August 2003 **by Kinwa Bluesky**[1]

AN OVERVIEW OF ABORIGINAL SELF-GOVERNMENT

Introduction

Aboriginal self-government is a topic that has received considerable attention in recent years. As part of the BC treaty process, the governments of Canada and British Columbia are negotiating self-government arrangements with Aboriginal people. In 1998, the federal and provincial government entered into a treaty with the Nisga'a Nation, which includes numerous self-government provisions.

Despite all the attention being given to Aboriginal self-government in recent years, it is a topic that remains little understood by the general public. What is it? Why are governments negotiating self-government arrangements with First Nations? These questions will be explored in this paper.

What is Aboriginal Self-Government?

Most efforts to define the "Aboriginal self-government" inevitably produce abstract, theoretical definitions of this complex and multi-faceted concept, which are of little assistance to the average person struggling to understand what self-government means.

A more practical approach to understanding Aboriginal self-government is to look at the specific governance issues that are being negotiated by Canada, BC and Aboriginal people as part of treaty negotiations. When negotiating the governance component of treaties, the parties typically address the following topics:

(1) the source of authority for Aboriginal law-making power;
(2) the scope of Aboriginal law-making powers; and
(3) harmonization of Aboriginal laws with the laws of Canada and British Columbia.

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Source of authority for Aboriginal Self-Government – inherent, contingent or delegated?

What is the source of authority for Aboriginal governments to make laws? There are at least three different schools of thought on the source of authority for Aboriginal self government, namely the inherent rights approach, the contingent rights approach and the delegated authority approach.

Under the inherent rights approach to self-government, Aboriginal governments are seen as having independent powers to make laws, and such law-making authority predates the establishment of Canada and goes back in time thousands of years. Such authority originates from Aboriginal peoples themselves and is based upon their existence as organized societies on this continent for thousands of years.[2] In other words, under the inherent rights theory, Aboriginal law-making powers exist independently of the Constitution of Canada and do not depend on recognition by federal or provincial governments for their existence.[3]

Conversely, under the contingent rights theory of self-government, Aboriginal governments do not have any independent powers to make laws and the existence of any Aboriginal law-making authority would depend on recognition by federal or provincial governments or constitutional amendment.[4] In other words, under the contingent rights theory of self-government there are only two possible sources of authority for Aboriginal governments to make laws, namely, recognition of Aboriginal law-making power by the federal or provincial governments or amendment of the Constitution to create law-making authority for Aboriginal governments.

Under the delegated authority approach to self-government, Aboriginal governments have no independent authority to make laws and can only do so where the federal or provincial governments have delegated law-making authority to them under sections 91 or 92 of the Constitution. The rationale for this perspective is that sections 91 and 92 of the Constitution

[2] Jim Aldridge, "Self Government: The Nisga'a Experience" in Speaking Truth to Power III by the BC Treaty Commission, p. 43.
[3] Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Soveriegnty: An Essay on R v. Sparrow", (1991) 29 Alberta Law Review 498 at 500 and 502.
[4] Ibid at p. 500.

contain all of the law making powers exercisable by any government in Canada. As these powers have already been divided between the federal and provincial governments, the existence of any Aboriginal law-making powers would depend on a delegation of law-making powers to Aboriginal governments by the federal or provincial governments.

What do the courts have to say about the source of authority for Aboriginal law-making powers? The Supreme Court of Canada hasn't made any determinative rulings on the question of source of authority for Aboriginal self-government.

However, in the *Campbell* case[5], the British Columbia Supreme Court appears to have rejected the delegated authority approach in favour of the inherent rights theory of self-government. As noted above, the rationale underlying the delegated rights approach is that sections 91 and 92 divide all the law-making power in Canada, leaving no room for Aboriginal law-making power. On this question, Williamson J. in the *Campbell* case commented as follows:

> *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 the powers of Parliament and the legislative assemblies, just as it had been beyond the powers of the colonies.*[6]

Williamson J. then went on to comment on the impact of the division of powers on Aboriginal law-making powers:

> *… 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 the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at different issues and was a division "internal" to the Crown.*[7]

By ruling that Aboriginal law-making powers survived the division of powers in sections 91 and 92, the British Columbia Supreme Court in the *Campbell* case appears to have rejected the

[5] *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333
[6] Supra, note 4 at p. 353.
[7] Supra, note 4 at p. 354.

delegated authority approach in favour of the inherent rights theory of self-government. Unless and until the *Campbell* case is appealed or overruled, it represents the current state of the law in British Columbia. Therefore, on the legal front, the inherent rights approach appears to be prevailing at the present time.

On the political front, the inherent rights theory is the approach that is advanced by Aboriginal people. In a 1995 policy statement, the Government of Canada also "recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982"[8] and is prepared to negotiate self-government agreements with First Nations in accordance with its inherent rights policy.

The Government of British Columbia's preferred approach on the source of authority for Aboriginal law-making powers remains unclear. However, based on the questions posed to voters in the 2002 province wide referendum on treaty principles, it appears that the Government of British Columbia favours a delegated rights approach. At question 6 of the referendum, voters were asked whether "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia."[9]

Scope of powers

One of the basic functions performed by any government, regardless of its size, power or the source of its authority, is to make laws. As part of the BC treaty process, the governments of Canada and British Columbia are negotiating the scope of Aboriginal law-making powers with Aboriginal people. What types of law-making powers do Aboriginal people want to exercise? What types of law-making powers are Canada and BC willing to negotiate with Aboriginal People? In all likelihood, few British Columbians know the answers to these questions.

[8] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: Federal Policy Guide – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995), pp.2 and 3.

[9] Government of British Columbia, Treaty Negotiations Office, "Backgrounder – Referendum on Treaty Principles", April 2, 2002, question 6.

There are few examples that British Columbians can refer to when trying to answer these questions. While treaties are being actively negotiated at 52 treaty tables in BC, no treaties or self-government agreements have been concluded to date under the BC treaty process.

The Nisga'a Final Agreement, which was concluded outside the BC treaty process, is the only treaty concluded to date in this province. British Columbians can certainly refer to the Nisga'a treaty, which contains numerous self-government provisions to get a glimpse into the types of powers that Aboriginal people want to exercise as part of treaties or other agreements with Canada and BC.

What types of law-making powers are set out in the Nisga'a treaty? In the Nisga'a treaty Canada and BC recognize and affirm the power of the Nisga'a nation to make laws over the following subject matters:

- matters integral to the distinct culture of the Nisga'a people, such as Nisga'a language and traditional laws, also known as *Ayuukhl Nisga'a" or "Ayuuk"*;[10]
- matters that are internal to the Nisga'a people, such as membership in the Nisga'a nation,[11] Nisga'a government institutions,[12] marriages,[13] social services,[14] health services,[15] child and family services,[16] child custody,[17] adoption [18] and education;[19]
- management of Nisga'a lands, including the development and management of a Nisga'a land title system,[20] control over access to Nisga'a lands and highways[21] and the use, management, planning, zoning and development of Nisga'a lands;[22] and
- management of resources on Nisga'a lands, including forest, fisheries, wildlife and resources on Nisga'a lands.[23]

[10] Supra, note 1 at p. 46.
[11] Nisga'a Final Agreement (1998), chapter 20.
[12] Ibid, chapter 11.
[13] Supra, note 10, chapter 11, sections 75-77.
[14] Supra, note 10, chapter 11, sections 78-80.
[15] Supra, note 10, chapter 11, sections 82-85.
[16] Supra, note 10, chapter 11, sections 89-93.
[17] Supra, note 10, chapter 11, sections 94-95.
[18] Supra, note 10, chapter 11, sections 96-99.
[19] Supra, note 10, chapter 11, sections 100-107.
[20] Supra, note 10, chapters 3 and 4.
[21] Supra, note 10, chapters 6 and 7.
[22] Supra, note 10, chapter 11, section 47(a).
[23] Supra, note 10, chapters 5, 8 and 9.

What types of law-making powers are Canada and BC willing to negotiate with First Nations? Canada's policy on the types of law-making powers that it is willing to negotiate with Aboriginal people is much more clearly articulated than BC's policy. Specifically, in its inherent rights policy, Canada has expressed a willingness to negotiate the following types of law making powers with Aboriginal people:

- matters internal to the group, integral to its distinct culture, and essential to its operation as a government or institution, such as membership, marriage, adoption, language, culture, religion, education, health, social services, property rights, land management, natural resource management, hunting, fishing and trapping and direct taxation and property taxation;[24] and
- matters that have impacts that go beyond individual communities, such as divorce, environmental protection, fisheries co-management and migratory birds co-management.[25]

However, Canada is not prepared to negotiate the following types of law-making powers with Aboriginal people as part of treaties or self-government agreements:

- powers related to Canadian sovereignty, defence and external relations, such as international/diplomatic relations and foreign policy, national defence and security, security of national borders, international treaty making, immigration, naturalization and aliens and international trade;[26] and
- other national interest powers, such as management and regulation of the national economy, including bankruptcy, insolvency, trade and competition policy, intellectual property, currency, maintenance of law and order and criminal law.[27]

British Columbia is currently revising its self-government mandates following the province wide referendum on treaty principles. Accordingly, we cannot be certain of the types of Aboriginal law-making powers that BC is willing to negotiate with Aboriginal people until this process of mandate revision is completed.

What do the courts have to say about the scope of Aboriginal law-making powers? The only clear direction provided by the courts on this question is set out in the *Pamajewon*[28] case. In

[24] Supra, note 7, at p. 5.
[25] Supra, note 7, at p. 6.
[26] Supra, note 7, at p. 7.
[27] Ibid.
[28] *R. v. Pamejewon* (1996), 138 D.L.R. (4th) 204, 109 C.C.C. (3d) 275, [1996] 2 S.C.R. 821, [1996] 4 C.N.L.R. 164, 50 C.R. (4th) 216, 92 O.A.C. 241, 199 N.R. 321.

Pamajewon, the Supreme Court of Canada held that the power to regulate high stakes gambling on reserve lands is not an Aboriginal law-making power that is recognized and affirmed by section 35(1) of the *Constitution Act, 1982.*[29] Apart from exclusion of a right to regulate high stakes gaming, the full scope of Aboriginal law-making powers recognized and protected by section 35(1) remains unresolved by the courts.

At the end of the day the scope of law-making powers that will ultimately be recognized and affirmed in treaties or self-government agreements between Aboriginal people and the federal and provincial governments is a matter for negotiation. Governance arrangements will likely vary from treaty to treaty to address the unique social, cultural, political and economic needs of Aboriginal people in the various regions of this province.

Harmonization of laws

What does harmonization of laws mean and why are Canada, BC and Aboriginal people negotiating harmonization of laws as part of treaty negotiations in the BC treaty process?

It is not uncommon for governments in a federal system to share law-making authority over the same subject matter. Where governments share law-making authority, it is essential that there be clear rules in place to determine which law applies in a given situation. This is what is meant by harmonization of laws.

Canada's law-making powers are set out in section 91 of the *Constitution Act, 1982* and British Columbia's law-making authority is set out in section 92. Most of the powers that Aboriginal people wish to have recognized and affirmed in treaties are subject matters that Canada and BC also have law-making authority over under sections 91 and 92 of the *Constitution Act, 1982.* To avoid confusion about which law will apply in any given situation, it is necessary for the parties to harmonize their respective law-making authorities. That is why Canada, BC and Aboriginal people are negotiating harmonization of laws as part of treaty negotiations in the BC treaty process.

[29] *R. v. Pamejewon* [1996] 4 C.N.L.R. 164 at p. 172.

In the Nisga'a treaty, harmonization of laws was accomplished by identifying those instances when Nisga'a law must be followed and those instances where federal or provincial laws must be followed. For example, Nisga'a laws generally prevail, or must be followed in respect of matters that are internal to Nisga'a lands and people, such as decisions about Nisga'a language, culture and treaty entitlements.[30] Federal and provincial laws prevail over matters of broader application, such as peace, order, public safety, construction of buildings, health services and environmental protection.[31]

Why Self-Government?

Why are Canada and British Columbia negociating self-government with Aboriginal people?

There are certainly compelling historical reasons for Canada, British Columbia and Aboriginal people to negotiate governance as part of treaty negotiations. First Nations were self-governing before the arrival of European and other nations in Canada and continually expressed their desire to govern themselves according to their own traditions. Furthermore, Aboriginal people were denied the right to vote provincially until 1949 and federally until 1960, which limited their opportunities for advancing their interests within the Canadian political system. Canada, British Columbia and Aboriginal people undoubtedly want to turn the page on this chapter of history and build a new relationship based on mutual respect and recognition.

There are also legal imperatives underlying the decision of the parties to negotiate self-government as part of treaty negotiations. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples. If self-government is an existing Aboriginal right, then Canada and British Columbia would be required to engage in negotiations with Aboriginal people to give effect to the constitutional protection afforded by section 35(1).

[30] Supra, note 1 at p. 46.
[31] Ibid.

While the question of whether self-government is an existing Aboriginal right protected by section 35(1) has been considered on numerous occasions by the courts, unfortunately the courts have not made a determinative ruling on this question. Moreover, the courts have consistently encouraged the parties to resolve this question through negotiation rather than litigation.[32]

With no clear direction from the courts, public opinion remains divided on the question of whether public governments should be negotiating self-government arrangements with Aboriginal people.

On the political front, the Government of Canada has taken a pragmatic approach to the question and is prepared to negotiate self-government arrangements with Aboriginal people in accordance with its inherent rights policy. The Government of British Columbia is also prepared to engage in exploratory discussions with Aboriginal people regarding Aboriginal self-government.

Is Self-Government an Existing Aboriginal Right?

At the centre of the current debate about whether governments should be negotiating self-government with Aboriginal people is the question of whether Aboriginal self-government and Aboriginal law-making powers are among the Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982.*

In this section of the paper, we will examine in greater detail what the courts have said about the protection afforded to Aboriginal self-government and law-making powers by section 35(1) of the *Constitution Act, 1982*.

[32] Bradford W. Morse "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*", [1997] McGill Law Journal 1011 at p. 1042.

What the courts say

On the legal front, the courts have offered little or no guidance on the question of whether Aboriginal governments have existing law making powers that are now protected by section 35(1) of the *Constitution Act, 1982.*

The Supreme Court of Canada first considered this question in the *Pamajewon* case in 1996. Unfortunately, due to an absence of necessary evidence, the Court did not need to consider the broader question of whether the inherent right of self-government is an Aboriginal right protected by section 35(1).[33] Instead the Court ruled on the narrower question of whether the right of the Shawanaga and Eagle Lake First Nations in Ontario to regulate high stakes gaming fell within the scope of Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

In deciding this case, the Court applied the test set out in the *Van der Peet*[34] for determining the Aboriginal rights recognized and affirmed by section 35(1), which requires that

> *in order to be an aboriginal right an activity must be an element of a practice, custom or tradition, integral to the distinctive culture of the aboriginal group claiming the right.*[35]

On application of the *Van der Peet* test, the Court ruled that the high stakes gambling is not an activity that was integral to the distinctive culture of the Ojibwa people, who were the ancestors of the Shawanaga and Eagle Lake First Nations.[36] Since the Court did not decisively reject the existence of the inherent right of self-government in *Pamajewon*, some room has been left for future consideration of this question through litigation.[37]

[33] Supra, note 31 at pp. 1030, 1036 and 1040.
[34] *R. v. Van der Peet* (1996), 137 D.L.R. (4TH) 289, 109 C.C.C. (3d) 1, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177, 50 C.R. (4th) 1, [1996] 9 W.W.R. 1, 130 W.A.C. 81, 23 B.C.L.R. (3d) 1
[35] *R. v. Van der Peet* (1996), [1996] 2 S.C.R. 507 at 549 and supra, note 31 at p. 1029.
[36] *R. v. Pamajewon* (1996), [1996] 4 C.N.L.R. 164 at 172 and supra, note 31 at p. 1030.
[37] Supra, note 31 at p. 1040.

In 1997, the Court was again asked to consider this question in the *Delgamuukw*[38] case. In *Delgamuukw,* the Gitxsan and Wet'suwet'en appellants did not focus solely on the question of whether the inherent right of self-government is an existing Aboriginal right protected by section 35(1). Instead, the Gitxsan and Wet'suwet'en peoples asked the court to rule on the much broader question of Aboriginal sovereignty. In particular, they asked the Court to rule on their authority or jurisdiction to govern their respective traditional territories.

Unfortunately, the Court found that it was impossible to determine whether the claim to self-government by the Gitxsan and Wet'suwet'en had been made out "due to errors of fact made by the trial judge and the resultant need for a new trial."[39] The broad manner in which the Gitxsan and Wet'suwet'en framed their claim to self-government also influenced the Court's decision not to rule on this question as evidenced by the following comments made by Chief Justice Lamer:

> *…One source of the decreased emphasis on self-government on appeal is this Court's judgment in Pamajewon. There, I held that rights to self-government, if they existed, cannot be framed excessively in general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not recognizable under s.35(1).*
>
> *The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of Aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.*[40]

[38] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285.
[39] *Delgamuukw v. British Columbia* [1998] 1 C.N.L.R. 14 at p. 80.
[40] Ibid at pp. 80-81.

While the Supreme Court of Canada has not yet made any determinative rulings on the question of whether self-government is an existing right recognized and affirmed by section 35(1), in 2000 the British Columbia Supreme Court made some clear pronouncements on this question in the *Campbell*[41] case.

In the *Campbell* case, the BC Supreme Court was asked to rule on the constitutionality of certain governance provisions of the Nisga'a treaty, which set out the authority of the Nisga'a to make laws that prevail over provincial and federal laws. In the *Campbell* case, a Canadian court for the first time squarely addressed many of the questions that have been at the centre of the debate about Aboriginal law-making powers. In particular, in this case the court considered the impact of the assertion of sovereignty by the British Crown, Confederation and the division of legislative powers under sections 91 and 92 on Aboriginal law-making powers.

On the question of the pre-existing law-making powers of the Nisga'a nation prior to the arrival of Europeans, Williamson J. made the following determination:

> *History, and a review of the authorities, persuade 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.*[42]

The court went on to consider whether Nisga'a law making powers survived the assertion of sovereignty by the British Crown and Confederation. On this question, Williamson J concluded:

> *… 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.*[43]

[41] *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333.
[42] Ibid at p. 355.
[43] Supra, note 40 at pp. 355-356.

The court then considered the effect of the division of law-making powers between the federal and provincial governments at section 91 and 92 of the *British North America Act, 1867* on Nisga'a law making powers. On this question, the BC Supreme Court concluded that sections 91 and 92 did not exhaustively divide law-making power in Canada between the federal and provincial governments, thereby leaving room for the continued existence of Aboriginal law-making power. In concluding that Nisga'a lawmaking powers survived the division of powers in the Constitution, Williamson J. noted:

> *… 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 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.*[44]

Based on conclusions reached on the foregoing questions, the court concluded that Nisga'a law-making powers were in existence in 1982 and thereby protected as an existing Aboriginal right under section 35(1) of the *Constitution Act, 1982.* However, the Court also concluded that that Nisga'a law-making powers guaranteed by section 35(1) were not absolute or sovereign and that section 35(1) only protected a limited form of Nisga'a law making powers.[45]

The decision of the BC Supreme Court in the *Campbell* case offers considerable guidance on the question of whether Aboriginal governments have any law-making powers and whether such law-making powers are existing Aboriginal rights that are protected by section 35(1) of the *Constitution Act, 1982.* However, the Supreme Court of Canada has yet to have a final say on this question. In the meantime, unless and until this decision is appealed or overturned, the *Campbell* case represents the current state of the law on Aboriginal self-government in the province of British Columbia.

[44] Supra, note 40 at p. 354.
[45] Supra, note 40 at headnote on p. 335.

Conclusion

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

This view appears to be supported by the Government of Canada as evidenced by the following excerpt from the federal government's inherent rights policy:

> *The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements. For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.*[46]

[46] Supra, note 7 at p. 3 and supra, note 31 at p. 1039.

About the Scow Institute

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at **www.scowinstitute.ca.**

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