



Canada's native peoples fight for self-government on many fronts

BY TERRY GLAVIN

On the morning of September 14, 2000, a solemn but happy ceremony was conducted in Gitlaxt'aamiks, a small village in the Nass Valley in the northwest corner of British Columbia, on Canada's west coast. The event was held on the occasion of the official opening of Wilpsi'ayuukhl Nisga'a, the legislative building of the new aboriginal government of the 6,000-member Nisga'a nation.

Meanwhile, several thousand kilometres away, on the east coast of Canada, a sometimes-violent dispute continued to inflame tensions between the Mi'kmaq people of Burnt Church, New Brunswick, and their non-native neighbours. Houses have been burned, boats rammed, and fisheries officers pelted with rocks over the question of whether treaties negotiated in 1760 and 1761 afford the Mi'kmaq the right to govern the conduct of their own lobster fishery.

Although the events in Gitlaxt'aamiks and at Burnt Church are a study in contrasts, both mark milestones in an emotional debate that continues to raise vexing constitutional and political questions in Canada. Where do aboriginal governments fit, exactly, as institutions of Canadian federalism? Are they mere creatures of federal statute, or do they arise from inherent, constitutionally-protected aboriginal rights? Are they subservient to provincial governments, or are they equal?

These questions are being answered, increasingly, by Canada's courts.

A right to self-government ?

The new Nisga'a government is certainly not without controversy. Although it arises from a modern-day treaty, which enjoys broad public support in Canada, several of its aspects—and to some, the very fact

self-government was included in it at all—remain politically contentious.

The Nisga'a treaty itself is the first such arrangement concluded in British Columbia since the former British colony became a Canadian province in 1871. The treaty was approved by the government of British Columbia last year, and Canada's federal government, after a 1999 House of Commons vote of 217 to 48 formally ushered it into law on May 11 this year. The treaty eliminates the Nisga'a Indian reserves, sets out amounts of land to be held by the Nisga'a in common, allocates access to natural resources, and provides a cash settlement along with measures to extend tax laws to Nisga'a individuals and businesses. But it is the treaty's self-government provisions that have attracted the most heated criticism.

The nineteenth-century act of the British Parliament (the British North America, or BNA, Act) that forms the essential core of the Canadian Constitution assigns jurisdiction over what were then referred to as "Indians" to the federal government. The BNA Act makes no reference to anything resembling a right of aboriginal peoples to self-government.

But the Nisga'a treaty sets out a complete self-government regime. In specific areas of jurisdiction, such as Nisga'a culture and education, the Nisga'a power to legislate is paramount. In most areas of jurisdiction, however, Nisga'a laws are to be consistent with, and answerable to, the laws of Canada and British Columbia. The Nisga'a are entitled to pass laws with respect to Nisga'a citizenship, the regulation of land use, the protection of children, and so on, but Nisga'a law applies only to Nisga'a people, on Nisga'a lands.

Spurred on by "one law for all" and "no special rights" rhetoric, British Columbia's

official opposition party has campaigned against the Nisga'a treaty and has challenged its self-government arrangements in the courts. The fallout from the rumpus has severely hobbled the work of treaty making in British Columbia, where no other treaties have been concluded, and where bitter disputes over access to natural resources are commonplace as a result. The self-government provisions of the Nisga'a treaty were hoped to be a model for similar treaties, but that prospect is now in doubt.

An "empty box"

One might have thought, at the advent of the 21st century, that Canada would have been long past divisive constitutional and legal arguments about the scope and extent of aboriginal self-government rights. But the place aboriginal self-government occupies within Canadian federalism is burdened by a rather grim history.

The British North America Act established Canada as an independent nation state in 1867—and, as we pointed out earlier, gave responsibility for native people to the federal government. Within 20 years, the federal government had outlawed the "potlatch" system*, which was the heart of aboriginal systems of government on

* *Potlatches were at one and the same time ceremonies to mark important events and instruments of social and political organization for many of the aboriginal peoples of the Pacific coast. They took many forms and could involve singing, dancing, dramatic presentations and games. One of the most prominent features of many potlatches was the practice of extensive gift giving by the host to his/her invited guests.*

Canada's west coast. Indian bands were established in ways that made aboriginal people wards of the state, with the same rights as lunatics and children, and in 1927 Canada's aboriginal peoples were prohibited from raising money or retaining legal counsel to advance their rights to land, natural resources and self-government.

Most of these discriminatory laws were abolished in 1951, but the vote was denied to aboriginal people until 1960. When the federal government formally considered abolishing all forms of aboriginal status in 1969, many aboriginal communities in Canada were antagonized to the point of insurrection.

In 1982, Canada enacted an important series of amendments to the BNA Act (the Constitution Act of 1982) that included a charter of rights and a new formula for future constitutional amendments. This Act contained a clause recognizing aboriginal rights in a non-specific way and provided that aboriginal self-government be discussed at a series of subsequent federal-provincial conferences. These discussions produced no results, however, and the whole matter of aboriginal rights, particularly self-government rights, was left "an empty box" that the courts were expected to fill.

Confrontation and the courts

The 1990s began with a tragic confrontation between Quebec's Mohawks and the Canadian Armed Forces, and the decade was marred by several bitter disputes between aboriginal societies and Canada's federal and provincial governments.

Meanwhile, Canada's courts have been busy, although reluctantly so, with the work of filling the "empty box" of aboriginal rights recognized and affirmed by the 1982 Constitution Act. As for aboriginal self-government rights, Canada's courts are increasingly finding that despite the exhaustive assignment of jurisdictions between Canada's federal and provincial governments in the old BNA Act, and despite the absence of an explicit recognition of aboriginal self-government in the 1982 Constitution Act, self-government is still an aboriginal right.

The courts are also finding that self-government is in fact a meaningful and enforceable form of government within Canadian federalism, and that this has always been so. For instance, in 1867, in a decision handed down by a Quebec Superior Court judge when Canada was only eight days old, an Indian woman was found to be fully entitled to claim community of property under the laws of Quebec as a result of a marriage entered into according to customary law of the Cree tribe. And throughout the 20th century, several court rulings—mainly in the federally administered Northwest Territories—recognized and enforced aboriginal laws governing marriage and adoption. In fact, federal courts have ruled that certain actions taken by Indian band councils need be subject only to the customary laws of the aboriginal communities they represent.

An "inherent" right

In a 1993 case in British Columbia adoptions by aboriginal customary laws were found to be as valid as adoptions by conventional civil law, and in 1997, the Supreme Court of Canada ruled, in a case known as *Delgamuukw Versus the Queen*—now the leading aboriginal rights case in Canada—that an aboriginal community's right to its lands "encompasses within it a right to choose to what ends a piece of land can be put."

Meanwhile, several provincial governments have conceded the existence of aboriginal self-government rights, at least as a matter of policy. And in 1995, the current federal government stated that it recognized aboriginal self-government as a matter of law, describing an inherent right to self-government as being "an existing aboriginal right under section 35 of the Constitution Act, 1982."

But the road ahead is by no means certain, and difficult questions remain.

In September 1999, the Supreme Court of Canada ruled that treaties negotiated between the Crown and the Mi'kmaq people in 1760 and 1761 gave rise to a contemporary Mi'kmaq right to fish in pursuit of a "moderate livelihood." The judges subsequently clarified their decision to make it plain that Mi'kmaq

fishing rights were in no way absolute, and the federal authority to regulate the lobster fishery was still very much intact.

But the main point of contention between the federal government and Mi'kmaqs of Burnt Church is the extent of the federal government's authority to make decisions about the Mi'kmaq fishery that go beyond simple regulation for conservation purposes.

The Mi'kmaq issue is by no means insoluble. Canadian courts have been consistently adamant that such matters should be negotiated, rather than litigated, and negotiations continue. Still, it appears that for the foreseeable future, Canada's judges will continue to play a reluctant role in sorting out the place aboriginal governments occupy within Canadian federalism.

As for the Nisga'a, the limited self-government powers in the treaty they recently signed have not provoked violent standoffs or stone-throwing. In the villages, life has not changed—people still hunt, fish, and struggle to find jobs. But the Nisga'a are busy establishing their own courts, mapping out economic initiatives, and planning a future in which the decisions they make will not depend upon whims of far-away politicians.

There is an undeniably upbeat mood in the Nass Valley, which comes from what Nisga'a chief Joe Gosnell says is the Nisga'a people having "become full partners in the Canadian federation." 