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Aboriginal Land Claims in British Columbia: Serious Concerns About the Nisga'a Deal

by Melvin H. Smith, Q.C.

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Editors & Designers: *Kristin McCahon*

For media information, please contact Suzanne Walters, Director of Communications,
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A faulty blueprint for BC

If the *Nisga'a Final Agreement* is the template for the 50 or more land-claim agreements or treaties yet to be negotiated in BC as Premier Glen Clark says it is, then at the end of the exercise, British Columbians will wake up to discover that their federal and provincial governments will have substantially altered forever the economic, social, and political fabric of their province.

We will discover that those governments have greatly diminished the public land and resource base of the province—the greatest source of our wealth; they have turned over much of their taxing power to native bands; they have paid out billions of dollars in cash compensation; they have constitutionally entrenched a native-only commercial fishery; and they have authorized and financed an array of 50 or more ethnic-based governments, whose laws in some instances will supplant federal and provincial laws.

Senior governments will have done all of this for less than 3 percent of the population, while confirming to the native people covered by these agreements their right to continue to receive the benefits from the scores of special programs for native people only, which annually cost the Canadian taxpayer about $7 billion.

The federal treaty-making policy, first established in 1973 and originally designed to compensate natives for the loss of their traditional activities, has been expanded into a policy that now provides a cornucopia of economic and social benefits, land, resources, taxing powers, and self-government—all financially backstopped by the Canadian taxpayer.

One might well ask what motivation drives governments to give to 5,500 Nisga'a, only 2,000 of whom actually live in the Nass Valley, outright ownership of 1,930 square kilometres of publicly-owned land (17 times the size of the City of Vancouver or one-half the size of the Okanagan Valley) including timber, mineral rights, water rights, plus cash payments well in excess of $275 million, and a major say in wildlife resource management in an area one-third the size of Vancouver Island.

Part of the answer is that the whole process is driven by the unrelenting efforts of what has been called the "Indian Industry"—the national native leadership, the many lawyers, consultants, advisers and academics, all government-funded, who would keep it going in perpetuity. Couple this with a provincial government unwilling to aggressively defend provincial interests in court, and you have a bad mix. Over-zealous bureaucrats and compliant politicians complete the loop. But the Canadian public is out in the cold. Paternalism—telling us what is good for us—is now being visited upon us all.

Those who raise legitimate questions over this major restructuring of British Columbia's social, political, and economic order are called alarmists, obstructionists, or worse. All of this has shades of the Charlottetown Accord debate where those who questioned what was going on were branded by the establishment as "the enemies of Canada." No one should be intimidated by such labels. The following concerns are being shared by more and more British Columbians as they become more acquainted with this subject:

- Is there any legal justification for the wholesale distribution of wealth that treaties will bring about?

- Will treaties like the Nisga'a agreement really bring certainty and finality?
- Are treaties just about "minority rights," as the BC premier suggests, and therefore the majority should not have a say as expressed in a referendum?
- What are the full costs of the Nisga'a deal?
- Is it true that Nisga'a will become full taxpayers like other Canadians?
- Is a "free vote" in the Legislature on this deal a sufficient expression of the public will?
- Is the proposed Nisga'a government purely municipal in nature or is it something much more?
- What about the democratic rights of non-Nisga'a who reside on Nisga'a lands?
- Will the Nisga'a agreement achieve the desired result of remedying the discredited native policy in Canada of the past 130 years?

These are legitimate questions which an increasing number of British Columbians are asking. Sad to say, slick answers, or in some cases no answers at all, are forthcoming from governments. This paper attempts to briefly answer these questions. But a preliminary question is, has BC really neglected its obligation to native peoples?

Has BC neglected its obligation to native peoples?

British Columbians have been told that most of the rest of Canada has long since entered into treaties with their native people and because we have not done so (apart from the Douglas Treaties on southern Vancouver Island) it is now our turn.

Just what was the nature of treaty-making 100 or more years ago when the "numbered treaties," which totally blanket the three prairie provinces, were negotiated? To what extent (if at all) have we in BC been derelict in our duty towards native people in failing to enter into treaties until now, and what are the lessons to be learned from these earlier efforts for modern day treaty-making?

Treaty No. 7 between the Crown and the Blackfeet, Blood, Piegan, Sarcee, and Stony native people of southern Alberta, entered into in 1877, is typical of all the numbered treaties and is as much in full force and effect today as it ever was. By its terms the native people surrendered any right or interest in 35,000 square miles of territory in return for reserves being set aside for them sufficient to provide one square mile for a family of five. To this was added small annual payments ranging from $25 for chiefs down to $5 to every other Indian, a rifle for each chief, an annual supply of ammunition, and a small selection of farm implements to encourage the practice of agriculture. That was about it.

Note that the main feature by far of these earlier treaties was the establishment of Indian reserves. Although BC did not enter into early treaty-making, the point to be stressed is that it did establish Indian reserves and did so in spades.

So what's all this fuss about BC not having entered into treaties? A good argument can be made that BC achieved the same result—establishing reserves—without entering into treaties. So much so that today, out of a total of 2,323 reserves in the whole of Canada, 1,634 of them are located in BC.

True, BC's reserves are generally smaller in size than those on the Prairies but that is due in part to the difference of the two regions and the difference in native pursuits on the prairie which were partially based on agriculture, versus the coastal native economy which was based on the products of the sea. That said, the per capita difference is not all that great. BC has 17 percent of Canada's status Indians and 13 percent of the area of all reserves in Canada.

Why is the significance of existing reserves being totally ignored by modern day BC treaty-makers? Surely BC negotiators should be holding to the position that BC has already paid the price and that, under the Constitution, outstanding obligations to the native people are Ottawa's responsibility. At the very least, existing reserves should be offset against land-claim settlements. This is not happening. The ownership of 1,930 square kilometres of land to be given to the Nisga'a is *in addition* to the approximately 70 existing Nisga'a reserves.

There are other lessons to be learned from Treaty No. 7. It is six pages long. Contrast this with the Nisga'a agreement which is 252 pages, plus an appendix volume with an additional 462 pages.

The Nisga'a agreement contains literally dozens of special rights, concessions, and privileges not available to non-Nisga'a. Collective land ownership of 1,930 square kilometres, mineral rights, water rights, timber rights, commercial fishing rights, effective control over the annual harvest and sale of designated wildlife species in an area one-third the size of Vancouver Island, the right to establish a quasi-provincial government financially supported by others, major tax and royalty concessions, exemption of some provincial licence fees. The list goes on.

The point is that because of section 35 of the Constitution Act, 1982, these rights are forever "locked-in," and cannot be retrieved in the future by either federal or provincial law. The Nisga'a would have to agree to any removal of these government-granted rights. Treaties, like diamonds, are forever. That is why it is folly for negotiators to assume omniscience and produce voluminous treaties that attempt to cover every eventuality.

What if public policy attitudes on these issues change over time? What if the provincial government finds that the deal is too generous or that Nisga'a government should be cut back but the Nisga'a leadership doesn't see it that way? Ordinarily Parliament or the provincial legislature could take the necessary remedial steps, but not here. That is why the Nisga'a deal should be subject to the broadest and most careful public scrutiny. To let British Columbians in on the deal, essentially negotiated in secret, only after the initialing ceremony and be told by those in authority that no changes will be considered is the height of arrogance and is simply unacceptable.

Total cost of Nisga'a deal untold

Throughout the Nisga'a negotiations which concluded last July, estimates of the total cost of the agreement to the federal and provincial governments, and ultimately the Canadian taxpayer, have been a moving target. This much is sure, however: the initial price tag put on the deal substantially underestimates the total cost, which is continuing to move ever upward.

In 1995, the provincial government announced that BC and Ottawa were offering $125 million, 1,900 square kilometres of crown land, a share of the Nass River fishery, and the promise of aboriginal self-government. By the time the draft agreement in principle was released in 1996, the cash component had jumped to $190 million.

But this figure failed to include any valuation for the Crown land to be transferred, and the value of the timber thereon. Under pressure, the government reported that the Crown land was worth $107 million. This then would bring the cost of the deal up to nearly $300 million.

Reputable critics were quick to point out that the government had seriously underestimated the value of the land and the resources given up in the deal. At $107 million, this works out to only $228 an acre. But independent assessments of the timber resources alone put the value at $350 million to $490 million. Furthermore, the value of the minerals, including the precious minerals, under

the land have never been estimated, and the value of the extensive water rights extended to the Nisga'a under the deal have not been factored in.

Another substantial cost component is the lost revenue to the provincial government, the total value of which is impossible to quantify. Among the provisions leading to lost provincial revenue are these:

- The Nisga'a government will not pay provincial property taxes on the 1,930 square kilometres of land to be transferred to them, nor any capital or wealth taxes.
- The Nisga'a government will be exempt from paying the Goods and Services Tax, Social Services Tax, and Motor Fuel Tax. Furthermore, according to a government publication, the Nisga'a government and its corporation will be treated "the same as a municipality" in the payment of income tax. The fact is that municipalities do not generally pay income tax, but neither do they operate extensive entrepreneurial enterprises like the Nisga'a government will.
- The Nisga'a will be exempt from the payment of provincial timber fees (stumpage) and other provincial fees for water rights, mineral rights, and wildlife and fishing licences.
- Nisga'a citizens will be exempt from paying provincial property taxes on their residences.

There are other inducements as well which governments have given to conclude the deal. These include $41 million to upgrade highways in the territory; $30 million to pick up the tab for the Nisga'a negotiating fees and implementation costs; and the promise by the province to look favourably upon an application by Nisga'a to the Forest Renewal Fund to rehabilitate Nisga'a forests. One Nisga'a spokesman has stated that they could seek up to $200 million from the fund.

Perhaps the greatest cost component of all will be the ongoing cost to senior governments of the operation of the Nisga'a government. For the first several years it will cost the taxpayer $32 million a year, but the treaty imposes a perpetual obligation on senior governments to backstop the Nisga'a government and its public programs with taxpayer funds as needed. Only if it becomes "feasible" will such fiscal transfers be reduced over time.

One economic study commissioned by the Fisheries Survival Coalition puts the total cost of the Nisga'a deal at $1 billion. The government now concedes that the cost is at least $490 million.

Having regard to the fact that the Nisga'a deal is the template for 50 or more other land-claim agreements, what are the implications of these revised figures on a province-wide basis? If one extrapolates the more conservative estimate for the Nisga'a deal ($490 million) to the roughly 150,000 aboriginal citizens that stand to benefit from treaties, the total cost rises to $13 billion. But given the more realistic estimates of crown land values and the uncertain price tag for aboriginal government, the costs could approach $30 billion.

What are the long-term benefits likely to be derived from these kinds of expenditures to a collective-based society? Will the lot of the average native person covered by these treaties be substantially improved as a result? Sad to say these are questions that are not even being asked, much less answered, in official circles.

Nisga'a government—much more than municipal government

By no stretch of the imagination can the Nisga'a central government, to be established under the Nisga'a treaty, be considered merely municipal-like in nature, as government spokesmen and publications claim. Municipal government is relatively easy to recognize when you see it. First

and foremost, it is not an order of government recognized by the Canadian Constitution; only the federal and provincial governments are that.

Municipal governments are established by a provincial legislature delegating certain limited and local powers to a municipal body which it creates. The important point is that whatever powers the legislature delegates to a municipality, it can at any time in the future retrieve. It can even abolish altogether the very municipality it has created. The recent forced amalgamation and consolidation of municipal governments in Toronto is a case in point.

The second hallmark of genuine municipal government is that the powers given to it are local in nature, such as: taxation of real property; zoning and land-use planning; building inspection; regulation of noise, animals, and waste disposal; local road construction and maintenance; local business and trade licences; local policing; and the imposition of penalties for contravening these laws. There are other powers of like kind, but in essence they result in the passage of bylaws relating to local community.

The third feature of municipal government is that all adult residents within a municipality have the right to run for municipal office and, most importantly, vote for their municipal governments.

The form of the Nisga'a central government proposed under the Nisga'a final agreement fails to meet the test of any of the three criteria for a municipal type of government. It fails the first test, because the powers it is given by the province under the treaty are not delegated to it but are, in fact, forever irretrievable because they are contained within a land-claim agreement "constitutionalized" by section 35 of the Constitution Act, 1982. No city or lesser municipality in Canada is given that kind of irrevocable status. The federal minister of Indian and Northern Affairs acknowledges that this is the first time in the history of treaty-making in Canada that this kind of aboriginal self-government is included within a "constitutionalized" land-claim agreement.

It also fails the second test of a municipal type of government, in that the powers to be given to it go far beyond the right to pass bylaws on what are essentially community matters of the kind listed above. It will have the right "to make laws" (the language used in the Canadian Constitution to describe federal and provincial powers) on what are clearly provincial legislative powers and some federal ones. For example, the Nisga'a can make laws on: education (K-12); higher education (including establishing one or more universities); the delivery of health services; child and family services; businesses, trades and professions (except accreditation); their fish, aquatic plants, and wildlife entitlements. The list goes on.

These Nisga'a laws—yet to be passed by a Nisga'a government, yet to be established under a Nisga'a constitution—will supplant federal and provincial laws on the subjects mentioned above if there is any conflict between them.

On certain issues, such as adoption and solemnization of marriage, the laws of the Nisga'a government will extend outside of the Nass Valley to the Nisga'a people wherever they may live in BC. Far from being municipal government, all of these things put Nisga'a central government in a category never before seen in Canada.

Finally, Nisga'a government also fails the third test of municipal government, in that it prevents non-Nisga'a residing on Nisga'a lands from voting in Nisga'a government elections—notwithstanding that such people are subject to Nisga'a laws of general application and are potentially liable to Nisga'a property taxes. For non-Nisga'a merely to have some vaguely defined advisory input to lower-level public bodies has not proven effective where it has been tried elsewhere.

To sum up, the kind of central government that is proposed in the Nisga'a agreement is a far cry from municipal government. Any government ad, radio or TV spot, or spokesperson who says it is, is not being truthful. This is far more than an issue of semantics. It is a fundamental restructuring of how this province is to be governed in the future, brought about without non-Nisga'a consent. What can be done about it?

Why a referendum is necessary

For the past 20 years, the native leadership throughout Canada has been attempting, by various means, to persuade governments to amend the Canadian Constitution to add aboriginal government as a third order of government. The first attempt involved holding four top-level conferences between the prime minister, the premiers, and the native leadership in Ottawa between 1983 and 1987. Those conferences failed to agree on the principle and no amendment to the constitution on aboriginal government was made.

The next attempt was made through the Charlottetown Accord of 1992. It proposed to put into the Constitution an enormous array of special rights for natives including a third order of government. As we know, the Charlottetown Accord was defeated by the good sense of a majority of Canadians in a referendum. Incidentally, native people cast the largest No vote of any definable group because, it has been suggested, "ordinary" natives feared the enormous concentration of power that would be given to their ambitious leaders.

The native leadership then changed their strategy and began to argue that a third order of government has been implicitly within the Constitution all along. That is a view that the courts do not hold. The courts have continued to interpret the Constitution as establishing only two orders of government—federal and provincial—with total legislative authority divided between them.

Now, the Nisga'a agreement attempts to establish a third order of government without the benefit of a formal constitutional amendment. Given the nature of this third order of government as described above, in my view, such a move would be unconstitutional.[1] Others think the same and are prepared to test the issue in court. The BC Liberal Party has launched court proceedings; a separate lawsuit testing the same issue has been commenced by the Fisheries Survival Coalition. If these lawsuits, which will take months or years to complete, are successful, then all or a portion of the Nisga'a agreement would be found to be invalid. The only way it could be validated would be to amend the Canadian Constitution. Before that could be done, under existing BC law, a referendum would have to be held which would, at long last, give British Columbians a chance to vote on the deal.

I suggest that regardless of whether the courts ultimately find there is a legal requirement for a referendum, there are other good reasons to have such a vote—and have it now. The premier says it would be unwise to hold a referendum because the majority cannot be trusted with minority rights. This treaty is not about minority rights but about the rights of us all. It, along with 50 more treaties, will forever restructure the economic, social and political life of the province in a fundamental way. The treaty-making process in its present form will establish 50 or more ethnically based governments through the province financially backstopped forever by taxpayers, transfer massive portions of land and resources to a few, and erode the provincial tax base. The premier acknowledges that this treaty is the most crucial issue now facing British Columbians but balks at giving them a direct say on the matter.

1 For a more detailed analysis of the constitutional argument, please see the appendicies.

Instead, we are promised a free vote in the Legislature to decide the issue. Unfortunately a free vote is impossible because the provincial government has staked its political future on the passage of the treaty. It is reported that at a June 1998 meeting of his party's council, the premier expressed the view that the treaty provided an opportunity to gather support from "our traditional allies in progressive, environmental, and community groups." Later he is reported to have said that "all elements of my party must be in the debate because this is what we believe in."

Government MLAs cannot vote their conscience or their ridings' wishes in these circumstances. It would be a brave MLA indeed who would vote against party lines on this one.

Urbanites not immune from treaty-making

Treaty-making in the Nass Valley tucked away in northwestern BC, the home of the Nisga'a, seems so remote from the major population centres of the province as to cause many city-dwellers and suburbanites never to give the matter a serious thought. Although they may have some vague understanding that this will be the first of 50 or more treaties, it will only be when the process reaches their back yards, so to speak, that their interest will be heightened and concerns expressed. This is unfortunate because the principles being put in place now in the Nisga'a treaty are those which will be demanded as a starting point in future treaties.

One of the reasons for this suburban somnolence is the assurance given by government negotiators that "private property is not on the negotiating table." We cast our eyes over our 60-foot lot and home upon it, or our condominium, either of which may have taken half a life time to pay for, and are content to know that our home is still our castle and likely to be undisturbed by the treaty-making process. Unfortunately, it is not quite that simple.

In the first place, although we are assured private property holdings will not be disturbed, the native negotiators have made it plain that they expect to be compensated in dollars by the government for private property values. Such a proposition borders on fantasy when the calculation of private property in Greater Vancouver, for example, is considered. There is not enough money in the bank, much less in the federal and provincial treasuries, to meet such a demand. Nonetheless, the four separate bands laying claim to the Lower Mainland will press the point in negotiations and the likely outcome will be (if the current treaty-making policy is followed) that urban settlements will be top-heavy on cash payments and lighter on the transfer of Crown land simply because such land is in short supply in many urban areas. So the first impact of urban-centred treaty-making will be even larger cash payments than in the Nisga'a deal. That means substantially higher taxes for all.

Second, urban treaty-making will likely gobble up whatever Crown land there is within the area. Parks will not be immune. Stanley Park is part of one or more land claims, as are other public parks in Greater Vancouver. How this will play out remains to be seen. This much we do know: the BC government has set aside 1,200 acres of crown land purchased 30 years ago for the Roberts Bank superport in case it is needed to settle a land claim with the Tsawwassen Band. On the basis of the Nisga'a deal, the band would have the final say on land-use regulation and could overrule the Agricultural Land Reserve (ALR) legislation. If this were done, one estimate is that the value of such land would skyrocket to $100,000 an acre, whereas non-native neighbours would have their land, currently valued at $5,000 an acre, remain in the ALR. So much for equality.

It is this inequitable regulation of land use which has the greatest potential for conflict, division, and discord between lands covered by urban treaties and neighbouring lands. The ongoing dispute between the Municipality of Delta and the Tsawwassen Band over the development of reserve lands in a way which is incompatible with Delta's own requirements is a case in point. This is minor compared with what the situation would be if urban treaties give "First Nations" the final say on land use within their larger treaty lands.

Government treaty-makers must insist on the application of the ALR over treaty lands and the provincial government's ultimate say on land-use decisions throughout the province, and not give that power away under treaties.

In my view, treaty-making of any kind in urban settings makes no sense at all. Treaty-making can be satisfactorily achieved only if it takes place prior to the influx of settlers. That is why all treaty-making on the prairies began about 1880 and was completed by 1925. All treaties entered into since that time cover sparsely populated areas of the Northwest Territories, Northern Quebec, and Yukon.

Moreover, many individual native people living on reserves adjacent to urban centres in British Columbia are substantially integrated into the larger community around them. Why turn back the clock?

Certainty and finality

For governments, the *quid pro quo* for entering into treaties is the assurance that such treaties contain the sum total of all rights which that particular native group would ever claim. To achieve this, all previous treaties in Canada, including the recently concluded treaties in Northern Canada, have contained an extinguishment clause whereby the particular native group "cedes, releases and surrenders" any and all rights not contained within the treaty.

These words have on occasion been the subject of judicial interpretation. They were alluded to by the Supreme Court of Canada, in various contexts, in Delgamuukw. In short, their meaning has been judicially established.

Over the past five years, the native leadership has indicated a strong resistance to accepting an extinguishment clause of this kind in future treaties. The present federal government has acquiesced in that view and it appears that the provincial government has followed suit. Much discussion has taken place between governments and the native leadership to formulate words that would provide certainty and finality without using the word "extinguishment."

As a consequence, in the Nisga'a agreement the time-honoured words are replaced by another formulation of words wherein only the term "release" is used. The new words may or may not prove to be sufficient to achieve finality. No one can be assured that the new words will be interpreted by a court in the same way as the old ones. In fact, there is likely to be a tendency for a court to attach some significance to the different wording. Moreover, with the concept of "living treaties" in vogue in certain academic circles and beyond, this departure from the well-established term is unsettling. This much is certain—the Nisga'a see the new words more favourably in their interest.

There is, of course, another dimension to this matter of certainty and finality, and that is the danger of building uncertainty into the treaty itself. In many respects this is what has happened with the Nisga'a agreement. The forest industry has recognized this. In a news release dated August 5, 1998, the Council of Forest Industries identified four major areas of uncertainty in the forest sector alone. The council asked:

- Will compensation for expropriation of forest tenures be adequate to maintain economic confidence?
- What effect will the right of aboriginals to decrease or even halt harvesting timber on treaty lands have on the forest industry province-wide, with such rights being contained in many more treaties yet to come?
- How will existing sawmills be affected by the uncertainty of wood supply during the five-year transitional period and beyond?
- Will aboriginal-enforced laws relating to wildlife, fisheries, and environmental protection affect timber harvests outside Nisga'a lands?

Discretionary decision-making in the hands of boards and committees is another means of creating uncertainty. I have counted at least 50 explicit instances in the Nisga'a agreement where there must in future be "consultation," "agreement," "discussions," or "approval" between the Nisga'a government and the provincial or federal governments. Many of these require side agreements that, in turn, will require renegotiation after a term of years. No one can predict what the outcomes of these many sets of negotiations will be. To that extent, therefore, there is a clear element of uncertainty on many key aspects of this treaty.

This intergovernmental interface will turn many a Nisga'a into a bureaucrat, and greatly increase the demands placed on the staff and resources of the provincial government particularly. If there are to be 50 more treaties like this one, I have no hesitation in predicting that at the end of it all the provincial Ministry of Aboriginal Affairs will be one of the largest in government. How ironic, considering that according to the Canadian Constitution the provinces have no explicit legislative jurisdiction over Indians.

Will there be certainty and finality with this treaty-making process? Not very likely.

Analyzing the problem

A recently released study by the federal Department of Indian Affairs confirmed what we all know: that living conditions on many Indian reserves in Canada are comparable to those of the Third World. Unemployment, poor housing, drug abuse, lack of education and economic opportunity are far worse than the national average. The plight of many native young people who have left their reserves and have congregated in large cities is, in many cases, equally pitiful.

This much is certain: the present state of affairs must not continue; on that we surely all agree. Where there is genuine disagreement is on the appropriate course of action best likely to provide a remedy.

There are those who advocate the treaty-making process in BC, of which the Nisga'a agreement is the first manifestation. They wrongfully brand anyone who raises serious questions or concerns over the implications of treaty-making as being mean-spirited and determined to keep native people in their backward condition. In their clamour to be politically correct, governments seem disinterested and even antagonistic towards any consideration of an alternative solution.

Before going on to suggest an alternative solution to the treaty-making process, allow me to list a couple of self-evident but often ignored facts.

First, treaties, long since in place in the rest of Canada, have not resulted in any better living conditions on reserves established by those treaties than on the 1,634 reserves already in place in BC. In fact, the government study referred to above found that living conditions on BC reserves were somewhat better than on those elsewhere in Canada. Don't misunderstand me. I am not advo-

cating the continuation of the reserve system. In fact I advocate the very opposite. I am merely saying that entering into treaties in other parts of Canada has not proved to be the panacea.

Second, the problem has not been solved through the massive expenditure of public funds made each year. Special federal programs for status and treaty Indians (which incidentally will continue to be paid to the Nisga'a) amount to close to $7 billion a year. Provincial programs and tax exemptions add at least a billion dollars more. So massive amounts of money have not solved the problem.

Well, what is the solution? It starts with a deeper diagnosis of the problem. Poverty, drug abuse, high unemployment, poor housing on reserves, et cetera, are not the problem. They are merely symptoms of it. The problem is that the native people have suffered for 130 years under a federal government policy regime that has made them wards of the state. It is a system based on the collective rather than individual ownership and therefore has discouraged self-reliance, individual initiative, and personal rewards for success. It places the power and dollars in their leadership's hands rather than in the hands of individual natives. And above all, it has been a system that has treated native people differently in law from other Canadians.

Such a policy, with the Indian Act as its centrepiece, has isolated aboriginal people from mainstream Canadian society; it has allowed special federal laws based on race to supersede many provincial laws of general application; it has isolated reserve communities from the provincial society to which they are adjacent; and it has deprived native people of developing any sense of provincial community.

Sad to say, the proposed Nisga'a treaty does not strike out in a new direction but reconfirms this failed and discredited federal policy even to the extent of incorporating some of the undesirable provisions of the Indian Act into the treaty. The ghettos which are reserves are to be made larger, and the barriers caused by separate legal regimes are to be made still higher.

Any solution to the outstanding native issues in this province must take into account the decision of the Supreme Court of Canada in the Delga-muukw case of December 1997. Although the court ordered a new trial and did not find one square foot of BC to be covered by aboriginal title, it set out the criteria on the nature and scope of aboriginal title, thus making it easier to establish it in specific cases than had previously been the case.

How the application of the criteria will play out in site-specific situations remains to be seen. Some analysts of the decision interpret it in a narrow way, suggesting that aboriginal title would largely be confined to existing native settlements and other areas clearly in their possession. Other analysts see the criteria as giving a much more expansive application to the aboriginal title so as to cover much of the province.

Moreover, by its decision in the Delgamuukw case, the Supreme Court of Canada has seriously weakened the meaning and scope of the assertion of British sovereignty in 1846 over the territory of what is now British Columbia. Sovereignty was always considered to have established English law and its institutions within the territory and placed land ownership in the hands of the Crown in right of the colony. The Court's decision has put all this into question. It's time to take the necessary steps to shore up the province's legitimacy and to also provide a fair and reasonable solution to the land claims issue. Federal and provincial legislation will be necessary and possibly a constitutional amendment as well.

There has to be a better way

This much is certain. The present treaty making process in BC is not the answer. It is in need of a substantial overhaul. The provincial Minister of Aboriginal Affairs acknowledges it would take 100 years to complete, and that it would bankrupt the province. There has to be a better way. Why not extend to our native people, at long last, the full rights and responsibilities of Canadian citizenship? In specific terms:

1. Transfer the ownership of Indian reserves to the various bands who now occupy them to be dealt with in the same way as other landowners deal with their lands.

2. Where treaties do not exist, augment reserve lands with the transfer of Crown land, or dollar compensation in lieu, on the basis of a limited but reasonable interpretation of aboriginal title as found in the Delgamuukw case, with a portion of such lands being made available to individual band members.

3. Encourage, where viable, the establishment of democratically-elected municipal governments on native lands, with municipal-like powers only, but outside of land-claim agreements so as to avoid constitutional rigidity.

4. Limit treaties to interests in land and allow all economic and social programs of general application, both federal and provincial, to be available to native people, with some degree of preferential treatment for 25 years.

5. Begin to phase out, to be completed within 25 years, the special federal programs for aboriginals only.

6. Confirm that all laws and government institutions both federal and provincial will apply to native people throughout Canada.

7. Repeal the Indian Act.

8. Turn out the lights forever in the federal Department of Indian Affairs, and do likewise in the various provincial ministries responsible for aboriginal affairs.

The end result would be to integrate native people into Canadian society and yet provide once and for all compensation for their special land rights—integration without cultural assimilation. It is the only workable solution for all concerned. It is time to get on with it.

Appendix A: Analysis of Self-government Aspects of the Nisga'a Final Agreement

The Nisga'a Agreement purports to give a lengthy list of legislative powers to a Nisga'a central government yet to be established under a Nisga'a constitution.

Whereas up to now federal and provincial law has been in full force and effect in the 1,930 square kilometres that will be transferred to the Nisga'a, after the transfer many provincial and some federal laws may be replaced or overridden by Nisga'a laws in that area and over the people therein whether, in some cases, they be Nisga'a or non Nisga'a. This represents a significant diminishment of the exercise in that part of the province of the legislative powers of the Legislature of British Columbia given to it by the Constitution of Canada.

The same can be said of those Nisga'a laws which will have paramount effect on the vast area adjacent to Nisga'a lands (i.e., Nisga'a laws in relation to wildlife entitlements). Moreover, to provide, as the Agreement does, that Nisga'a laws rather than provincial laws apply, in certain respects, to Nisga'a people outside the territory, with their consent, is a further restriction on the exercise of the legislative powers of the Legislature of British Columbia over those people.

To be specific, the Nisga'a Agreement would make Nisga'a laws constitutionally paramount on at least 17 subject matters and give the Nisga'a government shared legislative jurisdiction over another 16 subject matters. (See Appendix B.) There is an even more troubling aspect of this matter of giving paramountcy to Nisga'a laws over provincial laws which is contained in section 13 of the General Provisions of the Agreement. That section provides that the terms of the Agreement prevail over both federal and provincial laws, if there is a conflict, in virtually all aspects relating to Nisga'a.

When this diminishment of provincial legislative power is coupled with the effect of these provisions being "constitutionalized" under section 35 of the Constitution Act, 1982, and therefore virtually unable to be undone in future, then, in my view, the consequence is that this constitutes a *de facto* amendment to the Constitution of Canada because it permanently diminishes the powers of the BC legislature.

Furthermore, when these kind of legislative powers are extended to 50 or more other "First Nations," one can see the cumulative effect this would have on the diminishment of provincial legislative powers.

If this proported transfer of paramount law-making power from the province to the Nisga'a constitutes a *de facto* amendment to the Constitution of Canada, as I suggest it does, what flows from that? The answer is that section 52(1) of the Constitution Act, 1982, makes it clear that such provisions are of no force and effect. To rectify the matter, this *de facto* amendment could be perfected and be given constitutional validity only by invoking the appropriate amending formula of the Constitution referred to above.

Some will argue that the "inherent right" to native self-government is implicit in the words "aboriginal rights" as they appear in s.35 of the Constitution Act, 1982, and that this renders this transfer of legislative authority valid. This is a popular view among certain proponents of the native cause in the academic community but there is no juridical support for this. Even the Supreme Court of Canada in Delgamuukw, with its expansive view of aboriginal rights and title,

pulled back on any finding on the inherent right issue.

I would ask these proponents that if, as they say, the inherent right is already in the Constitution, why did the federal-provincial-aboriginal leadership and their officials hold four constitutional conferences in the 1980s unsuccessfully attempting to get agreement in putting the concept into the Constitution? And why was it a part of the Charlottetown Accord if it was already in the Constitution?

Section 8 of the General Provisions of the Agreement states that the Agreement does not alter the Constitution of Canada, including the division of powers between Canada and British Columbia. While such a statement may be interesting in showing the intention of the Parties, it is not in any way determinative of the issue. It is for a court of competent jurisdiction to consider the issue of constitutionality. The Parties cannot wish it away.

On a related issue, section 9 of the General Provisions states that the Canadian Charter of Rights and Freedoms applies to Nisga'a government. It is highly debatable whether such a clause has any force or effect. Section 32 of the Charter itself sets out to whom the Charter applies. It applies to Parliament and the provincial legislatures in respect of all matters within their authority. Can it be said that Nisga'a government is under federal or provincial authority?

I want to stress that my view that certain sections of the self-government provisions of the Agreement are constitutionally invalid is based on the combination of the transfer of legislative power to Nisga'a government with Nisga'a paramountcy with the "constitutionalization" of those rights by section 35 of the Constitution Act, 1982, brought about because they are rights contained in a land claim agreement.

Of all of the modern land claim agreements, only British Columbia has allowed itself to fall into this constitutional difficulty. That is because in all of the agreements negotiated in recent times, self-government has been negotiated outside land claim agreements and therefore those separate self-government agreements are not "locked in" to the Constitution by s.35 of the Constitution Act, 1982. The other two land claim agreements are those in Northern Quebec—the James Bay and Northern Quebec Agreement with the Cree and Inuit of northern Quebec (1975), and the Northeastern Quebec Agreement with the Naskapi Indian Band (1978). In both of those, there is a measure of self-government extended, but it is largely administrative in nature with Quebec law firmly overseeing the native self-government established. There is no wholesale transfer of legislative power here. The Quebec government has its hand firmly on the self-government tiller.

In summary it is my view that:

1. The transfer of legislative jurisdiction to Nisga'a government which is to be paramount over provincial legislation, coupled with the effect of s.35 of the Constitution Act, 1982, is to diminish the legislative power of the Legislature of British Columbia and therefore amount to a *de facto* amendment to the Constitution of Canada. It amounts to an irretrievable delegation of legislative power in that, at some later date, the Legislature or government of British Columbia, acting alone, cannot retrieve its own constitutional power.

2. Because the provisions in question did not come about through a formal amendment to the Constitution, by virtue of s.52(1) of the Constitution Act, 1982, those provisions are likely of no force or effect.

3. The above deficiency can be rectified by invoking the appropriate section of the amending formula of the Constitution of Canada and thereby formalizing the amendment. If this were to be done, present legislation in British Columbia would require a province-wide referendum.

4. The statement contained in the Agreement that it does not alter the Constitution of Canada or the division of powers is of little effect.

5. It is highly questionable whether the Canadian Charter of Rights and Freedoms applies to laws to be made and actions to be taken by the Nisga'a government.

Appendix B

Subject matters where valid Nisga'a laws will be constitutionally paramount include:

- Nisga'a "citizenship";
- Nisga'a government—with capital, wealth and property tax exemptions;
- Nisga'a lands and assets;
- Expropriation;
- Nisga'a fiscal management—including federal and provincial transfer payments;
- "Regulation, licensing and prohibition of businesses, professions, and trades, including the imposition of license fees or other fees…";
- Culture and Language;
- "Preservation, promotion and development" of Nisga'a language and culture;
- Child and Family Services;
- Adoption;
- Pre-school to Grade 12 education;
- Post-secondary education;
- Structure of Nisga'a health care delivery;
- Nisga'a "healers"—or Nisga'a medical practitioners;
- Nisga'a wildlife entitlements—with licence and fee exemption;
- Nisga'a fishing entitlements—with licence and fee exemption;

Subject matters where Nisga'a government will have shared jurisdiction but where federal and provincial laws will be paramount:

- Direct taxation of Nisga'a citizens*;
- Nisga'a police;
- Administration of justice, including a separate new Nisga'a Court;
- Community corrections;
- Social services
- Environmental assessment;
- Forest resources, including Nisga'a forest practices code and scaling standards;
- Prohibition and terms for sale or possession of intoxicants on Nisga'a lands;
- Right to reject gaming on Nisga'a lands;
- Solemnization of marriages of Nisga'a anywhere in BC;
- Wildlife and migratory management;
- Sale and trade of wildlife, migratory birds, and wildlife parts;
- Fisheries and management;
- Training programs for hunters;
- Public order, peace, and safety;
- Traffic and transportation;
- "Cultural employment standards for Nisga'a workers throughout BC.*

* Paramountcy is not stated.

ABOUT THE AUTHOR

Melvin H. Smith, QC, spent 31 years in the public service of British Columbia. A lawyer by profession, from 1967 until 1987 he was the ranking official on constitutional law and constitutional reform issues for four successive provincial administrations. He was a key player in the patriation of the constitution in 1981, and also served as a Deputy Minister for 13 years in various ministries until his early and voluntary retirement in 1991. A leader in the "No" campaign on the Charlottetown Accord, he now spends his time as a consultant, commentator on public issues, columnist, and university lecturer. He is the author of the Canadian best-seller, *Our Home or Native Land?* and lives in Victoria, British Columbia.