

CCF UPDATE

Chief Mountain et al. v. Canada et al.

“I have rights as a Canadian and a Nisga’a which are best protected under the Canadian Constitution not a constitution passed by a government controlled by family cliques”.

James Robinson
(Chief Mountain)



Canadian Constitution Foundation Chief Mountain Background

James Robinson - Nisga’a Indian Chief Mountain - launched a court action to fight for his constitutional rights as a Canadian, which are violated by the Nisga’a Agreement.

Negotiated in the 1990’s by the federal and B.C. governments, the Nisga’a Final Agreement creates a new Nisga’a “nation” in northwestern, B.C.

The Nisga’a government has the power to grant or withhold Nisga’a citizenship—even from individuals of Nisga’a descent. Only Nisga’a citizens are allowed to vote in this new, semi-sovereign

country. Laws passed by this new Nisga’a government prevail over Canadian federal and provincial law.

This agreement has constitutional status and cannot be altered except through an amendment to Canada’s Constitution.

If this agreement becomes the template adopted by other Indian Bands, which we understand is happening, Canada could soon have over 600 semi-sovereign countries within its borders, each with its own laws that will trump Canada’s federal and provincial laws.

Thanks to the generosity of donors across Canada, the Canadian Constitution Foundation has enabled Chief Mountain’s “David vs. Goliath” legal challenge to proceed against the federal, British Columbia provincial, and Nisga’a governments.



Chief Mountain et al. v. Canada et al. Litigation Chronology

What follows below is a simplified litigation chronology of the challenge to the Nisga'a Agreement from 1997 to the present (the CCF formally being involved since 2002):

Kamloops Petition:

- In 1997, Chief Mountain petitioned the B.C. Supreme Court in an attempt to set aside the Nisga'a ratification of the Nisga'a Agreement in Principle. Mercy Thomas swore an affidavit in support of the petition. The petition was dismissed on July 31, 1998, by Justice Hunter.
- Chief Mountain filed a notice of appeal from the dismissal of the petition and applied to the Court of Appeal for an interim injunction to halt the process of ratification of the Nisga'a Final Agreement. The application was dismissed on October 1, 1998 by Justice Goldie, and the appeal was subsequently withdrawn.

Campbell Action:

- On October 19, 1998, Gordon Campbell, Geoffrey Plant and Michael de Jong, filed an action in the B.C. Supreme Court seeking declarations that various provisions of the Nisga'a Final Agreement were inconsistent with parts of the Canadian Constitution.

“There is good reason to conclude that the Nisga'a Agreement and the statutory provisions concerning its ratification contravene the provisions of the Canadian Constitution and accordingly cannot have the force of law”.

Justice Estey (Supreme Court of Canada)

Justice McIntyre (Supreme Court of Canada)

Justice Goldie, Q.C. (BC Court of Appeal)

- The Nisga'a Final Agreement took effect on May 11, 2000. The *Campbell* trial took place between May 15 and 29, 2000. On July 24, 2000, Justice Williamson dismissed the *Campbell* action.
- Campbell et al. appealed the decision of Justice Williamson to the B.C. Court of Appeal. They abandoned their appeal on November 9, 2001.

Chief Mountain Action:

- On March 22, 2000, Chief Mountain, Mercy Thomas, Frank Barton, Marlon Watts and Wilp-lth Git Gingolx (a corporation incorporated by Barton, Watts and Thomas) filed an action in the B.C. Supreme Court seeking declarations that

Supreme Court of Canada

Justices Estey (left) and McIntyre testified before the Senate Committee on Aboriginal Peoples that the Nisga'a Final Agreement would create an unconstitutional “third order of government” and would create an “independent self-governing nation state...within the boundaries of Canada”.





Mercy Thomas together with Chief Mountain and other Nisga'a peoples are challenging the "third order" of government created by the Nisga'a Final Agreement.

(Below) What Canada may one day come to resemble if the Nisga'a Agreement becomes the template adopted by other Indian Bands across Canada.



the federal and provincial settlement statutes giving effect to the Nisga'a Final Agreement were inconsistent with parts of the Constitution, including the Charter, and injunctions preventing the federal and provincial governments from bringing the settlement statutes into effect. The defendants included the Federal, B.C. provincial, and Nisga'a Nation governments.

- On April 5, 2000, their application was dismissed by Justice Williamson, on the basis that courts must not interfere in the legislative process.
- Chief Mountain et al. sought leave to appeal from the B.C. Court of Appeal, but on April 10, 2000, the application was dismissed without hearing from the defendants.
- Chief Mountain et al. then applied to the B.C. Supreme Court for interlocutory injunctions. On April 20, 2000, the application for interlocutory injunctions was dismissed.
- Chief Mountain et al. then applied to intervene in the *Campbell* action, but on May 9, 2000, the application to intervene was dismissed.
- The Nisga'a Nation and the Attorney General of Canada subsequently brought motions in the B.C. Supreme

Court to strike out parts of the Chief Mountain et al. statement of claim.

- On December 13, 2002, in accordance with an order of Justice Wong dated September 25, 2001 (despite unsuccessful attempts to appeal the order to the B.C. Court of Appeal), Chief Mountain et al. filed an amended statement of claim.
- On June 16 and July 11, 2003, Chief Mountain et al. delivered notices of motion seeking an order lifting the stay of proceedings that was ordered by Justice Wong in his order of September 25, 2001. The various defendant governments did not oppose the motion and on July 16, 2003, the stay of proceedings was lifted.
- On August 15, 2003, Chief Mountain et al. requested the appointment of a case management judge.
- On November 25, 2003, Chief Justice Brenner convened a pre-trial conference in the case.
- From November 26, 2003 to May 2005, the case was bogged down in procedural delays due to applications and challenges to the applications to remove counsel for the plaintiffs Barton and Watts as solicitor of record, and to remove plaintiffs Barton and Watts as parties.

- Mr. Justice Pitfield was appointed as Case Management Judge in May 2005.
- From June 16, 2005 to June 3, 2008, the case was held up due to applications from the defendant governments for demanded particulars, a motion by the defendant Nisga'a Nation for an order dismissing the case, and notices of appeal by Chief Mountain et al. against the dismissal of the case in its entirety by Justice Pitfield.
- Case management resumed before Justice Pitfield on June 3, 2008.
- On June 20, 2008, Chief Mountain et al., delivered a Notice of Motion for leave to amend the statement of claim. A 5th statement of claim was filed on April 21, 2009. Amended statements of defence were subsequently filed.
- On August 19, 2009, Chief Mountain et al. delivered a Rule 18A Notice of Motion (rule authorizing a judge in chambers to give judgment based on affidavits or similar evidence, which serves to speed up a trial). A response was filed by the defendants on August 31, 2009.
- On October 16, 2009, the defendants delivered a Notice of Motion for an order to strike Chief Mountain et al.'s Rule 18A Notice of Motion.
- At a Case Management Conference held on January 19, 2010, Justice Pitfield made an Order setting the hearing of Chief Mountain et al.'s application for a Rule 18A summary



“There is no case in the Canadian courts as critical to the future of Canada as *Chief Mountain*”.

Chris Schafer, Executive Director and Lawyer, Canadian Constitution Foundation

trial for 5 days commencing on September 27, 2010.

- On April 26, 2010, the parties appeared before Madam Justice Smith who advised that she would not be available the week of September 27th and the commencement of the trial was changed to October 4, 2010.
- On May 27, 2010, the parties appeared before Madam Justice Smith in respect of the admissibility of certain documents. The issue was settled by the parties and a consent order was granted.
- The defendants delivered their written arguments to the plaintiffs on August 27, 2010.

- A final case management conference was held before Madam Justice Smith on September 15, 2010.
- Chief Mountain et al. delivered their reply argument to the defendants on September 17, 2010.
- Trial was held at the B.C. Supreme Court from October 4-13th (excluding the holiday on the 11th). Trial resumed for 4 days commencing January 11, 2011, and continued on March 1st and 2nd, 2011. A decision in this case is pending.



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