

**Between Colonialism and Independence:
Analyzing British Columbia Treaty Politics From a Pluralist Perspective
By
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Introduction

The signing of Agreements in Principle (AIPs) in 2003 between four First Nations and the governments of Canada and British Columbia constitute an event of singular importance for the treaty process in B.C.¹ After years of frustrated efforts, the AIPs suggest that at the level of principle at least, a number of First Nations in B.C. and the governments of Canada and B.C. are now on their way to successfully reconciling aboriginal rights and title with Canadian state interests. The four AIPs signed to date are not legally binding. Nevertheless, they begin to clarify the nature of the treaty relationship that will exist between First Nations, Canada, and B.C. with respect to land, resources, governance, and capital transfers. For this reason, the four AIPs constitute significant milestones.

This paper traces the political evolution of treaty talks between First Nations and the Liberal Party from their election as the government of British Columbia in the spring of 2001 through to the election of May, 2005. The underlying thesis is twofold: 1) Initially, the Liberals demanded that treaty settlements not result in a diminished political sovereignty for either the governments of British Columbia or Canada. 2) However, over time, this approach has gradually given way to the idea that what matters more from the point of view of justice and workable public policy is that treaty settlements be ones capable of commanding the assent of all parties. Legitimacy for treaty outcomes in other words, rather than rigid adherence to the Canadian political sovereignty order as currently constituted, has gradually acquired the status of a higher order public good for the Liberal government of B.C.

I attribute this rather dramatic shift in Liberal policy to what I call the phenomenon of relational pluralism. Treaty politics in B.C. is as much about dialogue and the establishing of equitable political relations between Aboriginal and non-Aboriginal negotiators at the treaty tables as it is about achieving results. Aboriginal leaders have employed the treaty tables to develop and transmit their own perspectives on Aboriginal sovereignty and self-determination in a way that has fundamentally challenged the Liberal government's negotiating position. Over the course of four years, the Liberal government has moved from a position of overt ideological hostility and non-acceptance of Aboriginal views on self-governance to one of emerging and partial acceptance. This paper examines a number of key episodes in the treaty process of the past four years that have contributed to this change.

The following analysis is necessarily selective and will focus primarily on the legislative jurisdiction secured by the four First Nations under the terms of their respective AIPs. I begin by framing my analysis of the B.C. treaty process within the theory of relational pluralism. Next, I examine the B.C. Liberals' response to the Nisga'a Treaty and its policy choice to hold a referendum on principles for provincial negotiators, two episodes that illustrate in particularly stark terms the nature of the Liberal objection to Aboriginal leaders' views on self-government. I then identify factors that contributed to the Liberals' policy shift on self-government and trace the evidence of that shift in the

four AIPs signed to date. Finally, I consider a number of objections leveled against the governance provisions within the B.C. treaty process from the perspective of what might be called Aboriginal nationalists and I conclude by responding to those objections from the perspective of relational pluralism.

Theoretical Considerations

Relational pluralism constitutes a body of scholarship appropriate for developing a normative theory of treaty making.² The underlying premise of the theory is that the group basis of political life, particularly in the case of marginalized groups seeking to validate and empower themselves, should receive state recognition and protection. The normative task of relational pluralism is to show how the political conflict generated between groups as they seek state validation can be appropriately channeled and accommodated.

When applied to B.C. treaty making, relational pluralism upholds certain standards of equality in the bargaining process between Aboriginal, Canadian, and provincial negotiators. Relational pluralists draw into focus the political imperative of equality because they identify individual self-development as dependent upon the capacity of the individual's socially significant groups to develop. As a result, groups need power in the context of their interactive relations with other groups. Scholars contend that particularly in cases of inequality, what groups need most is political authority to construct boundaries around their members. Boundaries in turn, are said to give groups protected public space so that the members within can fashion and then express their identities according to their own priorities.

Consequently, as a normative theory, relational pluralism requires policy-makers to confront substantial differences in power exercised by groups as a potential or actual political problem. Fundamentally required in such cases is an absence of domination. Groups should be granted that degree of independence from public authorities and one another, and that degree of self-determination over their own affairs, to fulfill the unique functions for which they have been created and commissioned by their members. The standard of justice in this scheme is purely relational. One judges the justice of the B.C. treaty process by the degree of independence and self-direction that First Nations secure in the context of formalizing their relations with Canada and B.C. through treaties. In short, treaties ought to establish legal boundaries behind which First Nations can enjoy their Aboriginal right to be self-defining within Canada.

Relational pluralists also argue that the success of treaties need not be defined and measured by the degree to which they establish cultural, political, and social separation between First Nation peoples and Canadians. Instead, treaties are seen as a function of relations; they are created to facilitate the development of boundaries so that certain ties of group identification can be nurtured and objectives fulfilled by First Nations persons within their communities. The key function of treaties therefore is to establish a relationship in which the members of First Nations and members of the Canadian state accept that neither side will invade or attempt to dominate each other as each pursues their respective self-defining processes. What makes this form of pluralism "relational" is the fact that the degree of separation between groups is the product of an agreement secured between them; it can be greater or lesser depending on the respective aspirations of the First Nations involved.

So, from a relational pluralist perspective, what criteria ought to be employed to determine whether the treaty negotiation process actually leads to outcomes consistent with the First Nations' right to be self-defining within Canada? Three evaluative standards come to mind.

The first standard relates to the need for evidence that First Nations enjoy status as equals with Canada and B.C. at the treaty negotiation tables. This standard means that for the purposes of negotiations, First Nations should not be understood nor compelled to act "as minorities already in a relationship of subordination and some form of subjection to the Crown in Canada and B.C."³ Many First Nation leaders insist that their nations are political communities with residual political sovereignty and are therefore entitled to equality of status in their relationships with Canadian governments. Equality of status at the negotiating table, however, should not necessarily be understood to mean equality in power. In both scale, population, and service requirements, First Nations are much smaller than Canada and B.C. and as a result, simply do not need the same resource and power base to govern their citizens effectively. Instead, what equality of status refers to is an Aboriginal right to an equal share of power with the governments of Canada and B.C. at the treaty tables when they make decisions about how to define the ground-rules for their future relationship. In short, a genuinely co-decisional approach is critical if treaties are to command the consent of all parties in the negotiations.

The second standard relates to the need for genuine shifts in power from Canada and B.C. to First Nation governments. The success of treaties ought to be measured by the degree to which they establish relations that put an end to Canadian governmental paternalism over First Nations. Of first importance, in other words, is "Aboriginal rather than external authority over jurisdictions and institutions of relevance to Aboriginal peoples."⁴ What direction these shifts in power take is necessarily up to the Aboriginal, Canadian, and British Columbian governments to decide. In practice, one would expect to find that different kinds of political choices will be made by Aboriginal leaders about the range of powers they will exercise: some will be modest, while others will be more wide-ranging, reflecting those currently exercised by federal and provincial governments. The point that bears emphasizing in this context is that shifting relations of power from Canada and B.C. to First Nations through treaty agreements ought to be about finding ways to integrate Canada politically based on the idea of coordinating rather than subordinating Aboriginal communities and their governments. Paraphrasing the BC Treaty Commission, negotiated treaty resolutions, "which take into account the interests of all of the parties, rather than a solution imposed by..." the Canadian or British Columbian governments, "is obviously the preferred approach."⁵

The third standard relates to the idea that treaties should provide certainty in the relationship between First Nations, Canada, and B.C., but certainty of a particular kind. James Tully argues that it has been the consistent position of the governments of Canada and B.C. that modern treaties transform undefined Aboriginal rights into a set of modified, explicit, enforceable but limited rights so that there can be certainty about who owns what and who has jurisdiction over what in B.C.⁶ The intended consequence, notes Doug McArthur, "is that uncertain rights and interests in some manner become null and void, and are replaced by a set of operative rights, interests, and benefits."⁷ A position more in keeping with relational pluralism would be to regard certainty as an attribute of an intergovernmental relationship in which First Nations acquire explicit recognition of

their Aboriginal title and rights through treaties. That is, what treaties ought to do is establish clear and reliable guidelines about the nature of the obligations, rights, and responsibilities that the governments of Canada, B.C., and First Nations owe one another. Clarification of this sort leads to certainty too, though not because Aboriginal rights are limited. Instead, certainty is a product of clarifying rights and corresponding responsibilities in ways that can command the agreement of all parties, a condition that holds greater promise for First Nations, Canada, and B.C. to use treaties to build deeper political relations of interdependence and cooperation with one another.

The question to confront next is whether the B.C. Liberals' policy position on treaties meets these three evaluative standards. As we will see, the Liberals' record is mixed on this score.

Overt Ideological Hostility

Upon assuming office in 2001, the Liberals immediately declared that they endorsed treaty negotiations, including negotiations on Aboriginal self-government. At the same time, political action taken by the Liberals immediately prior to and following the election signaled that the Liberal negotiating position on treaties would be subject to significant constraints. While the Liberals were willing to accept the validity of Aboriginal title and rights, they also insisted that those rights not interfere substantially with provincial governmental power. It appeared as though the Liberals viewed treaty negotiations as an opportunity to put Aboriginal peoples in their place: while treaties could promote greater Aboriginal political and economic self-reliance, they must not compromise the larger political and economic interests of non-Aboriginal British Columbians. This uncompromising position was most clearly illustrated in the Liberals legal challenge to the Nisga'a treaty's self-government provisions, advanced while still in opposition, and its referendum on the province's treaty negotiation mandate, undertaken shortly after assuming the reigns of power.

Overt ideological hostility to the prospect of a significant redistribution of political power between First Nation and Canadian governments was clearly expressed by the Liberals in their legal challenge to the Nisga'a Treaty in 2000. In *Campbell*, "the plaintiffs (sought) an order declaring that the Nisga'a Treaty...(was) in part inconsistent with the Constitution of Canada and therefore in part of no force and effect."⁸ In particular, they argued that the Treaty provided the Nisga'a government with legislative jurisdiction and authorized the Nisga'a government to make laws that prevail over federal and provincial laws in ways clearly "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**."⁹

The legal justification for the plaintiffs' case against the Nisga'a can be summarized as follows. They made a clear distinction between Aboriginal title, other Aboriginal rights such as the right to hunt and to fish, and the right to self-government. According to the plaintiffs, when the **British North America Act** was enacted in 1867 certain Aboriginal rights survived (such as Aboriginal title) but the right to self-government did not. In their legal opinion, "all legislative power was divided between Parliament and the legislative assemblies" and as a result, "there was no legislative power left to Aboriginal peoples."¹⁰ Consequently, if the Nisga'a government was to have power to make laws that prevail over federal or provincial laws a constitutional

amendment would be required, a prospect that the Liberals did not support. They argued that what was required from a constitutional point of view was an arrangement in which Canada and B.C. delegate authority to the Nisga'a government by means of federal and provincial enabling legislation.

In July 2000 Justice Paul Williamson ruled against the plaintiffs. He found that while the assertion of sovereignty by the British Crown diminished the Aboriginal right to self-government, it was not extinguished. Consequently, the self-government provisions of the Nisga'a Final Agreement are constitutional because they give definition and content to a right that while limited, nevertheless remained with the Nisga'a after the assertion of British sovereignty.¹¹ The Liberals immediately appealed the decision to the B.C. Court of Appeal. However, in the spring of 2001 the Liberals won the provincial election and so in August of that year Premier Campbell did an about-face and abandoned the appeal. In the words of his attorney-general Geoff Plant, the appeal had to be abandoned since as the newly minted government and thus signatory to the Nisga'a Treaty, proceeding with the appeal would mean that the Liberals were effectively suing themselves.¹²

While the Liberals abandoned the Nisga'a Treaty appeal, they were nevertheless determined to institute what they referred to as a "fresh approach" to the treaty process. At the core of this approach was to be a provincial referendum. The Liberals claimed that the treaty process, by then underway for close to a decade, was moribund and desperately in need of renewal. The key, according to Plant, was to begin afresh, this time armed with a set of transparent principles, endorsed by the voters, that provincial negotiators would be obliged to follow at the treaty negotiation tables.¹³ Ostensibly, the objective of the referendum was to build understanding and support among Aboriginal and non-Aboriginal British Columbians alike for a renewed, clear, and accelerated set of negotiations.¹⁴

The Liberals posed eight questions, hoping to secure an emphatic "yes" with respect to each. Interestingly, seven of the questions matched in virtually identical form the treaty bargaining position of the New Democrats while in office. Only the question concerning an Aboriginal third order of government (Question 6) constituted a clear departure from New Democrat policy.¹⁵ It is this question that drew the most criticism and is also the one most germane to my discussion. Through it the Liberals sought public approval for the position that "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia."¹⁶ One can reasonably conclude from the phrasing of the question that despite having lost their legal challenge to the Nisga'a treaty, the Liberals were determined to achieve the same political objective but this time by means of the back door of public consent.

The question drew immediate criticism from Aboriginal leaders who objected to the prospect of a non-Aboriginal majority voting on the substance of Aboriginal rights. Aboriginal leaders claimed that they derive their governing powers by means of an inherent right and not as a result of grants that occur at the pleasure of federal or provincial governments. Furthermore, democratic exercises in the form of a referendum must not be allowed to trump fragile Aboriginal rights, particularly when employed for the express purpose of limiting Aboriginal rights so as to serve the political ambitions of the non-Aboriginal majority.

The results of the treaty referendum can be read in at least two ways.¹⁷ On the one hand, the vast majority of B.C.'s 2.1 million registered voters (65%) who refused to participate could be interpreted as having done so either because of their own indifference to the issue or because they responded favorably to a concerted effort by Aboriginal leaders, churches, and a wide range of social activists urging voters to boycott the referendum. According to this reading, the high abstention rate means that the public called into question the legitimacy of the referendum itself. On the other hand, among those 760,000 who did participate (35%), endorsement for the eight principles was overwhelming, ranging from a low of 85% to a high of 95% with the contentious Question #6 garnering 87% support. In response to the resounding support from those who did vote, Premier Campbell concluded that his government now had "a solid set of principles to guide negotiations."¹⁸ According to his reading, the results of the referendum were clearly legitimate. Those who had refused to participate could have done so but chose to exempt themselves from a democratic exercise to which all British Columbians had been invited. Furthermore, among those who did participate, the numbers exceeded those needed to elect the apparently democratically legitimate New Democrat governments of 1991 and 1996 (approximately 600,000). On these grounds alone, Campbell stated with full conviction that the eight guiding principles would "be given to treaty negotiators to incorporate into their discussions."¹⁹

In summary, the B.C. Liberal government began its mandate in 2001 with a clear intent to retract the range of negotiable powers available to First Nations in the treaty process. It did so under the guise that the self-government powers negotiated in treaties to date were either beyond the scope of what is constitutionally permissible or beyond what the public would tolerate. Consequently, from now on treaties had to be negotiated on the premise that the presupposition of "inherent rights" be replaced with "delegated powers." That is, the source of Aboriginal powers must be seen to flow from the Crown and not Aboriginal peoples themselves. With the source of Aboriginal power located in the Crown, the provincial government would then be in a position, as Jim Albridge puts it, to "infringe or nullify the exercise of any aboriginal powers of self-government recognized by treaty without justification."²⁰

By the criteria of relational pluralism, the Liberals early treaty policy constituted a clear violation of justice. The Liberals were committed to a legal policy of containment in which any power sharing with First Nations was to be strictly contained within and limited by the established order of federal-provincial jurisdiction. First Nations were thus placed in a position of subordination to Canada and B.C. even before treaty negotiations began. Relational pluralists would respond by saying that the right to self-government can be meaningful only if the range of law-making authority of First Nations is linked to that of the governments of Canada and B.C. through an open and unprejudicial process. A key attribute of the treaty process, in other words, is that it must afford First Nations the legal tools they need to construct protective boundaries around those aspects of their communities central to their capacity to be self-defining within Canada. In most cases, those aspects will extend beyond the powers typically granted to municipalities including, for example, the capacity to exercise powers over treaty lands and resources as well as over cultural, educational, and language matters, and the right to exercise management powers over fish and wildlife resources. These objectives were jeopardized when the Liberals placed arbitrary limitations upon the range of powers that

First Nations might exercise under treaty. Under restrictive terms such as these, it is hard to imagine what would compel First Nations to want to embark upon treaty talks at all.

Shifting Provincial Policy Ground

In its annual report of 2003, the BC Treaty Commission observed that “there was little actual progress in the first eight months of the year primarily due to the BC Government’s province-wide referendum on their guiding principles for treaty negotiations.”²¹ However, a significant shift in the Liberals’ policy position became perceptible in the fall of 2002 and by the spring of 2003 was well established. In essence, the Liberal’s ideological hostility to Aboriginal self-government began to tone down and was replaced by what the BC Treaty Commission termed “a more creative and flexible approach in negotiations.”²² It was as though the Liberals understood that if treaties were to command the assent of all parties in the negotiations, rigid adherence to doctrinaire positions about the inviolability of the Canadian federal order as currently constituted would only get in the way. Instead, the Liberals now seemed willing “to explore any issue important to the new relationship being sought through treaties.”²³

How can this rather dramatic shift in the Liberals’ policy stance be explained? And is it indeed the case that the Liberals are now prepared to engage in serious negotiations on self-government with First Nations on the premise that they are equal partners with federal and provincial governments at the treaty tables? This and the next section characterize in what respects the Liberal treaty policy language changed and why the Liberals might have felt compelled to make those changes.

Shortly after the treaty referendum it became commonplace for journalists to use propitious adjectives to describe what they saw as a dramatic shift in Liberal treaty policy: “we’re pleased to note...that...they sound open and ready to compromise”; these attitudes are nothing short of a breakthrough²⁴; and “Mr. Plant needs time to build trust with native leaders...about the sudden conversion by the Liberals.”²⁵ It would be more accurate, however, to regard the new Liberal disposition toward treaties less as a “conversion” and more as a “subtle shift” precipitated by political events largely beyond their policy control. In fact, the Liberals began to emit distinctly contradictory policy themes. On the one hand, they insisted that provincial negotiators must negotiate and make commitments “consistent with the referendum principles.”²⁶ But on the other hand, they understood that they were entering into a relational setting of negotiations involving the federal government, First Nations, and the courts as well. Consequently, the Liberals also began to indicate a willingness to shake off what Plant referred to as “inflexible mandates in negotiations with First Nations.”²⁷ As partner to a negotiation process involving two other parties, compromise is inevitable and in this spirit the Liberals declared that it could not “guarantee outcomes.”²⁸ Indeed, Plant went so far as to say that “the B.C. government and the federal government are seen to come to the table with a cookie cutter that doesn’t always meet the needs of the First Nation... Tension is created because the mandate doesn’t permit an open or creative enough discussion.”²⁹ Based on statements such as these, the BC Treaty Commission concluded that “where the parameters for negotiations were once seen as too narrow, there now appears to be a willingness to discuss any issue viewed as significant to the new relationship being sought through treaties.”³⁰ Two examples concerning extinguishment and self-government will suffice to illustrate the point.

In exchange for constitutionally protected treaty rights, Canadian governments have traditionally demanded that First Nations “cede, release, and surrender” all residual “undefined” and “uncertain” Aboriginal rights. First Nation leaders have rejected this approach arguing that treaties are not policy instruments for the containment of a limited set of Aboriginal rights and for the extinguishment of all those rights left undefined or unaccounted for in the treaty. Instead, they say that Aboriginal rights exist into perpetuity and cannot be extinguished. Consequently, treaties ought to be the means by which First Nations and Canadian governments decide how the respective entitlements to land, resources, and political power that they both lay claim to as a result of their rights are to be shared.

After initial rejection, the BC Liberals now appear to be more amenable to the First Nation leaders’ point of view. In the fall of 2002, the Liberals stated that First Nations would no longer be expected to surrender significant Aboriginal rights in exchange for treaty rights. Instead, what treaties must strive to do is “modify and define (Aboriginal) rights, providing all parties with certainty over lands and resources...”³¹ Left unclear in this policy statement, however, is what the term “modification” actually requires. Modification might well constitute a process in which Aboriginal rights are defined and circumscribed only to the extent necessary for the purpose of reconciling those rights with the interests of the Crown and Canadian citizens. Alternately, modification might well refer to an “extinguishment” policy but by a different name, this time activated in a modified and potentially less sweeping fashion.

The Liberals also appear to be responding more positively to the First Nation leaders’ point of view on self-government. The Liberals continue to insist that the self-governing powers of First Nations secured through the treaty process should have the characteristics of local government. At the same time, however, they admit that when negotiating, there is “sometimes a need for some give and take.” In fact, Plant admitted that “there will be some times and places where I will have to stand up and explain to members of the house how it was that we did not achieve an agreement that reflects any one of these eight (referendum) principles in full.”³² Evidence of such flexibility is apparent in the AIPs negotiated to date as all make provision for a broader form of Aboriginal self-government than that of local governments.³³ In addition, the Liberals have tried to put arguments about the source of Aboriginal self-government aside in favor of negotiating self-government powers into what they call “Governance agreements” that will allow First Nations communities to evolve in ways consistent with their ambitions over time.³⁴

In summary, what I detect is not a policy “conversion” so much as a policy shift by the B.C. Liberals in the direction of greater openness to the positions of many First Nations at the treaty tables. The Liberals no longer hold rigidly to the conviction that First Nations must be understood as minorities who exist in a relationship of subservience to federal and provincial governments. More pervasive is the realization that if treaties are to be successful, they must be able to command the consent of all three parties at the negotiation tables. And consent in turn, demands a measure of compromise by the Liberals at both the level of principle and policy outcomes. The question to consider then is whether the compromises the B.C. Liberals have been willing to entertain are sufficient to meet the criteria established for the treaty process by the terms of relational pluralism. Before answering this question with reference to the AIPs

themselves, I want to consider how the B.C. Liberals were compelled to adopt a policy change of heart not just because circumstances required it if treaties are to be concluded, but also because the courts and factors associated with political pragmatism forced them to do so.

Political Pragmatism and the Role of the Courts

The courts have established in law that there are two kinds of coexisting land titles in British Columbia, Aboriginal and Crown title. Moreover, Aboriginal title has been defined by the courts as a property right in the land itself, not just as a set of rights to use the resources of the land for traditional purposes such as hunting, fishing, and gathering. As the Supreme Court made clear in its *Delgamuukw* decision of 1997, it is the responsibility of federal, provincial, and Aboriginal governments to find ways to reconcile their respective interests in the land in ways that are beneficial to the province of B.C. as a whole. The B.C. Liberals have accepted the authority of the Supreme Court on this matter and so regard the treaty process as an important instrument for reconciling Aboriginal title with Crown interests. Indeed, following the Supreme Court's instruction, the B.C. Liberals prepared a set of elaborate policy instructions for the notification, consultation and the securing of First Nations' consent in cases where provincial land use decisions may have an impact upon aboriginal title (whether proven or only potentially in existence).³⁵

In keeping with Supreme Court rulings, the B.C. Liberals accept the proposition that the recognition and protection of Aboriginal title to land constitutes legitimate components of modern day treaties in B.C. The proposition that the Liberals had been unwilling to accept until very recently, however, is that modern day treaties also ought to include protected components of Aboriginal self-government. The question to consider therefore is whether the courts have played any role in shifting the Liberals approach to self-government in treaty-making. I believe the courts have influenced the Liberals' approach in two respects. First, the courts are increasingly inclined to recognize self-government as an Aboriginal right under section 35 of the constitution and as such, Canadian governments are simply required to follow suit. After an initial period of defiance (i.e. the Nisga'a challenge), the Liberals are now of the view that the courts' mind is set and so they have little choice but to fall into line with legal opinion. Second, while the courts now recognize that an Aboriginal right to self-government exists, they have also said very little about the substantive meaning of self-government. What they have said, however, is that the capacity of First Nations to exercise their right to self-government is subject to negotiation with federal and provincial governments and will suffer inevitable impairments as a result. It is this judicially sanctioned and reassuring idea (from the Liberals' perspective) that recognition of self-government rights will go hand-in-hand with their impairment that I believe has had the most influence in shifting Liberal policy.

The clearest expression of this judicial interpretation of both the recognition and impairment of the inherent right to Aboriginal self-government can be found in the July 2000 *Campbell* judgment of the Supreme Court of British Columbia. Justice Williamson stated emphatically that "indigenous nations of North America were recognized as political communities," and therefore, while the assertion of British sovereignty diminished the Aboriginal right to self-government, it "did not extinguish aboriginal

powers and rights.”³⁶ The legal reasoning that leads Williamson to this conclusion is compellingly straightforward. He states that the powers distributed in sections 91 and 92 of the *British North America Act* did not cover the whole area of self-government within Canada but only those powers that had belonged to the colonies and were to be distributed to the federal and provincial governments. Consequently, anything outside of the powers of the colonies also remained outside the powers of Parliament and the legislative assemblies, which, Williamson noted, included “aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws...”³⁷ The fact that the Aboriginal peoples of Canada “had legal systems prior to the arrival of Europeans,” “that these legal systems... continued after contact,” and that “since 1867 courts in Canada have enforced laws made by aboriginal societies,” provide sufficient evidence that the Aboriginal right to self-government continues to exist..³⁸ Williamson concludes therefore that with respect to the Nisga’a (the case at trial), the self-government provisions of their treaty can be both encompassed and protected by Section 35 of the *Constitution Act, 1982*.³⁹

When lined up against court decisions on Aboriginal self-government like that of *Campbell*, commentators were quick to point out that Liberal treaty policy that would “allow First Nations nothing more than delegated local government powers” constituted “a giant step backwards.”⁴⁰ For example, Grand Chief Edward John and Chief Harry Pierre noted that “the provincial policy on aboriginal rights and title are out of step with Canada’s constitutional recognition of aboriginal rights,”⁴¹ while Thomas Berger remarked that by means of *Campbell*’s delegated powers policy he is “bound to refuse to recognize in treaty negotiations the law as laid down by the courts.”⁴² At the same time, Justice Williamson did state emphatically that the Aboriginal right to self-government is not absolute but significantly diminished by the assertion of British sovereignty. Moreover, it is my view that the limitations Williamson placed upon Aboriginal self-government for the purposes of treaty-making in B.C. are precisely the kinds of limitations that the B.C. Liberal government has decided it can live with.

Following the Supreme Court of Canada’s lead, Williamson states that the primary purpose of Section 35(1) of the *Constitution Act, 1982* “is to provide a framework within which the prior existence of aboriginal peoples may be reconciled with the sovereignty of the Crown.”⁴³ With the notable exception of most of B.C., the way in which Aboriginal rights were reconciled with the Crown in Canada was through treaties. Williamson argues that treaties remain crucially important policy instruments today because they provide the means by which those First Nations who have never ceded their rights or lands to the Crown agree to a range of specified definitions to and limitations upon their Aboriginal rights. What Williamson is suggesting in other words, is that treaties play a dual role in the lives of First Nations. On the one hand, they serve to provide constitutional protection to the range of Aboriginal rights that are enumerated and defined within the treaty documents. But on the other hand, by entering into treaty negotiations, First Nations also agree to submit to a process in which their rights will be impaired because they accept that their rights are subject to negotiation. As put by Williamson with respect to the Nisga’a; “The Treaty... 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.”⁴⁴ I believe

the B.C. Liberals have decided to accept this proposition – they can no longer take a legal step backwards by insisting that Aboriginal self-government powers be delegated but what they can do is try to “impair” those self-government rights to the greatest extent possible in treaty negotiations.

The question is to what degree will First Nations in the B.C. treaty process agree to impair their rights? The Liberals have had to concede that while Aboriginal rights will be diminished by the exercise of Canadian sovereignty, the kinds of rights to be protected in treaties will be those integral to the internal life of the First Nation community in question. One would expect that First Nations would have their list of non-negotiable items; items such as the power to administer their treaty lands, resources, fish, wildlife, languages, culture, education, child welfare, and heritage – items, in other words, that go to the heart of Aboriginal identity. Furthermore, most of these powers extend well beyond those exercised by local governments and have the characteristics of a “stand-alone” right within Canadian federal practice that are not typically delegated from either the federal or provincial government. Thus, at the behest of the courts, it appears as though the B.C. Liberals have been placed in a position of having to share a degree of political sovereignty with treaty First Nations in B.C.

Factors associated with political pragmatism have also played a role in shifting the B.C. Liberals’ treaty policy on Aboriginal self-government. Two of the more important were signified by; i) a noticeable shift in policy rhetoric by the attorney general and minister responsible for treaties, Geoff Plant, suggestive of a significant change of mind by the minister in charge, and ii) partisan pressure applied on the B.C. Liberals by the federal Liberal government and the First Nations of B.C.

Following the treaty referendum, policy statements by Plant regularly suggested that he had simply begun to believe that treaty negotiations are the most responsible way to achieve progress for all British Columbians. For example, in one statement he indicates that the path to social and economic prosperity cannot run roughshod over Aboriginal rights and title because the courts require that governments, businesses, and private citizens alike take these rights and title into account.⁴⁵ On a more positive note, Plant remarks elsewhere that treaties constitute a pragmatic pathway to justice because they are a potential means to economic stability in the province and to improving the social and economic lives of persons living within First Nation communities.⁴⁶

In short, Plant began to justify treaties in a business-liberal sense. He conceded that unresolved Aboriginal rights and title constituted a major obstacle to business investment in B.C.’s land-based resource development. As a result, treaties are important because as Plant puts it, they “will create certainty that British Columbians want and that the business sector needs to make investment decisions.”⁴⁷ In this sense, the objective of treaties for the B.C. Liberals is motivated by profoundly pragmatic considerations: what they are intended to do is solve basic problems about how to share land, resources, and political power so as to strengthen First Nation communities and at the same time “open up B.C. to new investment.”⁴⁸ I conclude, therefore, that the shift in Liberal policy on treaties was motivated in part because the Liberals, under Plant’s leadership, were led to the inescapable conclusion that doing so was necessary not only to “improve the lives of First Nations” but also to “stimulate the economy for everyone’s benefit.”⁴⁹

Partisan politics is another reason why harsh opposition by the Liberal government to the inherent source of Aboriginal self-government powers began to

dissipate in the fall of 2002. In one respect the Liberals experienced little partisan pressure given the absence of effective criticism from the political right. Hamar Foster notes, for example, that “with the conservative B.C. Reform party weakened, the B.C. Liberals no longer had to fear the right-wing rival would steal votes from them with a hard-line policy against treaties.”⁵⁰ In this sense, the Liberals could afford to be more generous in treaty politics than could the New Democratic Party before them because the New Democrats had to contend with fierce and skeptical opposition from the Liberal Party while they were in government. At the same time, partisan pressure upon the B.C. Liberals to adopt a more conciliatory position on Aboriginal self-government was immense. The federal government and First Nation leaders both held the position that First Nation governments should have constitutionally entrenched political powers and that in some cases those powers should be exclusive. Indeed, the federal government had endorsed this position in its 1995 inherent right to self-government policy. It was highly unlikely therefore, that the federal government was going to repudiate its policy and insist with the B.C. Liberals, that any powers First Nations would exercise would be delegated to them from Ottawa and Victoria. B.C. provincial negotiators were thus faced with the prospect of holding to a minority position at the treaty tables in the face of stiff opposition from their federal and Aboriginal counterparts.

To summarize, the Aboriginal assertion of their aboriginal rights at treaty tables, coupled with emerging support from the courts and the fact that the B.C. Liberals became party to a treaty process in which it was obliged to uphold the honor of the Crown, all conspired to shift the Liberals’ policy position on self-government. In my estimation, the dynamic of relational pluralism was at work in the negotiations. The treaty discussions themselves can be seen as forums for democratic deliberation in which the objective is to form a collective will that can command the consent of each of the parties. The problem for the B.C. Liberals was that they entered the treaty process in 2001 with policies in hand on Aboriginal self-government toward which First Nations and the federal government were in fundamental disagreement. No amount of public deliberation at the treaty tables would convince First Nation and federal negotiators that the policy position of the B.C. Liberals could be justified. Consequently, the B.C. Liberals were compelled to compromise. First Nation negotiators in particular insisted that they must be treated as political equals in the treaty negotiation process and that their treaties must result in a significant transfer of political power to First Nations in response to the rights that federal and provincial governments owed them.

Shared Sovereignty in the Making? The Four Agreements in Principle (AIPs)

Despite a policy shift by the B.C. Liberals in a direction more favorable to First Nations aspirations, the capacity of the treaty process to deliver results has been disappointing. The process has been unfolding at 44 negotiation tables involving 55 First Nations as well as federal and provincial negotiators, in each case working their way through a six-step treaty process.⁵¹ The results to date are 13 years of negotiations and no treaties. As a result, in the fall of 2002, Canada, B.C., and First Nation leaders shifted focus by concentrating their energies and resources on those tables where treaty deals were most likely. As put by Plant, “We’ve reorganized the treaty negotiation office to focus our resources on those tables where we believe there is opportunity for early success... We call these the breakthrough tables.”⁵² Four of these “breakthrough” tables

achieved success in the fall of 2003 and spring of 2004 by signing AIPs (stage 4), arguably the most detailed and difficult stage as well as precursor to negotiations to finalizing a treaty (stage 5). These four First Nations are the Lheidli T'enneh (July 2003), Maa-Nulth (October 2003), Sliammon (December 2003), and Tsawwassen (March 2004).

The question that I will consider is whether the four AIPs demonstrate a commitment by Canada and B.C. to a genuine sharing of political sovereignty with the First Nations involved. Specifically, three questions will motivate my analysis. First, concerning status; do the AIPs constitute intergovernmental arrangements in which political powers will be shared between First Nations, Canada, and B.C. in ways that both recognize the aspirations of each and protect against the possibility that those arrangements can be unilaterally changed by one or the other partner? Second, are the provisions concerning certainty intended to constitute the full and final settlement of undefined Aboriginal rights or (more in keeping with relational pluralism) do they act to clarify the nature of the obligations, rights, and responsibilities that Canada, B.C., and First Nations owe one another? And third, do the provisions for self-government provide each First Nation with areas of exclusive and paramount authority such that each will enjoy significant spheres of non-interference in areas deemed to be vital to their respective social, cultural, political, and economic aspirations?

The four First Nations whose members have endorsed AIPs differ in size, location, economic development and political circumstances. Consequently, each of the AIPs is tailored to meet the unique circumstances of each First Nation to some extent. At the same time, however, the four AIPs share certain common features and possess very similar structures. I will focus on three of those common structural features, namely; 1) those aspects that determine the political status of First Nations relative to their federal and provincial governmental counterparts; 2) those provisions that establish certainty with respect to the rights of the First Nations; and 3) those features that establish the powers and responsibilities that will constitute the First Nations' areas of self-government.

a) Political Status

There can be no doubt that from the perspective of political power, the four AIPs do not grant the First Nations involved equality of status with their federal and provincial counter-parts. The reason for this inequality of power is principally a function of scale; the four First Nations are small in size, ranging from 235 (Tsawwassen) to 1,934 (Maa-Nulth) members, and therefore they simply do not need access to the same degree of power that Canada and B.C. do to govern their citizens effectively. Instead, evidence of equality of political status, in as much as it is recognized within the AIPs, is found within the protocols, procedures, and agreements requiring reciprocal obligations of consultation and consent between First Nations, Canada, and B.C. when they activate and then employ the terms of the treaties. Equality of political status therefore, is less about an equal distribution of power between governments, and more about guaranteeing equal political standing between First Nations, Canada, and B.C. in the intergovernmental decision-making processes they will employ to decide how political power is to be distributed and exercised between them. The following three examples drawn from the AIPs illustrate this point.

First, under the category of “General Provisions” each of the four AIPs set out constitutional relationships that will exist between the respective First Nations and the governments of Canada and B.C. What the texts of each of the AIPs suggest is that First Nation governments will in fact share a degree of political sovereignty with the governments of Canada and B.C. By political sovereignty I mean the capacity of First Nations to exercise decision-making authority over various jurisdictions to the exclusion of all other governments. To be sure, the allocation of political sovereignty to First Nations is subject to significant constraints. For example, the AIPs make clear that whatever the origin of First Nations’ political powers (inherent or otherwise), those powers will be exercised within “the framework of the Constitution of Canada.” Furthermore, whatever the range of jurisdictions assumed by First Nations in the Final Agreements, that range “will not alter the Constitution of Canada, including the distribution of powers between Canada and British Columbia.” And in addition, the *Charter of Rights and Freedoms* will apply to all matters of authority under the command of the respective First Nation governments.⁵³

Despite these constraints, however, the AIPs also specify that all “arrangements set out in the Final Agreement(s) will reflect a government-to-government relationship between the Parties” in which First Nations will exercise those constitutional powers that come to them by virtue of their section 35 Aboriginal rights. Furthermore, the Agreements themselves are not intended to alter the identity of the First Nations in question nor prejudice their ability “to exercise, or benefit from, any constitutional rights for aboriginal people that may be applicable to them.”⁵⁴ Thus, while Final Agreements will not alter the distribution of powers between Canada and B.C., what those Agreements will do is specify how the distinct powers of First Nations that flow from their section 35 rights will be brought into meaningful alignment with the federal-provincial constitutional distribution of powers. In short, these provisions appear to signify that the B.C. Liberals (and Canada) do not regard First Nations as minorities in a position of subservience and dependence upon Canadian governments, but as communities with governments that have specific and specialized roles to play under the Constitution of Canada.

Second, under chapter headings such as Lands, Land Management and Use, Access, Forest Resources, Fisheries, Wildlife, Migratory Birds, Parks, and Environmental Management, the four AIPs set out the range of resources to which the respective First Nations have an Aboriginal right and the extent to which those resource rights will be constitutionally protected under Final Agreements. What is significant about the resource provisions of the AIPs is how closely they follow the direction provided by Supreme Court of Canada jurisprudence on Aboriginal rights.⁵⁵ With the exception of lands, land use and management, and forest resources, all resource harvesting rights are to be restricted to domestic uses only, cannot be sold to anyone other than Aboriginal persons, and are to be subject to federal and/or provincial measures necessary for conservation, public health, or public safety.⁵⁶ There is to be no commercial Aboriginal right with respect to the harvesting of fish, wildlife, or migratory birds. Furthermore, the federal and provincial governments will be granted rights to expropriate First Nation treaty lands although only under highly restrictive conditions. And, while the First Nations will possess treaty rights to harvest fish, wildlife, and migratory birds for domestic purposes, the annual total allowable catch per First Nation

will be determined by the federal minister. To this end, the four AIPs make provision for a complex array of mechanisms to facilitate the decision-making process of the minister. With respect to fish, for example, the four First Nations will each submit Annual Fish Plans to the minister produced by the First Nation and then reviewed by a Joint Fisheries Committee made up of First Nation, federal, and provincial representatives. The minister will then consider the recommendations of the Joint Fisheries Committee together with other factors such as conservation needs and issue a Harvest Agreement outlining the annual Aboriginal harvest right of each First Nation⁵⁷

Clearly, the range of Aboriginal rights to resources to be protected by treaty will be tightly circumscribed and subject to a good deal of federal and provincial regulation. One could justifiably argue therefore, that under restrictive terms such as these, the aspirations of First Nations are not only severely constrained by federal and provincial interests, but First Nation governments are also not being treated as governmental equals. To some extent this criticism is fair. However, it is also important to point out that a formal consultative role for First Nations in establishing target numbers for their total annual allowable catch of fish, wildlife, and migratory birds under both domestic and commercial arrangements will be guaranteed by the Final Settlements. The Annual Plans, coupled with the existence of Joint Advisory Committees, are intended to provide the relevant federal and provincial ministers with the information they need to protect First Nations' Aboriginal rights to resources and to issue commercial licenses consistent with First Nations' needs. In short, measures such as these constitute a significant enhancement in the participatory status of First Nations in the policy decisions that affect their own economic livelihood.

The BC Treaty Commission offers another way to conceptualize this matter of governmental status. The Commission states that "treaty negotiations are a voluntary political process" in which the success of negotiations depend upon First Nations, Canada, and British Columbia all sitting down at the table in full recognition of the fact that "there is legitimacy to the claims of title, of ownership and jurisdiction" by First Nations, Canada, and British Columbia.⁵⁸ What follows from this requirement of reciprocal recognition? Simply put, each level of government must recognize that the other has rights and responsibilities relative to the constituents they serve. Consequently, the objective sought in the government-to-government relations to be formalized in Final Agreements is to reconcile and coordinate Aboriginal title, ownership and jurisdiction with that of Canada and B.C. In this relationship, it is understood that First Nations exercise jurisdiction over their own citizens exclusively while the governments of Canada and B.C. exercise power over all citizens, First Nations included, in a way that reconciles and coordinates Aboriginal rights to land, fish, wildlife, and migratory birds with the rights of non-Aboriginal Canadians to those same resources. In the four AIPs signed to date, one can conclude that First Nations' citizens have decided to recognize and concede to the governments of Canada and B.C. overall coordinating authority over the resources named so that they are distributed equitably and fairly to all Canadians. In my view, this position is not a capitulation by First Nations to Canadian governmental authority. Instead, it constitutes recognition on the part of First Nations that the task of Canadian governments is to safeguard First Nations' access to resources based upon their Aboriginal rights within the broader context of overall Canadian interests to those same resources.

Finally, the status of First Nations as equal governmental partners with Canada and B.C. is perhaps most clearly represented in those chapters of the AIPs dealing with implementation, amendment, dispute resolution, and ratification. In each case, the AIPs outline an interlocking ratification, implementation, and amendment procedure that will be legally binding upon all three treaty partners. With respect to the ratification of the Final Agreements, for example, both Canada and B.C. will be required to pass enabling legislation while First Nations will establish ratification committees (with equal representation from Canada, B.C., and the First Nation) responsible for setting up referendums, requiring a majority of eligible voters casting votes in favor for the Final Agreements to pass.⁵⁹ Implementation plans of ten years will also be developed outlining the activities that each partner must undertake to fulfill the obligations required of them under the Final Agreements.⁶⁰ And where amendments to the Final Agreements are concerned, any one or more of the partners may propose them but amendments can only proceed with the agreement of all three partners.⁶¹ What provisions such as these clearly establish is the following principle: because Canada, B.C., and First Nations are co-equal governmental partners in a legally binding and constitutionally protected Agreement, the terms of that Agreement can neither be ratified, nor implemented and amended without the consent of all three.

b) Certainty

Certainty in a treaty means that ownership and jurisdiction, including the obligations, rights, and responsibilities that Canadian governments and First Nations owe one another, are clarified. The problem for Canadian governments in the past has been that the uncertain and largely undefined status of Aboriginal rights has meant lack of clarity concerning the obligations and entitlements they owe First Nations. Consequently, the position of Canadian governments has been that a treaty should involve an exchange in which First Nations trade their uncertain and undefined rights for a set of certain and defined rights. This was referred to as the “extinguishment” model.

From the perspective of Canadian governments the advantage of the extinguishment model was two-fold: first, it would result in treaty settlements in which the reciprocal obligations between Canadian and First Nation governments would be made predictable and certain, and second, it would render null and void the possibility that First Nations under treaty could invoke their Aboriginal rights in the future to make additional claims to lands and resources. This latter consideration was particularly important to the government of B.C. in light of its desire to consolidate its hold over Crown land and resources.

First Nation leaders have been quick to express fundamental objections to the requirement that they had to extinguish all their previously existing Aboriginal rights except for those explicitly recognized and protected in treaties. Many First Nation leaders expressed the view that Aboriginal rights are far “too fundamental to the nature and character of their people and history to surrender them for any treaty.”⁶² Responding to arguments such as these in 1991, the BC Claims Task Force rejected the notion of extinguishment and urged Canada and B.C. to seek a policy alternative. In time, Canada and B.C. have come partially round to the First Nation leaders’ point of view. They now agree that blanket extinguishment is not an option.⁶³ One alternative that has been devised is found in the four AIPs.

First Nations, Canada, and B.C. agree that the objective of treaties must be to attain clear and predictable relations between them concerning who has ownership over what lands and who has jurisdiction over what resources. The challenge, therefore, according to the BC Treaty Commission, is to achieve certainty without extinguishing Aboriginal rights.⁶⁴ The model adopted in identical form in the four AIPs signed to date is a “modification” approach in which the partners agree that the First Nations will modify their Aboriginal rights as set out in their respective Final Agreements.⁶⁵ The key here is that First Nations do not give up their Aboriginal rights in exchange for treaty rights. Instead, what they do is choose to define those rights in concrete terms and then agree that those specifications will constitute the full and final definition of their rights for the purpose of the treaty agreements.

The question is whether the modification model is simply another form of the extinguishment policy. For example, Doug McArthur argues that modification approaches do not fundamentally change what B.C. or Canada take treaties to be; “namely, the internal exchange or substitution of existing rights for a new bundle of rights.”⁶⁶ In my view, McArthur’s characterization is inaccurate. Indeed, according to the BC Treaty Commission, the B.C. Liberals have played an important role in finding a way to achieve certainty without requiring any form of release.⁶⁷

First Nations regard treaties as an expression of their entitlement to share land and political power with Canada and B.C. Aboriginal rights are thus regarded as the deep and rich source from which the contemporary and partial expression of those rights as documented in Final Agreements originate. The governments of Canada and B.C. meanwhile, want an agreement from First Nations that in exchange for not having to release their Aboriginal rights they will exercise only those rights agreed to and formalized within their treaties. What is the solution to this potential impasse in vision? Each of the four AIPs state that prior to the Final Agreement, the partners will negotiate and attempt to reach an agreement on a process that will allow First Nations to exercise rights that are not addressed or modified into a right set out in the Final Agreement. It is too early to say what agreements will emerge and whether First Nations can be persuaded to accept a position consistent with Canadian governments’ interpretation of certainty. Nevertheless, the fact that B.C. and Canada are willing to be pushed in the direction of the aspirations of First Nations means that the potential exists for a convergence of positions.

c) Self-Government

The four AIPs signed to date indicate that the B.C. Liberals now accept First Nations as co-decision makers in determining the details of their forthcoming treaty relationships (status), and they now accept that Aboriginal rights need not be extinguished in exchange for settling a treaty (certainty). Both constitute significant policy developments. But what is the status of the B.C. Liberals policy on Aboriginal self-government? They have consistently held the view that the powers of First Nations secured through the treaty process should be delegated from the federal and provincial governments and should possess the characteristics of local governments. It is important to consider, therefore, whether the advancements on status and certainty are rendered inconsequential when lined up against the B.C. Liberals’ position on self-government.

With respect to First Nations, the BC Treaty Commission observes that they “assert their right to govern themselves is an inherent aboriginal right protected by the constitution – the right is not given or delegated, but is based on their existence as organized societies in this country for thousands of years.”⁶⁸ The Government of Canada has endorsed this view by indicating in two of the AIPs that it will negotiate self-government “based on the policy of Canada that the inherent right to self-government is an existing aboriginal right under section 35 of the *Constitution Act, 1982*.”⁶⁹ In contrast, the B.C. Liberals have insisted that First Nations governance powers must be secured in separate Governance Agreements, outside of treaties, without constitutional protection as section 35 rights. It appears, therefore, that the B.C. Liberals are holding firm to their treaty referendum promise: they will negotiate delegated forms of self-government only and they will subject those negotiated jurisdictions to the greatest degree of impairment possible. Interestingly, however, a careful reading of the four AIPs indicates the development of a rather different reality. There can be no doubt that the B.C. Liberals’ position has served to constrain the positions of First Nations and Canada, but the model of self-government that is emerging is still significantly advanced beyond that of a strictly delegated version.

First, the inclusion of a Governance chapter in each of the four AIPs is, in and of itself, an accomplishment of significant importance. To be sure, the distinction insisted upon by the B.C. Liberals between constitutionally protected Final Agreements and non-constitutionally protected Governance Agreements is a significant blow to the position of many First Nation leaders. Still, the Governance and related chapters establish two principles significantly weighted in First Nations favor. First, the Final Agreements establish that First Nations will be legal entities “with the rights, powers, privileges, and capacity of a natural person...”⁷⁰ This provision constitutes a significant advancement over current Indian Act practice. In essence, legislatively derived Indian Act band status will be replaced by constitutional recognition for First Nations’ governments. In keeping with the principle of federalism, this effectively means that the Government of Canada will not be able to unilaterally dissolve First Nation governments. Second, the proposition that Governance Agreements should stand outside Final Agreements suggest that B.C. (or Canada) wish to retain the right to alter Governance Agreements unilaterally, without the consent of the First Nation affected. However, the AIPs preclude this from happening. The texts stipulate that with respect to both the Final and Governance agreements, any one or more of the partners may propose amendments, but no amendment can occur without the consent of all three.⁷¹ Thus, even though the Governance Agreements will lack constitutional protection, it is still the case that First Nations will be able to maintain a tight grip on their content and development.

Second, the AIPs clearly grant the four first Nations a range of law-making powers that will not only be constitutionally protected in the Final Agreements, but will also prevail over federal and provincial laws in the case of a direct conflict. The B.C. Treaty Commission points out that the B.C. Liberals are in favor of these arrangements.⁷² For the most part, the subject areas are linked to matters of internal concern to First Nation citizens only and they express the means by which First Nation governments will exercise authority in those areas. The range of jurisdiction includes, land ownership, land management and access, forests, fisheries, wildlife and migratory birds, the environment, water, roads and rights of way, direct taxation of First Nation citizens, and culture and

heritage. In a number of these areas, First Nation law-making powers will be subject to standards established by Canada or B.C. For example, First Nations will be able to manage their own forest resources but their jurisdiction must meet or exceed provincial forestry codes and practices. And with respect to fish, wildlife and migratory birds, the Final Agreements will define the right of First Nations to regulate the internal management of their total allowable annual catches, but those catches will be limited by measures necessary for conservation as well as public health and safety.

In what sense then will First Nation laws prevail in the above areas in the event of a direct conflict with federal or provincial laws? Under the AIPs it is understood that all powers are concurrent or shared and as a result, it is likely that on occasion a First Nation, federal, or provincial law will address the same subject area. In the event of an overlap resulting in a conflict, the AIPs list in what areas First Nations' laws will enjoy paramountcy. For the most part, these areas of paramountcy relate to the First Nation's right to regulate and distribute their land and resources free of outside interference. In some cases though, First Nation laws must meet federal or provincial standards and comply with federal or provincial regulations if they are to be valid. If those standards are met, regulations adhered to, and a conflict nevertheless ensues, then the First Nation law prevails. In short, constitutional entrenchment of certain First Nation powers in the Final Agreements, coupled with rules about First Nations paramountcy, can be regarded as a permanent abdication on the part of B.C. and Canada of its presumed right to interfere in the identified areas of First Nations governance.⁷³

Third, the Governance chapters of the four AIPs indicate that an extensive range of additional law-making powers will find their way into the Final Agreements. In essence, what I find is the following principle at work. B.C., along with Canada, has agreed that all those jurisdictions "internal to the group, integral to its distinctive Aboriginal culture, and essential to its operation as a government or institution" will be constitutionally protected in Final Agreements as section 35 rights.⁷⁴ Taking the Sliammon AIP as an example, such powers would include; aspects of preschool to Grade 12 education, aspects of child and family services, adoption, regulation, administration, and expropriation of Sliammon lands, culture and language, assets, zoning and land use planning, control of public nuisances and safety, citizenship, and managing Sliammon government.⁷⁵ At the same time, any powers that might go beyond matters integral to the internal life of First Nations and that may have a direct or incidental impact on the jurisdictions of Canada and B.C. will be placed in Governance Agreements. Again, using the Sliammon case, the powers to be placed in a Governance Agreement include; aspects of preschool to Grade 12 education, aspects of child and family services, the administration of justice, solemnization of marriage, social services, income support, health services, buildings, structures, and public works, licensing, regulation and operation of businesses, emergency preparedness, fire protection, traffic and transportation, and post-secondary education.⁷⁶ As to paramountcy, the AIP is silent, stating that this matter will be resolved prior to concluding Final Agreements. One would expect though to see First Nation laws prevail in most of those jurisdictions protected in the Final Agreements as these pertain to internal matters and to see federal and provincial laws prevail in most jurisdictions enumerated in Governance Agreements.

Proponents of First Nations sovereignty argue that the AIPs do not recognize the independence of First Nations law-making power at all but instead constrain that

jurisdiction to conform to the laws of Canada and B.C. For example, all First Nation laws are to be concurrent with those of B.C. and Canada, and in many cases provincial and federal laws will prevail. Generally speaking, First Nations are prohibited from exercising jurisdiction over matters relating to criminal law, the protection of the health and safety of all Canadians, and matters that could be construed as inconsistent with any of Canada's international legal obligations.⁷⁷ Furthermore, the areas of law-making authority over which federal and provincial laws will prevail is considerable, ranging from aspects of land, forest, and water management to determining documentation procedures for the harvesting of fish, wildlife, and migratory birds by First Nation persons. First Nations jurisdiction is also to be exercised within the context of the constitution of Canada, will be subject to the *Canadian Charter of Rights and Freedoms*, and constrained by "the application and operation of Federal and Provincial laws in respect of human rights."⁷⁸ One can conclude, therefore, that the powers of First Nations will be substantially limited by the conditions of the Final and Governance Agreements. Indeed, under constraints such as these it could be argued that the nature of Crown sovereignty will not have changed at all.

So in the end are the governance provisions of the four AIPs consistent with the delegated and local government stipulations of the B.C. Liberals' treaty referendum? On balance, I would suggest not. On the one hand, many of the governance provisions will be relegated to Governance side agreements that will not receive constitutional protection as section 35 Aboriginal rights and as a result, will not disrupt the constitutional division of powers between federal and provincial governments. In this respect, the B.C. Liberals have managed to give pretty strong effect to their referendum policy. On the other hand, many of the powers First Nations will exercise will be protected in the Final Agreements as section 35 rights and in many cases will extend well beyond those exercised by local governments. Furthermore, while the B.C. Liberals may claim the powers are delegated, if in a conflict the First Nation's law has paramountcy, then practically speaking, with respect to that subject matter, the First Nation's power is paramount or superior. Thus, while Crown sovereignty may not be altered by the forthcoming Final and Governance Agreements, it is certainly the case that Crown sovereignty will be shared.

Conclusion

The Governance chapters of the four AIPs are remarkably slim on detail. The chapters do state that the four First Nations will have constitutions and governments with authority to make laws protected either by Governance Agreements or Final Agreements. But while the range of law-making powers are listed in each case, the substance of those powers is left undefined and it is left unclear which power would prevail in the event of a conflict between a First Nation's and a federal or provincial law. Nevertheless, the intent of the AIPs is clear enough: the four First Nations will be provided with areas of exclusive and paramount self-governing authority over their own lands and citizens. They will, in other words, enjoy significant spheres of noninterference over their internal affairs.

Some Aboriginal leaders have denounced the BC Treaty process as little more than "an advanced form of control, manipulation, and assimilation."⁷⁹ This attack is based upon the following characterization of events. Some argue that there are essentially two positions on Aboriginal self-government; a principled position based on

traditional nationalism and a high level of Aboriginal political autonomy from the Canadian state and a compromised position (as Aboriginal nationalists and their supporters would put it) developed within a colonial mentality that accepts a partial recognition of self-government within the structural and legal confines of the state. From the position of the first the second is clearly problematic, yet this is the position in which the B.C. Treaty process is said to fall.⁸⁰ The B.C. Treaty process places parameters on what is negotiable and it demands that negotiation be the precondition for recognition of Aboriginal rights. The result is that all First Nations are seen to be losing resources vital to an independent political existence. They surrender traditional territory and resources, they yield to the assimilationist forces of Western liberalism and free-market capitalism, and they submit to Canada's claimed sovereignty over them. Seen from this perspective, the B.C. treaty process is not about negotiating treaties at all. Instead, as put by Taiaiake Alfred, it is "designed to solve the perceived problem of indigenous nationhood by extinguishing it and bringing indigenous peoples into Canada's own domestic political and legal structures with certainty and finality."⁸¹

While some First Nation leaders assert an Aboriginal right to an independent political existence, most frame their ambitions for self-government within the Canadian federal setting. For those First Nations committed to Canada, they must accept the necessity of forging linkages between First Nation and Canadian governments. The question then is whether the linkages entertained by the B.C. Treaty model will affect the future development of B.C. First Nations' life in a positive or negative manner. In my view, the answer is not yet clear. What is important is that the intergovernmental relationships established by the B.C. Treaty process be ones that enhance the Aboriginal ability to make choices in freedom at both individual and community levels. Those relationships must be ones to which the First Nations affected offer their full consent; they must see those relationships as facilitative measures contributing to their own political empowerment. If the B.C. Treaty process meets these criteria from the perspective of First Nations, then I think it is fair to say that the process can be seen as a complementary adjunct to the Aboriginal right to be self-defining within Canada.

There can be no doubt that the B.C. Liberals' policy position on treaties has shifted considerably in the years between 2001 and 2005. They began their mandate by insisting that they would negotiate treaties based on the premise that the source of Aboriginal powers originate in the Canadian Crown and must be expressed as delegated rights in a form characteristic of local governments. By 2005 the B.C. Liberals had agreed that First Nation governments would be constitutionally protected, that many of their powers would span both federal and provincial jurisdiction and would be protected in Final Agreements, and that First Nations law-making authority would prevail in some cases in the event of a conflict with federal or provincial law. By the criteria of relational pluralism, this policy shift constitutes a significant development. The shift signifies the beginning of a postcolonial mentality in which the B.C. Liberals are now more willing to regard First Nations as co-equal governmental partners at the treaty tables, and in which they are more inclined to strike deals that involve a genuine sharing of political power.

So are the four AIPs a form of colonial co-optation and assimilation? Here we must defer to the Sliammon, Tsawwassen, Lheidli T'enneh and Maa-nulth First Nations by asking them if they believe their forthcoming treaties will grant them sufficient recognition of their rights and title, guarantee them sufficient assets to build community

infrastructure, and provide enough resources to stimulate their local economy.⁸² In the words of the B.C. Treaty Commission, “at the end of the day, First Nations people must decide if the expression of recognition is sufficient to enable them to regain control of their lives.”⁸³

Notes

¹ See *Sliammon First Nation Agreement-in-Principle* (Canada, Sliammon, British Columbia: October 4, 2003), online at http://www.gov.bc.ca/tno/down/sliammon_agreement_in_principle_aip.pdf; *Lheidli T'enneh Treaty Negotiations: Summary of Agreement-in-Principle* (Canada, Lheidli T'enneh, British Columbia: July 26, 2003), online at http://www.gov.bc.ca/tno/down/heidliaip_july26_final_with_sig.pfd; *Maa-Nulth First Nation Agreement-in-Principle* (Canada, Maa-Nulth, British Columbia: October 3, 2003), online at http://www.gov.bc.ca/tno/down/maa_nulth_aip_signed_october_3_2003.pdf; *Tsawwassen First Nation Agreement-in-Principle* (Canada, Tsawwassen, British Columbia: March 2004), online at http://www.bctreaty.net/nations_2/agreements/Tsawwassen_AIP.pdf.

² The following section draws substantially from my *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003). See especially, 16-19, 30-37, and 113-137.

³ James Tully, “Reconsidering the B.C. Treaty Process,” in Law Commission of Canada and B.C. Treaty Commission, *Speaking Truth to Power, a Treaty Forum*. Online at <http://www.lcc.gc.ca/en/ress/part/200103/tully.asp>

⁴ Augie Fleras and Jean Leonard Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992), 24.

⁵ BC Treaty Commission, *The Changing Landscape: Annual Report 2002* (Vancouver: BC Treaty Commission, 2002), 15.

⁶ Tully, “Reconsidering the Treaty Process,” 4.

⁷ Doug McArthur, “Developments in the Recognition of Aboriginal Title since the White Paper.” Unpublished Paper prepared for presentation to the Internet Speakers Series, *Governance and Land Claims*, First Nations Studies Program, University of British Columbia, Vancouver, B.C., January 25, 2005.

⁸ *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 20000724, 2000 BCSC 1123, para 1. Online at <http://www.courts.gov.bc.ca/jdb-txt/sc/00/11/s00-1123.htm>

⁹ *Ibid*, para 12 and 13. Important to note is that the plaintiffs did not seek an order to set aside the entire Treaty. In the words of the presiding judge, Mr. Justice Williamson, “the plaintiffs do not challenge to 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." Ibid, para 44.

¹⁰ Ibid, para 59 and 72.

¹¹ See *Campbell et al*, para 178-184.

¹² John D. Weston, "How Tom Berger got it wrong," *Vancouver Sun*, Monday, April 22, 2002.

¹³ Geoff Plant, "Treaty talks move from process to achieving goals," *Vancouver Sun*, Tuesday, September 28, 2004.

¹⁴ Peter Colenbrander, "The Treaty Process, 1998-2001: An Overview," in Roslyn Kunin, ed., *Prospering Together: The Economic Impact of the Aboriginal Title Settlement in B.C., Second Edition* (Vancouver: The Laurier Institution, 2002), A-47.

¹⁵ The substance of the remaining questions dealt with whether private property should be expropriated for treaty settlements (Question 1); whether the terms and conditions of provincial leases and licenses should be respected (Question 2); whether hunting, fishing, and recreational opportunities on Crown land should be ensured for all British Columbians (Question 3); whether parks and protected areas should be maintained for the use and benefit of all British Columbians (Question 4); whether province-wide standards of resource management and environmental protection should continue to apply (Question 5); whether treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighboring local governments (Question 7); whether existing tax exemptions for Aboriginal people should be phased out (Question 8). In short, in each case the questions sought to establish a clear set of limitations and restrictions upon what was up for negotiation in the treaty process. See, Citizens for Public Justice, *Referendum on Treaty Negotiations: Make your vote count for justice* (Toronto: Citizens for Public Justice, 2002).

¹⁶ Ibid.

¹⁷ The figures in this paragraph are taken from the following articles: Mark Hume, "Negotiators have all the cards on the table," *National Post*, Thursday, July 4, 2002; National Post Editorial Board, "What B.C. thinks," *National Post*, Saturday, July 6, 2002; and Vaughn Palmer, "B.C.'s people speak decisively," *National Post*, July 4, 2002.

¹⁸ Hume, "Negotiators have all the cards on the table."

¹⁹ Ibid.

²⁰ Jim Aldbridge, "Self-Government - The Nisga'a experience," in *Speaking Truth to Power III - Self-Government: Options and Opportunities* (Vancouver: BC Treaty Commission, 2002).

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- ²¹ BC Treaty Commission, *Where Are We? Annual Report 2003* (Vancouver: BC Treaty Commission, 2003), 4.
- ²² *Ibid*, 4.
- ²³ *Ibid*, 4.
- ²⁴ Vancouver Sun Editorial Board, “B.C. Liberals may prove more flexible than thought,” *Vancouver Sun*, Tuesday, July 23, 2002.
- ²⁵ Vaughn Palmer, “A-G tap-dances on Liberal’s treaty queries,” *Vancouver Sun*, Tuesday, April 15, 2003.
- ²⁶ Geoff Plant, “Instructions to Negotiators,” July 31, 2002. Online at http://www.legis.gov.bc.ca/tno/negotiation/instr_for_negotiators.Htm.
- ²⁷ Vaughn Palmer, “Plant starts to show First Nations flexibility,” *Vancouver Sun*, Saturday, July 27, 2002.
- ²⁸ Plant, “Instructions to Negotiators.”
- ²⁹ Palmer, “Plant starts to show First Nations flexibility.”
- ³⁰ BC Treaty Commission, *The Changing Landscape*, 3.
- ³¹ Geoff Plant, “Dissent in a democracy,” *Vancouver Sun*, Thursday, November 6, 2003.
- ³² Vaughn Palmer, “Squaring Liberal language with treaty reality,” *Vancouver Sun*, Wednesday, April 16, 2003.
- ³³ I will indicate in what respects the self-governing powers contained in the AIPs extend beyond those of local governments later in this paper.
- ³⁴ Craig McInnis, “B.C. accepts First Nations historic rights,” *Vancouver Sun*, Saturday, November 23, 2002.
- ³⁵ British Columbia, *Provincial Policy for Consultation with First Nations*, October 2002. Online at http://www.gov.bc.ca/tno/down/consultation_policy_fn.pdf.
- ³⁶ *Campbell et al*, para 95.
- ³⁷ *Ibid*, para 81.
- ³⁸ *Ibid*, para 85, 86.
- ³⁹ *Ibid*, para 139.

⁴⁰ Tony Penikett, “Treaty questions falsely simplistic,” *Vancouver Sun*, Wednesday, March 6, 2002.

⁴¹ Grand Chief Edward John and Chief Harry Pierre, “B.C. government should see these decisions as a unique opportunity,” *Vancouver Sun*, Thursday, March 14, 2002.

⁴² Thomas Berger, “Why I won’t be voting,” *Vancouver Sun*, Monday, April 15, 2002.

⁴³ *Campbell et al*, para 168.

⁴⁴ *Ibid*, para 32.

⁴⁵ Plant, Treaty talks move from process to achieving goals.”

⁴⁶ BC Treaty Commission, *Consider...a new relationship*, *Treaty Commission Annual Report 2004* (Vancouver: B.C. Treaty Commission, 2004), 42.

⁴⁷ Plant, “Treaty talks move from process to achieving goals.”

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ Quoted in Douglas Todd, “We look after the land,” *Vancouver Sun*, Wednesday, October 20, 2004.

⁵¹ BC Treaty Commission, *Consider...a new relationship*, 18. The treaty process involves six stages for each First Nation involved. The six stages are as follows: Stage one: statement of intent; Stage two: preparations for negotiations; Stage three: negotiation of a framework agreement; Stage four: negotiation of an agreement in principle; Stage five: negotiation to finalize a treaty; Stage six: implementation of the treaty. See Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future, Second Edition* (Vancouver: UBC Press, 2000), 34-35.

⁵² As quoted in Vaughn Palmer, “Breakthrough strategy in treaty talks,” *Vancouver Sun*, Thursday, April 24, 2003.

⁵³ See *Tsawwassen First Nation Agreement in Principle (AIP)*, 15; *Sliammon First Nation Agreement in Principle (AIP)*, 15; *Lheidli T’enneh Treaty Negotiations: Summary of Agreement in Principle (AIP)*, 17; and *Maa-Nulth First Nations Agreement in Principle (AIP)*, 16.

⁵⁴ This and the previous quotation are unique to the *Tsawwassen AIP*. See page 13. Though not expressed in precisely the same language, similar sentiments can be found in the other three AIPs. See *Sliammon AIP*, 14-15; *Lheidli T’enneh AIP*, 17-20; and *Maa-Nulth AIP*, 15-18.

⁵⁵ In *Van der Peet* the Supreme Court of Canada said that in order to be an Aboriginal right, “an activity must be an element of a practice, custom or tradition integral to the distinct culture of the aboriginal group claiming the right,” while with respect to an Aboriginal right to fishing, the Supreme Court said in *Sparrow* that the right was restricted to fishing for food, social, and ceremonial purposes only. See *Van der Peet v. The Queen*, (1996) 9 W.W.R. 1; and *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385; (1990) 1 S.C.R. 1075.

⁵⁶ Compare *Tsawwassen AIP* Chapter 7 (Fisheries), Chapter 8 (Wildlife) and Chapter 9 (Migratory Birds) with *Sliammon AIP* Chapter 8 (Fisheries), Chapter 9 (Wildlife and Migratory Birds) and *Lheidli T’enneh AIP* Chapters on Fisheries, Wildlife, and Migratory Birds, and *Maa-Nulth AIP* Chapter 8 (Fisheries), Chapter 9 (Wildlife and Migratory Birds).

⁵⁷ *Ibid.*

⁵⁸ BC Treaty Commission, *Consider...a new relationship*, 6.

⁵⁹ See *Sliammon AIP*, Chapter 23; *Tsawwassen AIP*, Chapter 22; *Lheidli T’enneh AIP*, “Ratification”; and *Maa-Nulth AIP*, Chapter 23.

⁶⁰ See *Sliammon AIP*, Chapter 32; *Tsawwassen AIP*, Chapter 22; *Lheidli T’enneh AIP*, “Implementation”; and *Maa-Nulth AIP*, Chapter 21.

⁶¹ See *Sliammon AIP*, 20; *Tsawwassen AIP*, 88; *Lheidli-T’enneh AIP*, 25; *Maa-Nulth AIP*, 21-22.

⁶² McArthur, “Developments in the Recognition of Aboriginal Title Since the White Paper,” 22. See also BC Treaty Commission, “Aboriginal Rights,” online at http://www.bctreaty.net/files_2/issues_rights.html.

⁶³ BC Treaty Commission, *Consider...a new relationship*, 12.

⁶⁴ BC Treaty Commission, *Where Are We?*, 10.

⁶⁵ See *Sliammon AIP*, 18-19; *Tsawwassen AIP*, 18-19; *Lheidli T’enneh AIP*, 21-22; and *Maa-Nulth AIP*, 20-21.

⁶⁶ McArthur, “Developments in the Recognition of Aboriginal Title since the White Paper,” 23.

⁶⁷ BC Treaty Commission, *Consider...a new relationship*, 12.

⁶⁸ BC Treaty Commission, *The Changing Landscape*, 17.

⁶⁹ *Tsawwassen AIP*, 65. See also *Lheidli T’enneh AIP*, 4. Presumably the same principle applies to the Sliammon and Maa-Nulth negotiations as well.

⁷⁰ *Sliammon AIP*, 60; *Tsawwassen AIP*, 65; *Lheidli T'enneh AIP*, 113; and *Maa-Nulth AIP*, 78.

⁷¹ *Sliammon AIP*, 20; *Tsawwassen AIP*, 88; *Lheidli T'enneh AIP*, 25-26, 111; *Maa-Nulth AIP*, 21-22.

⁷² BC Treaty Commission, *Where Are We?*, 9.

⁷³ I take this insight from Justice Williamson's decision in *Campbell et al*, para 128.

⁷⁴ This approach to treaties is consistent with the policy of the Government of Canada. See *Federal Policy Guide – Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995), 5.

⁷⁵ See *Sliammon AIP*, 63-64. Similar arrangements are provided in the *Lheidli T'enneh* and *Maa-Nulth AIPs*. See *Lheidli T'enneh AIP*, 114-115; and *Maa-Nulth AIP*, 82-83. The *Tsawwassen AIP* does not distinguish which powers are to be protected in the Final Agreement and in the Governance Agreement in its Governance chapter.

⁷⁶ *Sliammon AIP*, 64-65. See also *Lheidli T'enneh AIP*, 115-116; and *Maa-Nulth AIP*, 83-84.

⁷⁷ *Sliammon AIP*, 16; *Tsawwassen AIP*, 15-16; *Lheidli T'enneh AIP*, 18-19; *Maa-Nulth AIP*, 17-18.

⁷⁸ *Sliammon AIP*, 15; *Tsawwassen AIP*, 17; and *Maa-Nulth AIP*, 16.

⁷⁹ Taiaiake Alfred, *Peace, Power, Righteousness: an indigenous manifesto* (Don Mills, Oxford University Press, 1999), 119.

⁸⁰ *Ibid*, 119-128. See also Taiaiake Alfred, "Deconstructing the Treaty Process," online at <http://www.delgamuukw.org/research/bctreatyprocess.pdf>; Richard J.F. Day and Tonio Sadik, "The B.C. Land Question, Liberal Multiculturalism, and the Spectre of Aboriginal Nationhood," *B.C. Studies*, No.134, Summer 2002, 5-35; Kiera Ladner, "Rethinking Aboriginal Governance," in Janine Brodie and Linda Trimble, eds., *Reinventing Canada: Politics of the 21st Century* (Toronto: Prentice Hall, 2003), 43-60.

⁸¹ Alfred, "Deconstructing the British Columbia Treaty Process," 3.

⁸² I thank Peter Colenbrander, senior manager at the BC Treaty Commission, for this insight.

⁸³ BC Treaty Commission, *Consider...a new relationship*, 6.

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