

The Importance of 'Traditional' Culture in Modern Governance and Legal Systems: A Case Study of the Nisga'a Nation

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Abstract—In a global economy dominated by multinational corporations there seems little room for what is often rather inappropriately called 'traditional' culture. In this paper a First Nation self-government agreement will be examined as an example of how traditional culture can be expressed within a 'modern' (or western to be more specific) economic and social framework. The aim of this paper is to provide an example of how one 'traditional' societies are adapting the modern world to fit their aims and aspirations, rather than being ruled by it. Through this example, it will be argued that even through a history of mistrust and even violence, a spirit of negotiation and cooperation may prevail.

Index Terms—traditional culture, resources, agreements, economy, law and legislation.

I. INTRODUCTION

In a global economy dominated by multinational corporations there seems little room for what, in my view, is often rather inappropriately called 'traditional' culture. The word traditional evokes images of pre-modern, pre-industrial, pre-technology life, which Hobbes describes so vividly as "nasty, brutish and short". This, in my view is the first misunderstanding. Traditional culture should not be seen in such a light. In fact, it is the strength of tradition that informs everything that we do in the modern world with the new tools that industry and technology has provided us. In this paper, I am going to provide one illustration of how the deep roots of traditional culture can inform the contemporary social, legal and governmental life of a nation. It is through this lesson that I would argue that we can come to recognize the strength in cultural traditions that can inform a better more prosperous and just future.

This case study does not investigate what would in international law be normally considered a nation. The Nisga'a Nation does not have a seat in the UN, and does not have its borders marked in bold lines across a world map. It concerns a Nation of Indigenous peoples that line in the north-western shores of Canada. When Canada formed as a country there was an uneasy relationship between settler and native cultures marked by treaties when it was convenient, and not so benign neglect when it was not. The latter half of the 20th Century saw the Canadian government moving to

recognize indigenous Canadian's traditional claims to land and rights [1]. This recognition grew into a modern treaty-making practice that has come to include governance rights. The case study I will be discussing one such nation, the Nisga'a Nation, who signed a comprehensive land claim and self-government agreement with the government of Canada that came into effect in 2000. In this agreement, the Nisga'a Final Agreement (NFA) [2], the Nisga'a Nation was given rights over land and resources that continue to be vitally important to their survival. They were also given governance powers, in the form of jurisdiction over areas such as education, health and even the administration of justice.

This treaty was the subject of a hotly contested debate, as well as two court challenges. [3] The most recent decision is being appealed to the British Columbia Court of Appeal. The main debate was between Aboriginal rights proponents and right-wing conservative critics. Aboriginal rights proponents argued that the treaty did not provide the Nisga'a Nation with adequate resources and power to maintain their way of life [4]. Conservative critics saw the treaty as a threat to the constitutional principles of equality and liberal governance [5]. I believe the truth is somewhere in between. The Nisga'a Final Agreement did gain many rights to resources important for their survival, but they accepted a form of delegated governance within the Canadian constitutional structure to gain more control on their destiny as a nation.

The focus for this paper is going to be how the treaty they negotiated is informed by their cultural traditions. Through exploring some of the key provisions, and how these provisions were viewed by members of the Nisga'a Nation, I am going to argue that it is the strength of their cultural traditions that will enable the Nisga'a to navigate a modern economy, in a radically changing world to guarantee that their cultural traditions are not relegated merely to the quiet halls of museums.

II. CANADIAN FEDERALISM AND TREATY MAKING

Canada is a federal government. The federal government (in Ottawa) has governmental authority over aspects of Canadian life such as military, currency, banking, and criminal law among others. Generally one can say that the national government is in charge of things of national concern. The provincial governments have legislative authority over education, health care, local undertakings, and administration of public lands, among other more local concerns. Obviously there are areas where cooperation is required, particularly in relation to the funding of such matters.

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The one other important heading of federal government competence is 'Indians and lands reserved to Indians'. It has always been the federal government's jurisdiction to negotiate treaties with Indigenous peoples, and maintain those treaties. The most common practice since the settlement of Canada was to sign treaties with First Nations to give up their rights on the vast areas of Canada they initially laid claim to in exchange for a patch of reserve land and other maintenance payments. It is too long a project to discuss the negative effects this policy had on First Nations, but suffice it to say much of the modern work of Aboriginal activists is involved in redressing the harm from the reserve system. For the purpose of this paper, the one effect that is important to note is the loss of cultural history that occurred as the government undertook a policy to civilize the Indian. Many children were taken from their Aboriginal parents and placed in residential schools to "take the Indian out of the child". Aboriginal people in Canada lost much of their cultural heritage, but were never fully accepted into the new settler society. Relegated to reserves many aboriginal people now struggle with issues of substance abuse, violence and disenfranchisement. Loss of their cultural traditions set them adrift in an uncertain world where they did not feel all that welcome.

In contrast, the Nisga'a people were mainly left alone to their own devices. Nisga'a lands are located in a geographically remote area that is difficult to access. The one resource they had which settlers coveted was their old-growth forests that were harvested under licences by large corporations. Aside from logging, however, the Nisga'a continued to practice their cultural traditions, even underground when ceremonies such as the potlatch were outlawed. What they perceived as the rape of their forests, and other settler incursions, motivated the Nisga'a to file one of the first court cases asserting their traditional rights [6]. This was the first of many which set the stage for modern treaties.

Modern treaties had to be negotiated between the federal, the provincial and the Nisga'a people. As Indians the Nisga'a were what could be described as wards of the state under the 'protection' of the federal government. A modern treaty dealing with resources, land and governmental jurisdiction therefore involved areas of both federal and provincial legislative competency. The Nisga'a Final Agreement was therefore a treaty that had to move the Nisga'a from the status of wards of the state to a partner in the nation.

It is from this tri-partite negotiation that one of the most remarkable aspects of the treaty emerges. Unlike a typical nation with a seat on the UN, the Nisga'a are by necessity bound to their neighbors in a relationship where cultural difference, mistrust and even conflict has marked the last few centuries. Despite this sometimes bloody history the Nisga'a are trying to negotiate beyond these past wrongs for a better future. Their tools are hope and patience. To illustrate, I was watching the aftermath of the bombings in London in 2005 with an Aboriginal leader from the west coast of Canada. He remarked, "imagine if we did that to you, rather than just killing ourselves". He was referring to the inordinately high suicide rate amongst First Nation peoples in Canada. Aboriginal peoples kill themselves, but rarely resort to

violence against the settler culture.¹ This one comment has always stayed in the back of my mind throughout my research. What are the factors that have allowed Canada and Indigenous peoples to largely avoid violent conflict? I don't believe I have any answers yet, but I do believe that the modern treaty process is one element to be considered.

III. THE NISGA'A FINAL AGREEMENT – TRADITIONAL RESOURCES

The Nisga'a Final Agreement, after decades of negotiation, finally came into effect in the year 2000. This agreement is almost 300 pages, with an appendix nearly three times the size. In contrast to many founding documents that we are more used to like the American Declaration of Independence, it is an elaborate and detailed articulation of rights, powers, and responsibilities of the Nisga'a Nation within the federation of Canada. It is, for the purpose of illustration, complex legislation. Through examining the details of this agreement that we begin to see how Nisga'a culture is influencing their modern lives in a 'modern' world. One of the primary reasons to seek an agreement was to allow the Nisga'a to get more control over resource extraction that affected their livelihood, particularly over the 20,000 square kilometers of Nisga'a lands that surround the four primary villages.

The agreement contains some standard areas such as taxation, administration of justice, and fiscal relations. The areas that relate more closely to Nisga'a traditional culture are forest resources, fisheries, and wildlife and migratory birds. I am going to review a few of the provisions that appear in these areas that intersect with Nisga'a traditional life to demonstrate how their culture is acting as a guide to Nisga'a government in the modern world.

During interviews with members of the Nisga'a Nation, several people told me a story about how one their main village was flooded and washed away during heavy rains. I was told that the reason for this disaster was that the clear cut logging on the hills of the valley had caused the excess run-off that destroyed the village. The clear-cut logging also affected trapping and hunting. The animals that the Nisga'a relied upon abandoned the clear-cut areas compromising another important resource. In the Nisga'a Final Agreement, the Nisga'a Nation was recognized as the owner of all forest resources on Nisga'a Lands. They gained the authority to determine, collect and administer fees, rents, royalties and other charges in respect of non-timber resources and certain quotas of timber resources on Nisga'a lands (Chapter 5, sections 3 & 4). This was important, as the protection of the ecological integrity of Nisga'a territory is essential for the continuation of their way of life.

The other major issue for coastal groups is fisheries. The Nisga'a live along one of the few salmon rich rivers remaining in British Columbia. Fish and other water animals and plants are abundant, but there are many threats to healthy fisheries like overfishing, pollution, and disease. The Fisheries chapter recognizes Nisga'a entitlement to fish and other water

¹ In 1990, for example, there was a standoff between the Mohawk and the town of Oka who were developing a golf course on a Mohawk traditional burial ground.

resources. Nisga'a rights to trade and barter, which are the more traditional indigenous rights. Are recognized. In chapter 8, section 9 "Nisga'a citizens have the right to trade or barter among themselves or with other aboriginal people any fish and aquatic plants harvested in Nisga'a fisheries." Rights to commercial fisheries are also discussed in the treaty, with the Nisga'a getting certain allocations. The treaty also creates the Joint Fisheries Management Committee to make recommendations to the provincial government as to fish allowances based upon fish stocks and habitat health. The agreement also creates the Lisims Fisheries Conservation Trust in this section, whose goal is to

- 1) Promote conservation and protection of Nass Area fish species;
- 2) Facilitate sustainable management of fisheries for Nass Area species and stocks; and
- 3) Promote and support Nisga'a participation in the stewardship of Nass Area fisheries for the benefit of all Canadians.

These provisions reflect that while the Nisga'a are a modern nation that is both developing and protecting their traditionally important resources.

The final resource I will briefly discuss that is covered by the agreement is wildlife and migratory birds. Nisga'a citizens have the right to harvest wildlife and migratory birds subject to conservation measures and other legislation for public health and safety (Chapter 9, s.1). The right to harvest is to be "consistent with the communal nature of Nisga'a harvest for domestic purposes, and the traditional seasons of the Nisga'a harvest." (Chapter 9, s.2) The agreement creates a process for determining harvest allocations, including the creation of a Wildlife Committee to make recommendations on whether management plans are necessary for the conservation of species. Again, the agreement reflects a concern for the continued viability of traditional resources.

Nationally and globally it is becoming apparent that when it comes to resources no nation is an island. Fish stocks are not limited by the policies within national boundaries. Animals are not contained by lines on a map. Environmental sustainability is dependent upon complex natural global systems. The Nisga'a have a deep respect for the land, waters, and animals that they have shared their land with for generations. Their governmental treaty, as a result, reflects these values and the understanding of the importance of the living things they share their land with for the future of the Nisga'a Nation. Global corporations answer to shareholders and stock markets. It is hard not to recognize how the priorities of shareholders and stock markets have negatively impacted local populations around the globe when these priorities take precedence. For the Nisga'a a government cannot just be about political systems, but must also be about caring for the land that they have relied upon since time immemorial. In this way, Nisga'a traditional culture is forging a new path into a more sustainable future.

IV. THE NISGA'A FINAL AGREEMENT – POWER AND NON-TRADITIONAL RESOURCES

The Nisga'a government's powers, as delineated in chapter

12, reflect the nation's focus on developing non-traditional resources. In this chapter, the Nisga'a Nation's jurisdiction over education, social services, and health services are catalogued. In these provisions the importance of Nisga'a culture within the modern nation becomes very apparent. In education, the Nisga'a Nation have the ability to make laws in relation to education including curriculum and certification of teachers. The limitation provided in the agreement is that the education provided must provide standards comparable to the provincial system (s. 100). Through these provisions the Nisga'a will have the ability to provide Nisga'a language and culture education as well as the standard Canadian curriculum. Nisga'a children will have knowledge of their culture, as well as the ability to participate in the modern world. In health services a similar balance is created whereby the Nisga'a can make laws in relation to Aboriginal healers, incorporating traditional practice into modern medicine (s. 86-88). Similarly with social services the Nisga'a can make laws in relation to child and family services that are compatible with their traditional culture (s. 89 – 99).

V. CONCLUSION

The brief examination of the provisions in the treaty above demonstrate how the Nisga'a are retaining aspects of their traditional culture while participating in a modern economy. Fishing, once a primary traditional resource is now a primary commercial resource. Timber, important culturally is now important economically. These resources are now a part of the modern Nation's survival. This, however, is not a transition that is without its tensions. The development of oil and gas resources (particularly offshore) presents dangers to the fisheries. The lack of employment on Nisga'a lands requires many members of the Nation to get employment in other cities, which makes maintaining cultural ties more difficult. There is still a lingering mistrust on behalf of Aboriginal peoples in Canada, and neglect on behalf of the Canadian government. The treaty is a framework, a beginning. Its success however depends on continued negotiation and cooperation. The treaty is still young, but it does provide a basis for the creation of a new relationship between the Nisga'a and the rest of Canada that may end up benefitting all Canadians.

The world is rife with examples of cultural differences resulting in conflict. In my view, it is a sign of great hope that there is at least one example where cultural difference may instead result in a better future for us all. It is tempting to believe that our contemporary world was born and bred from western economic principles (there are definitely some western theorists that advocate that view), and therefore western cultural norms. It is even tempting to assume that those peoples, communities and nations that do not fully adopt western cultural practices cannot benefit from the advantages of the modern economy. The Nisga'a stand as an example of a nation that has maintained its traditional practices, and through generations of negotiation found themselves a place within Canada and the wider world. And I would argue, because of their participation, a better world.

REFERENCES

- [1] Aboriginal Affairs and Northern Development Canada. (January 2011). General Briefing Note on Canada's Self-Government and Land Claims Policies and the Status of Negotiations. [Online]. Available: <http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/gbn/gbn-eng.asp#section1>.
- [2] Canada, British Columbia, & Nisga'a Nation. *Nisga'a Final Agreement & Appendices*. [Online]. Available: <http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html>.
- [3] *Campbell v. British Columbia (A.G.)*, 8 W.W.R. 600; 189 D.L.R. 4th 333 (B.C.S.C.), 2000; and *House of Sga'Nisim v. Canada*, BCCA 362 (B.C.C.A.), 2002.
- [4] P. Rynard, "Welcome in but Check Your Rights at the Door: The James Bay and Nisga'a Agreements in Canada," *Canadian Journal of Political Science*, vol. 33, no. 2, pp. 211, 2000.
- [5] J. Carpay. *Aboriginals in Canada: segregation or equality*. C2C. [Online]. Available: <http://www.c2cjournal.ca/public/articles/43>.
- [6] *Calder v. British Columbia*, 34 D.L.R. (3d) 145, 1973.



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