

Draft-February 19,2004

Power Sharing and First Nations Governments in Canada

By

Frank Cassidy

School of Public Administration

University of Victoria

January 2004

**PO Box 1700,
Victoria, British Columbia
V6W 2Y2**

E-mail: fcassidy@uvic.ca

Tel: 250-721-8060

First Nations as well as other Aboriginal peoples in Canada have an inherent right of self-government.¹ Self-government is intrinsic to First Nations political, social, economic and cultural life. It exists within First Nations as a permanent aspect of who they are.

First Nations self-government is recognized in Canadian law in a number of ways. As the Supreme Court of Canada's 1997 *Delgamuukw* judgment clearly established, Aboriginal title is protected by section 35 of the Constitution. Aboriginal title, among other things, includes a right to make decisions about the land itself. This right is a right of self-government.²

The inherent right is also a "free-standing" Aboriginal right. It is not merely an extension of other Aboriginal rights or of Aboriginal title. As the Government of Canada has indicated, it "recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*".³ The inherent right, as such, is rooted in the traditional decision-making and leadership processes as well as the laws and institutions that exist within the societies of First Nations.

For the right of self-government to be realized fully, this right needs to be understood in terms of the jurisdiction that First Nations have or could have in Canada. The possession of the inherent right means that First Nations are endowed with

¹"First Nations" is the contemporary term that is used to refer to those people and collectivities who are Aboriginal peoples, as defined by section 35 of the *Constitution Act, 1982*, but not Metis or Inuit. "Indians" is a term with a legal meaning related to several provisions in the *Indian Act* and, more generally, the *Constitution Act, 1867*. Other than in a legal sense, the term First Nations has replaced Indians in common discourse. More correctly, reference shall be made to actual nations of Aboriginal peoples, i.e., the Haida, the Mikmac, the Dene, etc.

²*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (paras. 114, 115, 117 and 166). See *Campbell et al. v. AG BC/AG Cda & Nisga'a Nation et al.*, [2000] B.C.S.C. 1123. This decision represents the current status of the law with regard to the inherent right in British Columbia. See also Kent McNeil, *The Post-Delgamuukw Nature and Content of Aboriginal Title*. Prepared for the Delgamuukw/Gisday'wa National Process of the Assembly of First Nations (Vancouver: Assembly of First Nations, Office of the B.C. Regional Vice-Chief, 2000).

³Canada, Department of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. Federal Policy Guide presented by the Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development and the Honourable Anne McLellan, Federal Interlocutor for Métis and Non-Status Indians (Ottawa: Public Works and Government Services, 1995) (p. 1).

governing powers.⁴ Given the existence of governments other than First Nations in the Canadian system, power-sharing considerations between governments with complementary or overlapping jurisdiction are a necessary part of the political domain.

Within a shared framework of law and governance, power sharing takes place when two or more governments each hold the prerogative to act in a more or less authoritative manner in relation to particular people, subjects or geographical areas. Power sharing is an essential characteristic of many governing systems, particularly those that are federal in nature.

In a governing system that rests upon two or more sets of powers, powers are often separated and divided. One government, for example, may have the power to act with regard to a particular matter and another may have the power to act with regard to a different matter. At other times, powers are held by different governments with regard to the same field of jurisdiction. In either case, they can be arranged so there is a higher degree of compatibility and less conflict.

Power-sharing arrangements may include joint administration or planning structural agreements to abide by common standards, consultation processes, dispute resolution techniques and a host of other approaches. The varieties, uses and designs of power-sharing arrangements with reference to First Nations governments in Canada's federal system are the subject of this paper.

As Douglas M. Brown has asserted in a research paper prepared for the Royal Commission on Aboriginal Peoples, "the point of federalism is shared power and coordinated spheres of government, each sovereign in its jurisdiction".⁵ Peter Hogg and

⁴Often, a distinction is made between power and authority. Power is seen as the ability to get something done. Authority is pictured to be power that is rooted in a legitimate source. It is not just pure power. Power, in a legal sense, is the right or authority as well as the ability to do something. Legally, it is circumscribed by jurisdiction, which determines the subjects in relation to which it is used as well as the field in which power can be exercised. It is in this legal sense that the term "power" is used in this paper.

⁵Douglas M. Brown, "Aboriginal Peoples and Canadian Federalism: An Overview: RCAP Notes," in Canada, Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples 1965-1992* (Ottawa: Supply and Services Canada, 1993-1996), pp. 1-57 (p. 2).

Mary Ellen Turpel have concurred, observing that: “intergovernmental cooperation and sharing of jurisdiction are the norm rather than the exception in Canadian federalism.”⁶

As First Nations governments enter into the complex network of federal-provincial relations, they will find, Hogg and Turpel have noted, advantages in many of the techniques of cooperation and dispute resolution that have been developed by the federal and provincial governments over time. “Self-government does not occur in a political vacuum,” they have argued, “no government is an island unto itself”.⁷

As early as 1987, Ian Cowie, in a study commissioned by the Queen’s University project on Aboriginal Peoples and Constitutional Reform, identified the need for those who are concerned with First Nations governance to focus on the mechanisms and requirements associated with the interfaces and tensions that appear in the exercise of multiple jurisdictions within one governing system. Understanding the requirements that exist in such conditions is essential, Cowie asserted, to the effective negotiation and implementation of self-government arrangements.⁸ This is so for several reasons.

The powers that First Nations governments need to exercise is one reason. In many cases, these powers are divided already in an explicit manner within the Constitution, in sections 91 and 92, as powers within the spheres of federal or provincial jurisdiction. Accordingly, as First Nations governments are more fully recognized as having their own independent powers, these powers, for the most part, need to be understood as concurrent ones. Concurrent powers require a higher degree of coordination on the part of governments than exclusive powers.⁹ As a result, the design of power-sharing arrangements becomes a pressing task.

⁶Peter W. Hogg and Mary Ellen Turpel, “Implementing Aboriginal Self-Government Constitutional and Jurisdictional Issues: RCAP Notes,” in Canada, Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples 1965-1992* (Ottawa: Supply and Services Canada, 1993-1996), pp. 1-34 (p. 13).

⁷Hogg and Turpel, “Implementing Aboriginal Self-Government,” in RCAP, *Public Policy*, 12-13.

⁸Ian B. Cowie, *Future Issues of Jurisdiction and Coordination Between Aboriginal and Non-Aboriginal Governments*. Aboriginal Peoples and Constitutional Reform Background Paper #13 (Kingston Institute of Intergovernmental Relations, 1987), p. 12.

⁹John M. Olynyk, “Approaches to Sorting Out Jurisdiction in a Self-Government Context,” *University of Toronto Faculty of Law Review* 53 (Spring 1995), pp. 235-271 (p. 269).

A second reason to understand the dynamics of power sharing arises from the lack of uniformity among First Nations across Canada. As John Olynyk has indicated, because of the heterogeneity of First Nations, “it is difficult to discuss the scope and content of self-government powers on a generic basis.”¹⁰ Self-government arrangements regarding First Nations governments will vary. As a result, the mechanisms and arrangements that foster power sharing need to be understood in terms of their individual characteristics and uses, so that they may be tailored to meet specific conditions.

There is another reason why power-sharing arrangements between governments in Canada deserve close attention. Such arrangements enable negotiation to be a more likely tool than litigation in the resolution of issues. What may emerge as an all-or-nothing matter can become, through power sharing arrangements, a subject of mutual accommodation.

Often litigation has its merits as a way of resolving disputes. On balance, it has been a major force with regard to the recognition of First Nations Aboriginal and treaty rights in Canada, but litigation is not always the best way to address differences. As Hogg and Turpel have pointed out:

Legally, the litigation of matters of self-government is very open-ended, and the outcomes are unpredictable. The issues are complex, and legal proceedings are lengthy and costly. Moreover, the outcome of litigation is usually more negotiation, as the courts have never imposed an agreement....¹¹

With specific reference to potential overlaps in jurisdiction between First Nations governments and other governments, Olynyk has agreed. The judiciary, he has noted,

¹⁰Olynyk, “Jurisdiction in a Self-Government Context,” *University of Toronto Faculty of Law Review* 53 p. 236.

does not have a vested interest in decisions concerning the jurisdiction of First Nations governments, except perhaps, with regard to the need for certainty and the rule of law. Accordingly, judicative approaches to jurisdictional issues “may not be in accord with the needs of the parties or the fixed, social and economic realities of the situation.” Governments, Olynyk has argued, must consider creative, workable arrangements which foster communication, cooperation and coordination.¹²

In Canada, there is some experience with the design of power-sharing arrangements that involve First Nations. This paper begins with an overview of the background and essential features of two examples that provide such arrangements: the Yukon self-government agreements and the Nisga’a Treaty. With particular reference to the Yukon and Nisga’a experiences, there is a discussion of twelve power-sharing approaches that can be used to produce compatibility and reduce conflict between governments. The discussion then moves to an examination of some of the considerations involved in the design of arrangements that feature the use of two or more power-sharing approaches. A few concluding comments are offered on the future use of power-sharing strategies as a way to further recognize the reality of First Nations governance in Canada.

The Nisga’a Treaty and the Yukon Self-Government Agreements

The Nisga’a Treaty is the first modern day treaty in British Columbia. It is a negotiated agreement between the Nisga’a, the Province and Canada that took effect in 2002. The Treaty covers the Nass Valley area in the northwestern part of the province. About 2,500 of the approximately 5,500 Nisga’a live in the valley along with about 100 non-Aboriginal residents. The Treaty provides the Nisga’a with \$196.1 million; unchallenged title to 2,019 square kilometres of land; transition, training and one-time funding of \$40.6 million; fish and wildlife benefits and the recognized authority to

¹¹Hogg and Turpel, “Implementing Aboriginal Self-Government,” in RCAP, *Public Policy*, p. 26.

¹²Olynyk, “Jurisdiction in a Self-Government Context,” *University of Toronto Faculty of Law Review*, p. 268.

operate Nisga'a governments with the ability to pass laws in relation to specified matters. Other benefits are involved as well.

In the Treaty, the main provisions regarding Nisga'a governance are contained in Chapter 11. In addition, there are many intergovernmental arrangements that are embedded throughout the Treaty in provisions regarding matters such as the management of parks, forest resources, fisheries, wildlife and migratory bird management.¹³

Section 1 of Chapter 11 of the Treaty provides that: "The Nisga'a Nation has the right to self-government, and the authority to make laws, as set out in this agreement." The provisions in this chapter, entitled "Nisga'a Governance," indicate that the Nisga'a Lisims Government has constitutionally protected power to make laws in several jurisdictional fields.¹⁴

Nisga'a legislative jurisdiction and authority are laid out in a series of sections which are each devoted to a area of governance activity such as constitutional development, governance structure, citizenship, culture and language, lands and assets, social services, education, assets, traffic and transportation and the solemnization of marriage. Although the format varies a bit, from jurisdiction to jurisdiction, each section contains two or more provisions to assure compatibility between Nisga'a powers and those of the federal and/or provincial governments. Each section also includes an identification of which government's law-making powers will prevail in the event of a conflict between powers.

From the federal and provincial points of view, it can be argued the source of Nisga'a powers is the Treaty itself, but there is no explicit statement in the Treaty that either the federal or provincial governments have delegated these powers. From the

¹³Canada, Federal Treaty Negotiations Office, British Columbia, Ministry of Aboriginal Affairs and Nisga'a Nation, *Nisga'a Final Agreement*, (Ottawa: Department of Indian And Northern Affairs, Ch. 3, s. 106-112; Ch. 4, s. 12 and 32-39; Ch. 8, s. 77-91; Ch. 9, s. 35-66 and Ch. 9, s. 95-99.

¹⁴Canada et al. *Nisga'a Final Agreement*, Ch. 11.

Nisga'a perspective, it can be asserted that there is an un-stated implication in the Treaty that Nisga'a powers already resided, before the Treaty, within the Nisga'a Nation. As such, these powers are inherent. Accordingly, they would be transformed in the Treaty from pre-existing Aboriginal rights to treaty rights with a clear and accepted meaning as well as constitutional protection under Canadian law.

The constitutional nature of Nisga'a Treaty rights adds considerably to the force of Nisga'a governing powers. As the Supreme Court of Canada noted in the *Sparrow* judgment, the constitutional status of First Nations rights means that the honour of the Crown is at stake when it is dealing with these rights. This provides "a measure of control over government conduct and a strong check on legislative powers."¹⁵ The federal and provincial governments have a fiduciary obligation to recognize and affirm Nisga'a governance rights and powers. They must be able to justify legally any infringements upon them.¹⁶ As a result, the courts have the potential to become an important support for the protection of Nisga'a self-government, if the need should arise.

The governance arrangements in the Yukon self-government agreements are quite different from those arrangements in the Nisga'a Treaty. The majority of Yukon First Nations have signed such agreements. These agreements have been established pursuant to the provisions of the Yukon Umbrella Final Agreement (UFA). The UFA provides a framework within which each of the fourteen First Nations in Yukon can conclude a final settlement and a separate but related self-government agreement with Canada and the Yukon Territorial Government.¹⁷ All UFA provisions are a part of each First Nation's Final Agreement.

The UFA applies to the entire Yukon and all 8000 Yukon Indians. As a result of the UFA and with the conclusion of a First Nation Final Agreement, each of the Yukon

¹⁵*R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1110.

¹⁶*Sparrow* deals with Aboriginal rights rather than treaty rights, but much of the approach to s. 35 that it takes has been incorporated into Supreme Court rulings on treaty rights. There is a great deal of similarity between the Yukon self-government agreements. In this paper, the Tr'ondëk Hwëch'in Self-government Agreement is used for the purposes of citation. It has been chosen because it contains a section on "community lands" which focuses on the creative use of dispute resolution mechanisms.

First Nations is eligible for a share of 41,439 square kilometres of land; \$242.6 million cash compensation; resource revenue and ownership and other benefits. In this sense, the structure of the Yukon final agreements is similar to the composition, if not the exact substance, of the Nisga'a Treaty.

As noted previously, the Nisga'a self-government provisions are part of the Treaty. The rights contained within them are protected as treaty rights under section 35 of the *Constitution Act, 1982*. The Yukon self-government agreements are not part of the First Nations Final Agreements and are not protected through section 35. The Yukon self-government agreements are authorized by the *Yukon First Nations Self-Government Act*, passed pursuant to powers stemming from section 91(24) of the *Constitution Act, 1867*.¹⁸ Section 91(24) of the *Constitution Act, 1867* gives the federal government exclusive power to legislate with regard to "Indians, and Lands reserved for the Indians." Accordingly, the jurisdictional powers that are provided to First Nations as a result of the Yukon self-government agreements are delegated powers.

Delegated powers, as compared to constitutionally protected powers, are limited in a number of ways. Delegated powers are ultimately subject to the jurisdiction of the "senior" government. The government that provides them can take them away. They are not as susceptible to judicial protection as independent, constitutionally established self-government powers. Moreover, while the fiduciary obligations of other governments to First Nations continue, these obligations are not as broad as they are when self-government is a constitutionally protected right.

The delegation of powers in the Yukon self-government arrangements sets the stage for significant differences in relation to the design of power-sharing arrangements in the Yukon and Nisga'a instances. In Yukon, the territorial and/or municipal governments can restrict many of the powers of First Nations on specific settlement

¹⁷ *Yukon First Nations Self-Government Act*, 1994, c. 35.

¹⁸ See text.

lands.¹⁹ The same restrictions do not exist in the Nisga'a instance. Delegated powers, because of their nature, lend themselves to such an arrangement.

As a result of the Nisga'a Treaty, inconsistencies or conflicts between the provisions in the Treaty and any federal or provincial law are resolved in favour of the agreement. Pending the outcomes of future negotiations, in Yukon all federal laws of general application shall continue to apply to First Nations, although First Nations have the exclusive power to enact laws in relation to the administration of their own affairs, operations and internal management. They also have the exclusive power to manage and administer the rights or benefits flowing from final agreements.²⁰

The Nisga'a Treaty makes explicit references to Nisga'a governments. Even though the Yukon accords are called "self-government" agreements, "Government" in them is explicitly defined as either Canada or the Yukon.²¹ The federally empowered First Nations entities are not called governments, and, it might be assumed, that neither Canada nor Yukon pictures them as such.

Approaches to Power Sharing

Although the Nisga'a and Yukon agreements contain different arrangements, the extensive use of power-sharing approaches is extensive in both. As exemplified by the Yukon and Nisga'a agreements, power sharing can be fostered by several different approaches. Twelve such approaches are identified in this paper (see Table 1). These approaches are clustered under three headings: boundary-establishing measures, participatory processes and extraordinary provisions.

¹⁹In Yukon the term "settlement lands" refers to those lands identified in a Final Agreement as the lands of a First Nation.

²⁰It should be noted that, with the exception of matters relating to taxation, a Yukon law of general application is inoperative to the extent that it provides for any matter for which provision is made in a law enacted by a Yukon First Nation. A general provision of this nature does not exist in the Nisga'a Treaty.

²¹Canada, Department of Indian Affairs *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Department of Indian and Northern Affairs, 1993).

Boundary-establishing measures include those that set definitive limitations around the use of governing powers in order to limit or enhance self-government activities. They may or may not be explicit expressions of power sharing, but they enable power sharing to take place, even if it might be in a limited way.

Participatory processes highlight shared activities and mechanisms whereby the parties to an agreement can work together to achieve their goals.

Extraordinary provisions are ones that exist only in very special instances. Sometimes, they are designed to advance power-sharing activities. For example, they may provide for transitional measures. Sometimes they represent an agreement to withdraw from power sharing in instances such as emergencies.

Six **boundary-establishing measures** are used to foster power sharing in the Yukon and Nisga'a self-government agreements. The first of these may be termed the *prevailing jurisdictions* approach. This approach to power-sharing arrangements rests on the notion that in certain instances the powers of one of the parties will be superior to those of the others. The strategy is usually employed as part of multi-dimensional arrangements. Other power-sharing approaches are used, in such instances, as strategies to avoid the need for a particular party's jurisdiction to prevail or to highlight or reduce the powers of the party with the prevailing jurisdiction. In the interests of certainty, clear rules regarding predominance of one government's jurisdictional powers are established.

The approach to governance in the Nisga'a Treaty is based, to some degree, on the idea that the Nisga'a have prevailing jurisdiction in several substantial areas. The Nisga'a have prevailing powers with regard to matters such as Nisga'a government, citizenship, culture, language, lands and assets, the organization and structure for the delivery of health services, child and family services, adoption and education. Almost

Table 1
Approaches to Power Sharing

Approaches	Description
Boundary-establishing measures:	Place definitive limits around the use of governing powers in order to limit or enhance self-government activities.
1. Prevailing jurisdictions	Provide for instances in which the powers of one of the parties will be superior to those of others.
2. Restricted powers	Limit the powers of one of the parties unless another government agrees to allow them to be asserted.
3. Limits on litigation	Restrict the ability of a party or parties to engage in legal proceedings.
4. Joint agreements	Require or enable parties to negotiate agreements on specific matters.
5. Common standards	Provide for specific degrees of attainment with regard to particular activities.
6. Financial agreements	
Participatory processes:	Highlight shared activities and mechanisms whereby the parties to an agreement work together to achieve their goals.
1. Joint administrative structures	Enable parties to work cooperatively in structured ways.
2. Guaranteed representation	Enables parties to have one or more formal representatives as participants in decision making in an authoritative institution.
3. Consultation	Provides for the expression of the views of a party or parties in a specific instance where a decision-making process is taking place.
4. Dispute resolution	Creates processes by which parties can attempt to resolve conflicts.
Extraordinary processes:	Provide for the activation of exceptional processes when parties to an agreement agree that in specific kinds of instances one party will exercise, more or less, unilateral powers.
1. Emergency procedures	Provide for instances in which one party will exercise, more or less, unilateral powers.
2. Transitional measures	Enable agreements or specific parts of agreements to be implemented in initial stages.

without exception, the prevalence of Nisga'a jurisdiction is mediated by a number of other power-sharing approaches designed to encourage compatibility and reduce conflict. These strategies are not always used as purely technical or value-free ones. In many instances, they effectively limit the exercise of Nisga'a jurisdiction.

Even though the Yukon self-government agreements are not constitutionally protected, there are a limited number of places where the First Nations powers prevail. These include powers, for example, relating to the administration and management of internal First Nation affairs as well as the management of the rights or benefits flowing from a Final Agreement.²²

A second kind of boundary-establishing measure is one that features *restricted powers*. As noted, First Nations with self-government agreements in Yukon are confined by boundaries established by Canada and the Yukon. With the exception of possible amendments to an agreement, Government (i.e., Canada or Yukon) may determine, from time to time, how and by whom any power or authority of Government set out in an agreement shall be exercised.²³

The Yukon self-government arrangements have been characterized as an example of a restricted self-government model. A First Nation, with some variation from agreement to agreement, is restricted from exercising a number of land-based self-government powers on specified parcels of settlement lands, unless another government in Yukon—in many cases a municipal government—agrees to allow the First Nation involved to assert these powers. These restrictions may apply to some important powers such as those relating to planning, zoning and land development as well as the control of the construction, maintenance, repair and demolition of buildings or other structures.²⁴

²² Canada, *Tr'ondëk Hwëch'in Agreement*, s. 1 (Definitions).

²³ Canada, *Tr'ondëk Hwëch'in Agreement*, s. 13.1.

²⁴ Canada, *Tr'ondëk Hwëch'in Agreement*, s. 3.7.

In the Nisga'a Treaty, the restricted powers approach is also used, but in quite a different manner. It is employed to reinforce as well as reduce Nisga'a powers. At a number of points in the Nisga'a Treaty, the ability to restrict the use of government powers lies with the Nisga'a, while at other points it rests with the federal or provincial governments. British Columbia may continue to use existing gravel pits on lands recognized as "Nisga'a Lands" as a result of the treaty.²⁵ It may do so, however, only on the basis of a provincial gravel management plan approved by the Nisga'a. Nisga'a powers in relation to gravel are also restricted in the sense that these powers can only be exercised in the context of a management plan approved by British Columbia.

A third type of boundary-establishing measure that is used in the Nisga'a and Yukon agreements is one that involves *limits on litigation*. Neither Yukon, Canada nor a First Nation can challenge legally the validity of any provision of a Yukon First Nations self-government agreement.²⁶ The Nisga'a Treaty includes a comparable provision. It also establishes that the Nisga'a will release Canada, British Columbia and all other persons from any claims the Nisga'a "ever had, now has or may have in the future," relating to or arising from infringements on Nisga'a Aboriginal rights or title.²⁷ A similar provision exists in the Yukon Final Umbrella Agreement and the Yukon First Nation Final Agreements, documents to which the Yukon self-government agreements are subject.²⁸

Joint agreements represent a fourth form of boundary-establishing measures. In the Nisga'a and Yukon arrangements, joint agreements are mandated in several instances. At the request of any party to the Nisga'a Treaty, the governments involved are required to negotiate and attempt to reach agreements to coordinate environmental assessment requirements.²⁹ Another example of the use of this approach arises when, upon the request of the Nisga'a, the parties can be required to negotiate and attempt to

²⁵The term Nisga'a Lands refers to those lands to which the Nisga'a hold title after the signing of the Treaty. See Canada et al., *Nisga'a Final Agreement*, Ch. 1, Canada et al., *Nisga'a Final Agreement*, Ch. 7, s. 52-59.

²⁶ Canada, *Tr'ondëk Hwëch'in Agreement*, s. 7.2.

²⁷ Canada et al., *Nisga'a Final Agreement*, Ch. 2, s. 20.

²⁸ Canada et al., *Yukon Umbrella Final Agreement*, Ch. 2, s. 2.8.2.

reach agreement to enabling the Nisga'a Lisims Government to carry out its policing responsibilities.³⁰

The joint agreement approach is used also in Yukon. In the self-government agreements, the parties are mandated to enter into negotiations to create arrangements with respect to the administration of First Nations justice.³¹ In addition, Canada and the First Nations are obliged to negotiate financial transfer agreements as well as program and service agreements.³²

The *common standards* approach is a fifth way of achieving power sharing through boundary-establishing measures. Through this approach one or more of the parties to an agreement agrees to abide by specified measures of attainment. In Yukon, First Nations and the federal and territorial governments have concurred that the resources for programs and services offered to First Nations by First Nations must be of a level of quality equivalent to that of the programs and services the federal or territorial government would have offered prior to self-government. Provisions concerning financial accountability provide another example of this approach, as Yukon First Nations are bound to prepare, maintain and publish their accounts in a manner consistent with the standards generally accepted for governments in Canada.

In the Nisga'a Treaty there is extensive use of the common standards approach. The Nisga'a Nation has the recognized power to make laws, for example, in respect of the management of timber resources on Nisga'a lands, but the Nisga'a must adhere to standards that meet or exceed provincial standards.

The common standards approach can be structured in several ways. The "meet or exceed" approach is one type of common standards strategy. Others are the "compatibility" and "conformity" methods. Standards that are compatible are ones that

²⁹Canada et al., *Nisga'a Final Agreement*, Ch. 10, s. 1-2.

³⁰Canada, et al., *Nisga'a Final Agreement*, Ch. 12, s. 18.

³¹Canada, *Tr'ondëk Hwëch'in Agreement*, s. 13.3.1.

³²Canada, *Tr'ondëk Hwëch'in Agreement*, s. 16.1.

are more or less similar to one another. Conformity requires more. It requires standards that are identical. So, for example, public complaint procedures and the use of force by Nisga'a police must conform to provincial standards.³³ Nisga'a standards regarding police operations and a police code of conduct do not have to conform to provincial standards; they only have to be compatible with—to be more or less similar to—provincial standards.³⁴

A second broad general class of power-sharing approaches include various **participatory processes**, which enable parties to work together to achieve their goals. In the Yukon and Nisga'a agreements, four different participatory processes are used. *Joint administrative structures* are created to enable the parties to interact cooperatively in structured ways. In the Nisga'a Treaty a number of boards and committees are established. These include a Joint Park Management Committee, a Joint Fisheries Management Committee and a Wildlife Committee.³⁵ In each case, the terms of reference and membership of the committees are set out in the agreement. In Yukon, First Nations and the Territory or a municipality may establish joint planning structures regarding lands.³⁶

A second kind of participatory process features *guaranteed representation*, whereby one party agrees to allow another to have one or more formal representatives as participants in decision making in an authoritative institution. In Yukon, this may include First Nations participation on school boards, school committees or school councils.³⁷ As an outcome of the Nisga'a Treaty, a Ratification Committee for the approval of the final treaty by the Nisga'a was established by the Nisga'a Tribal Council. This committee had guaranteed representation from Canada and British Columbia.³⁸

³³Canada et al., *Nisga'a Final Agreement*, Ch. 12, s. 4.

³⁴Canada et al., *Nisga'a Final Agreement*, Ch. 12, s. 4.

³⁵Canada et al., *Nisga'a Final Agreement*, Ch. 3, s. 108-112; Ch. 8, s. 77-82 and Ch. 9, s. 45-54.

³⁶Canada, *Tr'ondëk Hwëch'in Agreement*, s. 25.1 and s. 27.1.

³⁷Canada, *Tr'ondëk Hwëch'in Agreement*, s. 17.9.

³⁸Canada et al., *Nisga'a Final Agreement*, Ch. 22, s. 4.

Consultation processes provide a third example of the use of participatory processes in self-government arrangements. In Yukon, both First Nations and municipalities must consult with one another when a proposed use of land may have a significant impact on or be incompatible with the land-based interests of the other party.³⁹ As a result of the Nisga'a agreement, the Nisga'a are required to consult with Canada and British Columbia with respect to any proposed Nisga'a laws that would significantly affect the regulation of public access to and into Nisga'a lands.⁴⁰

A fourth type of participatory process involves the use of *dispute resolution* mechanisms. The Nisga'a Treaty creates an elaborate, multi-staged dispute resolution process that can be used when conflicts arise regarding the interpretation, application or implementation of the agreement; a breach or anticipated breach of the agreement; or negotiations required to be conducted under any provisions of the agreement.⁴¹ In Yukon, the parties to self-government agreements may engage in mediation or arbitration when conflicts arise particularly, but not solely, with regard to self-government financial transfer agreements.⁴²

A third class of power-sharing arrangements includes **extraordinary provisions**. These processes are designed to come into play in exceptional circumstances. In the Yukon and Nisga'a agreements, two kinds of extraordinary provisions can be identified: emergency procedures and transitional measures.

Emergency procedures are activated usually when the parties to an agreement agree that in specific instances one party will exercise more or less unilateral powers. In the Nisga'a Treaty, provision is made for British Columbia to mitigate unilaterally a forest health problem on Nisga'a lands, subject to Nisga'a laws, if the Nisga'a are not able to do so.⁴³ As a result of the Yukon agreements, First Nations, Canada and the Territory all have the ability, in particular circumstances, to exercise extraordinary

³⁹Canada, *Tr'ondëk Hwëch'in Agreement*, s. 25.1.

⁴⁰Canada et al., *Nisga'a Final Agreement*, Ch. 6, s. 9.

⁴¹Canada et al., *Nisga'a Final Agreement*, Ch. 19.

⁴²Canada, *Tr'ondëk Hwëch'in Agreement*, s. 24.1.

powers to relieve emergencies involving both First Nations and non-First Nations citizens.⁴⁴

A second type of extraordinary provision in the Yukon and Nisga'a agreements relates to *transitional measures*. In Yukon, during a ten-year transition period, Canada has agreed to assist First Nations with the payment of property taxes, on the basis of diminishing scale, starting at 100 percent in year one and concluding at ten percent in year ten.⁴⁵ The Nisga'a are subject to various forms of taxation as the result of their agreement, but only after eight years as far as transaction taxes are concerned and twelve years with regard to all other taxes.⁴⁶ Each agreement contains other transitional provisions regarding implementation.

The Design of Power-Sharing Arrangements

The eleven approaches to power sharing that have been identified can be of assistance in forming the elements of governmental and intergovernmental organization that are designed to maximize strengths and balance weaknesses in varied power-sharing arrangements. Sections 25 through 28 of the *Tr'ondëk Hwëch'in Self-Government Agreement* provide a good example of the dynamics involved in the design of power-sharing arrangements in Yukon. These sections deal with the use, management and administration of settlement lands with particular reference to compatible (i.e., co-existing) land use as well as local government agreements and the creation of regional or district structures to deal with these matters. They provide also for relevant dispute resolution processes. A range of approaches to power sharing is employed in the design of the resulting arrangements. As a result, various approaches become the building blocks for the structures and processes of governmental and intergovernmental composition, for the machinery of government.

⁴³Canada et al., *Nisga'a Final Agreement*, Ch. 5, s. 63.

⁴⁴Canada, *Tr'ondëk Hwëch'in Agreement*, s. 13.4.

⁴⁵Canada, *Tr'ondëk Hwëch'in Agreement*, s. 14.10.

⁴⁶Canada et al., *Nisga'a Final Agreement*, Ch. 16, s. 6.

Several participatory processes are used in these parts of the Agreement. Joint administrative structures are employed in a number of ways. In section 25 of the Agreement, the First Nation, the Yukon or a municipality may establish a joint planning structure regarding settlement lands and adjacent lands. In section 27, provision is made for the establishment of a common administrative and planning structure for part or all of the traditional territory of the Tr'ondëk Hwëch'in.

Use is also made of consultation processes. While the parties may set up the compatible land use structures, they must consult with one another for the purpose of resolving an actual or potential incompatibility in settlement land use. Moreover, the Tr'ondëk Hwëch'in, Canada and Yukon may agree to develop a process for consulting affected residents regarding common administrative and planning structures for part or all of the First Nation's traditional territory.

As noted above, the use of the restricted powers approach plays a significant role in the Yukon self-government agreements. On specifically designated parcels of settlement lands, First Nations law-making powers cannot be used without the agreement of an affected municipality or the Yukon, as the case may be.⁴⁷

In the Tr'ondëk Hwëch'in Agreement, this approach is ameliorated by the use of another power-sharing strategy, a *dispute resolution* process. In specific instances, a Tr'ondëk Hwëch'in law cannot come into force or effect until 60 days following its enactment. Within seven days of enactment, the Tr'ondëk Hwëch'in are required to provide the City of Dawson and Yukon with a copy of the law. If there is an objection to the law, the parties to the dispute are required to make best efforts to resolve the matter. If the parties cannot reach agreement, the Agreement provides for the Supreme Court of the Yukon Territory to make a determining decision.⁴⁸

⁴⁷Canada, *Tr'ondëk Hwëch'in Agreement*, s. 28.1.

⁴⁸Canada, *Tr'ondëk Hwëch'in Agreement*, s. 28.1.

In the instance of the Nisga'a, the dynamic is slightly different. This is due to a number of factors. Where Nisga'a laws prevail, a range of power-sharing techniques is used to make sure they remain compatible with federal and provincial laws. A good example of this design strategy can be found in the provisions of the treaty regarding pre-school to grade twelve education (see Table 2 for the full text).⁴⁹

In these provisions, the prevailing jurisdictions approach is used to establish that final power regarding pre-school to grade twelve education is determined by Nisga'a law. The rest of the clauses in these provisions circumscribe the powers of the Nisga'a government to make them more compatible with, and, in some senses, subject to the provincial government and provincial governmental agencies. This is a good example of how power-sharing techniques can be used to limit as well as expand the powers of a government.

The common standards approach, for instance, is used to guarantee that Nisga'a instructional practices and the certification of teachers is compatible with the standards of the Province and provincial post-secondary education institutions. An exception is made for teachers of Nisga'a language and culture. These instructional personnel can be certified in accordance with standards established within Nisga'a law. This reflects the general approach taken in the Treaty that Nisga'a language and culture are matters that should be subject to Nisga'a laws and governments, to as great an extent as possible.

Other power-sharing techniques are used in this section to form an arrangement that represents compatibility between the Nisga'a and provincial government. The joint agreements approach is used to set boundaries around Nisga'a powers. If the Nisga'a

⁴⁹Canada et al., *Nisga'a Final Agreement*, Ch. 11, s. 100-102.

Table 2
Provisions of Nisga'a Treaty Regarding
Pre-School to Grade Twelve Education

100. Nisga'a Lisims Government may make laws in respect of pre-school to grade 12 education on Nisga'a Lands of Nisga'a citizens, including the teaching of Nisga'a language and culture, provided that those laws include provisions for:
- a. curriculum, examination and other standards that permit transfers of students between school systems at a similar level of achievement and permit admission of students to the provincial post-secondary education systems; and
 - b. certification of teachers, other than for the teaching of Nisga'a language and culture, by:
 - i. a Nisga'a institution, in accordance with standards comparable to standards applicable to individuals who teach in public or independent schools in British Columbia, or
 - ii. a provincial body having the responsibility to certify individuals who teach in public or independent schools in British Columbia; and
 - c. certification of teachers, for the teaching of Nisga'a language and culture, by Nisga'a institution in accordance with standards established under Nisga'a law.
101. In the event of an inconsistency or conflict between Nisga'a law under paragraph 100 and a federal or provincial law, the Nisga'a law prevails to the extent of the inconsistency or conflict.
102. If Nisga'a Lisims Government makes laws under paragraph 100, at the request of Nisga'a Lisims Government or British Columbia, those Parties will negotiate an attempt to reach agreements concerning of Kindergarten to Grade 12 education to:
- a. persons other than Nisga'a citizens residing within Nisga'a Lands; and
 - b. Nisga'a citizens residing off Nisga'a Lands.

chose to make laws regarding the provision of education to persons other than Nisga'a citizens residing within Nisga'a lands or Nisga'a citizens residing off Nisga'a lands, they are required to negotiate and attempt to reach agreements with the Province concerning these activities.

As a result of these provisions, the ability of the Nisga'a to engage in governance and make laws regarding justice becomes a matter of practical significance. A governance regime is established which consists of a mixture of power-sharing approaches such as the common standards, joint agreements and guaranteed representation techniques. These are augmented by other approaches in the Treaty that are designed to have more general application. Joint agreements regarding financial arrangements and dispute resolution mechanisms are examples of these more general strategies.

The provisions of the Yukon self-government agreements and the Nisga'a Treaty indicate how governments and intergovernmental regimes can be designed, but what determines what governments actually do and to what effect and extent they can do it? The answer to this question revolves around the notion that power sharing is more than a matter of technique. It not only facilitates the exercise of power, it is also a reflection and, often, a perpetuation of the power relations that form the context in which power sharing takes place.

Conclusion

One day in the spring of 1993, I was in Ottawa for a meeting of the senior staff and members of the Royal Commission on Aboriginal Peoples. Having a good part of an afternoon free, I decided to go to the downtown shopping area. Walking around, I saw several First Nations people from Yukon that I had met a few years before when I had served as a mediator in the Yukon land claims negotiations process. Filled with

curiosity, I finally said to one person: “It seems as if most of the Yukon First Nations leadership is in town. What’s going on?”

He looked very serious and noted: “We are at a critical point. Canada has given us an ultimatum. They say they are going to British Columbia to bring the treaty process forward there. They say also that the Territory and many of the municipalities are constraining their choices more and more. They say we have only a short time to take or leave what they have put on the table.”

“What do you think of that?” I asked.

“We don’t like it. We feel we should have more—more land, more compensation and more self-government. But, if we don’t accept what’s available now, we could lose everything we have fought for over the past twenty years. We are tired. We need to go back to our communities. There are schools waiting to be built and economic development projects to initiate. Many things have been placed on hold for too long. We have borrowed a lot of money to negotiate our agreements. It is adding up.

“I don’t think we have an alternative. It’s time to finalize the negotiations,” he said, walking away as if the weight of the world was on his shoulders.

A little less than five years later, the Supreme Court of Canada’s historic *Delgamuukw* judgment was announced, and it was clear that Aboriginal title is an Aboriginal right recognized, protected and affirmed in section 35 of the *Constitution of Canada*. A short time after the judgment, I had dinner with one of the treaty negotiators for the Nisga’a. When asked how the treaty negotiations were going, he was hesitant to say much, but indicated that a settlement might be at hand. Canada and British Columbia wanted to establish a precedent that represented the transformation of Aboriginal title and rights, and the uncertainties they represented under Canadian law, into clear and certain treaty rights.

“Canada and British Columbia need a success at the treaty table to show this process works,” he added. “They have been participating in the BC treaty process for several years and have little to show for it. We have been at the negotiating table since 1977 and still there is no agreement. We all want a victory.” Shortly thereafter an agreement on the essentials of the Treaty was achieved.

The Yukon and Nisga’s experiences illustrate the practical dynamics of the contexts in which power-sharing arrangements are formulated. These approaches tend to reinforce prevailing power relationships. The Yukon First Nations had choices, but these choices were limited by a powerful federal government which had developed commitments elsewhere and had important ties to non-First Nations interests, such as the Territory and various municipalities in Yukon. Given these and other interests, the Government of Canada threatened to pull out of the Yukon, and it refused to negotiate self-government arrangements that would be part of final agreements.

Meanwhile, the Yukon First Nations were deeply in debt, and they were tired. They also felt they needed results. So, they agreed to negotiate agreements that they were hesitant about, including pacts that would result in the “restricted powers” model regarding governance powers on key settlement lands.⁵⁰

The extensive use of the restricted powers approach in Yukon reflects a power dynamic within which First Nations were at a deficit as compared to the federal government, the Territory and, indeed, a number of municipalities. The provisions in the Tr’ondëk Hwëch’in Agreement ameliorate this dynamic and introduce more balance in the existing power relationships, but they do not necessarily change these relationships in any fundamental way. The Tr’ondëk Hwëch’in can resort to a dispute resolution process when certain land use planning issues arise, but in the final analysis, a Yukon court is the authoritative decision-making power.

⁵⁰It is important to note that Yukon First Nations also were able to gain several non-land based powers with regard to matters such as education, social and welfare services and adoption which were free from some of the limitations that would be imposed on the Nisga’a through the use of power-sharing techniques such as common standards and joint agreements.

The Nisga'a had a greater range of choices available to them than the Yukon First Nations did, particularly with regard to self-government. Canada and British Columbia, each for their own political reasons, wanted a completed treaty. The federal Liberal government needed to counter political critics of its land claims policy. The provincial New Democrats wanted to get re-elected. The Nisga'a were able to take skilful advantage of this situation.

A very significant difference in Yukon and in the Nisga'a territories was the presence or non-presence of a non-First Nations population. In Yukon, many of the settlement lands are located within or adjacent to municipalities. Accordingly, the Yukon territorial government and the municipalities had a strong interest in restricting First Nations land use, planning and management powers. There is not a large non-First Nations presence in the Nisga'a Territory. As a result, this factor did not have to be taken into consideration by Canada or British Columbia with the same intensity it attracted in Yukon.

The differences in the conditions surrounding the Nisga'a and Yukon agreements does not mean that the Nisga'a Treaty fully or radically prevails over the existing power dynamic in British Columbia. The absorption of most of the Nisga'a traditional territory by the Province indicates otherwise. Still the Nisga'a agreement provides a marked contrast to the Yukon agreements.

The context in which power sharing may take place is shaped in a variety of ways. Both the Yukon and Nisga'a arrangements were formed within the context of a land claims agreement or treaty. This is informative. It indicates that the federal and provincial governments and provincial as well as territorial governments may be willing to pursue power sharing primarily when they have to do so as part of a wider, more comprehensive agreement where economic, legal and political circumstances join to make further First Nations self-government a virtual necessity. Otherwise, power

sharing appears to be an item that has a low priority on the agenda of federal, provincial and territorial governments.

The lack of power-sharing arrangements involving First Nations in Canada may not be attributable to their impracticability. It may be more of a reflection of a lack of economic necessity, unacknowledged legal obligations and insufficient political will on the part of the federal and other non-First Nations governments. It also may be an outcome of the fears of Canadians regarding the unknown and regarding the sense of grievance that First Nations have about their historical treatment in this country.

The challenge for First Nations and other Canadians who see the need for greater self-government is clear. Urgency must replace hesitancy. Vision must replace fear. Publicly expressed intentions may not be not enough.