

Sovereignty Without the Referndum: Chief Mountain Speaks on Bay Street

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Weston, John D., Speaker

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The shape of our Constitution and therefore our country. Concern about the hurricane that is coming our way. The constitutional hurricane gathering force over our country. The Nisga'a Treaty. Why Chief Mountain claims the document is clearly unconstitutional and why this issue is important to each of us. Some facts and figures about the Nisga'a people. Ways in which the Nisga'a law conflicts with Canadian or provincial law and the prevailing of Nisga'a law. Thus the creation of a new nation, or a "third order of government." Some history. Some comparisons with Quebec. Chief Mountain's stand against his own Nisga'a government, the government of B.C., and the government of Canada. Consequences of the current situation. Some examples. An explanatory discussion of the issue. Chief Mountain's alternative. Economic consequences. The threat of the third order of government. Building momentum of support for Chief Mountain's case. The critical nature of this issue.

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Contact:

Empire Club of Canada
Email: info@empireclub.org
WWW address: www.empireclub.org
Agency street/mail address: Fairmont Royal York Hotel 100
Front Street West, Floor H Toronto, ON, M5J 1E3

Full Text

John D. Weston
General Counsel to the Chief Mountain Group
SOVEREIGNTY WITHOUT THE REFERENDUM: CHIEF

MOUNTAIN SPEAKS ON BAY STREET
Chairman: John C. Koopman
President, The Empire Club of Canada

Head Table Guests

Duncan N.R. Jackman, Managing Partner, Fulcrum Investment Company and Director, The Empire Club of Canada; Elizabeth Diamantopoulos, Grade 12 Student, North Toronto Collegiate Institute; Rev. Dr. John S. Niles, Victoria Park United Church and 3rd Vice-President, The Empire Club of Canada; Bill Laidlaw, President, Parkelaw Inc. and Past President, The Empire Club of Canada; Mark W. Mitchell, Vice-Chair, Fraser Institute; James Robinson, Chief Mountain; Loudon F. Owen, Managing Partner, McLean Watson Capital and Director, The Empire Club of Canada; Gordon Henderson, President, 90th Parallel Productions; Crystal Robinson, Spouse of Chief Mountain; and Garfield Mitchell, Vice-President, Community Affairs, George Weston Limited.

Introduction by John Koopman

By 1876, the leaders of all the other plains tribes had signed treaties. Half-free, half-Ojibway, leading a tribe of 3,000, Big Bear refused to sign Treaty No. 6. He feared the loss of freedom entailed in it would crush his people's way of life. Eerily prescient, Big Bear predicted the feeling of powerlessness and despair so endemic on aboriginal reserves today.

On October 16, 1969, a young 35-year-old federal minister of Indian and Northern Affairs spoke to this club for the first time. At the age of 31 this young man had already served as parliamentary secretary to the Right Honourable Prime Minister Pearson.

His objective was to preside over the liquidation of his department, and our president described our speaker as the last and greatest minister of Indian Affairs.

The young minister understood the spirit of Big Bear, I think. He had just published a ground-breaking white paper calling for the repeal of the Indian Act. At this club, in describing aboriginal policy up to 1969, the minister said: "Whether we like it or not ... it has led to a blind alley of deprivation and frustration."

The young minister was serving in Pierre Trudeau's government. And it was Trudeau who pithily summed up the intellectual thought behind that 1969 White Paper when he said: "Canadians should not be making treaties with other Canadians."

The minister was Jean Chretien and the White Paper went nowhere. The White Paper's proposals stirred up a storm of protest, and it was withdrawn. Alberta's Harold Cardinal penned what has come to be known as the Red Paper, and that Red Paper's framework has largely governed federal aboriginal policy since.

The past 35 years and the cascade of Canadian history have now brought us to the Nisga'a Treaty. Is the treaty an egress from the cul-de-sac of aboriginal poverty? Or does the Nisga'a Treaty extend a failed, discredited federal policy? To paraphrase Winston Churchill (which is never a bad thing to do at the Empire Club) is Canadian aboriginal policy descending incontinently, fecklessly the stairway, which leads to a dark gulf?

Do Mr. John Weston and Chief Mountain carry on the spirit of Big Bear or are they akin to King Canute ordering the tide not to rise? Mr. Weston and Chief Mountain know the answer to this question.

Mr. Weston and the Chief Mountain Challenge are not for the faint of heart. Anyone raising questions about this treaty is rapidly accused of being mean-spirited. Governments at all levels range from being disinterested in the challenge to being openly antagonistic. The challenge receives no government funding.

Mr. Weston is a very intelligent man. He is not even a full-time constitutional lawyer. He is an international commercial lawyer who has practiced with Baker & Mackenzie and Fasken Martineau. He speaks mandarin and has published over 80 articles. He also runs triathalons.

Chief Mountain, also known as James Robinson, is a courageous man who has suffered ostracism in his own community as a result of this suit. He is also a carpenter and an ancestral Nisga'a chief.

Let's find out why a pair of apparently sane intelligent men would tangle with the most ideologically charged area of Canadian public policy. We will first hear from Mr. Weston and subsequently from Chief Mountain.

Ladies and gentlemen, please welcome Mr. John Weston to the podium of the Empire Club of Canada.

John Weston

President Koopman, Chief Mountain, ladies and gentlemen and friends, it is an honour to be here. For 100 years, the Empire Club has enhanced our image of ourselves as Canadians. It has provided a unique forum for the presentation of issues that have enduring importance, both nationally and globally. The topic I will address today, which is the shape of our Constitution and therefore our country, will affect present and future generations profoundly.

There are very few pop songs about constitutional law, and it is sometimes seen as a dull area. It is often associated with ancient professors or unpopular politicians. As I was flying on the red-eye flight from Vancouver, I wondered how best to impress upon you just how vital this area is, particularly at this point in our history. I fell into a fitful sleep and began to dream. Suddenly, a genie appeared. Sounding a bit like a politician, he told me I could have any wish I wanted. My wish was to compete successfully for the attention of this illustrious Toronto audience. He promised Torontonians would indeed be shaken and rattled by the end of my speech. As Hurricane Isabel closes in today, it looks like I have got more than I asked for.

Everyone in this room is concerned about the hurricane that's coming our way. It's immediate, unpredictable,

and may unleash forces beyond our control. I'm here to discuss another form of hurricane, something far more insidious and potentially deadly than the windstorm coming up from the U.S. The constitutional hurricane gathering force over our country is destined to bring destruction, chaos, and danger that could literally rip Canada apart.

My talk addresses the Nisga'a Treaty. I will explain why Chief Mountain claims the document is clearly unconstitutional and why this issue is important to each of us.

The Nisga'a people number 5,500, 2,000 of whom live on their ancestral lands in northwestern B.C., near the Alaska Panhandle. They received \$453 million in funds pursuant to the terms of the 700-page treaty. The treaty was passed into law by the NDP government in B.C., the Chrétien Liberals and the Nisga'a tribal council three years ago.

Chief Mountain claims the treaty is unconstitutional due to one simple, but critical reason. It says that in at least 14 areas of law-making, if Nisga'a law conflicts with Canadian or provincial law, Nisga'a law prevails. This creates a new nation, or a "third order of government."

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 three, not four, and certainly not over 600 levels of government. Two levels of government. For over 100 years, our courts have upheld this fundamental premise.

In the words of the late Supreme Court of Canada justice, Bud Estey, the treaty is unconstitutional. It creates an "independent nation state," with its own land, boundaries, government, citizens, police force, judiciary, and powers over Nisga'a citizenship.

What has been given to the Nisga'a government 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.

Chief Mountain is an ancestral chief and a courageous man. He 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 1800s. The Chief Mountain of 1881 led the Nisga'a's initial delegation to Victoria to pursue their land claim.

Today Chief Mountain dares to stand against his own Nisga'a government, the government of B.C., and the government of Canada. He has launched an action in the courts to declare that the treaty violates our Constitution. He says that, by turbo-charging his Nisga'a government officials with new powers, people outside circles of government favour will be marginalized and vulnerable. They lack the protections of the Canadian Constitution, he says, including the Charter of Rights. They also lack legislative protections such as human rights codes and oversight by the Ombudsman.

In current cases launched by Nisga'a people, these fears have already been substantiated. In one case, a Nisga'a fisherman has 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.

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. He declined jurisdiction.

In fact, Chief Mountain claims his and other Nisga'a lands were traded away by the Nisga'a government in return for its new, overarching powers.

In addition to Mr. Justice Estey, many other constitutional experts have concluded the treaty breaches the Constitution. The list includes Mr. Justice William McIntyre, formerly of the Supreme Court of Canada; Mr. Justice Michael Goldie, formerly of the British Columbia Court of Appeal; Chris Harvey, one of Canada's top constitutional lawyers; and Derek Creighton, one of Vancouver's top litigators. These and other lawyers have joined me to represent Chief Mountain. They are all convinced the treaty is unconstitutional and that the case is absolutely fundamental to Canada's future. Consistent with these beliefs, the legal team has written off, subsidized and postponed its fees to keep Chief Mountain's claim alive in the courts. If the courts agree with us, the treaty will be declared invalid from the get-go.

The Nisga'a Treaty is a template for all aboriginal bands, in B.C. and throughout the country, including Ontario. Its principles are already being applied in

negotiations for new treaties. In fact, just last Friday, I had people in my office who plan to challenge the newly drafted treaty that governs the Westbank band in the Kelowna area. Following the Nisga'a example, the Westbank Agreement says that, in certain cases of conflict, Westbank law will prevail over Canadian law.

The third order of government principle also applies to old treaties even those completed over 100 years ago in places like Ontario. It's clear that a band whose ancestors were not aware of the third order of government powers available to them will have the sympathetic ear of judges to re-open and re-negotiate old treaties.

As Matthew Coon-Come said when he was Grand Chief of the Assembly of First Nations, Prime Minister Chrétien can't have his cake and eat it too. Either bands are sovereign and independent, or they're not. If they're sovereign, how can they be subject to Canadian law, courts, and tribunals?

Creating hundreds of separate nations within Canada will simply splinter the country. And I emphasize, contrary to what you may hear from the mouths of aboriginal elites, this is not what rank-and-file aboriginals or ancestral leaders want. They do not look forward to tribal councils with the powers of a national government. Who will protect the average Nisga'a if there is an abuse of power? Who is accountable for the \$453 million the Nisga'a government received? Who can challenge the Nisga'a government decision to spend millions of dollars on its own parliament building? Who will constrain the action of the Nisga'a government's president or their newly appointed cabinet ministers? There is over 90-per-cent unemployment in Kincolith, Chief Mountain's ancestral home. In this desperately poor and dependent community, a very small group has been given unbridled economic, legal, social and political power.

None of you would want or accept this situation in your own neighbourhoods, particularly if nine out of 10 of you were unemployed with little or no hope of employment in the future, except from your government.

So what does Chief Mountain seek as an alternative? 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.

The third order of government or a plethora of separate nations may be coming soon to a theatre near you. Prime Minister Chrétien has pledged to make self-government a cornerstone of any new treaty, even though the government acknowledges we lack a clear definition of "self-government." As I've said, 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 a candidate to recognize its own independent self-government, equipped with the same sovereignty as that conveyed by the Nisga'a Treaty.

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 an appalling level of control over land, people and purse strings.

The economic consequences are obvious. Depleted tax dollars. More red tape. Lowered bond ratings. Retreating

investment dollars.

Prior to their election, 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. But, once elected, they performed a 180-degree snap turn, abandoned their appeal, and now oppose Chief Mountain in the courts.

As Campbell and Plant found, 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.

The Chrétien government does not have a longstanding commitment to the third order of government. Ottawa's commitment to this new and dangerous path is only a decade old.

So there you have it. Chief Mountain, a carpenter of modest means, lines up against the taxpayer-supported lawyers of three governments: the compromised B.C. government; the flip-flopped Chrétien government; and Nisga'a government officials, who themselves negotiated a treaty over the heads of Chief Mountain and other ancestral leaders.

A combination of expediency and a cowardly fear of speaking out about aboriginal self-government are combining to suppress these matters, in public and in the courts. You would think our elected officials would unanimously back a hasty judicial review of self-government. Instead, they have blocked all avenues of public funding to frustrate a hearing of Chief Mountain's claim. There they are--a modest group of impecunious Nisga'a Canadians, stalled at the courthouse door by three well-funded adversaries, which use taxpayers' money to fuel their Goliath-like opposition. 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.

We Canadians have again and again proven our ability to deal with threats, standing shoulder to shoulder to respond to foreign wars and, more recently, to oppose SARS, terrorism, and polluted drinking water. The third order of government is a new kind of threat, harder to identify since it began with our own governments. But I believe the community of Canadians, ALL Canadians, will meet this threat successfully, too.

In fact, momentum is building. Supporters of Chief Mountain's case now include foundations and agencies, some of which are represented here today: the Donner Foundation; the Garfield Weston Foundation; the National Citizens' Coalition; the Canadian Taxpayers' Federation; and the Canadian Constitution Foundation. If you want to learn more or to join with them in support, please refer to their Web site address noted in the hand-outs. Meanwhile, as Ontario faces a provincial election and the Chrétien era comes to an end, don't forget to ask your elected officials to declare their positions on the self-government issue.

I believe, ladies and gentlemen, there is NO case in the Canadian courts that is as critical as the Chief Mountain Challenge for the future of Canada. If Chief Mountain succeeds, we will have achieved a stable foundation from which all Canadians may negotiate treaties, help aboriginal people attain their goals, and get on with the unfolding of this nation's future. If Chief Mountain can prove the treaty is unconstitutional, we can put in place a new, useful template that reconciles differences rather

than exacerbating them. His template encourages national unity instead of destroying it. His doctrine is that of reason--not treason.

We have a choice to make. Do we remain one nation? Or do we trade away the constitutional rights and protections of aboriginal Canadians, carving up Canada into more than 600 fragmented nations?

This is an epic challenge: not just for flag or anthem, but for the community we call "Canada."

The appreciation of the meeting was expressed by Loudon F. Owen, Managing Partner, McLean Watson Capital and Director, The Empire Club of Canada.

Rev. Dr. John S. Niles, Victoria Park United Church and 3rd Vice-President, The Empire Club of Canada, Crystal Robinson, Spouse of Chief Mountain and James Robinson, Chief Mountain.

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