Citation: Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al
2000 BCSC 1123

Date: 20000724
Docket: A982738
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GORDON M. CAMPBELL,
MICHAEL G. de JONG
And
P. GEOFFREY PLANT

PLAINTIFFS

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF CANADA
And
THE NISGA'A NATION

DEFENDANTS

AND:

THE In-SHUCK-ch N'Quat'qua
And
THE FIRST NATIONS SUMMIT

INTERVENORS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WILLIAMSON

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Dates and Place of Trial:	May 15 - 19, 2000 May 22 -26, 2000 May 29, 2000 Vancouver, B.C.

Contents

[1] The plaintiffs seek an order declaring that the Nisga'a Treaty recently concluded between Canada, British Columbia and the Nisga'a Nation is in part inconsistent with the Constitution of Canada and therefore in part of no force and effect. For the reasons which follow, I conclude the application should be dismissed.

BACKGROUND

[2] In 1982, the Parliament of the United Kingdom enacted the ***Canada Act*** which proclaimed, among other things, that the Constitution of Canada is the supreme law of Canada. That legislation listed specific statutes which make up the Canadian constitution, one of which is the ***Constitution Act, 1982***.

[3] Section 35 of the ***Constitution Act, 1982***, as amended, reads in part as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> . . .
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

[4] Section 25 reads:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> …
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[5] On August 4, 1998, representatives of Canada, the Province of British Columbia, and the Nisga'a Tribal Council concluded a Final Agreement which stated expressly in Chapter 2, Section 1, that

> This Agreement is a treaty and land claims agreement within the meaning of sections 25 and 35 of the ***Constitution Act, 1982***.

[6] The Agreement was the product of several years of intense negotiation.

[7] The Agreement goes on to state in Chapter 2, Section 22, that it is a full and final settlement in respect of the aboriginal rights, including aboriginal title, of the Nisga'a Nation. Section 23 provides that the Agreement "exhaustively" sets out the Section 35 rights of the Nisga'a Nation.

[8] In these reasons I will refer to the Nisga’a Final Agreement and the Nisga’a Treaty interchangeably. The Nisga’a Final Agreement is the document concluded by those negotiating

on behalf of Canada, the province, and the Nisga'a. The Agreement, pursuant to the terms of the document itself, became a "treaty" once it had been ratified by the Nisga'a people, and once settlement legislation passed by Parliament and the legislative assembly had been proclaimed. The effective date was May 11, 2000.

[9] I also emphasize at the start that it is treaty rights and not aboriginal rights which are the subject of this proceeding. As a result, there is no necessity to prove through admissible evidence a long standing aboriginal custom, practice or tradition integral to the distinct identity of the Nisga'a. Rather, the issue is whether the Nisga'a Treaty is a treaty constitutionally protected by s. 35 of the ***Constitution Act, l982***.

[10] Because this agreement sets out expressly the intention of the parties that it be a treaty as that word is used in s. 35, it is not necessary to review extrinsic documents and records to determine that intention. It is helpful, however, to review some extrinsic evidence to ascertain the intention of the framers of s. 35 of the ***Constitution Act, 1982***.

THE PARTIES AND THEIR POSITIONS

[11] The three plaintiffs are sitting members of the Legislative Assembly of the Province of British Columbia and members of Her Majesty's loyal opposition. They challenge the constitutionality of the settlement legislation enacting the Nisga'a Treaty.

[12] In short, they say that the Treaty violates the Constitution because parts of it purport to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces by Sections 91 and 92 of the ***Constitution Act, 1867***. Second, they submit the legislative powers set out in the treaty interfere with concept of royal assent. Finally, they argue that by granting legislative power to citizens of the Nisga'a Nation, non-Nisga'a Canadian citizens who reside in or have other interests in the territory subject to Nisga'a government are denied rights guaranteed to them by Section 3 of the ***Canadian Charter of Rights and Freedoms***. That Section reads:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[13] It is important to note at the start that the plaintiffs do not seek an order setting aside the entire Treaty. Rather, their arguments are directed at the settlement legislation of Parliament and the Legislative Assembly of British Columbia which gives effect to the Nisga'a Final Agreement, and gives it its status as a treaty. They seek an order that such legislation is inconsistent with the Constitution of Canada, and therefore of no force and effect, ***to the extent which*** the Agreement purports to provide the Nisga'a Government with legislative jurisdiction, or provides that the Nisga'a Government may make laws which prevail over federal and provincial laws or limit to Nisga'a citizens the right to vote for, or to be candidates for, Nisga'a Government.

[14] In their submissions, the plaintiffs emphasize that Chapter 2, Section 19 of the Agreement contemplates such a limited ruling by a court. It provides that if any provision of the Agreement is found to be invalid or unenforceable, that provision will be severable and the remainder of the Agreement will continue in force.

[15] The three defendants are the parties who negotiated the Nisga’a Final Agreement: Canada, British Columbia and the Nisga’a. At the beginning of the trial I granted an application to substitute as a defendant the Nisga’a Nation

for the Nisga’a Tribal Council. It was the Council which negotiated with the Crown on behalf of the Nisga’a people. Once the Treaty came into force on May 11, 2000, the Council ceased to exist and the Nisga’a Nation, contemplated by the Treaty, came into being legally and became the appropriate defendant.

[16] The intervenors are the In-Shuck-ch N’Quat’qua, one of the First Nations involved in the B.C. Treaty process (the Nisga’a Treaty was negotiated outside of that process), and the First Nations Summit, an organization representing a number of First Nations in British Columbia who are involved in treaty negotiations.

[17] The defendants and the intervenors all submit that the Treaty is a valid document negotiated in accordance with the Constitution and with the encouragement of judicial authority. They say that pursuant to Section 35 of the ***Constitution Act, 1982***, the provisions of the Treaty are now properly constitutionally protected. They submit that the plaintiffs' arguments that the Treaty interferes with the distribution of legislative powers, set out in Sections 91 and 92 of the ***Constitution Act, 1867,*** are incorrect and further, that there has been no interference with royal assent nor with the ***Charter*** rights of non-Nisga'a citizens.

[18] In these Reasons, I propose first to review briefly the history of the relationship between the Nisga'a Nation and the Crown as well as the basic provisions of the Treaty itself. I will then consider Sections 91 and 92 of the ***Constitution Act, 1867***, and the significance of Section 35 of the ***Constitution Act***, ***1982,*** particularly as it has been interpreted by the Supreme Court of Canada. Next, I will review the submissions of the plaintiffs regarding the role of the Governor General and the Lieutenant Governor, and the submissions concerning the ***Charter.*** Finally, I will consider the concept of s. 35 as a "framework" for the reconciliation of the prior existence of aboriginal peoples with the sovereignty of Canada. At the end, I will set out my conclusions in summary form.

HISTORY

[19] While it is not necessary to review in a detailed way the history of the Nisga'a people and the impact upon them of the assertion of sovereignty by the British Crown, it is necessary to consider whether, after that assertion, any powers of self-government remained with the Nisga'a. This is so because s. 35 does not revive extinguished aboriginal rights. It provides constitutional protection to aboriginal rights

existing in l982, and treaty rights existing at that time or acquired by way of land claim agreements since.

[20] It is not disputed that long before the arrival of Europeans, the Nisga'a occupied substantial areas of the Nass Valley in northwestern British Columbia. They had identifiable cultural traditions, language, territories, and systems in place for governing themselves. This history was reviewed in both the majority and the dissenting judgments in ***Calder v. Attorney General of B.C.***, [1973] S.C.R. 313. At p. 317, Judson J., writing for the majority, said:

> They [the Nisga'a appellants] are descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed. It was agreed for purposes of this litigation that this territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia. No other interest has intervened in this litigation to question the accuracy of this agreed statement of facts.

[21] In 1887, sixteen years after British Columbia joined Confederation, a delegation of Nisga'a Chiefs travelled to the legislature in the capital city of Victoria seeking to negotiate a treaty which would reconcile their previous and

continuing occupation and use of their lands with the existence of Canada and British Columbia.

[22] Although a committee was established subsequently to consider these matters, the Nisga'a peoples' assertion of title and their request for a treaty were dismissed.

[23] In 1907, the Nisga'a created a Nisga'a Land Committee mandated to secure a recognition of their rights. They went so far as to petition the Privy Council of the United Kingdom, again unsuccessfully.

[24] In 1927, the ***Indian Act*** was amended to prohibit the raising of money by Indian people for the purpose of pursuing claims of aboriginal title. This effectively halted the efforts of the Nisga'a to have their rights recognized. This provision of the ***Indian Act*** remained in force until 1951.

[25] After that prohibition was repealed, the Nisga'a again pursued their claims. These renewed efforts were unsuccessful. In 1969 the Nisga'a brought an action in this court for a declaration of aboriginal title. The case made its way to the Supreme Court of Canada by 1973. In that case, ***Calder*** mentioned above, the majority recognized that aboriginal title was part of Canadian law. Three of the seven judges concluded that the Nisga'a held aboriginal title to the

lands, three decided that title had been extinguished, and extraordinarily, one declined to determine the issue. As a result, on the face of it, the Nisga'a lost.

[26] However, shortly thereafter, the federal government established a comprehensive claims process and by the late 1970s, the Nisga'a and Canada began negotiations aimed at concluding what was in contemporary parlance called a "land claims agreement”.

[27] Despite these events, British Columbia continued to deny that aboriginal title existed in the province and refused to participate in negotiations.

[28] In 1982, as noted above, the ***Constitution Act, 1982*** came into force including Section 35 which recognized and affirmed existing aboriginal and treaty rights. In 1983, s. 35 subsection (3) was added ensuring that treaty rights included not only those in existence, but those that might be acquired after that date by way of land claims agreements.

[29] In 1991, British Columbia changed its position and agreed to participate in the negotiations. From that time on, tripartite negotiations were undertaken between Canada, British Columbia, and the Nisga'a. In early 1996, an

Agreement in Principle was concluded. The Final Agreement was signed on August 4, 1998.

[30] The Nisga'a Final Agreement included a chapter on ratification. It set out that ratification of the Agreement required the enactment of both federal and provincial settlement legislation giving effect to the Agreement. Ratification by the Nisga'a Nation would take effect only after debate at an assembly of the Nation to determine whether there would be a referendum on the matter, and if that course were followed, approval by a majority of eligible voters casting their ballot in secret.

[31] The Nisga'a people approved the Final Agreement in a referendum in November, 1998. The settlement legislation was passed by the Legislative Assembly of the Province of British Columbia on April 26, l999, and by Parliament on April 13, 2000. The treaty came into effect May 11, 2000: see ***Nisga'a Final Agreement Act***, S.B.C. 1999, c. 2; and ***Nisga'a Final Agreement Act***, S.C. 2000, c. 7.

[32] The significance of this history, which I have set out in the briefest form, is twofold. First, it demonstrates that the Nisga'a never ceded their rights or lands to the Crown. The Treaty which is now the subject of this litigation marks the first occasion upon which the Nisga'a have agreed to any

specified impairment of those rights. Chapter 2, Section 24, states that the Nisga'a Nation's aboriginal rights and title, as they existed before this Agreement took effect, continue "as modified" by the Agreement.

[33] Second, the fact that the Crown in right of Canada and the Crown in right of British Columbia have entered into these negotiations, and concluded an Agreement, illustrates that the Crown accepts the Nisga'a Nation has the authority to bargain with the State and possesses rights which are negotiable.

THE NISGA'A TREATY

[34] The Nisga'a Final Agreement, now a "treaty", is a complex tripartite agreement which purports to define in an exhaustive way the treaty rights of the Nisga'a Nation. Counsel for the plaintiffs have characterized the Treaty as having four basic components. The first is the substitution for aboriginal title with a grant of a fee simple to the Nisga'a Nation of just under 2,000 square kilometres of land in the Nass Valley. This would, to use the word in the Treaty, "modify" the existing aboriginal title. It is an area much smaller than that originally claimed by the Nisga'a.

[35] Second, the Treaty defines existing hunting, fishing and trapping rights in the Nisga'a lands, but also permits participation in wildlife and fisheries management over a much larger area known as the Nass Wildlife Area. Thus, it is important to note that there are two areas of land involved. The first is the smaller fee simple area owned by the Nisga'a Nation and over which it has defined legislative power. The second is the larger area in which the Nisga'a have certain specified hunting, fishing and trapping rights.

[36] The third basic component is the payment of money over a period of years which can be seen as compensation for what the Nisga'a have given up or possibly for the negative impact upon the Nisga'a which followed upon the arrival of Europeans.

[37] The fourth component is described by the plaintiffs as "a new order of government", a government with certain legislative jurisdiction specified in Chapter 11 of the Treaty. I have put the words "a new order of government" in quotation marks as there is some dispute about whether this government can be called new, except as to its structure.

[38] The Nisga'a government is divided into two groups: the Nisga'a Lisims Government and the Nisga'a Village Governments, intended to govern the Nisga'a Nation and the Nisga'a villages respectively. The Nisga'a Lisims Government is responsible

for intergovernmental relations between the Nisga'a Nation and Canada or British Columbia. Each of these governments is a separate legal entity which can enter into contracts and agreements, acquire and hold property, raise and spend money, sue and be sued, and do those things ancillary to the exercise of its powers. The Agreement provides for the creation, continuation, amalgamation, or dissolution of Nisga'a villages.

[39] The Treaty provides for a Nisga'a Constitution which must, however, be consistent with the Treaty.

[40] The Treaty also provides for the creation of Nisga'a Urban Locals, a provision designed to ensure that the Nisga'a who live away from the Nass Valley in three specified areas (Greater Vancouver, Terrace and Prince Rupert/Port Edward) will be able to participate in the Nisga'a Lisims Government.

[41] The ***Canadian Charter of Rights and Freedoms*** is stated expressly to apply to Nisga'a government "in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government" as set out in the Treaty.

[42] Nisga'a citizenship, or enrolment under the agreement, is the subject of detailed provisions. Individuals are eligible

to be enrolled if they are of Nisga’a ancestry and if their mother was born into one of the Nisga’a tribes, as are descendants and adopted children of such individuals. An “enrolment committee” is established to consider applications for enrolment under the Treaty.

[43] Another provision in the Treaty allows other Aboriginal Canadians who marry a Nisga’a citizen, and are adopted into one of the four Nisga’a tribes in accordance with the *Ayuukhl Nisga’a* (that is, traditional Nisga’a law), to apply for enrolment. In regards to non-Nisga’a citizens resident on Nisga’a lands, the Agreement requires the Nisga’a government to consult with them concerning decisions which “directly and significantly affect them”.

[44] As noted at the beginning of these Reasons, the plaintiffs do not challenge the transfer to the Nisga'a Nation of fee simple title to the Nisga'a lands, the confirmation of hunting, fishing and trapping rights, or the payment of compensation. They limit their constitutional challenge to what they submit is the establishment of a new order of government. I will therefore survey briefly the legislative powers of the Nisga’a nation as set out in the Treaty.

LEGISLATIVE POWERS OF THE NISGA'A GOVERNMENT

[45] The Nisga'a Government has power to make laws in a number of different areas which can be divided generally into two groupings. In the first category, when Nisga'a law conflicts with federal or provincial law, the Nisga'a law will prevail, although in many cases only if it is consistent with comparable standards established by Parliament, the Legislative Assembly, or relevant administrative tribunals.

[46] Generally speaking, the subjects in this category are matters which concern the identity of the Nisga'a people, their education, the preservation of their culture, the use of their land and resources, and the means by which they will make decisions in these areas. As noted, however, some of these areas remain subject to comparable provincial standards. For example, adoption laws must provide for the best interests of the child, just as does the ***Adoption Act***, R.S.B.C. 1996, c. 5. The provision for Nisga'a control of education is subject to various comparable provincial educational standards.

[47] Other jurisdictions of the Nisga'a government in this category have specific matters carved out and reserved to the Crown, or to laws generally applicable in the subject area. For example, the right to regulate the use and development of Nisga'a Lands rests with the Nisga'a, but rights of way held

or required by the Crown are subject to special provisions. The right to regulate businesses, professions and trades on Nisga’a lands rests with the Nisga’a, but it is subject to provincial laws concerning accreditation, certification and regulation of the conduct of professions and trades.

[48] In the second classification of jurisdiction, when a Nisga’a law conflicts with federal or provincial law, the federal or provincial law will prevail.

[49] The Treaty permits the Nisga'a to establish police services and a police board. Any regimes established pursuant to these provisions require the approval of the provincial cabinet. If the Attorney General of the province is of the opinion that “effective policing in accordance with standards prevailing elsewhere in British Columbia” is not in place, she or he may provide or reorganize policing on the Nisga’a lands, appointing constables or using the provincial police (the R.C.M.P.) as a police force.

[50] The Treaty also provides that the Nisga’a Lisims Government may decide to establish a Nisga’a Court. But again, if that course is followed, its structure and procedures, and the method of selecting judges, must be approved by the provincial cabinet. Further, an appeal from a final decision of the Nisga’a Court lies to the Supreme Court

of British Columbia. The Court section of the Treaty includes a number of references to the requirement that any Nisga'a court system must operate in accordance with generally accepted principles. For example, a Nisga'a Court and its judges must comply with "generally recognized principles in respect of judicial fairness, independence and impartiality".

[51] The Nisga'a Government has no authority to make criminal law (that power remains with Parliament). Importantly, a person accused of any offence for which he or she may be imprisoned under Nisga'a law has the right to elect to be tried in the Provincial Court of British Columbia rather than a Nisga'a Court. Any provincial court proceedings would be subject to rights of appeal to the Supreme Court of British Columbia or the Court of Appeal.

[52] Labour relations law, or what in the Agreement is called industrial relations, is governed by federal and provincial laws. However, the Nisga'a Lisims Government has a right in some instances to make representations concerning the effect of a particular aspect of labour relations law upon Nisga'a culture.

[53] While the Treaty defines the right of the Nisga'a to harvest fish and aquatic plants in Nisga'a fisheries areas, all the fisheries rights of the Nisga'a are expressly subject

to measures that are necessary for conservation and to legislation enacted for the purposes of public health or safety. Nisga'a peoples' harvest of fish is subject to limits set by the federal Minister of Fisheries. Any laws made by the Nisga'a government concerning fish or aquatic plants harvested by the Nisga'a are subject to relevant federal or provincial laws.

[54] The Nisga'a government may make laws concerning assets the Nisga'a Nation, a Nisga'a village or Nisga'a corporation may hold off Nisga'a lands, but in the event of a conflict between such laws and federal or provincial laws of general application, the latter prevail.

[55] Similarly, while the Nisga'a may make laws concerning the sale and consumption of alcohol (intoxicants) on Nisga'a lands, they are subject to federal and provincial laws in the area in the event of conflict.

[56] British Columbia retains the right to licence or approve gambling or gaming facilities on Nisga'a lands, but the Agreement provides that the province will not do so except in accordance with terms established by the Nisga'a government. Such terms, however, must not be inconsistent with federal and provincial laws.

[57] The above paragraphs do not list every jurisdiction and every rule set out in this lengthy and complex agreement about which law will prevail. This review, however, is enough to show that the legislative powers of the Nisga'a Government are significantly limited by the Treaty itself, without considering the effect of s. 35 of the ***Constitution Act, 1982.***

[58] Recognizing these restrictions, the plaintiffs submit that it is only those portions of the Treaty which allocate legislative power in the Nisga'a Government, and which provide that in the event of a conflict with federal or provincial law Nisga'a law will prevail, which are unconstitutional.

[59] The heart of this argument is that any right to such self-government or legislative power was extinguished at the time of Confederation. Thus, the plaintiffs distinguish aboriginal title and other aboriginal rights, such as the right to hunt or to fish, from the right to govern one's own affairs. They say that in 1867, when the then ***British North America Act*** (now called the ***Constitution Act, 1867***) was enacted, although other aboriginal rights including aboriginal title survived, any right to self-government did not. All legislative power was divided between Parliament and the legislative assemblies. While they concede that Parliament, or the Legislative Assembly, may delegate authority, they say

legislative bodies may not give up or abdicate that authority. To do so, they argue, is unconstitutional.

[60] For this reason, they ask this court to strike down those provisions of the Nisga'a Treaty which so provide.

[61] The defendants and the intervenors, aside from their submission that the Treaty is wholly constitutional, take the position that the order sought by the plaintiffs would have the effect of setting aside the entire Treaty. They argue that to give the Nisga'a land in fee simple and the right to hunt and fish in a larger area are empty gestures if the Nisga’a have no power to establish rules about the use of that land and those rights. They say that such rules are the very essence of self-government.

SECTIONS 91 AND 92: THE DIVISION OF POWERS

[62] I turn first to the significance of the division of powers between the federal and provincial governments originally set out in 1867 by the Parliament of the United Kingdom in ss. 91 and 92 of the ***British North America Act***. It is necessary to ask whether the passage of the ***British North America Act*** effectively concentrated all law making power in Parliament and the Legislative Assemblies.

[63] Sections 91 and 92 read in part as follows:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - …
>
> (24) Indians, and Lands reserved for the Indians.
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming with the Classes of Subjects next herein-after enumerated; that is to say, - …

[64] These sections, in view of the submissions of the plaintiffs, lead to at least two related questions. First, when the Parliament of the United Kingdom enacted the ***British North America Act*** in 1867 was all legislative power distributed through Sections 91 and 92? Second, is the legislative power granted to the Nisga'a Nation a new order of government? I have concluded the answer to both of these questions is “no”.

THE PREAMBLE TO THE *CONSTITUTION ACT, 1867*

[65] The argument that Sections 91 and 92 exhaustively distribute all legislative power does not sufficiently consider the preamble to the ***Act.*** That opening statement provides that the intention of the statute is to endow Canada "with a Constitution similar in Principle to that of the United Kingdom". In considering this Preamble, the Supreme Court of Canada has recognized that there are a number of constitutional principles and powers not set out in writing in the ***Constitution Act, 1867*** which nevertheless are fundamental to the Constitution.

[66] In ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (the Provincial Court Judges Reference)***, [1997] 3 S.C.R. 3, at 75, the Chief Justice, speaking for the court, listed the doctrines of full faith and credit, the privileges of provincial legislatures, the regulation of free speech, the limits on legislative sovereignty with respect to political speech, and the protection of judicial independence as constitutional principles implied in the preamble to the ***Constitution Act, 1867***. At page 69, the Chief Justice wrote:

> … the preamble is not only a key to construing the express provisions of the ***Constitution Act, 1867*** but also invites the use of those organizing principles

> to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

[67] Some two years later in ***Reference Re Secession of Quebec***, [1998] 2 S.C.R. 217, the Court referred to the ***Provincial Court Judges Reference*** and again affirmed, at page 239, that the Constitution “embraces unwritten as well as written” rules.

[68] British imperial policy, reflected in the instructions given to colonial authorities in North America prior to Confederation, recognized a continued form, albeit diminished, of aboriginal self-government after the assertion of sovereignty by the Crown. This imperial policy, through the preamble to the ***Constitution Act, 1867***, assists in filling out “gaps in the express terms of the constitutional scheme".

[69] The history of the negotiation of treaties by the executive branch after Confederation indicates that the distribution of power in Sections 91 and 92, and in particular the designation of "Indians, and Lands reserved for the Indians" as a parliamentary responsibility in Section 91(24), did not interfere with the royal or executive prerogative to negotiate treaties with aboriginal nations.

[70] Nor did the distribution of power in Sections 91 and 92 terminate the development of the common law, law binding upon citizens and enforceable by the courts. And until the Statute of Westminster was passed in l931, 64 years after Confederation, all legislation enacted in Canada was subject to the overriding powers of the Parliament of the United Kingdom. In short, long before the 1982 enactment of s. 35, aboriginal rights formed part of the unwritten principles underlying our constitution.

DO SECTIONS 91 AND 92 EXHAUST LEGISLATIVE POWER?

[71] The plaintiffs argue that all legislative power in Canada is "exhaustively" distributed between Parliament and the legislative assemblies by virtue of the ***Constitution Act, 1867***. Consequently, they submit, an amendment to the constitution would be required to allow aboriginal governments, such as the Lisims Government of the Nisga'a Nation established by the Treaty, the power to make laws which prevail over federal or provincial laws. Other than the Court of Appeal decision in ***Delgamuukw v. British Columbia*** (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (the persuasiveness of which for the purposes of these reasons I will discuss below), the plaintiffs rely principally upon much older decisions from the Privy Council. For example, in ***A.G. Ont. v. A.G. Canada,***

[1912] A.C. 571, a case which did not concern aboriginal rights but which was considered in detail by the Court of Appeal in ***Delgamuukw***, the Privy Council, while discussing the ***British North America Act***, said at p. 581:

> Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada.

[72] This is the heart of the plaintiffs' argument. If the powers granted to Parliament and the legislatures combined "cover the whole area of self-government" within Canada, there can be no legislative power left to aboriginal peoples.

[73] The flaw in this submission, however, becomes evident when one considers what the Privy Council said in the same judgment three pages on at p. 584:

> For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, ***within the limits*** of the British North America Act.
> (emphasis added)

[74] What are "the limits of the British North America Act"?

[75] In ***R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others,***

[1982] 2 All E.R. 118, the English Court of Appeal dealt with the question of whether after Canada obtained independence obligations owed by the Crown to aboriginal peoples remained with the Crown in right of the United Kingdom or became the responsibility of the Crown in right of Canada. The court found that such obligations had become the responsibility of the Crown in right of Canada. In his reasons, May L.J. quoted with approval the following passage from the decision of Watson J. in ***Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick,*** [1892] A.C. 437 at 441-2:

> The object of the [***British North America Act***] … was accomplished by distributing between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues ***which had previously belonged to the provinces***; so that the Dominion government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government.
>
> (emphasis added)

[76] Thus, what was distributed in ss. 91 and 92 of the ***British North America Act*** was all of (but no more than) the powers which until June 30, 1867 had belonged to the colonies. Anything outside of the powers enjoyed by the colonies was not encompassed by ss. 91 and 92 and remained outside of the power

of Parliament and the legislative assemblies just as it had been beyond the powers of the colonies.

[77] In the ***Quebec Secession Reference***, the Supreme Court of Canada reviewed the historical context of the events leading to Confederation. The Court observed, at pp. 244-5, that:

> Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity.
> …
> The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation …
>
> Federalism was the political mechanism by which diversity could be reconciled with unity.

[78] This demonstrates that the object of the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or aboriginal rights), but to ensure that the local and distinct needs of Upper and Lower Canada (Ontario and Quebec) and the maritime provinces were protected in a federal system.

[79] Several pages on in the same judgment, at para. 82, the Court spoke of the explicit protection for aboriginal and treaty rights in ss. 25 and 35 of the ***Constitution Act, l982***,

as being consistent with a tradition of respect for minority rights reflecting “an important underlying constitutional value”.

[80] The unique relationship between the Crown and aboriginal peoples, then, is a underlying constitutional value. In ***Mitchell v. Peguis Indian Band***, [1990] 2 S.C.R. 85, both Dickson C.J.C. and La Forest J. discussed this “unique historical relationship”. After discussing ***Guerin v. The Queen***, [1984] 2 S.C.R. 335; 13 D.L.R. (4th) 321 (S.C.C.), the Chief Justice wrote at pp. 108-9 that since 1867:

> … the Crown’s role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the ***Indian Act*** representing a confirmation of the Crown’s historic responsibility for the welfare and interests of these peoples. However, the Indians’ relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.

[81] A consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten “underlying values” of the

Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division “internal” to the Crown.

[82] The plaintiffs submit, nevertheless, that s. 91(24) assigning jurisdiction over “Indians and Lands reserved for the Indians” must be read as eliminating any possibility of even a diminished form of legislative power in aboriginal societies. I am not persuaded. Rather, the ***British North America Act*** placed upon the federal government the mantle of the Imperial authorities in relation to Indians. Thus, in 1867 it became the Crown in right of Canada, rather than the British Crown, which assumed responsibility for the obligations of the Crown towards aboriginal peoples, a responsibility which amounted to a fiduciary duty: see ***Guerin v. The Queen,*** at 383. As the English Court of Appeal pointed out in ***Secretary of State for Foreign Affairs, ex parte Indian Association of Alberta and others,*** at p. 125, it was the federal government which acquired the jurisdiction to negotiate and administer treaties with those peoples, treaties that might surrender reserve land or aboriginal title. The fact that the federal government assumed this responsibility under s. 91, rather than the provinces under s. 92, did not

affect aboriginal rights because, to use the word of the Supreme Court of Canada in ***Mitchell***, it was a division "internal" to the Crown.

RECOGNITION OF ABORIGINAL LAW AFTER CONFEDERATION

[83] I now turn to the subject of aboriginal legal systems and law making authority. In the Court of Appeal decision in ***Delgamuukw v. British Columbia***, one of the judges in the majority, Wallace J.A., noted at pp. 591-2 in his discussion of aboriginal self-government, that the trial judge in that case had adopted the definition of eminent constitutional scholar Professor Dicey in his Law of the Constitution, 10th ed.,(London: MacMillan Press, 1959), at page 40, that a law may be defined as "any rule which will be enforced by the courts".

[84] If it need be said, the common law will be enforced by the courts. The common law has long recognized 'customs' or rules that have obtained the force of law in a particular locality. Agreements such as treaties negotiated and entered into by exercise of executive prerogative will be enforced by the courts.

[85] History, and a review of the authorities, persuades me that the aboriginal peoples of Canada, including the Nisga'a,

had legal systems prior to the arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact. Aboriginal laws did not emanate from a central print oriented law-making authority similar to a legislative assembly, but took unwritten form. Lord Denning, in ***R. v. Secretary of State For Foreign and Commonwealth Affairs*** at p. 123 likened aboriginal laws to 'custom':

> These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.

[86] The continued existence of indigenous legal systems in North America after the arrival of Europeans was articulated as early as the 1820s by the Supreme Court of the United States. But the most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense.

[87] A review of the authorities illustrates this.

1823-32: CHIEF JUSTICE MARSHALL'S CASES

[88] Any discussion of the recognition by courts of the survival of a limited right of self-government in aboriginal peoples in North America must start with three celebrated decisions of the long serving Chief Justice of the United States, John Marshall, all decided in the first third of the 19th century: ***Johnson v. M'Intosh***, 21 U.S. (8 Wheat) 543 (1823), ***Cherokee Nation v. Georgia*** 30 U.S. (5 Pet.) 1 (1831), and ***Worcester v. Georgia***, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). In these cases, Chief Justice Marshall reviewed the history of the dealings between British authorities and aboriginal peoples in North America prior to the American Revolution. Although these are decisions of the U.S. Supreme Court, they are as persuasive with respect to British Imperial policy in North America prior to Confederation in Canada as they are with respect to that policy prior to the American War of Independence in what is now the United States.

[89] The Imperial attitude towards the right of aboriginal peoples to govern themselves described by Chief Justice Marshall has been frequently reviewed and recognized by American courts. More importantly for present purposes, Chief

Justice Marshall's decisions have been cited approvingly by the Supreme Court of Canada: see for example ***R. v. Van der Peet,*** [1996] 2 S.C.R. 507 at p. 541.

[90] In ***Johnson v. M'Intosh***, Marshall C.J. concluded, after reviewing the history of Imperial policy, that the indigenous peoples' right to govern themselves had been "diminished" but not extinguished. In a statement adopted by Lamer C.J.C. in ***Van der Peet***, at page 542, Chief Justice Marshall wrote at p. 572-3::

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

[91] Eight years later in the 1831 decision of ***Cherokee Nation*** at p. 16, Marshall C.J. wrote that although the legislative powers of Indian nations had been diminished, they were still "domestic dependent nations" (an expression which connotes the unique or *sui generis* nature of aboriginal communities) who retained the power to speak for their people and to enter

into treaties. In ***Worcester v. Georgia*** at p. 559, he spoke of the aboriginal peoples as “independent political communities” and suggested that we describe them as “nations” in the same sense that we use that word to describe other nations on earth. He wrote that these nations retained, after the assertion of sovereignty, all of their “original natural rights” except that they could no longer alienate their land to anyone other than the Crown.

[92] In the same case, the Chief Justice commented on the difficult proposition that the British, inhabitants of a different quarter of the globe, could have rightful dominion over aboriginal peoples. He answered this question by saying, at page 543, that

> … power, war, conquest, gave rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things [*in Canada, the assertion of sovereignty by the Crown*], having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

[93] These statements that the aboriginal peoples were independent nations and political communities whose sovereign rights were diminished rather than extinguished by the assertion of sovereignty, as I have noted, have been adopted

by the Supreme Court of Canada. These subsisting rights curtailed the powers of colonial governments, just as they later curtailed the powers of Parliament and the legislative assemblies.

[94] The proposition that any intervention by the Crown in the internal affairs of the Indians was to be minimal has also been recognized by the Supreme Court of Canada. In ***R. v. Sioui,*** [1990] 1 S.C.R. 1025, a case concerning a treaty signed by General Murray (military and then civil Governor of Quebec from 1760 to 1768) on behalf of the Crown in 1760, Lamer C.J.C., writing for the Court, said at p. 1055:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.

[95] In summary, these authorities mandate that any consideration of the continued existence, after the assertion of sovereignty by the Crown, of some right to aboriginal self-government must take into account that: (1) the indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but

did not extinguish aboriginal powers and rights; (3) among the powers retained by aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with aboriginal peoples was to be "minimal”.

[96] A review of the cases in which Canadian courts, since Confederation, have considered enforcing laws which have their origins with aboriginal peoples rather than with Parliament or a Legislative Assembly, discloses that the above four points have been accepted.

1867 AND AFTER: POST-CONFEDERATION CASES

[97] The case of ***Connolly v. Woolrich*** (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que.S.C.) upholding the validity of a customary marriage which took place in the Athabaska District (now Manitoba) in 1803, is significant among other reasons because the judgment is dated July 9, 1867, eight days after Confederation. It cannot be doubted that Monk J., the Quebec Superior Court judge who heard the case, was cognizant of the ***British North America Act***. The specific issue before the court was whether an Indian woman could claim community of property under the laws of Quebec as a result of a marriage entered into according to Cree customary law. In considering

the matter, Mr. Justice Monk relied upon ***Worcester v. Georgia*** and concluded at p. 82 (C.N.L.C.) that he had “no hesitation” in saying that:

> … the Indian political and territorial right, laws and usages remained in full force both at Athabaska and in the Hudson Bay region previous to the ***Charter of 1670*** [*establishing the Hudson’s Bay Company*], and even after that date as will appear hereafter.

[98] Counsel have put before the court a number of cases, mostly from the Northwest Territories, involving courts recognizing and enforcing aboriginal law relating to marriage and adoption. These cases start in the 1800s and run to the second half of the twentieth century. They include a number of decisions of Sissons J. and Morrow J. in the Northwest Territories trial court.

[99] This judicial recognition of aboriginal customary law has continued in recent years. In ***Wewayakum Indian Band v. Canada,*** [1991] 3 F.C. 420 at 430 (T.D.), Addy J. determined that whether a Band had the authority to sue in the name of Band members was something which "need not be subject to any special rules, laws or procedures other than those prescribed by the traditions, customs and government of the particular Band”.

[100] In ***McLeod Lake Indian Band v. Chingee*** (1998), 165 D.L.R. (4th) 358, [1999] 1 C.N.L.R. 106 (F.C.T.D.), Reed J. had to consider whether the McLeod Lake Indian Band had the authority to determine the method for selection of a Chief and Council of the Band and to settle the terms of such a method by a majority decision of the Band members attending a general meeting convened for that purpose.

[101] The defendants in that case submitted that the election of a Band Chief was invalid because it had been held, not in accordance with the customs of the Band, but in accordance with procedures which had been adopted by the general meeting of the Band. The plaintiffs, on the other hand, argued that the Band was authorized to determine the method by which it would elect a Chief in whatever manner it might choose. In other words, they submitted that custom is not "frozen in time". Reed J. accepted the submissions of the plaintiffs.

[102] The ***McLeod Lake*** case, although it concerns the ***Indian Act***, is authority for the proposition that not only have aboriginal peoples retained post-Confederation the power to elect their leaders, and that aboriginal peoples have the power to determine how they will make those choices, but that

the form or method of the exercise of aboriginal rights may evolve.

[103] Manifestly, the choice of how one's political leaders are to be selected is an exercise in self-government.

[104] In this province, the Court of Appeal decided in ***Casimel v. Insurance Corp. of British Columbia*** (1993), 82 B.C.L.R. (2d) 387, that an adoption in accordance with the customs of the Stellaquo Band of the Carrier People was valid to bring the adopting parents within the definition of dependent parents for the purposes of the ***Insurance (Motor Vehicle) Act,*** R.S.B.C 1979, c. 204. The court concluded unanimously at p. 398 that:

> …there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption.

[105] The response of the plaintiffs in the case at bar to this line of authority is that the law considered in those cases is distinguishable from the legislative power granted the Nisga'a Lisims Government in the Nisga'a Treaty because those decisions concern rules based upon consent. Counsel

alludes to the concept that customary or traditional "laws" of aboriginal peoples have force or legitimacy solely because they are accepted by the people. Such rules are not imposed upon them by the entrenched authority of a written constitution.

[106] I am not persuaded by this argument. First, the concept of legitimacy underlies all political and legislative institutions and indeed accounts in large measure for the efficacy of court orders. Canada is not a nation governed by the military nor by a state police force. Laws are, by and large, accorded respect because the overwhelming majority of the citizenry accepts the legitimacy of the exercise of power by the executive, legislative and judicial branches. This precious reality distinguishes Canada from many nations. Cases such as ***Casimel*** manifest a recognition by the courts that most aboriginal persons accept the legitimacy of an evolving customary or traditional law, just as most Canadians accept the legitimacy of common and statutory law.

[107] Second, in interpreting the effect of a constitutional provision, to construe the word "law" emanating from a legislative assembly as distinguishable from a "law" emanating from the customs of an aboriginal community is to fall into the error of viewing such issues from the

perspective of English or common law legal concepts while ignoring the perspective of aboriginal peoples. It is this pitfall which was addressed by the Supreme Court of Canada in ***R. v. Van der Peet*** at p. 550:

> In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In ***Sparrow***, *supra*, Dickson C.J. and La Forest J. held, at page 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

[108] This would seem essential when one is considering societies whose binding rules are promulgated by oral means rather than in written form.

[109] The idea of the "the will of the people" is important to constitutional law: see ***Reference re Manitoba Language Rights***, [1985] 1 S.C.R. 721 at 745:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental…

[110] That the will of the people expressed through an aboriginal decision making process results in a "customary law" which the people consent to accept rather than from an imposed written "statutory law" cannot serve to sustain an argument that all aboriginal legislative power was extinguished at the time of Confederation.

1982:SECTION 35 OF THE *CONSTITUTION ACT, 1982*

[111] I now turn to the case law that has developed since the entrenchment of aboriginal rights in s. 35 of the ***Constitution Act, 1982***. The issues here are whether s. 35 provides constitutional protection for the aboriginal legal systems discussed in cases such as ***Connolly v. Woolrich*** and ***Casimel,*** and whether that protection extends to the kind of law-making authority set out in the Nisga’a Treaty.

[112] A preliminary issue, however, is raised by the plaintiffs’ submission that the term “land claims agreements” in s. 35, another term for modern day treaties, does not include components of self-government. The plaintiffs argue that while title to land, rights to engage in traditional activities such as hunting, fishing and trapping, and compensatory payments of money may all be recognized as legitimate components of "land claims agreements", the provisions for the establishment of a Nisga'a government with legislative power are not so encompassed.

[113] The plaintiffs put forward three reasons for this submission. First, they say the establishment of a "new order of government" is not a legitimate component of a land claims

agreement. Second, they say that a "new order of government" cannot be characterized as merely modifying an existing aboriginal right. Third, they submit as they have elsewhere that Section 35 cannot be used to create a new order of government inconsistent with the sovereignty of Parliament and the Legislative Assembly and the exclusive distribution of legislative powers to those institutions.

[114] I do not find these submissions persuasive. The plaintiffs accept that Section 35 gives constitutional protection to aboriginal title to land. In their submission, they say that such a claim includes not only aboriginal title but the right to occupy and use the land for traditional activities. On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.

[115] If the right to the use and occupation of land imports some decision-making power with respect to that land, it is necessary to consider how the Supreme Court of Canada has dealt with Section 35 and its constitutional guarantee of

treaty rights that “now exist by way of land claims agreements or may be so acquired”.

1990: *R. v. SPARROW* AND ABORIGINAL RIGHTS

[116] In 1990, the Supreme Court of Canada discussed the significance of Section 35(1) of the ***Constitution Act, 1982,*** in ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075. Sparrow, a member of the Musqueam Band, was charged under the ***Fisheries Act*** with fishing with a prohibited type of net. The appellant admitted the facts, but said he should not be convicted because he was exercising an existing aboriginal right to fish for food. The actual constitutional question before the court was whether the net length restriction contained in the Band's fishing license was inconsistent with Section 35(1).

[117] The court reviewed the significance of Section 35 in detail. It ruled, among other things, that Section 35(1) applies to rights in existence when the ***Act*** came into effect - that is to say, 1982. The section, the Court said, does not revive aboriginal rights which had been extinguished previously.

[118] The court also ruled that existing aboriginal rights are to be interpreted flexibly which is to say they may evolve over time. The exercise of an aboriginal right may be carried out in a different manner as time passes. Put another way,

this idea has come to be stated as meaning that aboriginal rights are not “frozen” in the form in which they existed in the past. The Musqueam people fishing today are not limited to the methods their ancestors used in the eighteenth century. Similarly, if aboriginal nations have maintained a limited right to self-government, the exercise of that right, including the structure of the decision making body, may also change or evolve over time.

[119] Further, the court ruled that Section 35(1) is to be construed in a purposive way. At page 1106, the Court wrote:

> The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

[120] The Court ruled, however, that aboriginal rights, despite being constitutionally protected, are not absolute. There remains a residual power in Parliament to pass laws in appropriate circumstances that may infringe upon aboriginal rights. At page 1109, the Court said:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the ***Constitution Act, 1867***. These powers must, however, now be read together with s. 35(1). In other words,

> federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretative principle … and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada …

[121] This is a restriction upon the exercise of Parliamentary and legislative powers. But equally it is a restriction upon the exercise of aboriginal rights. In circumstances where exercise of an aboriginal right to self-government is inconsistent with the overall good of the polity, Parliament may intervene subject only to its ability to justify such interference in a manner consistent with the honour of the Crown.

[122] The importance of this limitation upon the exercise of aboriginal rights, and the necessity of ensuring that an appropriate measure of constitutional protection is given the exercise of those rights, is reviewed in ***Sparrow***. The Court recognized that aboriginal peoples are justified in their concern that government actions may threaten aboriginal rights and interests. It is for this reason that the Constitution sanctions challenges to legislation to the extent that such laws might infringe upon aboriginal rights. The Court stated

at p. 1110, however, that such legislation will prevail if it can be justified:

> Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s.35(1).

[123] I note here that the plaintiffs have emphasized repeatedly the following passage from p. 1103 of ***Sparrow*** to support their submission that Aboriginal peoples do not possess any legislative powers:

> … there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

[124] This passage, however, cannot mean that all legislative powers in Canada belong to the Crown (either federal or provincial). Rather, the comment concerns the assertion of ***sovereignty*** over the lands of Canada, and the power of the Crown to pass laws regarding those lands. Without doubt the fact of Crown sovereignty in that sense is binding upon this court: ***R. v. Ignace*** 156 D.L.R. (4th) 713. However, the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those Aboriginal groups were eliminated. Such a conclusion would be inconsistent with the principles underlying aboriginal rights set out in paragraph 95 above, first articulated by Chief Justice Marshall and later affirmed by the Supreme Court of Canada in cases like ***Sioui***.

1996: *R. v. BADGER* AND TREATY RIGHTS

[125] In 1996, in ***R. v. Badger*** [1996] 1 S.C.R. 771 at 812-813, the Supreme Court of Canada made it clear that while there are differences between aboriginal rights and treaty rights (the former grounded in the occupation of the land and the latter founded upon agreements with the Crown):

> … they [treaty rights] like aboriginal rights, may be unilaterally abridged … It follows that

> limitations on treaty rights, like breaches of aboriginal rights, should be justified.

[126] This pronouncement can be considered from two perspectives. First, it means that treaty rights, although they result from an agreement between aboriginal peoples and the Crown, are not absolute. But second, it holds that should Parliament move to infringe upon or impair a treaty right, the same justificatory analysis involving the honour of the Crown which applies when infringing upon an aboriginal right comes to the fore:

> The wording of s. 35(1) of the ***Constitution Act, 1982*** supports a common approach to infringement of aboriginal and treaty rights. It provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (***Badger*** at p. 813).

[127] Thus, the Supreme Court of Canada has recognized that the constitutional protection for treaty rights, just as for aboriginal rights, admits of interference by Parliament subject only to the necessity for justification consistent with the honour of the Crown as was described in ***Sparrow***.

[128] This limitation upon the exercise of otherwise constitutionally-protected treaty rights is important in the case at bar. Because it applies to treaties, it is an answer

to the submission that the constitutional entrenchment of the Nisga'a Treaty amounts to a permanent abdication by Parliament of its right to interfere with decisions of the Nisga'a Lisims Government taking into account the impact of those decisions upon the greater public good.

1997: *DELGAMUUKW* IN THE SUPREME COURT OF CANADA

[129] I now turn to ***Delgamuukw v. British Columbia,*** [1997] 3 S.C.R. 1010. In this case, the Supreme Court of Canada turned its attention specifically, among other things, to the issue of whether a claim for an aboriginal right to self-government had been made out by the appellants. The Court concluded, at page 1114, that there was not the necessary factual basis upon which to determine whether that claim had been made out.

[130] The court referred to its earlier judgment in ***R. v. Pamajewon,*** [1996] 2 S.C.R. 821, in which the court had found that a claim in that case for the right to self-government was framed "in excessively general terms" and therefore was not "cognizable" to the court. Thus, the court in ***Delgamuukw,*** as in ***Pamajewon,*** did not determine whether the appellants in that case had made out an aboriginal right to self-government.

[131] The legislative power set out in the Nisga'a Treaty does not succumb to the failing of being "excessively general". Rather, it is a detailed document setting out precisely what powers and what limitations to those powers reside with each party.

[132] The appellants in the case at bar make much of the decision of the Court of Appeal in the same case, even though that decision was in many respects overturned by the Supreme Court of Canada which ordered a new trial upon the issue of self-government.

[133] There was considerable discussion and many submissions by counsel about the effect of the Court of Appeal decision in ***Delgamuukw*** upon this case and the degree to which this court should be either bound or persuaded by the majority in that case. In the end, I am satisfied that while I may look to the reasons for the majority as well as to the reasons of the two justices who dissented, and while all of these judgments may be persuasive, none are binding. I note that the majority concluded that any aboriginal right to self-government was extinguished by the time of Confederation. The fact that the Supreme Court of Canada ordered that the matter be returned to trial for a determination as to the extent of

the right of self-government indicates that they disagreed with that conclusion.

[134] In ***Delgamuukw***, the Supreme Court of Canada considered those things which render aboriginal title a unique (*sui generis*) concept in law. The first was the source of such title. The court noted that aboriginal title arises from the prior occupation of the territory by aboriginal peoples, that is to say prior to the arrival of Europeans. The court concluded at page 1088 that prior occupation is relevant not only because of its physical fact, but because "aboriginal title originates in part from pre-existing systems of aboriginal law". Further, the court noted at page 1091 that Section 35(1) has provided constitutional protection to aboriginal title "in its full form". At page 1113, the Chief Justice wrote that "aboriginal title encompasses within it a right to choose to what ends a piece of land can be put".

[135] These observations suggest that the right to determine the appropriate use of the land to which an aboriginal nation holds title is inextricably bound up with that title. First, it is "aboriginal law" which is part of the source of aboriginal title. Second, the right to decide how to use that land is also a part of the right – part of aboriginal title "in its full form".

[136] One must interpret these aspects in light of the conclusion of the Supreme Court of Canada that aboriginal title is held communally. It is described by the Court, at pp. 1082-3, as:

> …a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* [unique] and distinguishes it from normal property rights.

DOES S. 35 PROTECT ABORIGINAL SELF-GOVERNMENT?

[137] Can it be, as the plaintiffs' submission would hold, that a limited right to self-government cannot be protected constitutionally by Section 35(1)? I think not. The above passages from ***Delgamuukw*** suggesting the right for the community to decide to what uses the land encompassed by their aboriginal title can be put are determinative of the question. The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.

[138] An analysis of the reasoning of the Supreme Court of Canada in ***Delgamuukw*** can lead to no other result. Indeed, the

question may have been answered as early as 1990 in ***R. v. Sioui***. In that case, Lamer C.J.C. wrote at page 1043:

> There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the ***Indian Act***.

[139] That an agreement about political or social rights (self-government or self-regulation) can be a treaty within the meaning of Section 88 of the ***Indian Act*** (the section making provincial laws of general application apply to Indians "***subject to any treaty rights***"), supports the conclusion that self-government provisions may form part of a treaty encompassed by Section 35 of the ***Constitution Act, 1982***.

[140] This conclusion is consistent with the observation of Lambert J.A., speaking for the court in ***Casimel,*** at pp. 394-5, that:

> … the conclusion which should be drawn from the decision [of the B.C. Court of Appeal] in ***Delgamuukw v. British Columbia*** is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with that scope and content and the workings of the general law of British Columbia.
>
> (underlining added)

[141] If such rights to "social self-regulation" had not been extinguished by 1982, they perforce are constitutionally protected by s. 35.

[142] Finally, an entrenchment of rights essential to maintain the distinct culture of aboriginal peoples is consistent with the principles of constitutionalism discussed by the Supreme Court of Canada in 1998, after ***Sparrow***, ***Badger***, and ***Delgamuukw***, in ***Reference Re Secession of Quebec.*** In the section of those lengthy reasons concerning the principles underlying our constitutional structure, the Court said at page 259:

> An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule.
>
> …a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.

[143] Encompassing a limited right to self-government or legislative power within the constitution via s. 35 endows the

Nisga’a with the institutions and rights necessary to meet the threat acknowledged in the above quotation.

ROYAL ASSENT

[144] The plaintiffs’ second principal submission is that establishing a form of government for the Nisga'a Nation which permits them to make laws which do not require the assent of either the Governor General or the Lieutenant Governor is a breach of the fundamental constitutional framework underpinning the right to legislate and make laws in Canada. They cite Section 55 of the ***Constitution Act, 1867***. That provision states:

> 55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

[145] The plaintiffs say that as laws may be proclaimed in force in Canada only by assent of the Queen's representative, any provision which would entrench a legislative body absent that requirement must be void as unconstitutional. The plaintiffs point out that the requirement for royal assent is

considered so fundamental to the Constitution that it is one of only five matters which cannot be amended except with the unanimous authorization of Parliament and each of the ten provincial legislatures: see Section 41(a) of the ***Constitution Act, 1982***.

[146] The plaintiffs rely upon ***In re The Initiative and Referendum Act,*** [1919] A.C. 935 (J.C.P.C.). That case arose by way of referral from the Manitoba government to the Court of King's Bench for a ruling upon the question of whether the Legislative Assembly of that province had the jurisdiction to enact a referendum act. Mathers C.J. decided that the legislature had such authority. The Court of Appeal overturned that decision.

[147] The parties took the matter directly to the Privy Council without going first to the Supreme Court of Canada. Viscount Haldane, speaking for the Privy Council, ruled the legislation unconstitutional. Their Lordships found that the ***Act***, which would permit an initiative voted upon by voters at large to become law if approved by a majority without passage through the legislature and without royal assent, was unconstitutional. They stated at p. 945 that while a legislature could delegate legislation to subordinate agencies:

> … it does not follow that it can create and endow with its own capacity a new legislative power not created by the ***British North America Act*** to which it owes it own existence.

[148] The Privy Council decided the case on narrow grounds concerning the office of the Lieutenant Governor. The above quotation, then, is *obiter* (not essential to the decision, and therefore although potentially persuasive, not binding). The passage was considered by Beetz J. in ***OPSEU v. Ontario (Attorney General),*** [1987] 2 S.C.R. 2 at 47, where he said:

> While this *obiter* is confined to the particular facts of that case, it may stand for the wider proposition that the power of constitutional amendment given to the provinces by s.92(1) of the ***Constitution Act, 1867*** does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

[149] The specific, limited powers granted to the Nisga'a Nation in the Treaty are distinguishable from what was attempted by the Manitoba legislature in 1916. By that statute, the Legislative Assembly abrogated totally its legislative powers and purported to grant to the majority of eligible voters among the population the authority to enact legislation granted to the legislature in Section 92 of the ***British North America Act*** as it then was known. The limited powers granted to the Nisga'a Nation cannot be described as "a

profound constitutional upheaval". As I have found above, the powers granted to the Nisga'a Nation in the Treaty are limited and are within those contemplated by Section 35 of the ***Constitution Act, 1982***.

[150] Finally, s. 55 of the ***Constitution Act, l982***, speaks of legislation passed by Parliament and, by later reference, legislation passed by the provinces. It does not on its wording apply to other law-making bodies.

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

[151] As noted above, Section 3 of the ***Canadian Charter and Rights and Freedoms*** provides that every citizen of Canada has the right to vote in an election for members of, or to run for office in, the House of Commons or the Legislative Assembly of a Province. This concept has, the plaintiffs point out, been commented upon favourably by the Supreme Court of Canada in ***Reference Re Succession of Quebec*** where Lamer C.J.C. said, at page 255, that:

> Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters and as candidates.

[152] The plaintiffs submit that there is a "fundamental equation" between the guarantee of democratic rights under Section 3 of the ***Charter*** and the exclusive distribution of legislative powers under the ***Constitution Act, 1867***. This argument, of course, depends upon a finding that it is only Parliament and the Legislative Assembly that have the authority to make laws in Canada. I have already found that submission is in error. In my view, that conclusion undermines seriously the plaintiffs' submission on this point.

[153] If I were wrong in that conclusion, I would nevertheless not give effect to this proposition because I accept the submission of Mr. Aldridge, on behalf of the Nisga'a Nation, that Section 25 of the ***Charter*** is a complete answer to this argument.

[154] Section 25 is within Part 1 of the ***Constitution Act, 1982,*** and therefore unlike Section 35 part of the ***Charter of Rights and Freedoms***. It states:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[155] In construing this section, one must keep in mind that the *communal* nature of aboriginal rights is on the face of it at odds with the European/North American concept of *individual* rights articulated in the ***Charter***.

[156] Although there are few cases considering s. 25, what they show is that the section is meant to be a "shield" which protects aboriginal, treaty and other rights from being adversely affected by provisions of the ***Charter.*** It does not in itself add any substantive rights. The section is only triggered when aboriginal or treaty rights are challenged on the basis of the ***Charter*** and the outcome of that challenge might abrogate or derogate from "rights or freedoms that pertain to the aboriginal peoples of Canada". See: ***Corbière v. Canada (Minister of Indian and Northern Affairs)*** (1996), 142 D.L.R. (4th) 122 at 126, [1997] 1 F.C. 689 (C.A.), aff'd [1999] 2 S.C.R. 203 at 248-9; and ***Shubenacadie Indian Band v. Canada (Human Rights Commission)*** (1997), 154 D.L.R. (4th) 344 at 366, [1998] 2 F.C. 198, [1998] 2 C.N.L.R. 212 (F.C.T.D.), aff'd [2000] F.C.J. No. 702 (QL) (C.A.).

[157] This case being one involving treaty rights, s. 25 is triggered and must be given effect.

[158] Keeping these authorities in mind, and applying a purposive interpretation to s. 25 in light of the admonition of the Supreme Court of Canada that where there is ambiguity, constitutional or statutory provisions are to be given a large and liberal interpretation in favour of aboriginal peoples, one comes to the conclusion that the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the ***Charter***.

[159] The concern raised by the plaintiffs is that some Canadian citizens who are not Nisga'a citizens will find themselves subject to Nisga'a laws without the opportunity to vote for, or to put themselves forward as a candidate for, the institution which enacted those laws. This is not unusual.

[160] Provinces have residency requirements and citizens who move from one province to another may find there is a waiting period during which they may not vote. Citizens are subject to the laws of regional districts, municipalities, and various administrative boards, the regulations or by-laws of which have the force of law, yet frequently they are not eligible to vote in elections for such bodies, the members of many such agencies being appointed or the right to vote in elections for such bodies being restricted.

[161] To say that these are delegated powers does not dispel the significance of this fact. If the principle is that one is not to be subject to enforceable laws unless one has been able to vote for the body which enacted a particular rule, whether it was an act pursuant to a delegated power or a power granted by way of a treaty is not determinative.

[162] There is another reason for rejecting this submission. The rights guaranteed by s. 3 are limited by the wording of the section itself to elections for the House of Commons and legislative assemblies. In ***Haig v. Canada,*** [1993] 2 S.C.R. 995, the appellant was not permitted to vote on a referendum in Quebec because he did not meet residency requirements. He argued that his s. 3 rights had been violated. L'Heureux-Dubé J., writing for the majority, said at p. 1031:

> The wording of the section, as is immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. ...the right does not extend to municipal elections or referenda.

[163] The plaintiffs also submit that the treaty violates the rights of non-Nisga'a citizens guaranteed by ss. 7 and 15 (1) of the ***Charter.*** Those sections provide:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[164] However, counsel did not press these submissions in oral argument. In the plaintiffs' written submission it was submitted that the Treaty was a denial of "democratic rights", and that the onus is upon the Crown to uphold such an infringement as justified in a free and democratic society.

[165] I observe also that none of three plaintiffs have submitted that they have actually been denied some right pursuant to the ***Charter***. The submission, therefore, is speculative. It is worthwhile noting that while the Treaty ensures that certain people are guaranteed Nisga'a citizenship, it also permits the Nisga'a government to grant such citizenship to other persons.

[166] In any case, s. 25 of the ***Charter*** itself is as much an answer to a submission concerning sections 7 and 15(1) as it is an answer to the s. 3 submission.

THE FRAMEWORK

[167] The Supreme Court of Canada has referred to s. 35 as a "framework" for reconciling the prior existence of aboriginal peoples with the sovereignty of the Crown. In ***Van der Peet***, Lamer C.J.C. wrote at pp. 533-9:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35 (1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples, were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s.35 (1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; … [underlining in original]

[168] That the purpose of s. 35(1) is to provide a framework within which the prior existence of aboriginal peoples may be reconciled with the sovereignty of the Crown can mean nothing other than that there are existing aboriginal rights which have not yet been so reconciled. In much of Canada, these rights were reconciled through the negotiation of treaties. In most of British Columbia they were not.

[169] There are two ways to achieve the definition of "the substantive rights" which fall within s. 35(1): by resort to the courts, or by the negotiation of treaties. The Supreme Court of Canada, as have other courts, has stated a number of times that negotiation is the preferred method. In ***Sparrow,*** the Court wrote at p. 1105:

> Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.

[170] Seven years later, in ***Delgamuukw,*** Chief Justice Lamer referred to that passage from ***Sparrow*** and went on to write, at pp. 1123-4:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides,… that we will achieve ... "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

[171] Section 35(1), then, provides the solid constitutional framework within which aboriginal rights in British Columbia may be defined by the negotiation of treaties in a manner compatible with the sovereignty of the Canadian state. I conclude that what Canada, British Columbia and the Nisga'a have achieved in the Nisga'a Final Agreement is

consistent both with what the Supreme Court of Canada has encouraged, and consistent with the purpose of s. 35 of the ***Constitution Act, l982.***

[172] The idea that treaties could be the vehicle to define rights to be given constitutional protection by s. 35 is supported by a consideration of the records of meetings of the framers of s. 35, and a consideration of a temporary provision in the ***Constitution Act, 1982***, s. 37, the provision which mandated a first ministers' conference within one year of the passage of that ***Act***.

[173] The meeting required by this section took place in March of 1983. It was at this conference that the First Ministers agreed to add s. 35(3) to the Constitution. They also agreed to add s. 37(2) which stated that a future conference would include in the agenda

> … an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada …

[174] At the 1983 conference, transcripts of which are in evidence, the then Prime Minister said that one matter for the meeting was the "the identification of rights" to be included in s. 35. He went on to say that:

> … the heart of the matter, the crux of our efforts to improve the condition of our aboriginal peoples and strengthen their relationships with other Canadians, is found within the set of issues concerning aboriginal government.

[175] Twelve years later in December of l995, in another document in evidence, the federal government published a policy statement entitled ***Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.*** That policy statement said, at p. 3, that:

> The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under section 35 of the ***Constitution Act, l982***. It recognizes, as well, that the inherent right may find expression in treaties…

[176] These extrinsic documents are evidence that the framers of s. 35(3) considered that a form of self-government yet to be defined was to be included in the bundle of rights protected by that section, and that the Crown in right of Canada accepted treaties as a method of defining such rights as part of its policy.

[177] The Supreme Court of Canada recognized in 1990 that the rights guaranteed by s. 35 required definition. In ***Sparrow*** at p. 1108, the Court wrote of s. 35 as a "solemn

commitment that must be ***given meaningful content***" (emphasis added). The Nisga'a Final Agreement provides, with respect to the Nisga'a, that content.

SUMMARY

[178] The plaintiffs say that s. 35 of the ***Constitution Act, 1982***, although it may afford constitutional protection to aboriginal title and to some aboriginal rights, may not clothe self-government or legislative powers with such status. They say this is so because any right to self-government was extinguished at the time of Confederation when the Constitution divided all legislative power between Parliament and the provinces, leaving no legislative powers for aboriginal people and their governments.

[179] For the reasons set out above, I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before l982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a

treaty. The Nisga’a Final Agreement does the latter expressly.

[180] I have also concluded that the ***Constitution Act, 1867*** did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92 (subject until 1931 to the Imperial Parliament). But the ***Constitution Act, 1867***, did not purport to, and does not end, what remains of the royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga’a people in 1982.

[181] Section 35 of the ***Constitution Act, 1982***, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga’a after the assertion of sovereignty. The Nisga’a Final Agreement and the settlement legislation give that limited right definition and content. Any decision or action which results from the exercise of this now-entrenched treaty right is subject to being infringed upon by Parliament and the legislative assembly. This is because the Supreme Court of Canada has determined that both aboriginal and treaty rights guaranteed by s. 35 may be impaired if such interference can be justified and is consistent with the honour of the Crown.

[182] The Nisga’a Final Agreement, negotiated in full knowledge of the limited effect (a fact accepted by the Nisga’a Nation in these proceedings) of the constitutional promise of s. 35, itself limits the new Nisga’a governments’ rights to legislate. In addition, it specifies that in a number of areas, should there be any conflict between Nisga’a laws and federal or provincial laws, federal or provincial laws will prevail.

[183] Thus, the Nisga’a government, subject as it is to both the limitations set out in the treaty itself and to the limited guarantee of s. 35 of the ***Constitution Act, 1982,*** does not have absolute or sovereign powers.

[184] As set out above, the submission that the Nisga’a Treaty impinges improperly upon the offices of the Governor General and the Lieutenant Governor is answered by a plain reading of s. 55 of the ***Constitution Act, 1867***. The challenges based upon the ***Canadian Charter of Rights and Freedoms*** are answered by s. 25 of the ***Charter.***

RESULT

[185] In the result, I find the Nisga'a Final Agreement, and the settlement legislation passed by Parliament and the Legislative Assembly of the Province of British Columbia, establish a treaty as contemplated by Section 35 of the ***Constitution Act, l982.*** The legislation and the Treaty are constitutionally valid. The application for a declaration that the settlement legislation and the Treaty are in part void and of no effect is dismissed.

"L.P. Williamson, J."
The Honourable Mr. Justice L.P. Williamson

October 3, 2000 -- Corrigendum issued by Mr. Justice Williamson advising that in paragraph 124, the correct citation for ***R. v. Ignace*** should read:

"156 D.L.R. (4th) 713."