedoms* and the *Criminal Code of Canada* would apply and that First Nations would consult with non-aboriginal residents on decisions that directly affect them, for example, health, school and police boards.

Source of Authority

The source of authority for First Nation law-making powers is an issue the parties are endeavoring to resolve through treaty negotiations.

First Nations assert their right to govern themselves is an inherent aboriginal right protected by the constitution – the right is not given or delegated, but is based on their existence as organized societies in this country for thousands of year.

The Government of Canada recognizes that aboriginal people have an inherent, constitutionally protected right to self government – a right to manage their own affairs. The BC Government has indicated a desire to negotiate a delegated form of self government.

First Nations currently exercise a variety of law-making powers. For example, the inherent right is the source of authority for First Nation law-making in matters relating to customary marriages and adoption. First Nations also enact laws under authority delegated to band governments by the federal government under the *Indian Act*, or by federal or provincial legislation as is the case with Sechelt and in

the proposed Westbank First Nation Self Government Agreement.

However, the *Indian Act* is not intended to define the nature and scope of any right of self government. On the contrary, the limited range of powers that band governments are authorized to exercise under the *Indian Act* do not adequately equip First Nation governments with the tools necessary to develop effective governing institutions and resolve the social and economic problems facing many First Nation communities.

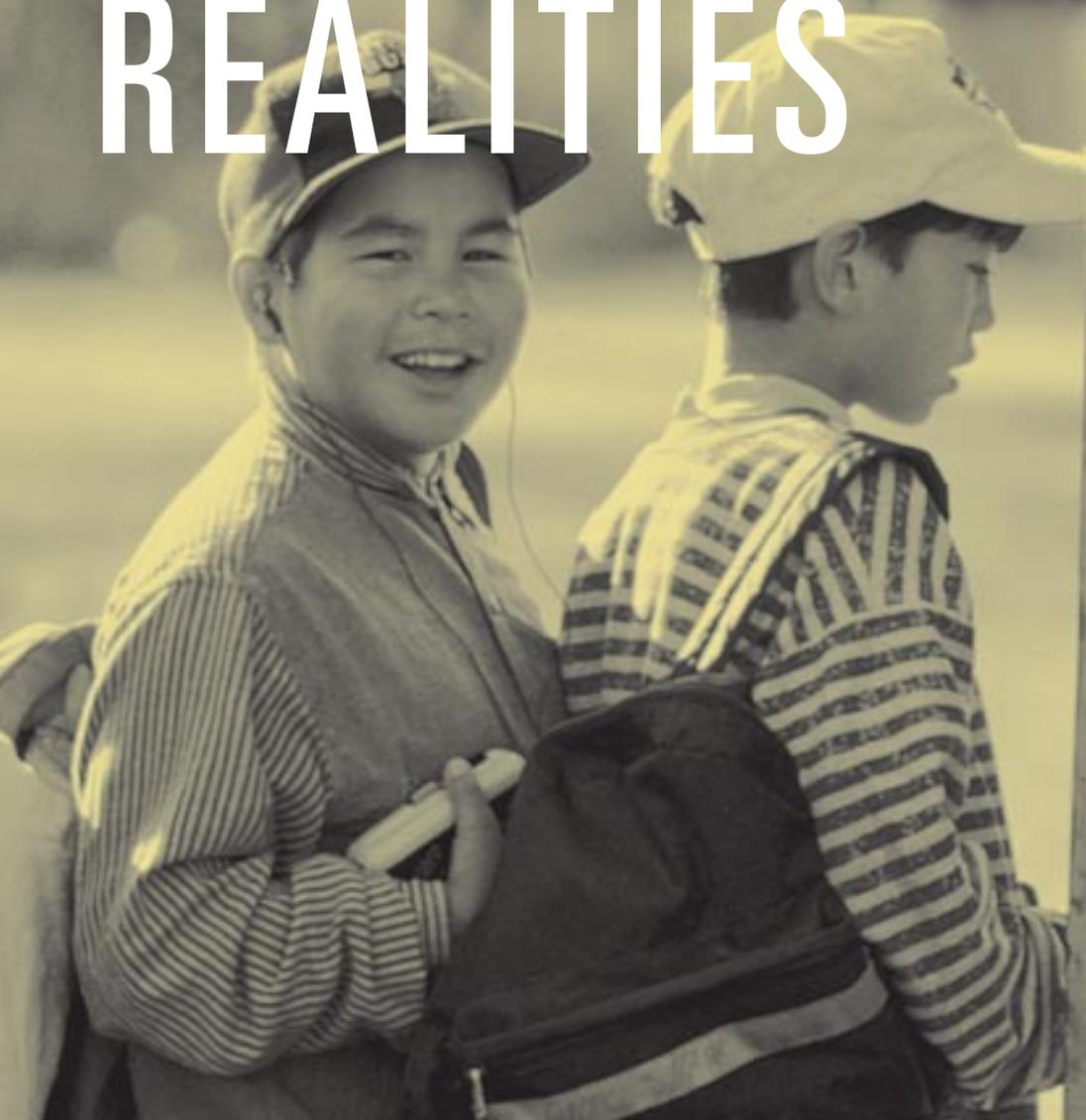
Harmonization of Laws

Federal, provincial and aboriginal laws must work in harmony, particularly where governments share law-making authority. For example, under the Nisga'a treaty, the Nisga'a and the provincial government share jurisdiction over wildlife. The Nisga'a treaty contains provisions that set out the respective roles and responsibilities of each government and define which laws will prevail in the event of a conflict.

“First Nation government, often referred to as self government, will be an essential component of a new relationship.”

BC Claims Task Force Report

SELF GOVERNMENT: THE FIVE REALITIES



1

HISTORICAL REALITY

Prior to European settlement, aboriginal people were living in communities as distinct and self-sufficient nations. Each nation had its own language, its own system of law and government and its own territory.

When British Columbia joined Canada in 1871, aboriginal people, who were the majority, had no recognized role in political decision-making. The Terms of Union made no mention of aboriginal title to land.

The Government of Canada assumed responsibility for “Indians and lands reserved for Indians.” The Government of British Columbia retained control over the creation of further Indian reserves and considered the “Indian land question” to have been resolved.

Aboriginal people could not vote provincially until 1949 and federally until 1960 or stand for election and they could not pursue their claims in court. The federal and provincial governments would not address the land question or force the matter into the courts.

First Nations were subjected to federal control under the constraints of the *Indian Act*. The “band” system of administration was imposed and federal officials made bands subject to detailed supervision that, to a lesser extent, continues to this day.

In spite of these policies, the traditional values, identities, institutions and allegiances of the aboriginal peoples endured. In their communities and among their councils there is the profound conviction that their aboriginal title and their inherent aboriginal right to govern themselves remains in effect, that no treaty or other lawful action has extinguished that

title or their right to self government. First Nations see aboriginal title as an historical, lawful claim to whole traditional territories amounting to ownership.

Indian reserves currently cover approximately 0.4 per cent of the British Columbia land base, which represents only a small portion of the land First Nations traditionally occupied and used.

“Justice Williamson, however, ruled not only that a limited form of self government survived confederation and was confirmed by s.35, but that the Nisga’a treaty properly and legitimately gave that limited right definition and content.”

Hamar Foster, University of Victoria professor, speaking at a Treaty Commission conference in March 2002.

2 LEGAL REALITY

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Under section 35 of the *Constitution Act, 1982*, aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed.

In *Calder (1973)*, the Supreme Court of Canada ruled that if there is an aboriginal historical presence on the land, aboriginal title could be recognized at common law – without the need for any action by the provincial or federal governments.

The recognition of aboriginal title in *Calder* as a legal right was sufficient to cause the federal government to establish a comprehensive land claims process.

In *Sparrow (1990)*, the Supreme Court ruled that unless legislation had a “clear and plain intention” to extinguish aboriginal rights, it did not have that effect, so those rights are continuing. After 1982, aboriginal rights and title were further protected from extinguishment by Canada’s constitution.

In *Delgamuukw (1997)*, the Supreme Court decision confirmed that aboriginal title exists in British Columbia, that it’s a right to the land itself – not just the right to hunt, fish or gather – and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights may be affected.

In *Campbell (2001)*, the BC Supreme Court ruled self government is an aboriginal right. The legal argument that all power in Canada is held by the federal or provincial governments was rejected by Justice Paul Williamson.

The BC Liberal Party, then in opposition, challenged the Nisga’a Final Agreement arguing the

treaty violates the constitution by setting up a Nisga’a government with sweeping powers that are legally reserved for the federal and provincial governments.

The court was asked to decide whether the Nisga’a treaty created a new order of government so as to require an amendment of Canada’s constitution. Sections 91 and 92 of the *British North America Act*, it was argued, divide all law-making power between the federal and provincial governments.

The court said the aboriginal right to self government was one of the underlying values of the constitution that remained outside the powers that were distributed to parliament and the provincial legislatures in 1867.

“We can’t put those (aboriginal) rights or title on hold while we negotiate treaties. The rights and title exist now as obligations and responsibilities that lie upon both the provincial and federal governments.”

Geoff Plant, Attorney General and Minister Responsible for Treaty Negotiations, speaking at an open Cabinet meeting in October 2001.

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POLITICAL REALITY

In 1990, there was both a political need and an appetite for beginning treaty negotiations with First Nations.

Direct action by First Nations was prominent throughout the 1970s and 1980s, with sit-ins, blockades and rallies. In the 1980s these actions were aimed at asserting aboriginal title and halting specific resource development projects.

The province's refusal to participate in negotiations was beginning to tell. Direct action and court rulings had delayed resource development projects pending the outcome of disputes over aboriginal rights and title. Economic activity was disrupted and investment in the province was down. Price Waterhouse calculated the cost to British Columbia of not settling land claims to be \$1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone.

As a result, the BC government made the decision to join First Nations and Canada in resolving long-standing issues through negotiations. Then in 1991, First Nations and the governments of Canada and British Columbia agreed to a made-in-BC treaty process for resolving the dispute over title to land in this province. A task force made 19 recommendations for creating a BC treaty process. Its report said, "First Nation government, often referred to as self government, will be an essential component of a new relationship."

The Government of Canada in 1995 announced its policy to implement the inherent right to aboriginal self government, paving the way for self government negotiations to occur across Canada. The

goal is an end to the *Indian Act* in favour of First Nation governance.

Minister Nault reiterated Canada's position in July 2002 saying, "Our position has been very clear. It won't change. We don't believe that municipal style type government for First Nations is on. We've been down that road many years ago; it has not been effective, nor will it work."

"We can't wait – and the younger generation of First Nations peoples will not wait – for inherent rights to mean more than words on a page."

Robert Nault, Minister of Indian and Northern Affairs, speaking at a Treaty Commission conference in March 2002.

4 ECONOMIC REALITY

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A 13-year study of indigenous nations in the United States has found economic success is closely linked to the power to make decisions.

Dr. Stephen Cornell, co-author of the Harvard Project on American Indian Economic Development, says their projects research has yet to find a single case in the United States of sustained economic activity on indigenous lands in which a government body other than the indigenous nation itself makes the decisions about government structure, natural resource use, internal civil affairs and development strategies.

The economic research has found four critical factors for success:

- 1 Jurisdiction (self government) matters.
- 2 Effective governing institutions are necessary.
- 3 Governing institutions must be appropriate to the people.
- 4 The indigenous nation must have a strategic orientation.

Speaking to the Treaty Commission conference, *Speaking Truth to Power III*, on self government in March, Cornell said jurisdiction matters because, “it puts the development agenda and control of the necessary resources in indigenous hands.

“Without jurisdiction, indigenous nations are subject to other people’s agenda. You can’t ask people to be accountable if you don’t give them decision-making power. Whoever is making the decisions has the accountability. Jurisdiction marries decisions to consequences, which leads to better decisions.”

The second critical factor, not surprisingly, is that good government is essential to economic success. Cornell said governments establish and enforce the rules of the game. “Those rules send a message to investors – everybody from some person thinking of taking a job in the nation’s government to someone thinking of starting a small business on reserve land – and the message is either, ‘Do or don’t invest here.’”

Thirdly, the governing institution must be culturally appropriate and have the support of the people.

“Institutions that match contemporary indigenous cultures are more successful than those that don’t,” said Cornell. “On the other hand, there is no blank cheque: institutions have to perform. We’ve seen nations who have admitted their traditional way of doing things isn’t up to the challenges they currently face, but that doesn’t mean they just grab a set of institutions off the shelf ... it means they spend some hard time trying to invent new institutions that they believe in and that are capable of getting the job done.”

The fourth factor for success is strategic orientation. A strategic orientation “encourages politicians to serve the nation instead of themselves because there is an explicit sense of what it is the nation is trying to do.”

“We think the focus of attention should be on helping indigenous nations build themselves through competent governments that are of their own making.”

Dr. Stephen Cornell, co-director, Harvard Project on American Indian Economic Development, speaking at a Treaty Commission conference in March 2002.

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ONE FIRST NATION'S REALITY

Excerpts from a presentation by Chief Sophie Pierre, Ktunaxa/Kinbasket Tribal Council administrator, to the Treaty Commission conference on self government, March 2002.

What makes a society? How do you recognize a society? We believe there are four main characteristics, four pillars, if you will, like the four directions. These pillars represent our land, our people, our language and culture and our governance structure. It's pretty much the same the world over. When you threaten one of these, as we see in the Middle East, it leads to war. The ability to govern is the heart of any nation. In our contemporary world this is always the understanding; we all exist within a broader context that places limits on our internal decisions.

We, the Ktunaxa people, have governed ourselves, followed our cultural beliefs and traditions since beyond time in memory. Traditional leadership roles and responsibilities have always been tied to a collective survival. All citizens understand their role and value within their community and tribe and respect the role and value of other citizens within their tribe.

Our ability to exercise full governance has been limited by the relatively recent imposition of the *Indian Act*. The imposition has forced a great deal of difficult change and adjustment within the nation. This new system of governance is deeply flawed for our situation and I argue it is flawed for all aboriginal people in Canada. New distributions of power and authority have created deep divisions within our communities.

One of the most difficult realities that we face is that our previous method of governance, the Ktunaxa governance, has been largely lost through the legislated restriction of First Nations cultural practices within Canada. As we redevelop our governance system, we face an enormous challenge ... we have to consider how to blend, first of all, our relationship with and within Canada and British Columbia, secondly, community comfort levels and the new distribution of powers and authorities and expectations created under the last century of governance under the *Indian Act* and lastly, elements of historical government structures and powers that have withstood the passage of time. We need to be creative on how we blend those three areas.

We recognize there are many challenges in developing governance methods to replace current governance structures within our communities. However, we have evolved and adapted through many upheavals and we are confident that we will continue to grow and change to meet these challenges.

Our treaty process is a nation-driven process – all citizens will be consulted on all aspects of the treaty. All citizens will be well informed; all decisions will be made in the best interests of our land, resources, culture, language and the future of the nation.

A community education and citizen involvement process has evolved over this time. The Treaty Council sponsors community meetings in all five communities on a monthly basis. It's the forum to review treaty-related documents, refine collective interests on topics and generally keep on top and review what's going on. There are also youth liaison

workers who hold meetings with the youth, although their involvement is not limited to a separate forum.

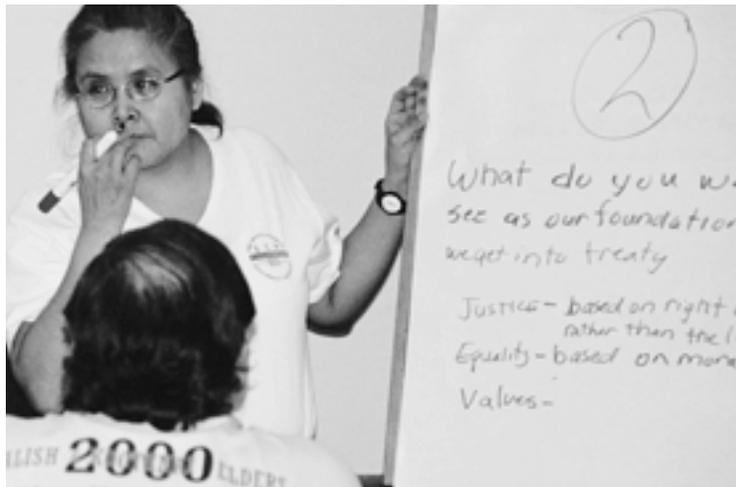
Within our nation we use another forum we call the Treaty Council. The Treaty Council meets on a monthly basis and membership is open to any citizen of the nation. The Treaty Council's role is to help guide the scope and pace of the negotiations. This forum is an opportunity to bring people together on a regular basis from all of our communities to discuss current treaty matters.

Through these forums we first built a respectful conversation and then we began to work on building a collective vision. From this common vision, we then build consensus for whatever the topic or issue we may be discussing. Of course, our internal views are then tempered and modified by the views and interests as a result of negotiating a treaty on a tripartite basis (with the governments of Canada and BC). We build this into the citizen-driven process also.

Our citizen-driven process took a long time to develop – it's not a perfect process and we are constantly refining and adjusting how we operate. We regularly use another forum as well – we call them nation meetings – and they are held every three months, give or take.

We are involved in many initiatives outside the treaty process: a good example of the progression outside the treaty would be in the area of child and family services and the delegated enabling agreement we signed in 1999 as a first step in pre-treaty implementation of governance jurisdiction and authority related to child welfare within our nation.

There are many challenges, many mistakes are made along the way, but we must persevere, for treaty negotiations, according to our perspective, are really a process of rebuilding our nation.





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Merging past and present, the Treaty Commission symbol represents the three Principals in modern-day treaty making – the governments of Canada and British Columbia and First Nations. Pointing in an upward and forward direction, the symbol implies a “coming together” pivotal to successful negotiations and treaty making.