WHY NEVER GIVE IN

AN ADDRESS BY

JOHN D. WESTON

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Access Law Group – Suite 1700 – 1185 West Georgia Street, Vancouver, B.C. Canada V6E 4E6 Phone: 604 689 8000 Fax: 604 689 8835
Web: www.accesslaw.ca Email: jweston@accesslaw.ca

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Why Never Give In

John D. Weston

Sixth Annual Mel Smith Lecture

Trinity Western University

February 12, 2004

What Does Mel Smith Mean to You and Me?

It's an honor and privilege to deliver the Sixth Annual Lecture in honor of my late friend and mentor, Melvin H. Smith, Q.C.

If I seem a bit nervous tonight, I hope you'll forgive me. For one thing, a former boss is looking down on me from Heaven correcting my syntax and holding me to account for errant research. Even as I learned to call him "Mel", rather than "Mr. Smith", I could never completely transcend the subordinate role I played when he and I first met. I was 21, an undergrad at Harvard, and was not chosen by Mel – his boss Rafe Mair had been my guest as a speaker at the Harvard Canadian Club and had told Mel to hire me as his summer student. A bad start, you might say – being parachuted in on your boss! I then worsened matters by playing squash with Rafe, Mel's boss, that summer. Rafe got progressively angrier on the court because he was losing. Then, when I let up a bit, he really chafed, to think I was patronizing him. Anyone in the room familiar with Rafe Mair can understand my predicament. If I'd known at the time that Rafe and Mel enjoyed a great friendship in addition to their professional relationship, I would have been less worried about politics on the squash court. It's just lucky that Mel, then the longest standing Deputy Minister in BC's history and a stickler for office decorum, never learned I dated one of the secretaries in his office. I'd never have lasted the summer, let alone be invited back for the two summers that followed!

And what a job it was! Not only was I mentored by one of Canada's foremost constitutional experts, but I also had occasion to see firsthand how a devoted Christian invested his principles in public policy. He didn't wear his faith on his shirtsleeve. Rather, as Francis of Assisi said, he "preached the Gospel constantly and, if necessary used words." Mel's retirement as Deputy Minister unchained his willingness to be governed by his convictions. It's a measure of the man that his influence in public life only increased after leaving behind the prestige of public office.

And consider the era when I worked for Mel. The first summer was 1979, when seven provinces, including Quebec, began to contemplate a joint Reference to the Supreme Court of Canada[1]. Can you imagine that, at that time, the Government of Canada under Prime Minister Trudeau believed it could bring back and amend our Constitution without participation of the provinces? The Supreme Court of Canada roundly rejected this notion, just as it may reject the notion of a third order of government. But more on that in a minute.

In 1979 and 1980 our little constitutional team in Victoria developed position papers and negotiated with the other provinces. I got to witness firsthand the intellects and street smarts of Bill Bennett, Peter Lougheed, Roy Romanow, and Jean Chretien – modern-day political heroes – or villains, depending on your perspective.

By 1981, now a first year law student at Osgoode, I returned for my third and final summer in Mel's office, where we coordinated the annual Premiers' Conference which that year happened to take place in Victoria. I was living in the Union Club, that wonderful, crusty old men's club which *The Vancouver Sun* cartoonist Norris used to caricature as the bastion of WASP conservative power. In truth, I felt on weekends, when all the MLA's had departed, that I was the youngest

[1] *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753

resident by two generations, a misfit by my inability to describe the Boer War from firsthand experience.

While working for Mel, I had the opportunity to participate with a tiny team of brilliant people, all centered in the Premier's Office, who were charged with the lofty role of negotiating BC's position on the new Constitution. At first, I felt out of place, the young kid on the block, still a poli sci student, working alongside people all of whom seemed older, brighter, and more experienced, such as a recent winner of the Gold Medal at U Vic Law School.

And then there was the fourth summer, working for Mel's counterpart in the Government of Quebec, an incredible opportunity to see the "unfinished Constitution" through the eyes of French-Canadian public officials whose leader Rene Levesque had cooperated with the other six provinces in forestalling Trudeau, only to be betrayed by a constitutional deal that left him out. Premier Leveque never signed the Constitutional Accord, and Quebec continues to this day as a non-signatory of our current Constitution.

Through Mel, I learned a deep respect for the Constitution. Many other Canadians share with me a common debt to him, for giving us the sense that the Constitution is a living document; that we all have a duty to uphold it, even when under attack by our own governments; and that we owe much of our legacy as Canadians to the peace, order and good government occasioned by the rule of law. I believe he would be encouraged today to know that his commitment to integrity, his determination, his love for Canada and the Constitution are shared by some of the people in the room and by the aboriginal people whose story I'll shortly be describing.

And here I am again, feeling slightly in awe of the elite circle of speakers who have taken this podium in the five preceding years: Rafe Mair, Preston Manning, Nick Loenen, Ted Morton, and Gordon Gibson. For these senior intellects, "Mel"

was “Mel” to them, and here I am, still wondering if he prefers I call him “Mr. Smith”!

Well, that’s the cheesecake – let’s turn to tackle the beef and potatoes – the third order of government, how it affects our constitution, and what it means to you and me.

What was Aboriginal Self-Government Prior to 2000?

Prior to 2000, we had a fairly clear distribution of powers in Canada, at least in theory. Canada’s law-making framework dates back to 1867, when the BNA Act stated explicitly that all legislative powers were distributed between two levels of government: Federal and provincial. Not 3, not 4, and certainly not over 600 levels of government. But two levels of government.

The prevailing theory suggested that no municipality, religious group, aboriginal band, or any other entity or enterprise could override federal or provincial law. All entities in Canada that sought to make laws were subject to one or the other level of government – federal or provincial. If they were really unlucky, they might be subject to both. But until the Nisga’a Treaty, there were only two levels of government in Canada.

The pattern for such a bicameral system is laid out explicitly in Sections 91 and 92 of the British North America Act, passed by the British Parliament in 1867 to create the nation of Canada. Section 92 lists specific classes of matters over which the Provinces have exclusive jurisdiction. Section 91 says that the Federal level has jurisdiction over anything not specifically listed in Section 92. The formula left no room for municipalities, religious groups, ethnic communities, or any other party to have separate law-making power independent of the federal and provincial levels. For instance, any power held by a municipal government is delegated by the Province, and the Province can take the power back, unlike the power allocated to the Nisga’a Government under the Nisga’a Treaty.

How Did the Nisga'a Treaty Change Things?

The concept promoted in the Nisga'a Treaty that there's actually a third order of government lurking out there with independent law-making power is what I call the New Sovereignty Principle. I count at least 7 significant implications arising from the New Sovereignty Principle: the creation of a third order of government.; undermining of human rights protections; the creation of up to 634 new potential governments; new public policy in related areas; new directions for our judiciary; encouragement for Quebec separatism; and dwindling confidence in Canada. In case you have trouble keeping track, I've listed them in your handout.

1. Creation of a Third Order of Government

The Nisga'a Treaty debate shrilled through the B.C. Legislature in 1999 and the House of Commons in 2000. You will recall that, in both cases, the NDP Provincial Government, under Glen Clark, and the Federal Government, under Jean Chretien each unilaterally shut down debate and rammed the law through.

There were many contentious aspects of the Treaty, including the 2000 square kilometers of land; the $453 million dollars; the special and exclusive fishing rights; and voting rights denied non-Nisga'a people residing on Nisga'a lands. However, the Treaty provision that has potentially the greatest impact for all Canadians is the creation of a third order of government.[2]

So how does the Nisga'a Treaty bring about such dramatic change? The Treaty says, in at least 14 areas of law, if Nisga'a law conflicts with federal or provincial law, Nisga'a law prevails. Most of these areas are set out in Chapter

[2] See Nisga'a Treaty, (chap 11: ss. 36, 38, 40, 43, 45, 49, 51, 55, 84, 87, 91, 99, 101, 105, and 116; chap 8, s. 71; chap 9, s. 38).

11 of the Treaty. They include the licensing of businesses; land use; taxation; adoption; and education.

By way of illustration, a B.C. Band recently challenged the adoption law in Ontario which, like the B.C. adoption law, makes the "best interest of the child" the most important factor in adoption matters. The band in question argued, no, there is a higher priority, at least where aboriginal parties are concerned, that is, the placement of aboriginal children with aboriginal parents for the perpetuation of the band. In the case before the court, the child was an autistic infant who had been placed in a foster home with two parents professionally qualified to care for such challenges. But the parents were not aboriginal and the band wanted the child to be reared by aboriginal parents. I am not sure where that case stands today but one thing's clear – if aboriginal law prevails over competing provincial law, that child is likely to be taken from the foster parents.

3. Undermining of Human Rights Protections

This is not just a battle over which government regulates you and me and other Canadians. The human rights implications are profound. The Nisga'a Treaty makes Nisga'a law prevail over the Charter of Rights and Freedoms, as long as the limitation Charter right imposed by Nisga'a law may be justified in Nisga'a society.[3] The practical effect of the Treaty in human rights terms is to remove rank-and-file Nisga'a people from the protections of provincial and federal human rights laws; ombudsperson oversight; and other protections familiar to Canadians.

We already have concrete examples of waht happens when powers are concentrated in the hands of a few elites. In one of three complaints that went

[3] Nisga'a Treaty, Chapter 2, sn. 9 states that "The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the *free and democratic nature of Nisga'a Government* as set out in this Agreement" (emphasis added). This must be read in light of Section 1 of the *Charter of Rights and Freedoms,* which states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

before the B.C. Human Rights Tribunal, a Nisga'a fisherman alleged wrongful discrimination under the B.C. Human Rights Code. He claims he's been denied a fishing license based on his opposition to the Nisga'a Government. The first defence raised by the Nisga'a Government was jurisdiction. In other words, the Nisga'a Government claims Nisga'a people do not have the protection of the provincial human rights code. Predictably, the provincial tribunal concluded it was unable to hear the case.[4] Will the federal tribunal also disclaim jurisdiction?

In a separate case, a Nisga'a woman has alleged that Nisga'a Government officials have misappropriated some of the $453 million received under the Treaty. She raised her complaint with the B.C. Ombudsman, who declared himself powerless to help her.

In other cases, the people who have confided in legal counsel are too afraid to make their complaints public. You can understand their fear in a community where unemployment is in the 90% range and the local government controls most of the jobs, as well as financial opportunities.

You can understand their fear, given the treatment meted out to someone who dares to challenge the regime. More on that below.

To which forum must an aggrieved Nisga'a person turn? The Nisga'a courts, as specified in the Treaty? As you can imagine, the Treaty states that the Nisga'a Government appoint Nisga'a judges.[5]

3. 634 New Governments

It seems natural that old treaties will be re-opened in an attempt to incorporate the newly discovered self-government power. Each one of the 634 Indian bands in Canada is eligible to recognize its own independent self-government, equipped

[4] Decisions of the B.C. Human Rights Tribunal #324 and #325, 2003.
[5] Nisga'a Treaty, Chapter 12.37

with the same sovereignty as that recently conferred upon the Nisga'a Government.

With 634 new governments in Canada we can expect a thicket of legal wrangling over jurisdiction and a proliferation of bureaucracy. A few powerful elites will have large control over land, people and purse strings.

4. New Public Policy in Related Areas

The concept that a third order of government exists in Canada has implications in public policy issues that don't directly relate to the self-government right in treaties. For instance, under former Minister of Indian Affairs Robert Nault, the Department of Indian Affairs intended to give Indian bands unrestricted powers of taxation over their reserves, even over tenants who have no vote for their band representatives.[6] Unless those tenants happened to be band members, the tenants would have no say in electing or monitoring the government that was their landlord and taxing authority. In other words, your landlord would become your taxing authority. For people such as the residents of the Musqueam Indian Reserve, this initiative would have taken "taxation without representation" to a new extreme in Canada. Without explicitly acknowledging the Nisga'a Treaty, Minster Nault was implicitly validating the New Sovereignty Principle.

5. Judicial Activism

The courts are inevitably also taking note of the New Sovereignty Principle. For instance, in the *Benoit* Case, decided in the Alberta Division of the Federal Court, the judge found that Treaty 8 Indians were exempt of taxes, probably all forms of taxation, "as long as the rivers shall run". Again, there was no mention in the decision of the Nisga'a Treaty or the New Sovereignty Principle but the decision presumed that the aboriginal band in question had the sovereignty and tax immunity like those of a foreign embassy in Canada, with immunity from

[6] This was the thrust of the *Fiscal and Statistical Management Act*, at least temporarily withdrawn under Prime Minister Martin.

taxation. The case was overturned by the Federal Court of Appeal but still speaks to the influence of the New Sovereignty Principle.[7]

6. Influence in the Academic World

In the academic world, my address at Harvard University last April 2003 brought me into contact with the institute there that has been hired by the Assembly of First Nations to provide research into aboriginal self-government. In an influential, well-funded study by Harvard University's Joseph Kalt and others, the authors concluded that even the level of self-government promoted by the Canadian Federal Government was insufficient to provide aboriginal bands the needed level of independence. The whole study was premised on a commitment to the New Sovereign Principle.[8]

Do you recall that Matthew Coon-Come, as Grand Chief of the Assembly of First Nations, tore up the bill on the steps of Parliament? Coon-Come's objection was that, on the one hand, Chretien was lauding an inherent right of self-government tantamount to sovereignty, but on the other hand were trying to dictate standards of accountability. How can you blame Coon-Come for his confusion?

7. Implications for Quebec Separatism

Critics have said what the Nisga'a Government received far exceeds what the Parti Quebecois ever asked for. What would be the consequences of giving these same rights to Quebec? What would happen if Quebec laws prevailed over Federal laws? As you would suspect, Quebec separatists were passionate supporters of the Treaty.

[7] 2002 FCC 243 (Campbell J.); 2003 FCA 236 (Nadon J.A.)
[8] Stephen Cornell, Miriam Jorgensne, and Joseph P. Kalt, *The First Nations Governance Act: implications of Research Findings from the United States and Canada*, July 2002

8. Dwindling Confidence in Canada

In addition to the consequences for the governance of Canada and for individual aboriginal persons, the economic consequences are dire. Depleted tax dollars. More red tape. Lowered bond ratings. Retreating investment dollars. International skepticism and domestic unrest. Until the courts arrive at a reliable definition of self-government, there can be no certainty for investors, governments, real estate developers, immigrants, or others who may justifiably fear the turmoil that arises when uncertainty drives people into bitter jurisdictional disputes.

How Have the Federal and Provincial Governments Shifted?

On December 7, 1998, Mr. Campbell rose as Leader of Her Majesty's Loyal Opposition to state that:

> [W]e cannot endorse a misguided model of self-government that is being imposed on British Columbians without their consent... At the very least, we should be waiting until the courts decide whether this treaty is constitutional ... We don't think the model of government proposed in this treaty is constitutional without an amendment.

Before they were in government, the current Premier of BC (Gordon Campbell) and the current Attorney-General (Geoff Plant), took the unprecedented step as Opposition Leaders to sue the government, alleging the Treaty was unconstitutional. As I'll describe in a minute, they lost their case and, once elected, performed a 180-degree snap turn, abandoned their appeal, and support the Treaty in the courts.

Similarly, Mr. Chretien did not have a longstanding commitment to the third order of government. Only in 1993 did the Federal Liberals announce their

commitment to an "inherent right of self-government". They did not define what that meant, nor did they describe how it would relate to our Constitution or our other levels of government. As recently as last year, Stephen Owen, as Junior Minister for Indian Affairs, advised a Canadian Bar Association meeting in Vancouver that the Federal Government did not really understand what "self-government" meant, but that his party intended to make self-government a cornerstone of every new aboriginal treaty.[9]

Prime Minister Martin appears keen to appease the Assembly of First Nations, having distanced himself from former Indian Affairs Minister Nault's confrontational approach; dropping Mr. Nault; and abandoning Mr. Nault's pending bill, the *First Nations Governance Act*.[10]

Many people don't want to fight the image of "aboriginal self-government" and "treaties" because these ideals sound so good on the surface. But Chief Mountain is not fighting aboriginal self-government or treaties. All he wants are self-government and treaties that are legal and valid under the Constitution. He clings to rights guaranteed by Canada rather than the more limited menu available under the Nisga'a Government.

What's the Legal Challenge About?

Who are the Parties?

I am now General Counsel for several Nisga'a people, including Chief Mountain, and Mercy Thomas, an esteemed matriarch. A courageous man, Chief Mountain takes his responsibilities to the Nisga'a seriously. His title is important. The name was formerly held by the most prominent of the Nisga'a Chiefs in the late

[9] Address to Aboriginal Law Sub-Section of the Canadian Bar Association, Vancouver, January 6, 2003
[10] See "All for Nault", editorial in *National Post*, Feb 5, 2004

1800's. The Chief Mountain of 1881 led the Nisga'as' initial delegation to Victoria to pursue their land claim.

Chief Mountain and his Nisga'a supporters filed a claim in the B.C. Supreme Court that alleged what Treaty detractors had been saying. The Treaty is unconstitutional, he claimed, because Nisga'a law CANNOT prevail over Canadian or provincial law. That would create a new nation, or a "third order of government", prohibited by the Constitution.

Ranged against the Plaintiffs are three governments, Canada, B.C., and the Nisga'a Government, supported by the apparently limitless funds of taxpayers. The Plaintiffs, on the other hand, have no money as they are people of almost no means who have no access to the large treasury of the Nisga'a Government.

A gulp and a prayer and the next thing I knew, I had former members of the Supreme Court of Canada and some of Canada's top constitutional lawyers fighting alongside me on behalf of this small, courageous group of Nisga'a people.

What are the Issues?

Today Chief Mountain dares to stand against his own Nisga'a Government, the Government of BC, and the Government of Canada. He rejects the New Sovereignty Principle, preferring to live under Canadian rule, with all the rights of Canadian Citizenship. He says the elites who negotiated the Treaty traded away his rights in exchange for powers never sought or imagined by his ancestors. And he says the rights he lost were not just *any* rights , but special aboriginal rights protected by Section 35 of the Constitution.

Like Campbell and Plant, Chief Mountain has in his claim alleged that the Treaty must be declared unconstitutional. If he succeeds, any actions based on the Treaty would also be invalid, and must be reversed. Chief Mountain says his

ancestral lands and many other Nisga'a lands were surrendered by the Nisga'a negotiators in exchange for unconstitutional authority that gave them great power, but power they were never eligible to have. He wants his lands back and he does not want to be subject to an aboriginal government with powers that cut him off from the benefits of Canadian Citizenship. As he says in an affidavit, "I am Canadian".

Many learned people agree with Chief Mountain that what happened is unconstitutional in Canada: a former (NDP) Attorney-General of British Columbia and the current (Liberal) A-G, to name a couple. Notable among Chief Mountain's supporters were three retired superior court judges: William McIntyre and the late Bud Estey, formerly of the Supreme Court of Canada, and Michael Goldie, formerly of the B.C. Court of Appeal. In their brief to the Senate, delivered in March 2000, they concluded that the Treaty purported to create an independent nation-state whose laws may override those of Canada or British Columbia but that the New Sovereignty Principle behind the Treaty is unconstitutional.[11]

What's the Case Law Say?

In the only decision on the matter to date, the New Sovereignty Principle has been upheld by British Columbia's Supreme Court, after the test case launched by B.C.'s Premier and Attorney-General, to which I have already alluded.[12] Campbell and Plant pleaded their case under Rule 18A, a provision in the B.C. Court Rules that allows for expedited hearings based on affidavit evidence. Campbell and Plant's case suffered from the absence of live evidence from the mouths of witnesses, such as Chief Mountain and Mercy Thomas The Court

[11] Submission of The Honourable Williard Z. Estey, Q.C., formerly of the Supreme Court of Canada; The Honourable William R. McIntyre, Q.C., formerly of the Supreme Court of Canada; and The Honourable D.M. Michael Goldie, Q.C., formerly of the B.C. Court of Appeal, to the Senate Committee on Aboriginal Peoples, March 22, 2000, Ottawa.

[12] *Campbell et al. v. Attorney-General of BC, Attorney-General of Canada & Nisga'a Nation,* 2000 BCSC 1123

also reacted unkindly to what it perceived to be a politically motivated initiative launched inappropriately in the judicial arena. In constitutional cases, it's common for the court to waive costs, given the social utility of resolving constitutional matters. However, despite the gravity of the public interest involved, the court punished Campbell and Plant with costs based on the judge's assessment that their case was more about political grandstanding than public interest.[13]

The Campbell / Plant case has left us with a decision on the books that must be overturned or distinguished for Chief Mountain to win his case. Otherwise, at least in B.C., we must assume that Canada indeed has three orders of government.

There are at least four reasons to distinguish the *Campbell* and the *Chief Mountain* Cases, Chief Mountain argues. Firstly, there will be a full trial rather than a decision based on affidavits. Secondly, the plaintiffs are aboriginal persons, in fact, Nisga'a persons, who act with the authority of ancestral leaders, so their motives cannot be so readily dismissed. Thirdly, the pleadings refer to aspects of alleged constitutional transgression not pleaded in the *Campbell* Case. And fourthly, they have material human rights complaints to buttress their argument that Canada's constitution has no place for local governments seeking to act outside the Constitution.

Apart from the *Campbell* Decision, the case law has consistently concluded that Canada has sovereignty over its own territory and that its sovereignty is divided exclusively between two levels of government. Most of the relevant case law predates the Nisga'a Treaty, but one leading case, authored by Chief Justice Beverly McLachlin, seems impossible to reconcile with the New Sovereignty principle or the *Campbell* Decision. Madame Justice McLachlin's Decision was

[13] *Campbell et al. v. Attorney-General of BC, Attorney-General of Canada & Nisga'a Nation,* 2001 BCSC 1400

in the *Mitchell* Case, decided in 2002, in which she concluded that Mohawk Indians who imported goods from New York into Ontario were subject to Canadian authority and must pay CCRA duties. Other cases on point that lawyers would recognize include that portion of the B.C. Court of Appeal Decision in *Delgamuukw*, which dealt with self-government and was undisturbed on appeal; and Supreme Court of Canada Decisions in *Sparrow, Gladstone, Van Der Peet,* and *Nikal.*

What Does Chief Mountain Hope to Achieve?

In 1969, two famous men had the following to say about the notion of imposing a separate constitutional regime on aboriginal people. See if you can guess the authors of these words:

> Canadians, Indians and non-Indians alike stand at the crossroads. For Canadian society, the issue is whether a growing element of its population will become full participants contributing in a positive way to the general well-being or whether, conversely, the present social and economic gap will lead to their increasing frustration and isolation, a threat to the general well-being of society. For many Indian people, one road does exist, the only road that has existed since Confederation and before, the road of different status, a road which has led to a blind alley of deprivation and frustration. This road, because it is a separate road, cannot lead to full participation, to equality in practice as well as in theory…[14]

The quote is from none other than Jean Chretien, then Minister of Indian Affairs, and Pierre Trudeau, in their 1969 White Papter. Today in Canada we desperately need a vision of the country that integrates all Canadians. We must

[14] Canada, Department of Indian & Northern Affairs, *Statement of the Government of Canada on Indian Policy, (The White Paper),* 1969, p. 6

abandon the discredited concepts of isolation, so Mr. Chretien told us 35 years ago.

The better vision is peace, order and good government – the very goal set out in Section 91 of our BNA Act. The words lack some of the energy of the US Constitution but they still convey the major underlying values that have consistently framed our legislative system and our governments. "Peace, order, and good government" has as a phrase come to mean a context of our parliamentary democracy wherein the weak have a safety net to prevent them from falling further; all have an opportunity to prosper; and everyone benefits from the fruits of well established human and democratic rights. How hard we Canadians have fought for peace, order, and good government in the past – whether in opposing tyrants with force abroad, or in opposing Quebec separatists in Parliament at home! How important to us are peace, order and good government today? How ready should we be to sacrifice them?

One answer can be found merely by examining communities which lack peace, order and good government. For instance, in The Congo, four million people have died since 1997 from ethnic conflict and malnutrition. How effective do you believe are the health and education systems in a place like that? Does it horrify you to hear that HIV infection rates range up to 40% in a place such as Lesotho? The ills of these unfortunate countries relate to more than the absence of peace, order and good government but, without that background, you cannot expect any country to enjoy the health and prosperity enjoyed by Canadians.

So why would we give up willingly what we previously fought so hard to keep? In our zeal to reach a treaty – any treaty – we have undermined the very foundation of our peace, order and good government.

Like the Ford Company used to tell us in its NHL ad spots, Chief Mountain has a better idea! He does want a Treaty. And, yes, he desires an autonomy that

would facilitate the blossoming of Nisga'a culture, language, and traditions. But he still wants to have his full rights and protections as a Canadian. This, he says, is possible simply by changing the Treaty to say that, in the event of conflict between Nisga'a and Canadian or provincial law, Nisga'a law will NOT prevail. Yes, the whole Chief Mountain Challenge can be summarized in that little sentence. In the event of conflict between Nisga'a and Canadian or provincial law, Nisga'a law will NOT prevail.

Why is it Hard to Get to Trial?

This is a David and Goliath story. Goliath—the federal and B.C. governments—are energetically fighting Chief Mountain's access to justice.

Given the importance of the case, you might have thought that this hearing would be welcomed and funded by the federal and provincial governments, if only to recognize the importance of debating the question. Sadly, neither government has helped. Not only have the governments shut down all the normal channels for public funding, but they have also put the plaintiffs to the test at every possible turn in terms of their courtroom maneuvers. The case has made it thus far only due to the willingness of the legal team to write off, subsidize, and postpone fees and costs.

The three Defendant governments are trying to take advantage of the financial pressure to shut down the proceedings. In fact, over a period of 18 months, the Nisga'a Government has relentlessly pursued one of the plaintiffs to collect an order of costs of about $9,000, to the point of obtaining a court order committing him to jail for contempt in failing to pay. Is it surprising that this individual and his family are afraid to continue as part of the Chief Mountain Challenge?

A court date has been tentatively set for November 2004, but this will rely heavily on the ability of Chief Mountain to muster funding soon.

Do you think it should be left to penniless aboriginal people to fight a battle so critical to all Canadians?

Chief Mountain claims in his affidavit that, in past, a person with his title would have “fought to the death” to defend his ancestral rights. He says that the courts are his only resort today. If he is denied his say, what is to stop him from falling back upon the approach of his ancestors? How long will aboriginal leaders take their battles to the courts if the rule of law is not upheld? The alternatives are frightening indeed.

What Ethical Obligations Do We Have?

Whether or not the Chief Mountain Challenge strikes you as an important one, we as Canadians have three duties worth discussing tonight – to our forbearers, to our fellow Canadians who live today, and to those who will follow.

Firstly, in the context of Chief Mountain and others who would stand up for our Constitution, it seems appropriate that we should consider the legacy we have received from our parents and grandparents.

Sir Wilfred Laurier claimed the Twentieth Century for Canada. In both World Wars and the Korean War, Canada punched way above its weight, fielding formidable forces in land, sea and air. Pearson embellished our history with a Nobel Peace Prize and Trudeau captivated the world as the leader of a country that had become a promised land, for our resources, people, and democracy. By the time Expo ’86 rolled around, the world was truly coming to our shores, if not as immigrants, then as investors or visitors. We had won for ourselves the reputation of a people who were loyal, tough, resilient, and, though slow to passion, clear and resolute in causes that we claimed as our own. In light of this

awesome legacy, are we losing the way? After making our way to seventh game of the Stanley Cup Finals, are we now scoring on our own net?

You might have in your family stories like I have in mine, of brave Canadians such as my father who went to war in the cause of freedom and democracy, were wounded, captured, or killed. It is due to their sacrifice that we have a free and peaceful country today. We must not forget them or ignore their legacy to our country. To paraphrase Pericles' gratitude for the creators of Athenian democracy, "every one of us alive should gladly toil" on Canada's behalf.[15]

If we have an obligation to those who won for us the country we cherish, we also have an obligation to fellow Canadians today, aboriginals, and other Canadians. Should poverty impede the ability of a person to benefit our country? Are we to stand by while aboriginal citizens are relegated to a constitutional dust bin? Are we to prevent courageous aboriginal leaders like Chief Mountain from having their say in our courts on matters of pressing national importance? Do we not have a duty to request that our courts deliver the long promised judicial hearing of the constitutional validity of this dramatic new development in our governmental system?

The third obligation is the most important of the three – the duty to future generations. For if our Canada is to remain "glorious and free", it is not because we pride ourselves in surpassing the peace, democracy, arts, culture, or other assets of other countries. It is because we share the faith that we may doggedly uphold the lot of even the weakest member of our society. It is through humility that we become strong. It is through faithfulness to past generations that we pave the way for future ones. And it is through courage that we can call ourselves worthy of this country that our ancestors have bestowed upon us, a trust we hold for those who follow.

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[15]Pericles, his "Funeral Oration," quoted by Thucydides, *The Peloponnesian War*, Penguin 1976, p. 143

In one of the finest speeches of all time, Sir Winston Churchill was addressing his alma mater, Harrow School, on October 29, 1941. The worst of the air raids was over but the worst of the fighting was yet to come. The US had not yet joined World War II, and the UK was a cou
ntry beleaguered by the onslaught of the greatest war machine the world had then known. Churchill peered over the lectern at the group of boys, and reminded them of respecting their legacy:

> Never give in, never give in, *never, never, never, never* – in nothing, great or small, large or petty – never give in except to convictions of honour and good sense.[16]

Mel Smith autographed his book for me, not once, but twice. In May 1997, he extended to me the good wishes and compliments you typically expect in remarks of this nature. In June 1999, his mood was more somber as he wrote: "The Nisga'a Treaty has now passed the Province but the essential problems remain that call for a response from us all. Perseverance is the key."

Perseverance is the key. Mel Smith said it; Chief Mountain says it; and now I say to you, in guarding your legacy as a Canadian, "Never give in!"

Thank you for your attention this evening.

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[16]Winston Churchill, "Never Give In!", speech to Harrow School, October 29, 1941, in Winston S. Churchill (ed.), *Never Give In! The Best of Winston Churchill's Speeches*, Random House UK Limited, UK, 2003, p. 307