

# **The Nisga'a Final Agreement: Negotiating Federalism**

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*The Nisga'a Nation, federal government and provincial government of British Columbia completed negotiation of the Nisga'a Final Agreement on 4 August 1998. Although the parties incorporated the language of nationhood, new relationships, and intergovernmental agreement, to many it remains unclear whether the Nisga'a Final Agreement creates a third order*

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of Canadian government. This article wades into the debate on the third order and asks whether the treaty text supports a federal relationship. While it is clear that the type of federal relationship described by the Nisga'a Final Agreement is different from that of the provincial and federal governments, the treaty's use of federalism's foundational legal and political institutions supports understanding it as federal. Moreover, its reading as a federal document can find sufficient support in the jurisprudence on Aboriginal rights and Canadian constitutional law.

## I INTRODUCTION

The conclusion of the *Nisga'a Final Agreement* on 4 August 1998 was a monumental legal and political event.<sup>1</sup> Signed after nearly 20 years of negotiation, the *NFA* is meant to be a full and final settlement of Nisga'a claims regarding Aboriginal rights and title, including self-government. The terms of the *NFA* deal with the settlement of land claims, resource claims, Aboriginal rights and compensation. More specifically, it delineates political authority, legal authority and Aboriginal resource rights over nearly 2,000 square kilometers in the Nass River Valley of northwestern British Columbia.<sup>2</sup> Much of the controversy surrounding the negotiation of the *NFA* has subsided and the implementation of the *NFA* has gone forward. However, there remains a certain degree of uncertainty over how the Nisga'a Nation now fits into the Canadian constitutional framework as a result of the *NFA*. This is not surprising given the presumption that the parties negotiated a political relationship as well as a legal one. However, the uncertainty has not yet been uniformly addressed by the parties in a coherent and useful manner. Some of the controversy can be traced to the fact that the word "federalism" is not used in the document itself. However, this fact does not preclude either the political reality of a federal relationship or the relevance

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1. The Nisga'a Nation ratified the *Nisga'a Final Agreement* on 9 November 1998. The British Columbia Government ratified the *NFA* on 22 April 1999, *Nisga'a Final Agreement Act*, R.S.B.C. 1999, c. 2. The federal government ratified by Royal Assent on 13 April, 2000, *Nisga'a Final Agreement Act*, R.S.C. 2000, c. 7 [*NFA*].
  2. The Nisga'a government consists of four local village governments and the Nisga'a Lisims Government. The Nisga'a Lisims Government consists of an executive and legislative branch, as well as a Council of Elders. Legislative powers are exercised by the Wilp Si'ayuukhl Nisga'a; executive powers to enact regulations under laws are exercised by the Wilp Si'ayuukhl Nisga'a, and administrative powers are exercised by Nisga'a public institutions.

of the treaty as a legal text which supports it.<sup>3</sup> In fact, there is a growing assumption that First Nations do comprise a third order but disparate analyses of how they do so.<sup>4</sup>

What are the possible implications of recognizing a federal relationship or a third order of government? The practical implications of political arrangements characterized by federal versus unitary typologies are too vast to detail here. Moreover, let us be wary of any definition of federalism which purports to foresee all future implications. Nonetheless, in order to understand what is at stake in finding a federal relationship, the term “federalism” is used here to invoke a certain intellectual approach to power which upsets the tendency to political dominance.

Consequently, one of the most salient reasons why federalism may be significant to understanding the *NFA* is its potential to symbolize power sharing between governments. For instance, Nisga'a participation in executive federalism may offer opportunities for policy coordination and the development of common goals. Participation in fiscal federalism may offer fiscal stability for the funding of programs related to health, education and other basic services.<sup>5</sup> Participation in constitutional federalism takes on a technical meaning in so far as it permits or forbids certain legislative or executive behaviour. For example, the power to legislate in regards to Nisga'a persons was premised on an interpretive paradigm which vested all legislative authority over Nisga'a persons in the provincial and federal governments by virtue of their authority in the *Constitution Act, 1867*. Prior to the *NFA*, the constitutional authority of the Nisga'a Nation to govern was not recognized by the state. In contrast, this article will document how the *NFA* vests certain governmental authority vis à vis Nisga'a persons in the

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3. For other discussion of the political and legal import of the *NFA* see P. Rynard, “Welcome In, but Check Your Rights at the Door: The James Bay and Nisga'a Agreements in Canada” (2000) 33:2 Canadian J. of Political Science 211. For a survey of various opinions on treaty issues, see *Speaking Truth to Power: A Treaty Forum* (Law Commission of Canada, 2001), online at <<http://www.lcc.gc.ca>>.
  4. Assumptions of a third order range from highly general pronouncements on Aboriginal nationalism co-existing within the Canadian federal state to specific statements on the effect of the *NFA*. For the former approach see Will Kymlika, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998) and Jean Leclair, “Federal Constitutionalism and Aboriginal Difference” (2007) 31:2 Queen's LJ 521. For statements on the *NFA* see the submissions of the House of Sga'nisims and Nisibilada on the creation of a Nisga'a third order, *House of Sga'nisims and Nisibilada v. Canada (A.G.)*, 2000 BCSC 659. Also see *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C.) at 363 [*Campbell*].
  5. For further discussion on federalism related to various types of Aboriginal governments, see Frances Abele & Michael J. Prince, “Counsel for Canadian Federalism: Aboriginal Governments and the Council of the Federation” in *Constructive and Cooperative Federalism?* vol. 11 (Institute of Intergovernmental Relations and Institute for Research on Public Policy, 2003).

Nisga'a government and defines the relationship of that authority to other governments.

The consequences for Nisga'a persons are immense. In areas of sole jurisdiction, Nisga'a laws will now prevail with little to no input by other legislative bodies. The implications of that authority are currently being explored in a series of decisions involving the House of Sga'nisims and Nisibilada.<sup>6</sup> In the main case, the parties are sharply divided on the issue of whether there was any discretion in granting Nisga'a citizenship or whether it was an absolute entitlement to one who meets the criteria in the *Agreement*. The larger issue is the authority of the Nisga'a government to govern in these areas and the degree to which other legal authorities may be read down to permit it.<sup>7</sup> In areas of coordinate jurisdiction, in which Nisga'a standards must "meet or beat" federal or provincial standards,<sup>8</sup> it is not difficult to imagine that the federal and provincial governments may see fit to continue to demand a high degree of legislative uniformity without deference to the differences that Nisga'a jurisdiction may favour. How those standards are measured and compared will be an area of increasing complexity should Nisga'a laws look inconsistent with, but not necessarily less than, that of other governments. For instance, authority predicated on political hierarchy versus federalism may result in different evaluative paradigms of those standards.

How would the *Nisga'a Final Agreement* document a relationship between the Nisga'a and the federal and provincial governments of Canada sufficient to establish a third order of government? The Canadian federation

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6. *House of Sga'nisims and Nisibilada v. Canada (A.G.)*, 2000 BCSC 659, 2006 BCCA 155, and 2006 BCCA 413. The plaintiffs claim that the settlement legislation passed by Parliament and the Legislature of British Columbia, giving effect to the *NFA*, was void and of no effect. In statements related to the action, counsel for the parties claims that the third order will undermine human rights protection, create 634 potential governments, and create uncertainty over which laws, jurisdictions and dispute resolution techniques apply. See J.D. Weston, "Self-Governing Bands and Municipal Governments: Bridging the Gap" (Keynote Address to the Canadian Institute Conference on Provincial/Municipality Liability, Toronto, 20 February 2004).
  7. Other examples include complaints of discrimination contrary to the B.C. *Human Rights Code* R.S.B.C. 1996, c. 210 which were brought before the B.C. Human Rights Tribunal against the Nisga'a Lisims Government. The claims were dismissed for lack of jurisdiction. *Azak v. Nisga'a Nation; Robinson and Lincoln v. Nisga'a Nation*, 2003 BHRT 79.
  8. I rely here and throughout this article on a very wide conception of coordinate authority which recognizes the distribution of governmental power between a central authority and various regional authorities in such a way that persons within the territory are subjected to several sources of governmental power, none of which are intended to be legally subordinate to the other. Although somewhat reliant on Wheare, this use is not meant to adopt one definition of federalism which excludes variations on the theme such as cooperative federalism and interdependence. Rather, it is meant to generate a basic description of governmental authority which is federal in nature.

is traditionally considered a political arrangement between the central government and the provinces alone.<sup>9</sup> Any political agreement which establishes a new order of government would redefine this traditional configuration to include other constituent entities. Consequently, in order to be seen as documenting a federal arrangement, the terms of the *NFA* must evidence an intention to create federal relations by instituting the seminal elements of a federal state. To evaluate the federal quality of the *NFA* this article presents three approaches to federalism, each of which originates from Western European political traditions and is consistent with Canadian jurisprudence on the subject to date.

The first approach derives from the theorizing of K.C. Wheare. Relying heavily on legal institutions, Wheare's approach confines federalism to polities where each constituent entity exercises coordinate authority with a strong central government.<sup>10</sup> For example, the federal nature of the Canadian state is exercised through section 91 and section 92 of the *Constitution Act, 1867*, in which the powers of the federal and provincial orders operate separately and coordinately with the other.<sup>11</sup> Moreover, the *Constitution Act, 1867*, binds both levels of government as the supreme law on this matter, unalterable by each of the central and regional authorities except by the formal amendment procedures needed to effect a change in power.<sup>12</sup> In order to meet the standards of this approach, the terms of the *NFA* would have to recognize the Nisga'a as a constituent political entity of the state that exercises distinct but coordinate authority with the federal and provincial governments. This recognition, combined with its constitutional protection pursuant to section 35(1), would substantiate the argument that the Nisga'a government is a constitutionally distinct political order incorporated into the federation as a third order of government.

A second approach to establishing federalism is the use of a political apparatus to assess the federal nature of the relationship. Federal relations are often defined by the apparatus through which governments deal with each other for the purpose of managing intergovernmental relations.

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9. For an alternative view of Canadian federalism which already includes some Aboriginal nations as parties to the federation through a process of treaty federalism, see James Sákéj Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev.
  10. Daniel Elazar, *Federalism and the Way to Peace* (Queen's University: Institute of Intergovernmental Relations, 1994).
  11. *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App II, No. 5 [*Constitution Act, 1867*]. The powers of the two governments are also defined in sections 93-101. The jurisprudence has supported the legislative competence of the federal and provincial orders. See *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.) [*Hodge*] and *Liquidators of the Maritime Bank v. Receiver General of N.B.*, [1892] A.C. 437 (P.C.) [*Liquidators*].
  12. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 part V. Prior to the *Constitution Act, 1982*, an act of the Imperial Parliament was necessary to effect a change to the distribution of powers found in ss. 91 and 92 of the *Constitution Act, 1867*.

Therefore, it would be significant to find that the *NFA* goes to great lengths to create official mechanisms by which the three governments are to determine their future relations, most especially dealing with fiscal matters. Should the *NFA* depart from traditional federal/Aboriginal fiscal relations and focus on a future relationship marked by the hallmarks of fiscal federalism, there is further evidence of federalism.

The third approach to establishing federalism canvassed here is the consensual approach, which grounds federal relations in consociation, a framework of consensual political association. While the most common measure of a federal state has historically been its institutional structures and practice, federalism is also descriptive of an intergovernmental relationship which legitimates itself based on the agreement and consent of its constituent members.<sup>13</sup> If the *NFA* is fundamentally premised on the consent of the Nisga'a Nation to join as confederates, it too may evidence a federal relationship.

It should be stated from the outset that this article does not purport to speak to a Nisga'a perspective on federalism. However, future scholarship on approaches to intergovernmental law and governance used by the Nisga'a, both historically and presently, would offer a rich source of information that would be significant to any discussion on the terms used here. That being said, I begin with the words of Nisga'a Chief Joseph Gosnell, who declared on signing the Nisga'a treaty in British Columbia, "We are negotiating our way into Canada, not out of it."<sup>14</sup>

## II THE NISGA'A FINAL AGREEMENT : IS IT FEDERAL?

### Constitutionally Distinct Order of Government

Federalism has traditionally been defined by the institutions which support it. Based on the classic definition by K.C. Wheare, federalism is a system which divides governmental powers so that the general and regional governments are each within a sphere coordinate yet independent from the other.<sup>15</sup> As a result of this arrangement and stated quite simply, political authority is divided between two or more constitutionally distinct orders of government. The status of the Nisga'a government as a third order of government within the Canadian federation would derive from the combination of two propositions of law: first that the terms of the *NFA*

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13. See the discussion, below, in part II, Consent.

14. J. Gosnell, Speech to the British Columbia Legislature (2 December 1998).

15. See K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963) at 1.

recognize the political and legal authority of the Nisga'a as fundamentally distinct from that of the federal and provincial governments and, second, that the *NFA* provisions which establish this authority are constitutionally protected by section 35(1) of the *Constitution Act, 1982*.

### ***Recognition of a Distinct Order***

The most apparent change that the *NFA* made to the status quo was its recognition that the Nisga'a have political and legal authority distinct from the federal and provincial governments. It expressly recognizes such authority in its declaration, "The Nisga'a Nation has the right to self-government and the authority to make laws, as set out in this Agreement."<sup>16</sup> Importantly, the *NFA* defines the Nisga'a Nation as "the collectivity of those [A]boriginal people who share the language, culture and laws of the Nisga'a Indians of the Nass Area, and their descendants."<sup>17</sup> Moreover, it is noteworthy that the Nisga'a right to self-government is explicitly recognized to reside in the Nisga'a Nation itself. This vests the right to self-government and governing authority in the Nisga'a as a people and not on the Nisga'a government, a separately defined entity which holds the power to exercise that authority.<sup>18</sup> Each of these terms differentiates the Nisga'a Nation from the federal and provincial government as an entity with separate and definable political authority.

The centrality of political recognition to the *NFA* is further bolstered by the language of mutual recognition incorporated into its preamble. The preamble holds as follows:

WHEREAS the Parties intend their relationship to be based on a new approach to mutual recognition and sharing, and to achieve this mutual recognition and sharing by agreeing on rights, rather than by the extinguishment of rights.<sup>19</sup>

Use of the mutual recognition principle to define the relationship with the Nisga'a Nation is not unintentional. The principle of mutual recognition was defined prior to the conclusion of the *NFA* and knowingly imported in order to import its common meaning. The preamble provides a common understanding of the premise upon which the parties have negotiated the *NFA* and consequently, its purpose. Moreover, its interpretative impact will

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16. *NFA*, ch. 11, art. 1.

17. *NFA*, ch. 1, Definitions.

18. *NFA*, ch. 1, defines Nisga'a Government as the "Nisga'a Lisims Government and Nisga'a Village Governments."

19. *NFA*, ch. 1, Preamble.

be in accordance with the use prescribed by the *Interpretation Act*<sup>20</sup> which holds that the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object. As such, it will be of great assistance to those who must determine the status of the *NFA* in law.

The Royal Commission on Aboriginal Peoples explored the concept of mutual recognition and defined it as political relation on the basis of (1) equality, (2) co-existence and (3) self-government.<sup>21</sup> Based on the recognition of the rights and responsibilities that flow from the Aboriginal connection to the land, it is considered a basic principle of a renewed relationship and a prerequisite for negotiation of modern land claim agreements.

By applying RCAP's definition of mutual recognition to the *NFA*, the normative value of Nisga'a political authority takes on a particular definition.<sup>22</sup> The concepts of equality, co-existence and self-government import the recognition of inherent political authority and attempt to elevate the Nisga'a Nation as an equal party to intergovernmental relations. For example, the recognition of equality, the first of the RCAP principles, is seen as a return to the nation-to-nation relations between Aboriginal peoples and incoming Europeans which characterized early treaty negotiation.<sup>23</sup> Because we know that the *NFA* is not incorporating the principle of individual equality, a right which Nisga'a persons already possess in law, it is likely incorporating the equality of the Nisga'a nation to the federal and provincial government. Similarly, the principle of co-existence, the second RCAP principle, has been interpreted as the institution of Aboriginals and non-Aboriginals living side-by-side while governing their separate affairs. It has been articulated by RCAP as the exercise of rights inherited from the past

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20. R.S.C. 1985, c. I-21, s.13.

21. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 675 (Co-chairs R. Dussault and G. Erasmus) [*RCAP Report*].

22. *Ibid.* RCAP's findings do not necessarily represent a perspective on intergovernmental relations that could be applied to all Aboriginal peoples. Rather, they represent RCAP's own conclusions on the history of relations between Aboriginal peoples, the Canadian government and Canadian society as a whole. That being said, RCAP's recommendations were partly based on the submissions of Aboriginal persons who presented their views and their community's views on governmental relations. As a repository of this information, RCAP's perspective offers significant insight into the language and terminology used in the *NFA*, especially since the *NFA* incorporated this language well after RCAP completed its report and defined this terminology. That it did so without explicitly amending its meaning may indicate a shared understanding of terminology.

23. For further discussion on mutual recognition, see James Tully, "Aboriginal Peoples: Negotiating Reconciliation" in James Bickerton & Alain G. Gagnon, eds., *Canadian Politics*, 3d ed. (Ontario: Broadview Press, 1999) at 418.



within a confederation that values political diversity.<sup>24</sup> Lastly, self-government has been interpreted as the fundamental tool for exercising Aboriginal political authority. An interpretation of the *NFA* which identifies a new order of government also finds support in recommendations made by RCAP on treaty making. The report identified the main objective of a new treaty-making process as to “establish the full jurisdiction of those nations as part of an Aboriginal order of government”<sup>25</sup> Taken together, these principles evidence a view of the Nisga'a Nation as a distinct political order which is equal in political status to the federal and provincial governments.

Moreover, the recognition of Nisga'a political authority as derived from a right of self-government finds support from other political sources. The recognition of Nisga'a political authority in the *NFA* achieves for the Nisga'a what was expected from constitutional amendments that would have resulted from the Charlottetown Accord of 1992.<sup>26</sup> Under the Accord, a new section 35.1 would have recognized that Aboriginal peoples “have the inherent right of self-government within Canada” and recognized this as a “third order of government.” Although the Accord failed to pass a referendum in 1992, the recognition by all first ministers and territorial leaders that inherent rights of self-government result in the recognition of a third order of government evidenced an informal recognition of this possibility that facilitated the negotiation of subsequent self-government agreements.<sup>27</sup>

In addition to establishing the political authority of the Nisga'a, the *NFA* also delineates how the Nisga'a Lisims Government will exercise its law making authority.<sup>28</sup> It itemizes the legislative, executive and administrative powers of various Nisga'a institutions.<sup>29</sup> Importantly, the *NFA* outlines specific areas in which the Nisga'a Lisims Government will have principal legislative powers. It is through these provisions that the formal division of authority between the three governments over Nisga'a lands is codified and from which a third order of government can be interpreted.<sup>30</sup>

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24. *RCAP Report*, *supra* note 21 at 678.

25. Indian and Northern Affairs Canada, “Highlights From the Report on the Royal Commission on Aboriginal People: People to People, Nation to Nation”, Chapter 2, “Restructuring the Relationship”, online: <[http://www.ainc-inac.gc.ca/ch/rcap/rpt/rel\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/rpt/rel_e.html)>.

26. The Charlottetown Accord was in the form of a Draft Legal Text issued on 9 October 1992 [“Accord”].

27. Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Ontario: Carswell, 1997) at 589.

28. *NFA*, ch. 1, Definitions.

29. The *NFA* also vests regulatory authority in the Nisga'a Lisims executive, which oversees the administration of the Nisga'a Lisims government and permits administrative powers to be exercised by Nisga'a public institutions which administer the application of laws to particular matters, including such matters as the administration and issuance of licences or permits and the regulation of hunting, fishing and other activities.

30. *NFA*, ch. 1, Preamble.

According to the *NFA*, the Nisga'a government has exclusive jurisdiction to make laws in areas of core cultural importance. These areas include Nisga'a government,<sup>31</sup> citizenship,<sup>32</sup> culture and language,<sup>33</sup> Nisga'a property in Nisga'a lands,<sup>34</sup> the regulation, administration and expropriation of Nisga'a lands,<sup>35</sup> the regulation of certain assets,<sup>36</sup> the licensing of Aboriginal healers,<sup>37</sup> and devolution of cultural property.<sup>38</sup> Although these provisions do not cover vast areas of jurisdiction, as awarded to the federal and provincial governments in the *Constitution Act, 1867*, they create spheres of authority in which the Nisga'a Nation is guaranteed freedom from external legislative intervention. If paramountcy prevents any external legislative power from overriding the authority of the Nisga'a Nation, then according to the provisions of the *NFA*, Nisga'a laws are paramount in these areas as there is no authority for provincial or federal intervention.<sup>39</sup>

In other areas, such as the provision of child and family services,<sup>40</sup> the adoption of children,<sup>41</sup> and education,<sup>42</sup> the Nisga'a may make laws which are paramount, provided those laws meet or exceed provincial or federal standards, or receive provincial or federal approval. These areas delineate concurrent jurisdiction upon the Nisga'a, federal and provincial governments. They vary greatly, however, from areas in which the Nisga'a have concurrent jurisdiction to legislate but the resulting laws are subject to the paramountcy of the provincial or federal government. For instance, the Nisga'a may make laws with respect to the public order and safety of its inhabitants<sup>43</sup> the solemnization of marriage, and the provision of social and health services.<sup>44</sup> However, in the event of a conflict between laws, the federal or provincial law will prevail to the extent of the conflict.

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31. *NFA*, ch. 11, arts. 34, 35.

32. *Ibid.*, art. 39.

33. *Ibid.*, art. 41.

34. *Ibid.*, art. 44.

35. *Ibid.*, art. 47.

36. *Ibid.*, arts. 53, 54.

37. *Ibid.*, arts. 86-88.

38. *Ibid.*, art. 115.

39. The *NFA* also provides authority to make laws with respect to matters that may be necessarily incidental to, or connected with, exercising authority in these jurisdictions: *ibid.*, art. 126. This provision can be likened to the pith and substance doctrine and the incidental effect doctrine. Also, it seems that whatever general powers are not delineated in the *NFA* fall within the jurisdiction of the federal or provincial government, *ibid.*, art. 121.

40. *Ibid.*, art. 89.

41. *Ibid.*, art. 96.

42. *Ibid.*, arts. 100, 103.

43. *Ibid.*, arts. 59-62.

44. *Ibid.*, arts. 82-85.

It is also interesting to note that, in addition to delineating the powers of the Nisga'a government, the *NFA* also expressly protects the unity of the land mass over which its governmental authority applies. The land provisions separate Nisga'a proprietary interests from Nisga'a governmental authority in that it permits alienation of the land in a manner that does not effect jurisdiction that the Nisga'a exercise under the treaty.<sup>45</sup> In effect, the Nisga'a never have to surrender governing authority over the land to the Crown, even should it be fully and finally sold to a third party, because they retain political and legal jurisdiction in perpetuity.

To summarize, the *NFA* identifies three general types of Nisga'a legislative power: first the power to make laws that are paramount over conflicting federal and provincial laws; second, in relation to other matters they have the power to make laws that are paramount so long as they meet minimal standards set by federal and provincial laws; and third, the power to make laws that will not prevail over conflicting federal and provincial laws.

It is these provisions which delineate the bulk authority of the Nisga'a government to create laws within the Canadian state. In doing so, the *NFA* sets out a hierarchy of Nisga'a law making authority which establishes the Nisga'a as a third order of government coordinate with the federal and provincial governments within the Canadian federation. Of course, the scope of legislative powers enjoyed by the Nisga'a Nation may not be as broad as those enjoyed, for example, by provincial legislatures, and it is clearly asymmetrical to the federal and provincial governments. However, the Nisga'a Nation may be said to occupy a position that is coordinate with federal and provincial governments insofar as it enjoys independent powers in those areas in which its laws are paramount.

### ***Constitutional Protection***

Despite the provision of coordinate legislative authority in the Nisga'a Nation in regards to certain matters, absent constitutional protection, the principle of parliamentary sovereignty permits the federal and provincial governments to legislate in contravention of Nisga'a laws and usurp its legislative authority.<sup>46</sup> If ultimate legislative authority still rests with the federal or provincial governments then the status of the Nisga'a Nation as a distinct order may be undermined. What type of constitutional protection is afforded to the *NFA*?

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45. *NFA*, c. 3, art. 5: "A parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change in ownership of an estate or interest in that parcel."

46. Despite the terms of the *NFA* which bind the parties to its terms and declare them final, *NFA*, ch. 2, art. 2-4.

The most obvious protection of Nisga'a legislative authority is found in section 35(1) of the *Constitution Act, 1982*. Section 35(1) provides the language which protects the legislative authority delineated by the *NFA*: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed." Section 35(3) clarifies that "for greater certainty, in subsection (1) "treaty rights" include rights that now exist by way of land claims agreements or may so be acquired." Based on a textual reading alone, it provides the state with the power to enter into land claim agreements without restricting their content or subject matter.

According to its own terms, the *NFA* is a treaty for the purposes of section 35(1) and hence entitled to constitutional protection.<sup>47</sup> Theoretically, constitutional protection of a treaty binds subsequent legislatures to its terms and protects it from unilateral change. Consequently, section 35(1) could render Nisga'a legislative authority constitutionally distinct because as a treaty it disables the federal or provincial governments from legislating in contravention of the *NFA*. The inability to alter the terms of the *NFA* or the legislative authority it delineates permits the impression that the *NFA*, when read in conjunction with section 35(1), bestows upon the Nisga'a its status as a third order of government coordinate with the provincial and federal governments.

This reasoning does, however, confront a troubling obstacle when considered in conjunction with the jurisprudence on section 35(1). The current jurisprudence is extremely clear that section 35(1) "recognizes and affirms" treaty rights but does not "guarantee" them. Although they acquire constitutional protection, treaty rights are not absolute and can be unilaterally limited in favour of overriding public interests. This reasoning has resulted in the justifiable infringement test. First articulated in *R. v. Sparrow*<sup>48</sup> and applied to treaties in *R. v. Badger*<sup>49</sup> and *R. v. Cote*,<sup>50</sup> the test permits the Crown to retain its authority to legislate in regards to matters that infringe treaty rights if the infringement is justified by reference to a compelling objective and it is consistent with the Crown's fiduciary duty to Aboriginal peoples.

For example, the *NFA* contains provisions which allow the Nisga'a to implement standards and requirements in regards to forestry that meet or exceed those required by provincial and federal legislation.<sup>51</sup> Would the provincial government have recourse to infringe Nisga'a provisions should a

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47. *NFA*, c. 2, art. 1.

48. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119 [*Sparrow*].

49. *R. v. Badger*, [1996] 1 S.C.R. 771.

50. *R. v. Cote*, [1996] 3 S.C.R. 139.

51. *NFA*, c. 5, arts. 6-12.

resource based company wish to exploit a forestry resource which ran across Nisga'a territory and non-Nisga'a territory but was prevented from doing so by onerous conditions implemented by the Nisga'a? The Nisga'a could argue that it has the jurisdiction to set standards as it sees fit as long as it meets or exceeds provincial and federal levels. The provincial and federal governments might potentially argue that undermining Nisga'a laws is in the broader public interest and therefore assert their right to infringe the jurisdictional arrangements found in the *NFA*. If infringement is permitted, it will subvert the parties' arrangement. Yet, this is what current formulations of the justifiable infringement test may permit.<sup>52</sup>

If the justifiable infringement test, as currently articulated, is applicable to the *NFA*, it could suggest that the Nisga'a Nation does not exercise paramount power and consequently is not a distinct order of government. If the *NFA* does not bind all levels of government, unalterable by each of the parties except by amendment, then ultimate authority remains with the federal and provincial governments and not with the Nisga'a. In brief, the principle of justifiable infringement permits the unilateral amendment of the *NFA* absent Nisga'a consent which prevents the Nisga'a from exercising coordinate power with the federal and provincial governments. This reasoning is consistent with the approach of the court in *Campbell*, which concluded that the principle of justifiable infringement prevents a profound constitutional upheaval sufficient to create a third order.<sup>53</sup>

While the use of justifiable infringement could lead to the conclusion that the *NFA* fails to meet the criteria of a truly federal system, it is not necessarily so. If the specific rights delineated by the *NFA* flow from the inherent right of Aboriginal self-government then permissible legislative constraints by Parliament or the B.C. Legislature would not necessarily detract from the status of the Nisga'a Nation as an independent political order. While it is arguable that using the justification test to override the authority of the Nisga'a is not in line with the spirit or intent of the *NFA*, even in light of the justifiable infringement test, there is no legal authority that can cancel the essential nature of Nisga'a political authority. Although the Nisga'a Nation exercises its authority in relation to the other political orders as delineated by the *NFA*, it will always retain its inherent right to govern, unless forfeited.

Whatever qualifications may limit the exercise of Nisga'a legislative authority, the Nisga'a government holds significant law making powers

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52. *Campbell*, *supra* note 4 at 363.

53. *Ibid.* at 376.

which do not seem to be delegated by other governments.<sup>54</sup> This is consistent with the federal policy statement on self-government, which applied at the time of negotiation. The policy recognized that an inherent right to self-government exists in some nations and that it will negotiate agreements with such rights holders.<sup>55</sup> The case of *Campbell* provided judicial support for the contention that Nisga'a legislative authority is not delegated but instead is founded on an inherent right of self-government.<sup>56</sup> The court upheld the *NFA* as constitutional on multiple grounds: (i) that Confederation did not exhaustively distribute all legislative power between the federal and provincial governments,<sup>57</sup> (ii) that the Nisga'a held unextinguished authority to enact laws since pre-Confederation, and (iii) that such authority was crystallized by the enactment of section 35 of the *Constitution Act, 1982*.

If one accepts that the inherent right of self-government was held by the Nisga'a Nation prior to the *NFA* and retained following its conclusion, constitutional interpretation which permits use of the justifiable infringement test would not change its essence. While the Nisga'a would exercise its legislative authority in accordance with the terms of the *NFA*, the source of its governing authority remains. Consequently, it is possible that the Nisga'a can maintain its status as a third order, independent and coordinate with the federal and provincial governments, despite the application of the justifiable infringement test.

Canada's definition of itself as a federation has previously withstood a similar conflict over the sovereign nature of provincial authority. According to a textual reading of the *Constitution Act, 1867*, Canada's position on the spectrum of federalism is focused on a strong central government that retains superior powers to those of the provinces.<sup>58</sup> The power of the federal executive to disallow (invalidate) provincial laws that are constitutionally valid,<sup>59</sup> to appoint provincial lieutenant governors (who are authorized to

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54. Nisga'a authority should be contrasted to band councils that operate pursuant to the *Indian Act*, R.S.C. 1985, c. 1-5 or bands acting pursuant to authority delegated in self-government agreements. For instance, the James Bay Agreement, *An Act Approving the Agreement Concerning James Bay and Northern Quebec*, R.S.Q. 1976, c. 46, s. 9.0.1. [*JBNQ*], the *Yukon First Nations Self Government Act*, R.S.C. 1994, c. 35, and the *Numavut Land Claims Agreement Act*, R.S.C. 1993, c. 29.

55. Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Series, 1995).

56. *Supra* note 4 at 376.

57. *Ibid.* However, Williamson J. denied that an inherent right to self-government results in a third order.

58. *Interpretation Act*, *supra* note 20 at 114.

59. *Constitution Act, 1867*, s. 90.

give or withhold royal assent to provincial bills),<sup>60</sup> to determine appeals from provincial decisions affecting minority education rights and enact remedial law<sup>61</sup> and the vesting of residual power in the federal executive and Parliament would fall short of an orthodox definition of federalism.<sup>62</sup> Consequently, according to the constitutional text, Canada in many ways fails to meet the criteria of a truly federal system in that the provinces were actually made subordinate to the centre, in violation of the federal principle that they be coordinate. In fact, these powers were commensurate with a relationship between the federal and provincial governments that K.C. Wheare characterized as quasi federal<sup>63</sup> and which Peter Hogg characterizes as more akin to “colonial than federal.”<sup>64</sup>

Although the text of the *Constitution Act, 1867*, seemingly undermined the finding of a true federation, it did not prevent the Privy Council from declaring in the late 19<sup>th</sup> century that Canada was a true federation in which the provincial legislatures were sovereign and coordinate within their respective spheres.<sup>65</sup> Despite federal superiority, which remains in the constitutional text to this day, the Judicial Committee of the Privy Council arduously supported a system of government with strong provincial rights and established precedents that elevated the provinces to coordinate status with the Dominion. In *Hodge v. The Queen*,<sup>66</sup> the Privy Council considered whether the provincial government had powers of delegation, in light of the submission that their powers were delegated from the Imperial Parliament. The judges held that it was erroneous to regard the powers conferred by the Imperial Parliament through the *Constitution Act, 1867*, as delegated. Instead, provincial legislative powers were described as “plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.”<sup>67</sup> Through this decision, the Privy Council confirmed that, despite federal superiority in the constitutional text, legislatures are as fully sovereign as the federal Parliament.

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60. *Ibid.*, s. 58.

61. *Ibid.*, s. 93.

62. The retention of residual legislative power was seen as problematic according to Lord Haldane in *Australia (A.G.) v. Colonial Sugar Refining*, [1914] A.C. 237 at 252-254 [*Colonial Sugar*]. Also, it is noteworthy that ss. 55, 56 and 57 of the *Constitution Act, 1867*, provided that acts of the Parliament of Canada were subject to reservation and disallowance by the Imperial Crown.

63. K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963) at 19. Despite this statement, Wheare conceded (at 20) that the *Constitution* was predominately federal in practice.

64. *Supra* note 27 at 116.

65. *Hodge*, *supra* note 11; *Liquidators*, *supra* note 11.

66. *Hodge*, *ibid.*

67. *Ibid.* at 132.

These precedents may permit analogizing the status of the Nisga'a in the Canadian federation to that of the provinces. Just as the provinces are sovereign within their spheres and exercising powers inherent to their jurisdiction, so could Nisga'a legislative authority be seen to be the exercise of an inherent jurisdiction to self-govern. Consequently, just as the scope of sovereign provincial power is as plenary and ample within the limits of section 92, so would the scope of Nisga'a power be plenary and ample within the limits of the *NFA*. Like the provinces who exercise coordinate jurisdiction in the face of federal superiority, the Nisga'a could exercise legislative authority coordinate with that of the federal and provincial governments despite the use of the justifiable infringement test.

Despite precedent which permits the application of the justificatory test to treaties, it should be noted that use of the test in relation to the *NFA* is an extremely contentious proposition. Various scholars have criticized the use of the justifiable infringement test in relation to treaty rights. It is a common complaint that the court has yet to provide an informed basis upon which to apply the justificatory test to treaty rights.<sup>68</sup> Moreover, the application of unilateral authority is thought to transform treaties from constitutional or quasi-constitutional documents into subordinate agreements with the Crown.<sup>69</sup> Instead, their consensual origin suggests that they should not be limited without the consent of both parties.<sup>70</sup> Regulating treaty rights does not envision treaties as binding on the legislative authority of Parliament and still conceives of treaties as contractual in nature.<sup>71</sup> In addition to arguments that militate against the use of the justificatory test in relation to treaties generally, the use of the test in regards to the *NFA* is even more contentious as it undermines the certainty of the agreement, a central principle of negotiation.<sup>72</sup> Similarly, use of the justificatory test undermines the dispute resolution devices and amendment provisions purposefully inserted by the parties.<sup>73</sup> This allows the *Sparrow* test to function as a kind of paramountcy rule where a federal or provincial law conflicts with one of the laws of an

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68. L. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997-1998) 3 *Alta. L. Rev.* 148 at 156.

69. *Ibid.* at 165.

70. *Ibid.* at 179.

71. P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination* (1990-1991) 36 *McGill L.J.* 382 at 438.

72. Jessica Bowering, "Certainty and Finality in the Nisga'a Final Agreement" (2002) 11 *Dal. J. Leg. Stud.* 1.

73. Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty" (2002) 35 *U.B.C.L. Rev.* 455 at 508-509.



Aboriginal nation even though the parties have already negotiated a detailed paramountcy scheme in the *NFA*.<sup>74</sup>

In sum, there are various reasons why use of the justificatory test in relation to the *NFA* would be contentious. Should this argument succeed in law, there is sufficient support for the argument that the *NFA*, read in combination with section 35(1), renders the Nisga'a Nation constitutionally distinct and bestows upon the Nisga'a its status as a third order of government. The third order of government delineated by the *NFA* would result from its recognition of a right to self-government as exercised through its specific provisions. Through these provisions, the *NFA* outlines Nisga'a legislative authority, thereby dividing what would otherwise be competing political authority over an itemized list of powers. Constitutional protection of the *NFA* as a treaty under section 35(1) protects Nisga'a political authority and establishes the paramountcy of its legislative authority in certain enumerated areas. Taken together, these terms recognize the Nisga'a as a distinct political entity which exercises authority coordinate with that of the federal and provincial governments. However, even should the test be applied to the *NFA*, there seems to be sufficient precedent arising from foundational Canadian case law to maintain the integrity of Nisga'a political authority and to support it as distinct from the federal and provincial governments under Canadian constitutional law.

### **The Apparatus of Federalism: Fiscal Relations**

In addition to constitutionally distinct orders of government, the second major institutional mechanism which defines a federal state is the existence of an apparatus through which governments deal with each other for the purpose of managing intergovernmental relations, most especially dealing with fiscal arrangements. Fiscal relations between the federal, provincial and territorial governments are marked by the relationship of fiscal support commensurate with the federal relationship created at Confederation. When compared with fiscal federalism, federal/Aboriginal fiscal relations differ in a manner which underscores the absence of a comparable federal relationship. Therefore, it is significant that the *NFA* denotes a departure from traditional federal/Aboriginal fiscal relations and focuses on a future relationship marked by a more comparable method of fiscal federalism.

Fiscal relations between the federal, provincial and territorial governments are defined by their origins in the financial settlement between

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74. *Ibid.*

the new Dominion and provinces at Confederation.<sup>75</sup> Although the early settlement focused on higher levels of federal revenue and expenditure, the increased responsibilities and powers of the provinces required a greater transfer of revenue to match expenditures.<sup>76</sup> The imbalance between the intake and expenditure of revenue commensurate with responsibility has marked fiscal federalism as one of constitutional flexibility and been reflected in the constant renegotiation of fiscal arrangements.<sup>77</sup>

Adopting a broad view of fiscal federalism, Michael Prince and Frances Abele<sup>78</sup> consider intergovernmental financial relations to include certain key elements: (i) the constitutional allocation and division of legislative powers and responsibilities between the orders of government; (ii) the division of taxing and borrowing powers and thus revenue sources for each order of government; (iii) agreements for the collection and disbursement of revenues and the harmonization of income and sales tax systems among governments; (iv) the transfer of tax points (tax room) from the federal government to provincial governments; (v) equalization payments; (vi) intergovernmental transfer payments; and (vii) political administrative structures for consultation, bargaining, planning, and joint decision making about intergovernmental fiscal arrangements.

In contrast to these key elements of federal fiscal relations, the history of federal/Aboriginal fiscal relations is marked by non-participation in Confederation and the assumption of control over Aboriginal governance through Crown sovereignty. Because “Indian people played no part in negotiating Confederation, or in drafting the British North America Act of 1867,”<sup>79</sup> key political communities were left out of negotiating a set of relationships that would determine their future fiscal affairs. As such, no expenditure functions, legislative powers or taxing powers were assigned or recognized by the settlement. Most importantly, the Crown replaced Aboriginal self-government and its control over spending with a successive series of Indian Acts.<sup>80</sup> The recent increase in transferred responsibility to individual bands for managing and delivering certain services has increased

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75. Michael J. Prince & Frances Abele, “Paying for Self-Determination: Aboriginal Peoples, Self-Government and Fiscal Relations in Canada” in Michael Murphy, ed., *Canada: The State of the Federation, 2003: Reconfiguring Aboriginal-State Relations* (Kingston: McGill-Queen’s University Press, 2005) 237 at 240.

76. *Ibid.* at 242.

77. *Ibid.*

78. *Ibid.* at 247.

79. *Ibid.* at 243, quoting House of Commons, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services Canada, 1983) at 39.

80. *Ibid.*

band responsibility, but still leaves real decision making power, including budget control and policy choices to the Department of Indian Affairs.<sup>81</sup>

The *NFA* does not mirror the fiscal federal arrangement between the federal and the provincial government. It does, however attempt to deal with the complaints which mark customary federal/Aboriginal fiscal relations and found its new relationship on the principles of fiscal federalism. Each of the elements, which mark the existence of a fiscal federal relationship listed above, can be found in the *NFA* and its appended agreements.

### ***Constitutional Division of Powers***

Just as the *Constitution Act, 1867*, divides legislative power and commensurate responsibility for service delivery between the provincial and federal governments, the *NFA* clarifies and identifies the Nisga'a government's exclusive and shared law making powers and provides for program and service delivery. Nisga'a legislative jurisdiction, as previously outlined, gives rise to commensurate responsibilities for the proper delivery of associated programs as defined by the fiscal relations chapter of the *NFA*,<sup>82</sup> the Nisga'a Nation Fiscal Financing Agreement, and the Nisga'a Nation Own Source Revenue Agreement.<sup>83</sup>

Together, these three agreements create terms which determine the responsibilities of the Nisga'a Nation vis à vis their legislative powers, define the specific programs and services that are to be provided to Nisga'a citizens by the Nisga'a governments and establish the means by which those programs and services will be funded. For instance, under the *NFA*, the Nisga'a has assumed concurrent jurisdiction over health, education, social and local services and, specifically, the authority to determine their delivery. According to the Fiscal Financing Agreement, the Nisga'a Nation is responsible for ensuring the delivery of programs and services in these four core areas. Likewise, the OSR Agreement requires that the Nisga'a government offset the cost of the service delivery first and the shortfall be made up by the federal and provincial government.

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81. *Ibid.* at 247.

82. *NFA*, c. 15.

83. Under the *NFA*, the Nisga'a, provincial and federal governments are obligated to negotiate a fiscal financing agreement ["Fiscal Financing Agreement"] and own source revenue agreement ["OSR Agreement"]: *NFA*, c. 15, arts. 3-20.

### ***Revenue Raising Powers***

The revenue raising powers of the Nisga'a Nation and their contribution to their own service delivery are also key elements, which mark the *NFA* as federal in nature. Funding of the programs and services is to be a shared responsibility of the three governments and coincides with the powers allocated to the Nisga'a for the collection and disbursement of revenues. Funding for programs and services will be provided first, by the Nisga'a Nation, to the extent of its own source revenue capacity and, second, by Canada and British Columbia, to the extent that the agreed upon funding for the defined programs and services exceeds the Nisga'a Nation's own source revenue. Nisga'a governments and governmental bodies will contribute funds through revenue contribution as negotiated in the OSR Agreement. In effect, the revenue raised by the Nisga'a government will go towards the delivery of its services.

Revenue source contribution requires the Nisga'a to contribute to the cost of its own governance in an amount equal to the tax revenues that would be raised by the federal and provincial governments if the lands were subject to taxation.<sup>84</sup> Moreover, Nisga'a citizens will indirectly contribute to the cost of programs through the payment of income and service tax to the federal, provincial and, potentially, Nisga'a governments.<sup>85</sup> This is a direct parallel to the method by which non-Aboriginal Canadians contribute to the financing of their government services through taxation.<sup>86</sup> The federal and provincial governments will provide any shortfall in funding not met by the Nisga'a OSR contribution up to the agreed upon amount.

### ***Harmonization and Tax Room***

The harmonization of taxation schemes is an essential characteristic of a federal system. The objective of harmonizing taxation is implemented in various ways by the *NFA*, most cogently through the OSR Agreement. For instance, the Nisga'a have the authority to impose tax on Nisga'a citizens that will run concurrently with that of Canada and British Columbia and may be exercised with or without their agreement. Despite having taxation powers, these powers are not likely to be exercised unless harmonized with the other levels of governments to prevent overtaxing Nisga'a citizens. The *NFA* permits the parties to enter into one or more tax coordination

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84. Tom Falconer, "Fiscal Aspects of the Nisga'a Final Agreement" (2000) 48 Can. Tax J. 1829 at 1834.

85. *NFA*, c. 16, art. 6.

86. *Supra* note 84 at 1833.

agreements which will permit the Nisga'a government to tax non-Nisga'a citizens and which will coordinate Nisga'a taxation with that of the federal and provincial governments.<sup>87</sup>

The OSR Agreement also allows for the transfer of tax points or tax from the federal and provincial governments to the Nisga'a government. Under the *NFA*, the OSR, in respect of any tax other than a property or local tax, will be equal to the amount of tax room vacated by the federal/provincial governments. Under this arrangement, tax collected by the Nisga'a government would automatically offset amounts transferred from the federal or provincial governments for service support. This arrangement prevents Nisga'a citizens from being overtaxed by their local government but also prevents the Nisga'a government from deriving any net economic benefit from the power to tax, unless it were willing to impose and could collect tax at a rate in excess of what the taxpayers otherwise would have to pay under the status quo or if it entered into tax harmonization agreements.<sup>88</sup> In short, every dollar of tax raised will be included in its OSR and will thereby reduce, on a dollar for dollar basis, the fiscal transfers it would otherwise receive. The Nisga'a have undertaken the responsibility of contributing to the cost of these programs through taxation, the OSR Agreement and Fiscal Financing Agreement on the same basis and to the same extent as their fellow Canadians contribute to theirs.

### ***Equalization Payments***

Another important aspect of Canadian federalism involves the distribution of financial resources across the country. Because the economies of each province vary tremendously, many provinces need financial resources transferred to them, in order to provide government services on a rough equivalence with the rest of Canada.<sup>89</sup>

Similarly, the Nisga'a will be responsible for ensuring the delivery of agreed-upon programs and services to Nisga'a citizens at levels that are reasonably comparable to those generally prevailing in northwest British Columbia. The *NFA* is noteworthy because this variant of the equalization principle is enshrined in the fiscal agreements.<sup>90</sup> This requirement commits the federal and provincial governments to equalization-like obligations with respect to ensuring service provision levels are comparable to levels prevailing in the region. Whether this is of benefit to the Nisga'a, who

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87. *NFA*, c. 16, art. 3.

88. *Supra* note 84 at 1840.

89. The principle of equalization is entrenched in s. 36(1) of the *Constitution Act, 1982*.

90. For a comparison between this provision and the absence of equalization payments in traditional relations see Prince & Abele, *supra* note 75 at 252.

generally provide services and programs at a higher level than that of other communities within the sparsely inhabited rural areas of the province, remains to be seen.<sup>91</sup>

### ***Transfer Payments***

Federal/provincial relations are marked by the federal power to provide block transfer payments to the provinces through conditional transfers, semi-conditional transfers, general-purpose grants or unconditional block grants.<sup>92</sup> The use of the federal spending power to control provincial service delivery is informal and controversial. However, the negotiation of provincial entitlement is a reality of intergovernmental relations. The *NFA* provides for the unconditional cash payment of \$190 million to be paid to the Nisga'a Nation. Investment of these funds is meant to provide economic development and employment opportunities for the Nisga'a but such directed use is not required. It is unlikely that there will be future transfer payments to the Nisga'a of the same magnitude. However, the use of future transfer payments as an informal exercise of federal spending power is possible.

### ***Intergovernmental Agreements***

The use of intergovernmental structures, which allow the federal and provincial governments to consult, bargain, plan and make decisions about fiscal and social policy, has been termed executive federalism and forms the backbone of intergovernmental coordination. The role of the Nisga'a in the process of inter-governmental decision-making is contemplated by the *NFA* in various ways. Under the *NFA*, Canada, B.C. and the Nisga'a Lisims Government have established a Tripartite Finance Committee to ensure that the parties have similar understandings and expectations regarding the implementation of *NFA*'s obligations. There is also a host of provisions in which federal and provincial governments must consult with or provide information to the Nisga'a nation in respect of various activities, most specifically dealing with resource development and extraction.<sup>93</sup>

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91. *Supra* note 84 at 1841.

92. Prince & Abele, *supra* note 75 at 247.

93. For instance, the parties established the Joint Fisheries Management Committee: *NFA*, c. 8, art. 77.

## Consent

### *Consent as an Indicator of Federalism*

While the most common measure of a federal state has historically been its institutional structures and practice, according to other definitions federalism can also describe an intergovernmental relationship which legitimates itself based on the agreement and consent of its constituent members. Support for the idea that federalism, as an indicator of consent, forms the basis of legitimate governance can be found in both the theoretical underpinnings of federalism and its treatment in Canadian jurisprudence.

A review of Canadian constitutional law reveals a heavy reliance on the concept of consent of its constituent entities to justify the authority of the federal and provincial governments. For instance, the preamble to the *Constitution Act, 1867*, states, “the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion.”<sup>94</sup> Similarly, the Supreme Court of Canada has regularly supported the use of consent to compact in interpreting the constitutional arrangement of federal-provincial relations and its historical source.<sup>95</sup> Recently, the Supreme Court echoed the sentiment of compact in *Reference Re Secession of Quebec* where it stated, “Confederation was the initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat.”<sup>96</sup> This approach to Canadian history conceives of Canada as a nation of people formed by the consent of the constituent political bodies which represented them. Regardless of its veracity, the sanctity of compact, which delineated the areas of jurisdiction to which the provinces retained autonomous power, has been used to shape the institutional structures which demarcate Canada as a federal state.<sup>97</sup>

The work of Daniel Elazar, the eminent political scholar on federalism, focuses on consent as the chief indicator of a federal relationship.<sup>98</sup> He contended that polities founded by covenant that reflect consent are essentially federal in character irrespective of their governing structure.<sup>99</sup>

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94. *Constitution Act, 1867*, Preamble.

95. *Canada (A.G.) and Ontario (A.G.)*, [1937] A.C. 326 at 351 (P.C.) and in *Re the Initiative and Referendum Act* (1919), A.C. 935 at 941.

96. [1998] 2 S.C.R. 217 at 241. This theory of federalism is contested in the scholarship and case law. For judicial support of the statute theory, which departs significantly from the consent model, see *Colonial Sugar*, *supra* note 62 at 252-253 and *R. v. Bonanza Creek Gold Mining*, [1916] 1 A.C. 566 at 579 (P.C.).

97. Paul Romney, “Provincial Equality, Special Status and the Compact Theory of Confederation” (1999) *Canadian J. of Political Science* 21 at 39.

98. *Supra* note 10 at 40.

99. *Ibid.* at 13.

That is to say, a federal state is actually a matrix compounded of equal confederates who come together freely and retain their respective integrities even as they are bound in a common whole.<sup>100</sup>

What is meant by the term equal confederates? Elazar uses the term to describe groups who become political entities within a federal state by virtue of the fact that their authority as a group is deemed essential to the legitimacy of the federal arrangement. This approach to federalism translates the political authority of the group into an essential requirement for their incorporation as a group into the federation.<sup>101</sup> In effect, these groups, which are vested with their own internal political authority, have been identified as the constituent entities of the state and, as such, have consented to a particular form of political association which recognizes that authority. In exchange, these groups use their consent to legitimize the political arrangement. It is this participatory and consensual role which underlies the legitimacy of the federal state in so far that we can say that the power of the state is authorized because it is consensual. It should also be noted that by equal, Elazar does not purport to argue that the parties are, in fact, equal in power, ability or even effective authority. Equality here references the requirement that each party possesses equally independent authority to negotiate the terms of arrangement.

### ***Consensual Association in the NFA***

What would make the institutional framework of the *NFA* federal, according to Elazar's understanding, is not only its resulting arrangement but the fact that it is premised on the consent of its signatories as equal confederates which join together in consensual association but maintain their respective integrities. As discussed earlier in the article, the *NFA* establishes the Nisga'a as an independent political entity, equal in negotiating status to the federal and provincial governments through the principle of mutual recognition. As discussed, the mutual recognition principle incorporates the assumption that political relations are based on political equality, co-existence and self-government. For example, it is clear from the *NFA* that each party is authorized to negotiate as a result of its own inherent authority. None of the parties conferred on the other the authority or power to negotiate. On the contrary, the numerous terms which source Nisga'a political authority to its nationhood, such as the one which recognizes the

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100. *Ibid.* at 20.

101. For discussion of the essential role of morality to Canadian Aboriginal law see M. Walters, "Morality of Aboriginal Law: A Tribute to John D. Whyte" (2006) 31 *Queen's L.J.* 470.



right of self-government, leave an impression that it is the inherent political authority of the Nisga'a Nation that qualifies it for this level of negotiation.

Despite evidence that the very nature of treaty negotiation requires consensual participation and that consent supports each and every one of its terms, the *NFA* also explicitly recognizes the authority of the Nisga'a Nation, thus defined, to consent to the terms of the *NFA* as an integral part of the negotiation. For instance, the authority to bind the Nisga'a Nation forms a representation and warranty in the *NFA* itself.

The Nisga'a Nation represents and warrants to Canada and British Columbia that, in respect of the matters dealt with in this agreement, it has the authority to enter, and it enters, into this agreement on behalf of all persons who have any [A]boriginal rights, including [A]boriginal title, in Canada, or any claims to those rights, based on their identity as Nisga'a.<sup>102</sup>

This term recognizes the Nisga'a Nation's authority to consent to the terms as binding on all of its citizens. It not only recognizes the Nisga'a Nation's political authority but recognizes a scope of authority so wide that it binds all citizens of the Nisga'a polity and prevents all Nisga'a from claiming any rights or authority to the contrary. This power suggests that the Nisga'a Nation possess the authority to bind its citizens to a political agreement which does not reside in any other governing power.<sup>103</sup>

The *NFA* also evidences an intention by the parties to use their power to join in political association and maintain their respective integrities. The explicit recognition that Aboriginal rights, including the right to self-government, continue in effect following the completion of the *NFA* reinforces the contention that each party maintains its own integrity even as they are bound in the whole.<sup>104</sup>

The perception that the Nisga'a applied its authority to negotiate terms of association is also echoed in the words of Nisga'a Chief Joseph Gosnell, who famously declared on signing the Nisga'a treaty in British Columbia, "We are negotiating our way into Canada, not out of it."<sup>105</sup> To the British Columbian legislature, he called the *NFA* a triumph "because, under the Treaty, the Nisga'a people will join Canada and British Columbia as free citizens—full and equal participants in the social economic and political life of this province, of this country" and because "[w]e will once again govern

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102. *NFA*, c. 2, arts. 5-6.

103. The current litigation between the *House of Sga'nisim and Nisibilada v. Canada (A.G.)*, 2006 BCCA 413, 2005 BCSC 1489, 2006 BCCA 155, 2000 BCSC 659, 2000 BCCA 260 over their inclusion in the *NFA* highlights significant issues related to the representative capacity of the Nisga'a Nation.

104. *NFA*, c. 11, art. 1 and c. 2, art. 23.

105. Department of Indian Affairs and Northern Development, Federal Treaty Negotiation Office, *Treaty News* (October 1999) at 11.

ourselves by our own institutions, but within the context of Canadian law.”<sup>106</sup>

Taken together, the *NFA* could be seen to document a federal relationship which, according to Elazar’s understanding, is premised on the consent of its signatories as equal confederates which join together in consensual association but maintain their respective integrities. Based on the fundamental role that consent played in its negotiation it would be difficult to deny that the *NFA* describes an intergovernmental relationship which legitimates itself based on the agreement and consent of its constituent members.

### ***Consensual Association Through Section 35(1)***

The approach to federalism advocated here relies on the use of section 35(1) and section 35(3) to engage in a process of treaty federalism. These two provisions found the process of building federal relations with Aboriginal peoples on the negotiation of self-government agreements which will be protected as treaties in accordance with section 35(1). Although the proposed approach is consistent with the language of section 35(1), to some, it may seem controversial to generate a federal relationship through treaties which presume the status of Aboriginal nations as equal confederates.

Although courts have protected the status of Aboriginal peoples as nations within Canada, the law has not generally promoted the notion of Aboriginal nations as equal confederates. This is largely due to its consistent support of the doctrine of Crown sovereignty. In fact, in *R. v. Sparrow*, the Supreme Court of Canada has gone so far as to reinforce that “from the outset there was never any doubt that sovereignty, legislative power and the underlying title to such lands are vested in the Crown.”<sup>107</sup> The denial of Aboriginal peoples as sovereign entities can be traced to early colonial policy, in which Imperial and colonial authorities asserted authority over [N]ative peoples by virtue of the Imperial claim to territorial sovereignty.<sup>108</sup> Similarly, Canadian constitutional law recognizes the colonies as the constituent entities of the Canadian state and the only participants in the

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106. J. Gosnell, Speech to the British Columbia Legislature (2 December 1998).

107. *Sparrow*, supra note 48. For further discussion on state authority and legitimacy see B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1992) 29 Osgoode Hall L.J. 681 at 700-703, M. Asch, “Aboriginal Self-Government and the Construction of Canadian Constitutional Identity” (1992) 30:2 Alta. L. Rev. 465 and P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 20.

108. This approach derives from the legal rules of reception, traditionally accepted as the origins of Canada’s legal system. For a critique of this legal model see Slattery, *ibid.*

negotiation of the *British North America Act, 1867*, now renamed the *Constitution Act, 1867*.<sup>109</sup> Although First Nations have been recognized by Europeans as distinct peoples or nations since the time of first contact, a recognition reflected in a long history of treaties and alliances forged between [N]ative nations and European representatives, they were neither consulted nor involved in the negotiation of the *Constitution Act, 1867*. As RCAP observed, negotiations for confederation began among colonial politicians as early as 1858 and culminated in the *British North America Act, 1867*, but, at “no time ... were First Nations included in the discussion, nor were they consulted about their concerns.”<sup>110</sup> In fact, their future position in the federation was not publicly announced or discussed.<sup>111</sup>

The fundamental difficulty with the presumption of Crown sovereignty is that this may not accord with seeing Aboriginal peoples as equal confederates, a prerequisite for a federal relationship. If the Crown is the only sovereign power, then it assumes that any sovereign authority Aboriginal peoples would have had prior to colonization would now be extinguished. If this now famous statement made in *R. v. Sparrow* does indicate the ultimate position of the common law on sovereignty, then the authority of Aboriginal peoples to negotiate their association with the Crown would be undermined. Any political authority that Aboriginal peoples may now possess would necessarily originate from the Crown and not from their own sovereignty or inherent authority. Consequently, this approach would severely limit the extent to which Aboriginal peoples would be considered to

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109. Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1990-1991) 36 McGill L.J. 308 at note 18, quoting W. Many Fingers, “Commentary: Aboriginal Peoples and the Constitution” (1981) 19 Alta L. Rev. 428 at 429, and *RCAP Report*, *supra* note 21 at 179.

110. *RCAP Report*, *ibid.* Also see Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1913* (Vancouver: University of British Columbia Press, 1992) at 176.

111. There were numerous sets of negotiations for confederation of the 10 provinces. Starting in 1858, and culminating in resolutions in 1864 and 1866 that formed the basis of the *British North America Act*, the first four provinces of Ontario, Quebec, New Brunswick and Nova Scotia were joined. Subsequent to the initial confederation, separate sets of negotiations for each province were undertaken but the pattern of Native non-participation continued. Interestingly, the 1871 *Terms of Union* that codified British Columbia's joining did include some provisions on Indian affairs, although First Nations themselves were not involved in its negotiation. For instance, Article 13 of the *Terms of Union* said that in relation to Indians, “a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government.” Ironically, British Columbia's policy of not negotiating treaties was even less liberal than the rest of Canada and did not assist the participation of First Nations. For further discussion on the entry of B.C. into Confederation see Fisher, *ibid.* at 176. One exception to Native non-participation was the negotiation of the *Manitoba Act, 1870*. The province of Manitoba was included as a result of negotiations with the Métis, an Aboriginal people. See J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 157-158.

be negotiating their political association as equal confederates through the constitution.

Despite potential controversy over incorporating Aboriginal nations as equal confederates through treaties, sufficient authority to use section 35 in this capacity does exist in the jurisprudence. First, its use of section 35 as constitutional authority for constitution-building absent constitutional amendment does not diverge greatly from the use currently permitted. As stated above, the state has the authority to render newly negotiated treaty rights as constitutional rights absent constitutional amendment under section 35(3). Second, there is evidence to suggest that the contemplation of section 35(1) as a tool for constitution building has been contemplated as a mutually acceptable approach to Crown-Aboriginal relations.

Recently, the Supreme Court of Canada seemed to lend some specific support to the use of treaties as a method of constitution building with Aboriginal peoples. In *Haida Nation v. British Columbia*, McLachlin C.J. stated that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by section 35 of the *Constitution Act, 1982*.” In addition to incorporating the language of sovereignty, McLachlin C.J. went on to clarify the centrality of treaties to reconciling sovereignties with this statement: “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so.”<sup>112</sup>

The recognition by McLachlin C.J. that Aboriginal sovereignty existed at any time in history and that it could be reconciled with the Crown through treaties indicates a marked departure from that position which denies the sovereignty of Aboriginal peoples. Viewed in conjunction with other statements of the court on Aboriginal sovereignty, we may see that *Sparrow* may not offer the final position of the common law on Aboriginal sovereignty.<sup>113</sup> Do these last five words of McLachlin C.J. in *Haida*, “have yet to do so,” insinuate that Aboriginal sovereignty is intact in those nations which have not yet negotiated treaties? The comments of the Chief Justice seem to acknowledge that there must be some explanation for what happened to Aboriginal sovereignty following the assertion of Crown sovereignty. Moreover, the tenor of her argument, that certain bands reconciled their claims through treaties and others did not, leaves open the

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112. *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 3 S.C.R. 511 at para. 25.

113. See for example the comments of Binnie J. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at 926.

possibility that claims to Aboriginal sovereignty are yet to be reconciled through treaty negotiation.

In contrast to the traditional position of the law, here, in the words of the Chief Justice, is the inkling of a theory that pays homage to the essentiality of negotiated consent.<sup>114</sup> Within this model, treaties would not merely document a political relationship. Instead, under this model, treaty negotiation would generate new relationships which reconcile Aboriginal and Crown sovereignty. Of course, what is meant by reconciliation is still being developed. We may see echoes of the same discussion in the debate over terminology relating to certainty and finality.<sup>115</sup>

The intention of Aboriginal peoples to engage in constitution building through treaties was also articulated powerfully by RCAP:

Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation: their goal is to complete it .... The goal is the realization for everyone in Canada of the principles upon which the Constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate.<sup>116</sup>

While treaties may not use such striking language in their text, past approaches indicated a similar interpretation. The Charlottetown Accord of 1992 proposed negotiations as the method by which the inherent right to

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114. For examples of recognition of Aboriginal sovereignty pre-settlement see *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 383, per Hall J. [*Calder*] and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 543, per Lamer C.J., both quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 542-543. Also see Lamer J. in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-53 and statements by Binnie J. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at paras. 129-135.

115. Whether the court conceives of reconciliation through treaty as a version of finality is still unknown. It is well established that Aboriginal peoples consider reconciliation to incorporate an ongoing relationship rather than finality. Moreover, there is growing evidence that First Nation signatories expect treaties to be respected as constitutional documents which delineate an intergovernmental relationship. For instance, conflicts arising during negotiations of contemporary agreements, and after, indicate significant reliance on the intergovernmental relationship created. Recently, Justice Ron Veale of the Yukon Supreme Court heard arguments that the Yukon territorial government owes a duty to consult with the Little Salmon-Carmacks First Nation on use of land abutting land settled in their final agreement. The decision is forthcoming. However, counsel for the First Nation made submissions that the land claim and self-government final agreements are not a finality agreement and that the First Nations and the territorial government will continue to have a relationship. Furthering the point he was reported as arguing, "I cannot state too strongly the significance of this issue. It would be a [F]irst [N]ation's and/or elder's worst nightmare to learn that they were tricked into an agreement that essentially fenced them in." Stephanie Waddell, *Whitehorse Star*, online <<http://www.whitehorsetar.com>>.

116. *RCAP Report*, *supra* note 21 at xxiv.

Aboriginal self-government would be implemented in Canada.<sup>117</sup> Moreover, the agreement makes it explicit that “the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada.”<sup>118</sup> If these statements reveal a purposeful approach to treaty making, it indicates a strong objective to use the treaty making process and hence section 35(1) as a tool for negotiated association.

One of the final justifications offered here for engaging in treaty federalism is that it goes a long way to address the incompatibilities between claims to Aboriginal sovereignty and claims by the state to legitimately legislate in regards to Aboriginal peoples.<sup>119</sup> Not all First Nations experience these incompatibilities, but for those who do, the law has not yet provided an effective answer to problems with state legitimacy. While the Supreme Court of Canada has not yet addressed the legitimacy of state authority *vis à vis* Aboriginal peoples, it has indicated that it will foray into the language of legitimacy. Generally, there is significant jurisprudential support for interpreting constitutional provisions in a manner which promotes legitimacy. In *Reference Re Secession of Quebec*, the Supreme Court appeared to support the idea that constitution building is not yet complete by its use of unwritten constitutional principles to guide the process of constitutional interpretation. In this case, the court outlined the principles of federalism, democracy, rule of law and respect for minorities as “essential to the ongoing process of constitutional development and evolution of our Constitution as a living tree.”<sup>120</sup> The Court prefaced its own approach to determining Quebec’s legal authority to secede under the *Constitution Act, 1867*, with the statement that, “[i]n our constitutional tradition, legality and legitimacy are linked.”<sup>121</sup>

The idea that constitutional interpretation is guided by an attempt to find legitimacy is supported by the four unwritten principles established as the legal norms which restrict and guide the actions of government.<sup>122</sup> Each

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117. Privy Council Office, *Consensus Report on the Constitution: Final Text*, (Charlottetown: 28 August 1992), Charlottetown Accord s. 45.

118. *Ibid.*, Charlottetown Accord, s. 41.

119. For greater examination of this claim, see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999). Also see, James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; James Sákéj Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. and S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 75.

120. [1998] 2 S.C.R. 217 at 248.

121. *Ibid.* at 240.

122. *Ibid.* at 249.

unwritten principle is used by the Supreme Court to create legal norms that will determine the process by which governments can legally and legitimately govern their constituencies. For instance, the Supreme Court held that according to the precise terms of the *Constitution Act, 1867*, the federal system is only partially complete.<sup>123</sup> Yet the principle of federalism completes the project by protecting the “diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.”<sup>124</sup> Similarly, the principle of democracy is used to inform the proper institutional structure of government as well as its substantive goals, namely, the “promotion of self-government” and the “consent of the governed.”<sup>125</sup> That the court requires the legitimacy of democratic systems “rest on a legal foundation,” “be capable of reflecting the aspirations of the people,” and “appeal to moral values”<sup>126</sup> reflects a desire to elevate the political principles which support political authority (such as federalism and democracy) to the legal framework of the constitution. In effect, the act of constitution building becomes the act of incorporating concepts of political authority for the legal justification of entitlement and rights. If this approach is applied to interpreting section 35(1), treaty negotiation could be treated as a form of activity which generates legitimacy through the negotiation of association. Consequently, treaty making would be understood as an attempt to contextualize the current debates over self-government as a process of constitutional legitimacy in which the link between the legality of the constitutional document and the legitimacy of governance is reinforced.<sup>127</sup>

### III CONCLUSION

There may not be absolute clarity as to what type of federal relationship has been created by the *NFA*. Does the lack of absolute clarity preclude a finding of federalism? No. Federalism is a political concept which uses legal, institutional and consensual elements to evidence its establishment. Consequently, it is meaningful that the *NFA* uses the institutions and hallmarks of federalism to implement a federal relationship. The establishment of the Nisga'a as a constitutionally distinct political order is relevant to understanding what the parties created. The use of institutions by which the three governments are to determine their future relations is

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123. *Ibid.* at 250.

124. *Ibid.* at 251.

125. *Ibid.* at 254, 256.

126. *Ibid.* at 256.

127. For further discussion on constitution building, see Tully, *Strange Multiplicity*, *supra* note 118 at 30.

relevant to understanding what models of governance they were using. Lastly, the use of consent to negotiate the terms on which the Nisga'a people will be governed is relevant to how the parties see their relationship.

Moreover, there is sufficient support in the law, as it stands today, to sustain an interpretation of the *NFA* as creating a federal relationship. There is support for a reading of Aboriginal nations as possessing a right to self-government which will sustain a constitutionally distinct order within the federal state and there is support for a position which vests them as equal confederates with the power to consent. What does remain uncertain, however, and a matter for future research, is what impact recognizing a federal relationship between an Aboriginal nation and the Crown will have on the practice of Canadian federalism.