

# NATIONAL IMPLICATIONS OF CHIEF MOUNTAIN'S CHALLENGE TO THE THIRD ORDER OF GOVERNMENT AND THE NISGA'A TREATY

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## **Birth of Nations**

It's no secret that human beings understand better what happens afar than what occurs in front of our noses. We can therefore remark with awe at the nation-building exercise that occasioned the downfall of the Soviet Union in 1989, when places like Czechoslovakia had for the first time in recent history to direct its own affairs, to develop a foreign policy, decide how its postal system would work, and create a new sense of nationhood. The result was a traumatic schism between the Czech Republic and Slovakia, the development of a new constitution, and, in the case of the Czech Republic, the ascent of a great leader Vaclav Havel, who molded the new entity into a thriving nation, complete with a healed sense of nationhood and self-esteem.

Few of us have the perspective to realize that the creation of the Nisga'a Nation in the Nass Valley area of British Columbia in the year 2000 precipitated a similar whirlwind of forces that are still in their infant stages. A constitution has been created with an electoral system. A modest system of foreign

relations is developing as the newly elected President of the Nisga'a Nation Chief Joseph Gosnell plots the ways in which he will relate to the head of sister entities, such as British Columbia and Canada. Hundreds of laws and regulations have been issued or are in the process and a multimillion dollar parliament building has arisen to accommodate the legislative processes that arise with the birth of a nation.

Not only do we underestimate the profound impact of the creation of the Nisga'a Nation with the passage of the Nisga'a Treaty but even fewer of us recognize that the very essence of Nisga'a nationhood has yet to be determined, that such essence comes down to the resolution of two competing visions, and that two great leaders are today subjecting those competing visions to review and resolution by the courts of this land.

### **What did the Treaty do?**

The Treaty was passed by the Nisga'a Tribal Council in 1999, the B.C. Legislature in 1999, and the House of Commons in 2000. The treaty transferred \$490 million worth of cash plus 1930 square kilometers of Crown land to the Nisga'a government, now known as the Nisga'a Lisims Government. Supporters of the Treaty said it was a giant first step toward ending land claims uncertainty in B.C. Its critics said it guaranteed racially based voting rights, was an open-ended financial commitment, and was unconstitutional, beyond the powers of the federal and provincial governments to approve. The latter issue is the primary focus of Chief Mountain's challenge to the Treaty, that it attempts to convey a constitutionally entrenched form of self-government that puts the Nisga'a people for many purposes outside both federal and provincial jurisdiction.

### **What is the Chief Mountain Challenge?**

The battle against a third order of government has now moved from the legislatures to the courts.

The Chief Mountain Group is a minority group within the Nisga'a cultural-linguistic group who do not accept that the "Nisga'a Nation" has or ever had authority over them. They

are not prepared to relinquish their constitutional rights as citizens of Canada.

Chief Mountain, an ancestral Nisga'a Chief, is suing the Nisga'a Government and the governments of Canada and British Columbia in an attempt to uphold the Constitution and to reclaim lands he lost due, he says, to the Nisga'a Government's breach of the Constitution. He says that those individuals who stood most to gain from the Treaty traded away Nisga'a lands, without authority, in return for expanded law-making powers never asked for or imagined by Nisga'a elders and ancestors. In a public statement issued July 29, 2002, he said, he is "both a Canadian and a Nisga'a. I have the rights as a Canadian and a Nisga'a which are best protected under the Canadian Constitution, not a constitution passed by a government controlled by [a small elite group]".

The aboriginal plaintiffs in this case fear the loss of their rights as Canadians and as aboriginal persons, a consequence they believe flows naturally from the imposition of a third order of government between themselves and the governments of Canada and BC. The type of political system envisioned provides none of the checks and balances familiar to Canadian citizens, such as an opposition party, an ombudsperson or full protection by the Charter of Rights and by human rights laws.

### **A Theoretical Framework for Evaluating and Creating Treaties**

As Counsel for the plaintiff group, I have been at work for 3 ½ years; have assembled enough documents to fill three filing cabinets; and anticipate boxloads of documents to follow, as we proceed to trial. My challenge in briefing anyone on the case is therefore to arrange the trees into an intelligible forest, and to put a vast array of information into a theoretical perspective that makes some sense. Of great assistance in this respect is the article written by Gordon Gibson, Senior Fellow at the Fraser Institute. As his article demonstrates, Mr. Gibson is a great asset to the country in helping us order our political thinking.

In his article published October 30, 1999 in the *National Post*, Mr. Gibson listed 10 basic principle that ought to characterize all treaty negotiations and all treaties. I discuss these principles below, and how they apply to the competing visions of Chief Mountain and Chief Gosnell:

1. **Municipal-type Government** Whatever the name we use for the aboriginal government involved, that government must be subject to federal and provincial jurisdiction. Otherwise, Canadian sovereignty is undermined.

The vocabulary here is lacking. Indian bands are not municipalities and justifiably resist having their governments characterized as such. However, the terminology is convenient for political scientists, since municipal-style governments are indisputably junior to the province and the federal government. Why can we not call these governments "Aboriginal Governments", on the basis that they deal with matters germane to aboriginal peoples, and that, in the case of conflict, their laws and regulations be subject to federal or provincial laws.

Chief Mountain has no quarrel with other native leaders who seek self-government. But he believes that the lot of his people is better if his people are fully within the Canadian Constitution. For him, this means "I am Canadian". He would say he is better protected by being subject to the obligations of Canadian citizenship than being subject to the government of a small principality with what he calls "exaggerated powers". Like the Chinese dissident in Tien Anmen Square who stood down the tank in front of an international audience, Chief Mountain presently faces off against a government of a small community armed with a large portfolio of powers.

2. **Mandating and Ratification** Negotiating parties must have the right to speak for their constituencies.

Chief Mountain claims that the group which negotiated the Nisga'a Treaty on behalf of Nisga'a people was not

properly mandated. He alleges a host of deficiencies in the electoral process. He claims that the Nisga'a people were unaware until the last moment of the contents of the Agreement-in-Principle upon which they were supposed to vote. He says that people who were summoned to the vote were told they were to vote, not on ratification of the Treaty, but merely on whether or not the Nisga'a were ready to make their choice. He has documentary evidence to show that the Kincolith Band pulled out of the ratification process and that the Nisga'a Tribal Council improperly overrode the duly expressed intention of the Kincolith people to withdraw, based on their revelation that they stood to lose 92% of their ancestral lands in exchange for exaggerated powers to be given to the Nisga'a Government leaders, most of whom would not come from Kincolith. Even more powerful is Chief Mountain's claim that the Nisga'a Tribal Council had no authority to alienate ancestral lands, a right relegated to each of the 61 Nisga'a houses that independently controlled their own lands and customs, according to aboriginal common law. All of these claims together suggest that the Nisga'a Tribal Council was not mandated to effect the negotiations.

Beyond Chief Mountain's claims are the claims of the neighboring Gitanyow Band, which believes part of its ancestral lands were stolen by the Crown to compensate the Nisga'a.

As it stands, the Government of B.C. faces double or triple indemnity, in terms of compensating those Nisga'a people whose ancestral lands were improperly surrendered, plus the overlap claims of the Gitanyow. Premier Campbell, who recently repeated his claim that "There would never be another Nisga'a Treaty" once told us that the Provincial Government was not properly mandated to carry out its negotiations, and that a referendum should have been held in accordance with the provincial *Constitutional Amendment Approval Act*.

British Columbians have indicated clearly we do not favor a third order of government. In the vote on the 1992 Charlottetown Accord, in which native self-government was a major platform, nearly 70% of British Columbians voted "no". Each time a municipal referendum was held on the Nisga'a Treaty during the lead-up debate, residents rejected the Treaty handily.

In the wake of the passage of the Treaty and the Liberals' prominent campaign against a third order of government, British Columbians voted again against the concept. An overwhelming majority said "no" in the Referendum held last year, in answer to the question whether they would support a third order of government.

3. **Reconciliation** Canadians generally wish that all members of our population should live together in goodwill, though not to the point of hamstringing democracy.

The media have reported great things about the triumphant completion of the Nisga'a Treaty. We were provided footage of Chief Gosnell's elegant entry into the B.C. Legislature, at Premier Clark's behest. Occasional stories of economic development from the Nass tempt us to believe that we Canadians have done a great thing. However, as discussed below, we are only beginning to learn of the human rights violations allegedly committed by the Nisga'a Government against individuals who fail to tow the line, in Kincolith and other places. We are only beginning to learn of Chief Mountain's struggle for a voice against rich and powerful governments. While our government negotiators spent over \$70 million to reconcile terms with Nisga'a Tribal Council leaders, the rank-and-file Nisga'a people and their claims were left out. In the next few months, I anticipate we will learn more that drives us to conclude we failed in the attempt to achieve reconciliation with the Nisga'a.

4. **Finality** Mr. Gibson assumed this was a bottom-line goal, for most Canadians, with the possible exception of people in the “Indian Industry”.

A just conclusion of the Nisga’a question should bring finality to the discussion. Stephen Owen argues that “certainty comes not from language of extinguishment but by building relationships with local governments, resource companies and other businesses.” Do you agree? In the Nisga’a Treaty, there are over 50 areas which call for continued discussion or negotiation. Ongoing annual subsidies of \$32.1 million continue, in addition to the huge one-time transfers described above, with only an “obligation” on the Nisga’a Government to try to reduce such fiscal transfers thereafter. Chief Mountain seeks confirmation of title to ancestral lands that he can develop into tourist destinations and resource extraction and an economic base that will sustain his people, NOT continued reliance upon government hand-outs.

5. **Clarity** Often the victim of an attempt to reach agreement, clarity relates to finality. Without clarity, treaties fail to reach their objectives and matters fall back upon the courts for resolution.

This should be a no-brainer, especially given the role the courts will play in interpreting any treaty if the treaty framers make things complicated or unclear. Remember, this is a land claim and a constitutional document. Does it make sense to take 700 pages to record what ought to be an elegant, over-arching agreement? The demand of the Chief Mountain Group is simple: the Group believes the Treaty should deal with ancestral land claims equitably and accommodate local governance in the context of the Canadian Constitution. More on the latter point below.

6. **Equity** A synonym for fairness, equity is not to be interpreted as “just about anything is possible”, Mr. Gibson wrote.

Not only a fair deal, but the appearance of a fair deal. This is surely what is desired, not only by Chief Mountain, but by all Canadians. Chief Mountain's group supports treaty making, just compensation for aboriginal people, healthy economic development for aboriginal communities, and a fair allocation of land.

Equity does not mean disproportionate transfers of wealth, but the furnishing of a just settlement that creates a sustainable economy and ends what Mr. Gibson calls "endless, soul-destroying welfare".

7. **Disentanglement** By this term, Mr. Gibson describes a goal by which the various parties ought to be able to get on with their business subsequent to the treaty without reference to one another.

The Nisga'a Agreement specifies over 50 areas where continuing consultation and agreement are required for implementation. Entanglement frustrates the need for each party effectively to go about its business, though it may be lucrative for members of the so-called "Indian Industry".

8. **Equality in Law** As Mr. Gibson puts it, Canadians are not equal before the law but we should aspire to bring our arrangements increasingly close to this time-honored objective.

In discussing his challenge, Chief Mountain often refers to his relationship to other Canadian people: blacks, whites, Asians and others. Here you have a carpenter who happens to be an ancestral Nisga'a Chief. An alumnus of the residential school system, he has mixed emotions about it, like most Canadians. He knows it harmed some of his people; he also realizes he never would have received an education without it. Most of all, he says "I am Canadian" and in that sense puts himself on the same plane with the rest of us. For this reason, he and his beliefs may be the strongest hope we have of a unified Canada where we celebrate differences but

deal with one another on a basis of equality. Like Mr. Gibson argues in his article, we can in no way deny the existence of aboriginal rights and title, which are explicitly protected in the Constitution. However, as he puts it, "modern treaties should aim to convert such distinctions into cash or into the same kind of property rights – the ownership and control of land and capital, for example – available to other Canadians." If Chief Mountain could reclaim his lands for his house and obtain for the Kincolith people their fair share of entitlements under the Nisga'a Treaty, he would welcome such a proposition. And, as Mr. Gibson writes, "this simple long-term goal is revolutionary in terms of existing government policy, which codifies and constitutionalizes differences between Indians and other Canadians." If we can turn this impetus in the direction Chief Mountain indicates, we will reap great dividends in creating treaties that bring Canadians together, rather than drive us apart. The Chief Mountain Vision is a nation-building exercise; the Chief Gosnell Vision is the harbinger of a balkanized Canada.

9. **Small Governments, Large Powers** Such was the opposite of a just society identified by Mr. Gibson in his article. Small governments with large powers have been shown time and again to augur corruption and tyranny. "Power corrupts; absolute power corrupts absolutely" was Lord Acton's famous dictum.

The Treaty gives massive powers to the Nisga'a Government, whose laws supplant federal and provincial laws over people in the Nisga'a lands, whether, in some cases, they be Nisga'a or non-Nisga'a. There are at least 14 areas in which the Nisga'a Treaty says that Nisga'a law prevails if it conflicts with federal or provincial law. Moreover, Nisga'a laws rather than provincial laws apply, according to the Treaty, to Nisga'a people outside the territory. Does that scare you? Such changes dramatically erode the powers of our senior governments in favor of a new kind of government unknown to you and me. Here is a list of some of the powers accorded to the

Nisga'a Government, powers that would make Bernard Landry salivate, powers that make the Nisga'a Nation look surprisingly as independent as the Czech Republic, a virtual independent nation state, with its own land, boundaries, government, citizens, police force and judiciary, and with power in its government to:

- i) make laws with respect to citizenship (chap. 11, s. 39);
- (ii) amend its own constitution by enactment of a law supported by a 70% majority of "Nisga'a citizens" voting in a referendum (chap. 11, s. 11);
- iii) pass laws in violation of the *Canadian Charter of Rights and Freedoms* so long as such laws are consistent with the particular nature of Nisga'a government as set out in the Agreement (chap. 2, s. 9);
- iv) pass laws to establish a police force with powers exercisable anywhere in British Columbia and laws regarding the command structure, appointment, training, arming, direction and dismissal of police officers (chap. 12);
- v) appoint and remove Nisga'a prosecutors, pass civil laws and laws creating offences carrying fines and imprisonment, laws providing for the appointment and removal of Nisga'a judges to adjudicate with respect to all such laws, and correction services with respect to persons convicted,

sentenced and imprisoned under such laws (chap 12, ss. 23, 33 and 37);

- vi) raise revenue by imposing taxes (chap. 16, s. 1); and
- vii) most critically, pass laws which override the laws of Canada and British Columbia where inconsistent therewith (chap 11: ss. 36, 38, 40, 43, 45, 49, 51, 55, 84, 87, 91, 99, 101, 105, and 116; chap 8, s. 71; chap 9, s. 38).

Such power, complexity, and expense go well beyond what Chief Mountain envisions in terms of localized self-government for his people, which have for hundreds of years met and maintained their culture and ancestral traditions without the encumbrances of a modern-day governmental structure. They envision a voluntary group who submit to ancestral leaders and ancestral traditions out of a commitment to their ethnic background, not out of coercive requirement. The distinction between *consensual commitment* and *coercive requirement* is a key one, perhaps the crucial distinction between the type of self-government established by the Nisga'a Treaty and the type of self-government envisioned by Chief Mountain and other aboriginal people.

10. **Private Ownership of Property** Community ownership of most property is inferior to private ownership, Mr. Gibson argued, echoing Hernando DeSoto. Mr. Gibson conceded that the choice of collective ownership ought to be there for Indians who want it, but merely proposed that the model not be assumed as exclusive.

Chief Gosnell's Vision is squarely at odds with that of Mr. Gibson on this matter. Under the Nisga'a Treaty, certain core lands, like traditional reserve lands, are Nisga'a Territory, and cannot be alienated. Of grave concern to Chief Mountain and the people of Kincolith, a second category of lands was created, lands which were

formerly held in trust by the Department of Indian Affairs for the Kincolith Band, most of which was created into fee simple, to be held by the Nisga'a Government. The fee simple lands can be alienated, like any fee simple lands. A third category of title in the Nisga'a Government is wildlife management and other rights held over Crown territory outside the 1930 square kilometers of core Nisga'a lands. All of these rights in land are to be held by the Nisga'a Government on behalf of the collective interests of all the Nisga'a people, according to the Chief Gosnell Vision. In accordance with Nisga'a tradition, Chief Mountain would say that only the chiefs and matriarchs of each respective house can on behalf of that house otherwise deal with the lands owned by the house. Chief Mountain and his people will have to explore the relationship between collective ownership of the lands and assets they claim and the simpler form of self-government they espouse as their model. One thing is for sure – if the form of self-government they adopt is subject to provincial and federal law, people who stand to be divested of all rights and property under the hegemonial Nisga'a model stand a better chance, with protections of the Charter of Rights, ombudspersons, provincial and federal human rights laws, and other protections afforded by the Canadian political system.

While Mr. Gibson's list is the best I have seen in terms of orienting coherent principles for treaties that are "built to last", the compliment is less lofty than it might sound. Though it may exist, I have not seen *any* list of standard philosophical principles generally employed by our governments in negotiating treaties. You might think our senior levels of government would have agreed on the basic principles of treaty-making before embarking on the perilous course of time-consuming, costly negotiations that stand to alter the essence of Canada. The closest might be the B.C. Liberals' Referendum list, which they appear to have abandoned even before the Referendum vote was taken.

As you can see, Chief Mountain's vision embraces most of the principles in the Gibson List, while Chief Gosnell's vision

directly opposes most of those principles. This may tell you why an increasing number of thoughtful Canadians have begun to recognize the importance of the Chief Mountain Challenge.

### Three Theoretical Justifications for a Third Order of Government and Why Chief Mountain Rejects Them

Mr. Gibson identified three theoretical ideas which typically animate those who advocate for a third order of government, as set up by the Nisga'a Treaty.

"We're So Different!" Firstly, he wrote, some people might say that Indians are different from the rest of Canadians, "more different from the rest of us than are men from women, old from young, gay from straight". Despite the undisputed ability of our governments to straddle these differences, some would suggest that "Indians are so extraordinarily different as to require a third order of government". Mr. Gibson rejects that idea and Chief Mountain does, too.

"Past Structures Need Resurrection" A second basis of theoretical support for the third order of government is that the native governance structure in place at the time of European contact should for some reason be re-instituted. People's values and expectations around the world have changed dramatically over the past 200 years. Most Nisga'a people, including Chief Mountain, do not aspire to return to the European or aboriginal practices of the 18th century, many of which we would consider barbaric today. As my friend Peter Morgan mentioned wryly last week, "Nostalgia ain't the same as it used to be." The test for governance should be utility, not just sentimentality.

"Survival of the Culture is at Stake!" A third theory is that the third order is required as the indispensable condition for the preservation of aboriginal culture. As Mr. Gibson points out, "other cultures, such as that of the Jewish people, have survived over the centuries not only without special protection, but in the face of terrible persecution." Chief Mountain would argue that the best protection of the ancestral rights and traditions is not through legislated institutions,

such as the Nisga'a Lisims Government, but in the freedom for him and his people to pursue their traditional practices, with the protections of the Canadian Constitution. The Nisga'a Lisims Government has already begun to use its power to strip the ancestral chiefs and matriarchs of their ancestral titles and rights. What shame for Canada to participate in the dismantling of these pure, time-honored conventions for the sake of answering those who demand a third order of government!

### **National Implications**

The issues we examine today are truly national in nature, with implications for all future generations of Canadians. While chairing a series of public forums on aboriginal matters last year, Mr. Gibson said, "These are the most pressing moral, economic, and political issues of our times."

This is the first time in modern history when self-government rights have been conveyed along with land claim rights in the form of a treaty. The consequence of this is profound because Section 35 of the *Constitution Act, 1982* means that such rights can never be unilaterally retrieved in future by any government, without the agreement of the other parties.

Writing October 22, 1999 in the *National Post*, Tom Flanagan said, "The price might be bearable if it were a unique deal with a single Indian nation, but in fact the Nisga'a treaty will set the standard for native claims all over Canada." The case has implications for *all* provinces in Canada, whether or not the governments of those provinces failed over time to negotiate treaties which explicitly resulted in the surrender of Indian title. Current-day descendants of native leaders who negotiated treaties a century ago must look at the Nisga'a treaty as the model which reveals the level of self-government that ought to have influenced ancient treaty negotiations. Just because one's forefathers were ignorant of their aboriginal rights, today's aboriginal leaders will argue, should the band forever be deprived of those rights?

### **Human Rights Implications**

Imagine that you lived in a tiny kingdom where the king controlled whether your children could attend school, what job you could get, and what economic opportunities were available in your community. Having equipped a small number of persons with massive powers in the form of the Nisga'a Lisims Government, is it any wonder that the accounts of human rights violations have already increased from a trickle to a regular stream? During our visits to Kincolith and Prince Rupert, we have learned of the diversion of post-secondary education benefits away from Treaty opponents; wrongful dismissal of a relative of one of the plaintiffs; the denial or curtailment of medical benefits to a woman suffering from breast cancer; and the withdrawal of pharmaceuticals from a twelve year-old boy with head lice, who had to miss two weeks of school as a result. The Treaty strips people of protections we have come to take for granted: an official opposition party; an ombudsperson; full coverage by the Charter of Rights; and a tradition of parliamentary democracy.

One of the greatest questions in a democracy is how to protect individuals and minorities against the tyranny of majorities. We in Canada have established a plethora of institutions, based among other foundations, on our 1982 *Charter of Rights*. Have we abandoned these protections for the Trojan Horse of entrenched "self-government"?

### **Canada's Position**

Which Jean Chretien would you rather believe, the one who spoke in the House of Commons in June 1969 as Minister of Indian Affairs or the Prime Minister who invoked closure to legislate the Nisga'a Treaty? The Jean Chretien of June 1969 described the road taken by Indian people until then as "the road of different status, a road which has led to a blind alley of deprivation and frustration. This road ... cannot lead to full participation, to equality," he said, and on behalf of the Government of Canada, he offered "another road that would gradually lead away from different status to full social, economic and political participation in Canadian life."

The Jean Chretien of 2003 spoke on January 6<sup>th</sup> through his Cabinet colleague, The Honourable Stephen Owen, MP, Secretary of State for Indian Affairs and Northern Development. Minister Owen said with great passion and enthusiasm that we are engaged in a breathtaking governance initiative in the treaty process. We are establishing a system to accommodate self-governing First Nations within the sovereignty of Canada, he said. He emphasized the immense importance of this process. Mr. Owen noted that, since 1985, the Liberal Government has recognized the inherent right to self-government and that this is an absolute policy of the Federal Government. One purpose of the treaty process is to implement the inherent right. Yet, when asked how the inherent right of self-government could exist alongside Canadian sovereignty, he could only say that the courts would have to respond. Given the "immense importance" of the question, might we expect the government to hasten a decision from the courts?

How can the Government of Canada relentlessly pursue a policy to entrench and magnify aboriginal self-government without defining it or determining its co-existence with the sovereignty of our country?

The Federal Government has poured huge resources into "First Nations Governance" initiative. A quick read through the Government's relevant website ([www.fing-gpn.gc.ca/NEW\\_MF\\_e.asp](http://www.fing-gpn.gc.ca/NEW_MF_e.asp)) would suggest that it would find favor with all aboriginal leaders who pursue a third order of government. The initiative is designed to start dismantling the *Indian Act*, at least in terms of DIAND's powers to do things like overturn elections and demand audits of First Nations. Under the proposed *First Nations Governance Act*, Canada aims to turn that power over to the First Nations themselves by providing the First Nation electorate with mechanisms to establish financial accountability to the members rather than to DIAND. Also included is the *Fiscal and Statistical Management Act* which, among other things, establishes a tax commission to regularize taxation on reserves such that the landlord on an Indian reserve will inherit independent power to tax tenants. Unless those tenants happen to be band

members, the tenants will have no say in electing or monitoring the government that is their landlord and taxing authority. For people such as the residents of the Musqueam Indian Reserve, this initiative takes "taxation without representation" to a new extreme in Canada.

What do you think was the reaction of native leaders to this attempt to transfer to them sweeping new governance powers? Mr. Owen's and Minister of Indian Affairs Minister Robert Nault's attempts to replace the Indian Act have been opposed by the Assembly of First Nations. AFN leaders demanded to be able to set their own process for changing the act. Matthew Coon-Come, Grand Chief of the Assembly of First Nations, stood on the steps of Parliament last year and tore up the bill in front of a national audience. The reason? Why should the government, which on one hand upholds the inherent right of self-government of aboriginal nations, presume to dictate to aboriginal groups how to govern themselves? Our Federal Government needs to learn from Queen Marie-Antoinette, that you can't have your cake and eat it, too.

Negotiations continue on the 50 or more treaties under consideration in this Province alone. The Federal Minister is seeking a new relationship with the aboriginal community nationwide. While pursuing a healthy new future for aboriginal people, the Chief Mountain Group says it is more important than ever for our courts to declare that Canadian sovereignty is intact, that a third order of government is not on the negotiating table for anyone, from coast to coast. The alternative is a country splintered into tiny self-governing principalities, unsustainable economically, ungovernable politically. Six hundred passports in a once sovereign land.

### **BC's Position**

B.C. Liberals The Government of B.C. presently opposes Chief Mountain in the courts. During interlocutory proceedings over the past year, the Campbell administration has gone so far as to oppose Chief Mountain's continuing to trial. The

Campbell administration has not permitted one dollar of funding in support of Chief Mountain.

This position seems bizarre, given the Liberals' election campaign, which stridently emphasized certainty, finality and equality as the cornerstones of treaty-making. You might remember the numerous speeches by Gordon Campbell and Geoff Plant against the "unconstitutional third order of government".

On December 7, 1998, Mr. Campbell rose as Leader of Her Majesty's Loyal Opposition to state that:

[W]e cannot endorse a misguided model of self-government that is being imposed on British Columbians without their consent... At the very least, we should be waiting until the courts decide whether this treaty is constitutional and whether there must be a referendum under the *Constitutional Amendment Approval Act*. We don't think the model of government proposed in this treaty is constitutional without an amendment.

The Liberals have surprised everyone by abandoning those positions. The Attorney-General has recently begun pursuing a policy of "incremental treaty-making", which serves the short-term goal of getting resources into the hands of aboriginal bands, but postpones the more important debate on fundamental principles of treaty-building.

The Liberals took their case against the Nisga'a Treaty to Court in 1998. Chief Mountain intervened to support their position in the Court of Appeal. The Liberals surprised some of us again by abandoning their case. Mr. Plant explained he did so because "he could not sue himself". Rafe Mair called the explanation "sanctimonious claptrap"; there are half a dozen ways in which the Liberals could have continued their action, directly or indirectly, he said. He added, they certainly did not have to abandon their ally Chief Mountain.

The Liberals took their policy to the people in the 2001 Referendum. They received the mandate they sought, with an

overwhelming percentage of voters supporting local-style government. The Liberals have surprised everyone yet again by abandoning many of the positions solidly girded by public support in the Referendum.

Well you may argue that the Liberals have adopted an approach of pragmatic politics over strict ideology. But at what point is a position a principled one, rather than mere ideology? On what other promises may we expect retreat by our provincial leaders? Premier Campbell said as recently as last week that there would “never be another Nisga’a Treaty”. For how long may we expect him to cling to that position? Native leaders said during the Referendum debate that, if self-government rights were not at the table, aboriginal leaders would not be there either.

Meanwhile, the B.C. Government is providing no support for Chief Mountain and the other beleaguered Nisga'a challengers. Furthermore, the same Campbell and Plant who based much of their election campaign on this continue to oppose Chief Mountain in the B.C. courts.

### **The Court Case**

#### **The Campbell Decision**

It was unprecedented for the leaders of a provincial party to take their constitutional grievance outside the political forum and into the courts. At least in this case, the courts did not take kindly to the endeavor, punishing Campbell and Plant with costs, and explicitly referring to the apparent inappropriateness of their departing from the more orthodox political arena.

Messrs. Campbell and Plant, then Opposition Party members, lost their B.C. Supreme Court Challenge. In a far-reaching decision rendered in July 2000, Mr. Justice Williamson discovered “constitutional space” for aboriginal groups to enact laws that prevailed over conflicting federal and provincial laws. As Tom Berger correctly says, Mr. Justice Williamson’s decision supports the view that a third order of government exists in Canada. Such a decision confounds a century-old line of legal authority in Canada and raises the

spectre of over 600 sovereign nations without our boundaries – Mr. Justice Williamson dared to go where Quebec has feared to tread.

Until the *Campbell* Decision, no court had found any constitutional support for the third order of government. The appeal courts of British Columbia had explicitly rejected the concept as being inconsistent with the Constitution. Chief Mountain argues the *Campbell* Decision:

- conflicts with the long-established doctrine that Canada is a fully self-governing nation;
- suggests that Section 35 itself and certain Supreme Court of Canada decisions are superfluous or wrong; and
- conflicts with the BNA Act and the Statute of Westminster.

However, the *Campbell / Plant* case has left us with a decision on the books that must be overturned or distinguished for Chief Mountain to win his case. Otherwise, at least in British Columbia, we must assume that Canada indeed has three orders of government.

#### Distinguishing the Chief Mountain Case from the *Campbell* Decision

There are at least three reasons to distinguish the Chief Mountain Challenge from the *Campbell* Decision. Firstly, and most importantly, the challengers in this case are native challengers. They are not vulnerable to the conscious or unconscious allegation that their objections are race-based or bigoted. As Premier Campbell and Attorney-General Plant discovered when they went to court to challenge the Nisga'a Treaty, the courts have adopted a policy of interpreting aboriginal rights in an expansive way that gives the benefit of the doubt to the aboriginal litigant, at each turn. Aboriginal litigants such as Chief Mountain are eligible to receive all the favorable treatment provided to native litigants by the courts

in Canada today. This means that only a native litigant is likely to be successful in challenging such a notion as the third order of government established by the Nisga'a Treaty.

Secondly, there is no question about the standing of the challengers to raise their concerns in court. Mr. Justice Williamson had difficulty accepting the relevance of the Section 15 equality objections raised by Gordon Campbell in his case. Both in its judgment and in its later decision on costs, the court expressed its concern that Campbell was raising in the courtroom arguments that might more appropriately be expressed in the political arena.

Thirdly, Campbell's challenge was a Rule 18A application. That means it relied on affidavit evidence and abbreviated court procedures. No witnesses were called. The courts gained insight only through what the lawyers said, and what the affidavits read. Do you think Rosa Parks, the black woman in Selma, Alabama, who just wanted to sit in the front of the bus, would have been as effective in court if her case had been argued purely on affidavit evidence? If the U.S. civil rights movement had to rely purely on affidavits to make its points, would Martin Luther King ultimately have prevailed?

#### Supreme Court of Canada Case Law

Chief Mountain is supported by a well-established principle of Canadian federalism, buttressed by a long line of case law, that the Constitution divides the totality of legislative power in Canada between the two orders of government, federal and provincial. That case law goes back as far as 1887 and culminates in a decision of the Supreme Court of Canada authored by none other than the Chief Justice and rendered subsequent to the *Campbell* Decision. The decision was the *Mitchell* Case, in which the Court upheld the integrity of Canada's national borders, finding that Mohawk Indians who imported goods from New York into Ontario indeed had to pay the customary duties, despite the Mohawks' allegation that their aboriginal rights prevailed over Canada's assertion of sovereignty.

As former Supreme Court of Canada Judge Willard "Bud" Estey stated in his presentation to the Senate Committee on Aboriginal Affairs, on March 22, 2000: "The [Treaty] provides for the transfer from the governments of Canada and British Columbia to the Nisga'a Nation very significant sovereign powers presently possessed by Canada and British Columbia in accordance with the Constitution of Canada. This transfer is, by itself, unconstitutional..."

Perhaps Geoff Plant summed up the jurisprudence best in his speech to the Legislature, in 1998: "For such a law to be valid," he said, "Either the law must be amended, or the Constitution must be amended," he said.

In short, the third order of government is by no means a "done deal", despite the *Campbell* Decision.

Remedy Sought Chief Mountain seeks a declaration that the Nisga'a Treaty is invalid as inconsistent with the Constitution. If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, s. 52(1) is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect" (*Skapinker*, Wilson J., Supreme Court of Canada, p. 353).

Return of the Lands One of the consequences of such finding will be that the land transferred pursuant to the Treaty was not validly transferred. For the Nisga'a Government, this would mean that land it received under the Treaty would revert to its former status, some of the land as reserve land, other portions of land not transferred still being subject to aboriginal rights. Whatever aboriginal rights Chief Mountain and his house could prove would continue to attach to their ancestral lands. The clause in the Nisga'a Treaty that resulted in surrender of such aboriginal rights would also be invalid. Such a finding of invalidity would allow Chief Mountain and his house to proceed with their ancestral land claim.

Preservation of Work Relating to the Treaty Not all the work invested in negotiating the Treaty would be lost. Agreements concerning shared responsibility for wildlife and resources, for instance, could be preserved. Should such agreements be part of an entrenched constitutional document? Many observers would rather see such agreements passed as ordinary legislation, with the added flexibility such status provides.

The Legal Team The legal team comprises some of the country's top constitutional experts, including the Honourable Mr. William McIntyre, Q.C., formerly of the Supreme Court of Canada, the Honourable Mr. Michael Goldie, Q.C., formerly of the B.C. Court of Appeal, and Chris Harvey, Q.C., one of the country's top constitutional litigators. The late Honourable Mr. Bud Estey, Q.C. was also very involved before he passed away a year ago, as was Melvin Smith, Q.C., formerly B.C.'s Deputy Minister of Constitutional Affairs, for whom I had the honor to work when the Constitution was being patriated. The fact that my assistant Shakira Miracle and I don't have Q.C.'s means that there are at least two persons on the legal team to whom the clients can relate, or so we hope.

### **Isn't There an Alternative to Litigation?**

One prominent local businessman asked recently, "Why can't we solve this the easy ways, by flying over to discuss the situation with Premier Campbell? Is it really necessary to spend millions of dollars and all this time to go the Supreme Court of Canada?"

The word "functus" sounds like a bad word, a verb that describes what some people say the politicians did to us by passing the Nisga'a Treaty. In fact, "functus" is a Latin word that means, "its capacity to act is exhausted". The politicians are now "functus". Only a court has the capacity to rule a law invalid as contravening the Constitution. All the politicians can do is to make it easier for the case to be heard, and for the impoverished Chief Mountain Group to gain access to justice.

### **Blocked Access to Justice**

Chief Mountain is a courageous carpenter who resides in the Queen Charlotte Islands with his Haida wife Crystal and their two children. He barely makes enough money for his family to get by. Things were complicated for him last year, when his wife underwent surgery to remove a brain tumor. The surgery was successful but he had to take time off work to assist her. He has been ostracized by the Chief Gosnell faction and is unable to find work in his native village of Kincolith. You can imagine that there is conflict within his family and among his friends over the sacrifices he is making to continue this struggle. His dedication to the role of ancestral chief and his longing to do something to build a unified Canada have helped him thus far overcome the huge impediments to continuing this struggle in the courts.

It cost the B.C. Government \$10 million to argue the *Delgamuukw* Case at one level of court. We estimate we can take the Chief Mountain Case through three levels of court for \$3 million.

However, the political might behind the Nisga'a Treaty has cut off financial support from the most likely funding sources: none of the federal or provincial agencies we have approached will provide funding for this critical case. Ironically, legislators who supported the Treaty comforted skeptics by saying our courts would find and mend any constitutional deficiencies. Those legislators did not anticipate the difficulty of getting in the courthouse door.

The case therefore relies heavily on the goodwill and dedication of the parties and private support sources. The legal team has postponed collection of its fees. A large and growing number of Canadians, from Vancouver to Ottawa, have volunteered time and begun to make financial contributions. Though the Project has a debt of \$300,000, recent contributions by the Donner Foundation and some prominent Canadians have given the Chief Mountain Case a "shot in the arm".

Chief Mountain believes the faster we move his case forward, the less serious will be the damage to his Group and to all of Canada. We therefore hope to move as quickly as possible to set a trial date, hire expert witnesses, conduct discoveries, and exchange documents with the other parties. In order to take such steps this year, we need this year to raise almost \$900,000, of the total \$3 million we have budgeted.

### Summary

The key issue is sovereignty. Is Canada a group of ten provinces, two territories, and over 600 sovereign Indian bands, all with authority parallel to that of the Federal Government? Or do we have two orders of government, federal and provincial, and Indian bands whose authority is more clearly akin to that of municipal authorities? If the answer is the former, the clutter of interjurisdictional disputes will tie up our courts forever, at unimaginable costs, both in dollar terms and in terms of the ability of Canadians to govern ourselves. If the answer is the latter, we will have a stable foundation from which to negotiate treaties, work with aboriginal countrymen and women attain the economic and social goals most Canadians support, and get on with the unfolding of our nation's great future.

The Chief Mountain Challenge is the most effective way to quash the notion that Canada's sovereignty is incomplete. Aboriginal leaders like Chief Mountain ought themselves to understand what is best for aboriginal people. An ancestral chief surely cares for the health and welfare of his people, but not at the expense of paralyzing Canada.

We have to support Chief Mountain in his courageous journey. If we fail to do so, we send the message that the Canada in which he believes is not one that we find worth believing in. Do you find it difficult to commit yourself to involvement in this ungainly mess of misbegotten decisions, of race relations, of poverty, of a democratic process that failed us? You should. But then, ask yourself what doubts Chief Mountain must have of being involved in a cause that pits him against family members, Nisga'a leaders, and all aboriginal people of

influence who have vested interest in maintaining the present system. Do you have doubts? Most certainly. Does Chief Mountain have doubts? Most definitely. He began this epic journey with doubt in his faith; if now he has faith in his doubts, you can't blame him. Still, he struggles on.

### **What You Can Do**

#### 1. Learn More

We have provided readily accessible relevant materials in digital form. In addition to articles available on a handy CD, you will be able to access new information as it appears, by clicking on our law firm's website, [www.accesslaw.ca](http://www.accesslaw.ca).

#### 2. Express Your Concerns

You can make your opinions known to your MLA, your MP, or the friendly bureau chief of your favorite newspaper.

3. Contribute Funds A growing group of individuals and foundations, including the Donner Foundation and the Canadian Constitution Foundation, have contributed to the funding of this case. We need \$3 million to take it all the way. The legal team has contributed by discounting and postponing fees. Tax receipts are now available to contributors. Anonymity is available for contributors who want it. Please contact Shakira Miracle for a contribution form (604 689-8000 x311; [smiracle@accesslaw.ca](mailto:smiracle@accesslaw.ca)).

4. Organize Your Own Discussion Group My assistant Shakira Miracle, other members of our team, and I are happy to speak to groups interested in supporting the challenge. Since last October alone, we have addressed groups in Prince Rupert, Victoria, Ottawa, and Toronto.