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## Comments on the Draft Nisga’a Treaty

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### Executive Summary

Because it is the first modern treaty in British Columbia, the draft Nisga'a Treaty has properly come under close scrutiny. It will inevitably set benchmarks by which dozens of further treaties will be measured, even though more urban land claims will require a different mix of cash, land, and resources.

This "template" characteristic, plus an unprecedented proposal for a third order of government unlike anything in the Canadian experience means that the Nisga'a Treaty is an unusually important matter of public policy. Unfortunately, governments have not provided for proper public advice and consent, which may lead to unfortunate consequences.

The very constitutionality of the treaty is in doubt, and the subject of several lawsuits as at this writing.

This paper concludes that there are significant positive elements in the treaty as drafted, but that the negatives clearly outweigh these on balance. The paper lists and reviews many of these areas, and challenges some of the comforting government assertions claiming "certainty," "Charter supremacy," and the alleged end to special tax treatment.

The main focus of the paper is on issues of *Citizenship* and *Governance*.

With respect to citizenship, the paper argues that the effect of the treaty will be to exacerbate the distinction between natives and non-natives, to the detriment of all. Nisga'a citizenship defines a *closed society based on ethnicity*, as distinct from the open and territorially defined provinces and nations that are characteristic of modern societies. In

the proposed new regime, political rights are to be based upon *membership* rather than simple *residence*, the standard now universally adopted elsewhere.

With respect to governance, the Nisga'a Treaty would not merely establish a "municipal type" government as its federal and provincial political proponents pretend. Rather, it describes a new, third order of government, sovereign or paramount *vis à vis* the federal and provincial governments in several important areas in law. In addition, though predictably perpetually subsidized, the Nisga'a government is unlikely to be subject to effective checks and balances of an external nature, and internal accountability may fail as a result of the unusual concentration of power in the Nisga'a government.

The paper examines the apparent motives for this experiment, and concludes that the chosen means may not be the most efficient to reach the desired goals.

The paper concludes that the Nisga'a Treaty self-government plan contravenes three fundamental and hard-won principles of organization that maximize freedom:

- Political rights should not be assigned on the basis of religion or gender or race or culture, but only on the basis of residence;
- Governmental power should be dispersed and balanced rather than concentrated in order that the citizen may rule the state rather than vice versa; and
- The clear lesson of the twentieth century is that the route of the Treaty—collective property and collective choice—is a proven failure. Private property and individual choice is

the surest guarantee of freedom and productivity.

Finally, the paper presents an alternate approach that would allow most of the important objectives of the Treaty to be achieved in a way that would be reversible if found wanting, unlike the current proposal which would be cast in constitutional concrete.

## Introduction

The draft Nisga'a Treaty (as it is at this writing in January 1999) is having to bear all of the critical examination properly due a pattern agreement. Given the fifty-some treaties now under negotiation in BC, and with more to come, the Nisga'a Treaty undoubtedly establishes a starting point for all of the others. No aboriginal politician will be able to afford to take "less" than Nisga'a, but governments may not be supported to even that level. Thus a foundation of expectations has been well and truly laid, which will give rise to much future grief. Governments must bear that blame.

That the Nisga'a have to bear the "pattern" burden is unfortunate in a number of ways. It is difficult for the Nisga'a themselves, who have been honourably engaged in this process for over 100 years, arguably longer than any other tribal group. They thought that in this current process they were dealing with properly mandated negotiators in the federal and provincial governments. This has turned out not to be the case—of a certainty in a political sense, and arguably in a legal sense as well.

During the negotiations the governments quietly moved far beyond the comfort level of their publics in reaching agreement on the draft treaty, and may have exceeded their legal authority as

well. A court case will answer the latter question, but only the court of public opinion can deal with the former. There is simply no avoiding this, and the fault lies with governments that thought to finesse the adoption of controversial fundamental principles without full debate.<sup>1</sup>

The second unfortunate fact is that though the Nisga'a Treaty is unavoidably a pattern simply because it is the first modern treaty to deal with the BC land question, it is the wrong venue for *the* pattern. The remote, culturally and ethnically homogeneous communities of the land-rich Nass Valley are very different from the more mixed, urbanized aboriginal communities of the Lower Mainland, for example. Different settlements will be required, in terms of the appropriate mix of land and cash in various parts of the province.

The third unfortunate fact—though considered an advantage by the governments involved in seeking a "stealth" precedent—is that the Nisga'a territory is so far from the experience of most British Columbians, both in the sense of distance and realities on the ground, that it has until recently been hard for the people in the metropolitan centres of the province to understand that these negotiations are of any real relevance to their lives.

The end result of all of this is that an agreement reached in good faith by the Nisga'a negotiators does not meet that standard on the other side of the table. The public has every right to examine today what they have not been asked to consider during the process, and that may lead to the rejection of the treaty as currently drawn. That is a hard fact, but an unavoidable one. The moral guilt for this unhappy situation lies squarely with the federal and provincial governments, and since the voters elected those governments they will undoubtedly have to pay for the bad faith in

<sup>1</sup> As well, governments have consistently and cynically sought to minimize the importance of principles being established, the quantum of resources being transferred, and the complexities of future intergovernmental relations being mandated by the agreement, in order to slide it past the public.

some way. Approval of the treaty, however, is too high a price—not just for most British Columbians, but also, it will be argued, for future generations of the Nisga’a people.

## Constitutionality

It should be said before proceeding further that there is a serious question of constitutionality involved. According to Section 52 of the constitution, it is the high law of the land, and any governmental actions not in accordance with it are of no force and effect. An action has been launched seeking a court declaration that the Treaty offends the Charter (in respect of failing to provide equal voting rights), the role of the Crown (in providing for paramount legislation without the assent of the Governor General or Lieutenant Governor), and established case law forbidding derogation of constitutional powers as between governments. The contrary argument is that the Treaty simply codifies existing rights of self-government which are already protected by Section 35. My own guess, based on the BC Court of Appeal in *Delgamuukw* and the Supreme Court of Canada in *Pamajewon*, is that there is a very significant constitutional problem here.

No one will know the definitive answer until the matter has worked its way through the Supreme Court of Canada (SCC). This is likely to take years. The question must be asked: Is it wise to ratify and proceed to implement a radically new system without considering the extremely serious effects of eventual disallowance?

The answer is the most expedited possible court consideration in working up from the BC Supreme Court through the Appeal and SCC levels. In the meantime, it is timely to discuss the merits and otherwise of the Treaty as presently written. At a very minimum we may develop thoughts for improvements if the current scheme is set aside by the courts, or otherwise frustrated.

## The net balance of the Treaty

In brief, notwithstanding the near-universal wish of British Columbians to bring honourable closure to this bundle of questions and the very considerable reservoir of good will that still exists, a bad process has brought forth what is arguably and on balance a bad deal.

“On balance” is a key qualifier. There is good and bad in the deal. The good elements are not negligible by any means.

For example, the concept of “reconciliation” is now pretty generally accepted, though many still argue that the past is over, that they personally had no part in it in any event, and that we should just worry about the future. Decisions of the SCC clearly rule out that approach.

The content of a reconciliation agreement remains controversial, but it certainly includes some generous measure of economic resources transferred in exchange for certainty and the precise definition of ongoing rights. It certainly includes the least possible continuing application of the Indian Act, but whether it also means a removal of legal distinctions between Indians and non-Indians remains a matter of hot debate.

Any treaty of this sort will have the salutary effect of removing the pernicious uncertainties imposed by *Delgamuukw*, and at least hold out the possibility of escaping the Supreme Court requirement of communal ownership of Indian title.

A treaty of this sort will have the effect of transferring financial resources with dignity—financial resources that the common Canadian commitment to a social safety net guarantees will be expended in any case.<sup>2</sup>

The draft treaty makes an attempt at building in measures for democratic accountability, though,

as I shall argue later, insufficient in my view. In addition, the drafting has required the completion of an enormous amount of technical work and legal documentation which will gradually evolve into a sort of “boilerplate,” with all of the legal comfort that this gives.

In addition there are other good features which I shall only allude to briefly.

- Consultation obligations, though often onerous, are at least defined.
- The extension of the general law of BC is constructive.
- Courts have often taken the position that the “Honour of the Crown” or a “fiduciary duty” requires that there be a presumptive bias in favour of aboriginals in governmental or court actions. The end of what has been an effective presumption of bias is explicitly agreed. (Sec. 2-57).
- Provision is made for fee simple ownership and the Torrens system.
- Forestry practices are to “meet or exceed” provincial standards and federal/provincial environmental standards prevail.

However, it is important to be realistic. Expressions of minimum standards such as this may in practice be nothing more than words to assist governments in selling the deal to a sceptical public.

With respect to this and other “prevailing standards” clauses, the matter of actual enforcement, or even theoretical possibility arises. Such action requires knowledge of in-

fractions (which in the nature of things will be often unavailable), political will (usually lacking), and sanctions for failure to comply. The record of the relationships in this regard between the Department of Indian and Northern Affairs and various Indian band governments gives little comfort in this regard. The position of other senior governments *vis à vis* a newly constitutionalized and entrenched native government will be even weaker.)

- Generally accepted provincial practices in education and the administration of justice will apply, or at least be persuasive.
- There is some provision for judicial review.
- There is a dispute resolution procedure.
- An attempt is made to deal with the representation of non-Nisga’a, but it is inadequate.
- There is a recognition of the need for standards of democratic and fiscal accountability and conflict of interest.
- The end to exemptions from taxation *appears* to be a “good” from the point of view of public policy. However, for reasons that will be further elaborated elsewhere, it will be possible to use the apparatus of the Nisga’a government for systemic taxation avoidance by channelling many of the necessities of life, such as housing and transportation, through the tax-free government.

Finally, though some may not see this as an advantage, I believe that whatever happens in the instant case, the Nisga’a Treaty controversy will have established that no further treaties will be entered into in BC without a referendum on the

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2 Here we have a problem of cost incidence however. The “safety net” costs are currently largely federal, while a huge fraction of the settlement cost—nearly 50 percent in the Nisga’a deal—will be borne by the province. Post-treaty, federal payments will presumably decrease somewhat over the years, as a notional “offset” against up-front federal costs. For the province there will be no such offset, and indeed, ongoing cash requirements will increase. This lack of “offsets” available to the province in treaties rich in provincial resource components will have to be addressed.

underlying principles of future aboriginal/non-aboriginal relationships. By the time this current Nisga'a experience is completed by the federal and provincial governments, I believe it will be seen as too painful for them to repeat without seeking public support. I suspect that citizens will be quite content to allow politicians or the courts to settle issues of quantum of compensation and the like, but that on the fundamental issues of citizenship and governance they will want to pronounce on guidelines. The public view on such questions may be less flexible if the Nisga'a Treaty is seen to have been implemented by a politically illegitimate process, however.

### Problem areas

There are significant problem areas embedded in the deal, some of which are not yet at all understood by the public.

The treaty is meant to provide *certainty*, but the very extensive ongoing consultation requirements in the large wildlife management area and elsewhere give leverage for huge continuing uncertainties.

The *cost* of the treaty in land and cash is high compared to past practice, and seems virtually certain to call for "reopeners" across the country, as well as a floor for expectations within BC (see Stuart Adams, Public Policy Source No. 17, The Fraser Institute, January 1999).

The bias towards *community property rather than private property* goes in the face of both Canadian practice and the lessons of economic history from around the world. This is a part of the tradition of many aboriginal cultures, but that does not change human nature, nor the fact that we live in a market economy.

The treaty provides that almost all Nisga'a assets will be owned and/or controlled by the Nisga'a government. That has implications for democ-

ocracy which will be canvassed later, but it also has implications for the efficiency of economic management. It is not for governments or anyone else to tell individual Nisga'a how to live their lives, but the treaty in fact by-passes the individual, concentrating economic power in the Nisga'a state.

The treaty creates a massively powerful *collectivity*, rather than an empowered grouping of *individuals*. This decision, if that is what is wished, should be made by Nisga'a individuals, not by the federal, provincial, and Nisga'a negotiators. (I appreciate that the Nisga'a electorate gave a majority vote in favour of the treaty. That is not an endorsement of all of the features of the treaty, but simply a statement that the voters, as informed by the leadership, believe the treaty taken as a whole to be better than the current arrangements. No choice was given, for example, as to preferences for direct distribution of cash and land to individuals.)

Provision exists in the treaty for certain creation of private title to lands, so that amount of flexibility exists, but that is all.

In addition, it should be noted that collective ownership builds in an economic perversity, namely a disincentive to mobility. The major benefits of the collective Nisga'a patrimony will inevitably be available chiefly to those who choose to remain on Nisga'a lands. And yet it is far from apparent that for the economic welfare of any given individual Nisga'a citizen that this location is the best place to be. We shall have to await the details of income distributions, educational opportunities, job creation, and so on, to be more definitive about this, but the general tendency as to the counterproductivity impact of mobility constraints is clear.

Some other briefly noted items:

- The much-vaunted (as a sales tool by governments) application of the Charter of Rights and Freedoms to the Nisga'a government is gutted by the actual defining of the Nisga'a government as "free and democratic" (thus building in automatic passage of the Charter test) and the action of Section 25 of the Charter.<sup>3</sup> Most citizens do not realize this.
- Private rights to the fishery, beyond the constitutionally mandated "Sparrow" rights are inappropriate until the entire fishery is privatized, whether by ITQs or otherwise.
- The restriction of the Freedom of Information and Privacy Act (Section 2-44) is regressive.
- The nickel-and-diming of a shifted (to external governments) cost here, another few millions of dollars of benefit there throughout the agreement makes a full assessment of costing extremely difficult. This was no doubt a shared objective of the negotiators, with benefits (of different kinds!) to each side.
- The wildlife section is a recipe for bureaucratic problems.
- The blanket commitment by the provincial government to consult on new legislation or regulations that may affect the Nisga'a government is not available to any municipality, and would be totally unworkable if replicated in 60 more treaties.
- There is a blank-cheque financing for a Nisga'a bureaucracy of whatever size (see Section 15-3).
- There is an effective exemption of settlement assets from "own source resources" in the calculation of required Nisga'a revenue effort.
- The issue of "taxation without representation" arises, particularly if the expected taxation agreements are completed with the provincial government.

Finally, the ratification procedure, as it applies to all British Columbians except for the Nisga'a (who had a direct ratification vote) is unacceptable in a matter of this great magnitude and principle, especially considering the unavoidable "pattern" or "template"<sup>4</sup> nature of the deal.

But all of the above is really by way of introduction. The greatest mistake of the Nisga'a treaty lies in the matter of citizenship and governance.

### **Citizenship and governance—back to the future**

In the area of citizenship and governance more than any other, we see the Treaty for what it is—an elitist accommodation that is great for the native and non-native leadership, but bad for Canadians, including Indians.

The seminal mistake in Canadian history was setting aside aboriginals as different from others, simply on the basis of who they are, by the operation of Section 91(24), and the subsequent passage of the Indian Act. The Act and government actions quickly made it clear that "different" in most matters meant "lesser." Over more than 100 years there was legally created a parallel society in Canada, distinguished by culture, ethnicity, and often the capricious effect of the law as to who was an Indian and who was not.

By about 30 years ago there was widespread acceptance that the situation was unacceptable by any standard, and a search for new thinking be-

<sup>3</sup> The two governments' very broad view of the sweep and power of Section 25 in exempting aboriginal arrangements from the purview of the Charter is evidenced in their statements of defence to the court challenge mounted by the provincial Liberal party.

<sup>4</sup> To quote Premier Glen Clark.



gan. One stream of thought focused on the *Indian as individual*, culminating in the Trudeau-Chretien Green Paper of 1969. A storm of protest arose among Indian leaders and the government backed down, effectively abandoning the old principle of assimilation. However, *no new set of principles was adopted to replace the old one.*

A quest began among aboriginal leaders and academics for a new paradigm. The idea was to preserve the historic and so painfully earned badge of “differentness.” Ironically, what had been an imposed burden in the past was now to be accepted as the defining value. The solution was clear—Indians in their several tribal groupings are by that very fact different from non-Indians. Indian-ness—the differentness—therefore springs from the *Indian as a member of a collective*. With no debate—perhaps unconsciously, and almost certainly so at the political level—government bought into this approach that the tough-minded Trudeau had so clearly rejected in 1969.

The Nisga’a Treaty represents the full flowering of this approach. There is to be a broadening, deepening, and entrenching of the differences between Indians and other Canadians, in law and indeed, in the constitution. There are to be different laws for different Canadians, and a differential assignment of political rights based on who you are, which in turn is defined by a complex bundle of ethnicity/culture that in most cases comes down to blood lines.

Thus, the Nisga’a Treaty is, at root, all about preserving the collective. *It has nothing to do with the well-being of individual Indians except to the extent that the collective does them more good than harm.* And the citizenship and governance provisions are at the heart of the collective arrangements.

## Citizenship

Citizenship is of transcendental importance. In this treaty the concept is simple. You are a Nisga’a if the Nisga’a say you are, and the primary criterion is your parentage. (There is provision for adoption.) And the Nisga’a citizens are to have a government.

What is here defined, then, is a *closed* society. To illustrate the difference involved in a closed society, compare the more usual political model. I am a Vancouverite if I live in Vancouver, an Ontarian if I live there. That is my choice.

Once that choice is made, political rights are assigned on the basis of residence. That is true even of immigrants from abroad. Once they are physically allowed into Canada, citizenship and political rights are virtually automatic.

That is not to be the case on Nisga’a lands. Residency does one no good. A non-Nisga’a will not have a vote for the Nisga’a government, which will have dominion over much of that individual’s life.<sup>5</sup>

Now some may say, “But that is already the case on reserves under the Indian Act.” And that is true. However, there being a near-unanimous view that the Indian Act has been a terrible failure, it is difficult to use it as a validation of anything.

To recap:

Canada = open society + political rights based on residence

Nisga’a = closed society + political rights based on membership

If one were talking about membership in a strata council or credit union (i.e., other sorts of closed

<sup>5</sup> For example, Sections 47 and 49 give the Nisga’a government control over all businesses and trades, with legislative power that prevails over that of either the federal or provincial governments.

societies) that is all very well, but here we are talking not only about a government, but about a *government much more powerful than the municipal level*. Yet municipalities of course are open societies with political rights based on residence, and anyone would think you mad to propose anything else. Indeed, even the property owners' voting right has long since been removed.

One government apologist argued that this is all right because "Nisga'a will govern Nisga'a, and white will govern white." This is indeed the scheme to be established over a broad range of governmental functions. Try the interesting thought experiment: "What would Nelson Mandela or Martin Luther King have thought of this?"

The concept of a different form of citizenship is basic to the whole question of aboriginal/non-aboriginal relations, and in my submission different categories of citizenship within one country are a grave mistake.

### *Governance*

At this point it will be useful to briefly outline the structure of governance to be established by the Treaty. Please bear in mind some background realities, as follows:

- The population on Nisga'a lands, subject to the Nisga'a government, is about 2,000 persons, divided among four main villages. About 1,100 of these are adults.
- The most optimistic projection of "own-source" revenue for the financing of governance responsibilities is only 25 percent

of actual requirements after a developmental period of 15 years.<sup>6</sup> While the Nisga'a lands are lovely, major tradeable economic production opportunities aside from fishing and forestry are not apparent.

- To the extent that the Nisga'a plan is a template, it will be applied in many cases to much smaller tribal populations in the province.

The Nisga'a government is conceived as a full-fledged government, and the Nisga'a Lisims (central) government will, for example, be responsible for "government-to-government" relations with Ottawa and Victoria. There is a parity of status underlying the entire Treaty approach. This is to be an important government with significant elements of sovereignty, notwithstanding the misleading federal and provincial attempts to characterize it a municipal-type entity.

While it is to have its own constitution, there are some important constraints. There must be elections, a system of financial administration generally comparable to those adopted by other governments in Canada, as well as generally comparable conflict of interest rules.

Following is a listing of the most important legislative powers. The designation (P) indicates Nisga'a paramountcy.<sup>7</sup>

- Own constitution (P)
- Own institutions (P)
- Citizenship (P)
- Culture and language (P)

<sup>6</sup> Tom Molloy, Chief Federal Negotiator.

<sup>7</sup> "Paramountcy" is a constitutional concept to describe what happens when there is a conflict between the overlapping powers of one government with another. In such cases (desirably, but not always!) there are rules that say which side will prevail. The automatically prevailing party under the rules is said to be "paramount." In the Nisga'a Treaty, the word that is used is "prevail," or its variants.

- Assets and lands (P)
- Regulation of trade and commerce (P)
- Public order (subject to BC laws re: police and courts)
- Traffic and transport
- Marriage solemnization
- Social services (including delivery by the Nisga'a government of federal and provincial programs to non-Nisga'a by agreement)
- Health services (including as per social services.)
- Licensing of aboriginal healers (P)
- Child and family services (P)
- Education K-12 (P) (but subject to harmonization with provincial standards)
- Post-secondary (P) (but as per K-12)
- Gambling and intoxicants
- Cultural property (P)

Clearly, these are considerable powers. There is extensive paramountcy, where the Nisga'a government will be supreme. Even in other areas where federal or provincial powers could control, at the end of the day and based on experience with Indian Act band Councils, other senior governments will be extremely reluctant to intervene in any but the most egregious problem areas. In other words, this is a new order of government that must be taken seriously.

Some comments:

As to "own constitution and institutions," no ordinary municipality has such power. Even

mighty Vancouver must regularly approach the Legislature for changes to its Charter.

As to "culture and language," it is curious that this perfectly reasonable devolution has not been seized upon by the sovereigntist government of Quebec, as it surely will be in due course.

As to social services, this is extremely important. As will be canvassed later, small governments with large powers provide a particular challenge for those concerned with democratic accountability. This is a world-wide phenomenon, totally independent of culture. The roll-in of social services places such critically important individual issues as housing, welfare payment, educational subsidies, employment training, and often employment itself under the Nisga'a government. Anyone wishing to defend such a concentration of power on the basis that something like this is already in force on many Indian reserves will have to deal with much recent experience having to do with abuse of power by chiefs and councils.<sup>8</sup>

In any event, the aggregate of the above goes to underline a main point: the Nisga'a government as contemplated is *far* superior to any municipality, however large. Not only will it have many more powers, but it will hold them in a *sovereign and paramount status*, protected by the constitution of Canada.

### *Assessing the plan—logic and stated intent*

The logic behind the idea of self-government appears to rest on three assumptions:

- Government closer to home is likely to be better government;

<sup>8</sup> Indeed, even one of the Nisga'a bands (which is to become a "Village Government" under the treaty) has recently been investigated for "irregularities" involving \$1 million in expenditures having exactly this sniff about them. See the *National Post*, November 6, 1998.

- The particularities of aboriginal communities can only be properly understood and worked with by aboriginal controlled institutions; and
- The dignity, empowerment, and self-esteem conferred by self-government will unleash productive incentives and responsibilities stifled by the present system.

Each of these statements needs to be subjected to hard questions.

First, the concept of “government closer to home” is a variant of the idea of *subsidiarity*—that decisions should be taken at the lowest possible level consistent with available resources, knowledge, consideration of efficiencies, and so on. However, and this is important, *subsidiarity starts with the individual*.

The concept of community in the Nisga’a plan does not start with the individual, but with the *collective*. This clearly makes the relationship of the individual and the collective of paramount importance, and when major powers are concentrated in the collective, as in this plan, the collective leadership is more likely to control the individual rather than vice versa.

The “particularities of aboriginal communities” argument comes down to trust, cultural sensitivity, local knowledge, and so on. This is an argument for a recognition of the need for culturally sensitive individuals, very often aboriginal, in the policy setting areas and above all in the front line delivery systems of social services. But if results are the criteria, it is *not* a conclusive argument for an overall system, such as welfare, to be controlled by an Indian government any more than the overall policy of the welfare system in much of Richmond needs to be controlled by a Chinese government representing the local majority.

Finally, as to “dignity, empowerment and self-esteem,” there is a strong argument in favour of be-

longing to a proud and vital community as a base for personal development. The resources for taking local decisions, both legal and financial, are an important part of this. The issue then becomes, “What is the appropriate community, and how is it connected with the wider world?” This is a very profound and basic question.

This question has an inescapable economic component of great importance to the individual. To the extent that the financial resources from external governments that flow onto Nisga’a lands via the Nisga’a government (and thereby foster a cultural and/or income support environment that provides an incentive for individuals to remain in an isolated location without non-governmental work or wider-world contact), is this a favour to the individual?

What has absolutely *not* been demonstrated, but has been merely affirmed, is that a totally new structure of governance, hitherto unknown to the Canadian constitution, is required for the desired “dignity, empowerment and self-esteem.” What *has* been demonstrated elsewhere is that other cultures (the Hutterites of Alberta are an example) can preserve and protect a community and way of life without even the powers of a mere municipality, let alone those of the Nisga’a experiment.

And finally under this section, *even if one conditionally accepts all of the assumptions which underlie the self-government logic of the Nisga’a Treaty scheme, why should one constitutionalize and cast in concrete what is unarguably a breathtaking experiment and leap of faith until an accumulation of new experience refutes much current experience with lesser-but-similar Indian Act aboriginal governance schemes which would argue in the opposite direction?*

### *Assessing the plan—contra-indications*

To recap points already made, the arguments against the particular plan of self-government set out in the draft Nisga'a Treaty are as follows:

- An untried experiment based merely on academic theory and the interests of aboriginal leaders (who would surely profit by the plan) should not be irreversibly placed in the Constitution of Canada before operational merit has been demonstrated. This immediate entrenchment is neither necessary nor intelligent. On the contrary, it is a principal reason for opposing the treaty as currently written.
- The potential exists for an extraordinarily expensive bureaucracy to grow, free of the usual constraints of internal financial support.
- The plan would concentrate an unusual amount of power in a very small government. The actions of the government would have an inordinate influence over the lives of its citizens. The net result would be to set up a situation whereby government (via skilful use of money and power) would have the potential to control people, rather than an independent people controlling government. This tendency has absolutely nothing to do with culture; it is a statement about universal human nature, observed around the world and throughout history. No internal checks and balances, however well meant, are likely to withstand such a concentration of power in the long run, as long as the major financial resources are provided by the outside world, rather than taxation of the people governed. No *external* checks and balances are likely to be brought into play except *in extremis*, given current political attitudes and the paramountcy provisions of the Treaty.
- The rest of Canadian society is founded on concepts of *private property* and *individual choice*. The draft Nisga'a Treaty would constitutionalize a scheme founded on *collec-*

*tive property* and *collective choice*. This is inextricably intertwined with the scheme of Nisga'a government. It is the vehicle for ownership and/or control of virtually all Nisga'a property.

Of course, these contra-indications flow from the details of the particular scheme, and could easily be addressed by amendments to the Treaty without undermining the essence of self-government. The stumbling block is *the collective question*. Collectivity of citizenship and collectivity of power are at the root of the treaty arrangements.

Put another way, three great principles, hard-learned, of successful democracies are as follows:

- Assign political rights equally to every individual, and not on the basis of religion or gender or race;
- Divide and balance power, do not concentrate it; and
- Provide for private property as the surest basis of freedom and productivity.

Of these three great principles, *the Nisga'a Treaty offends every one*.

It must be said again: If individuals choose to live under such arrangements of their own free will, that is their right. If children are born into communities founded on such arrangements, such communities requiring no special external support (as per the Hutterite example), that is their destiny. But that is not the case here.

What the Nisga'a Treaty asks Canadians to do is provide for major external support to bless and indeed impose on the Nisga'a people a newly constitutionalized structure of governance inconsistent with the lessons of democratic and economic history, to subsidize it, and to build in financial and other incentives for Nisga'a individ-

uals to remain within that system, in a remote and beautiful area otherwise incapable of supporting the growing population to currently required standards. The moral question is this: By what right do we impose such a scheme on people as yet unborn?

### An alternative

It is not sufficient to say that a plan arrived at after many years of discussion by representatives—even if not mandated on the Canadian and provincial side—should be set aside. One should also suggest an alternative. There are many possibilities. The one that follows has the virtue of simplicity.

In terms of the settlement with respect to the past—land, cash, resources and so on—in my view it is preferable to leave these arrangements undisturbed with two exceptions, unless the Nisga’a themselves should wish to re-open them in view of changes in the governance clauses.

The two exceptions relate to fish, and to the extended wildlife area. With respect to salmon, there is no reason why a property right in the resource should not be assigned to the Nisga’a, but it should be done only as part of an overall privatization of salmon rights in the Nass river system, similar to what has already been done in BC waters with respect to halibut and black cod (sablefish). This could serve as a useful test case for the possible extension of ITQs (individual transferable quotas) to other parts of the coast.

With respect to the extended wildlife area, harvesting entitlements should be left undisturbed, but management should remain solely with the provincial government. The principle of Nisga’a government management on Nisga’a government lands, and BC government management on BC lands better demarcates responsibility and au-

thority than the vague scheme of co-management set out in the treaty.

With respect to governance, the Nisga’a lands could simply become a municipality. There can be no question here of “swamping” of votes by non-Nisga’a; very few live in the area. And delivery of non-municipal services (welfare, etc.) in a culturally sensitive manner can be (and has been, here and elsewhere) arranged through a service-by-service agreement with the provincial government.

As to finance, the usual municipal grants would, of course, apply. But above and beyond that, one might look at a minor revolution, namely the direct payment to persons resident on Nisga’a lands of some major portion of funds otherwise payable to the bands and/or tribal council with respect to service to Indians. The Nisga’a government could then tax back those funds for agreed governmental functions. The same principle would apply to at least a major fraction of the \$190 million capital fund provided for under the treaty.

The purpose is clear. Just as taxation without representation is unjust, so representation without taxation is undisciplined.<sup>9</sup> This system would provide a guaranteed oversight *by the governed* of the use of their own money.

It would be interesting to have a plan such as the above put to a general vote in the Nisga’a community.

### Conclusion

The Nisga’a Treaty does not pass muster as a just and wise settlement from the point of view of Canada, British Columbia, or Nisga’a individuals. While for the latter it may appear to be better than what exists now, since we are talking “for-

<sup>9</sup> I owe this formulation of the concept to Tom Flanagan of the University of Calgary.

ever” (from the perspective of any single lifespan at least) it had better be made as right as possible.

Even those who reject this view should surely have the intellectual humility to consider that constitutionalizing novel arrangements should only be done after some experimentation (where such is possible, as it certainly is in this case) has demonstrated that the proposed arrangements will indeed work as planned.

The greatest problem in current treaty negotiations at all tables, not just that of the Nisga’a, is the “forever” problem, for each side. The course of wisdom is bold experimentation, subject to open, fulsome, and hard assessment—and change as required. Learning comes from experience. Through no fault of the Nisga’a, the accumulated experience so far will not support constitutionalizing this treaty.

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## About the Author

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Gordon Gibson is Senior Fellow in Canadian Studies at The Fraser Institute. His current areas of research include federalism, governance, and aboriginal/non-aboriginal relations.

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The Hecht Foundation project has as its goal the production of proposed principles to inform public consideration of the many emerging issues in aboriginal/non-aboriginal relations, and especially as relevant to the treaty process in British Columbia.

Mr. Gibson has also written Fraser Institute books and monographs in the field of federalism and national unity, the best known being *Plan B: The Future of the Rest of Canada*, and *Thirty Million Musketeers*.

Mr. Gibson is also active in private business, and writes a weekly column for the *Globe and Mail*.