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## A Principled Analysis of the Nisga'a Treaty

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## A Principled Analysis of the Nisga'a Treaty

The proposed Nisga'a Treaty is forcing the lay public to do its first in-depth thinking about aboriginal policy in the nation's history. All recent previous attempts at public dialogue, such as the Trudeau/Chretien policy paper of 1969, or the Mulroney Royal Commission on Aboriginal Peoples, or the many writings and symposia of academics, have been essentially "insider" affairs. The general public has been massively uninterested.

Now, finally, comes a case that for reasons of huge financial and political implications simply cannot be ignored. The public interest has finally been engaged—after the deal was done. It is too bad that the public wasn't more involved *before* the document was initialled by the negotiators. Governments must bear the opprobrium for failing to obtain a prior negotiating mandate for new arrangements of clear constitutional importance.<sup>1</sup> In any event, the debate cannot now be denied, irrespective of the fate of the particular Nisga'a proposal. Unfortunately, governments are still not prepared to engage in fundamental discussion, which means there is much unnecessary turmoil yet to come.

Government thinking remains a prisoner of the constitution of 1867. The world of 1867 was very different from that of today: *132 years ago, some people were considered much more equal than others.* For example, women were not to receive the right to vote for another two generations. And the 1867 world was racist. In the eyes of the governing white protestant Europeans of the time, Jews were distrusted, while blacks, Chinese, and Indians (among others) were thought inferior. However, only Indians were visited with the curse of

constitutional recognition, and were thus frozen in time. The estate of women, Jews, blacks, and Chinese (among others) has changed beyond all recognition over the past century. But Indians are still legally Indians. Until we understand the adverse consequences of that, we will get nothing right.

The constitutional basis for discrimination against Indians is twofold. In 1867 the federal government was given explicit legislative responsibility for "Indians and lands reserved for the Indians." In 1982 the constitution was amended to provide that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The first provision gave legislators the right to single out certain Canadians on the basis of race. The second extended that power to judges, and gave *them*—not *legislators* as elected representatives of the people—the final word on determining and interpreting the law.

As a result of the constitutional facts, Indians have been treated differently by the state than have other Canadians. For whatever reason, the results are almost universally considered unsatisfactory, though there is no such universal agreement on the solutions. The Nisga'a Treaty represents an attempt to improve things by new constitutionally protected arrangements that will treat Indians as more different still. The fatally flawed foundation of all of the policies, laws, and judicial decisions over the years (i.e., the treatment of some people in law on the basis of race) has not been re-examined by governments nor by most Indian leaders or scholars in the field.

<sup>1</sup> That the Nisga'a Treaty would engage the public was guaranteed by the decision to constitutionalize a new form of government. Had the governance provisions followed the earlier Sechelt model, the debate would have been much more muted.

Reassessment is required, and it is by no means an academic exercise. Despite the constitutional basis of aboriginal policy, the vast majority of the actions that have been taken are not *required* by the constitution, but simply *permitted*. Many aboriginal policies are therefore changeable, including governance systems, which is the focus of this paper.

This paper proposes a reassessment by looking at the Nisga'a Treaty from various principled points of view, each of them fundamental to conceiving Canada. These viewpoints are as follows:

- federalism
- democracy
- freedom
- citizenship
- the individual and the collective
- equality
- morality

No doubt every reader will be able to form his or her own views from each of these perspectives. What follows is but one set of conclusions, and comments would be appreciated. The greatest novelty and usefulness of the approach perhaps comes from the insistence that any such principled look should be taken *at all*.

### Plan of analysis

This study assumes that the reader is generally familiar with the contents of the Nisga'a Treaty,<sup>2</sup> but it may be useful to describe what the framers

were apparently seeking to achieve. There are three overall concepts. One is the idea of *reconciliation*, which carries ideas both of compensation and new ways of living together. A second is the concept of *empowerment*, the general idea that if aboriginals are given the proper legal and material resources they will solve their own problems. Finally, as I see the framers' approach, is the concept of *recognition*, an affirmative statement of aboriginal difference, and of the importance of that difference.

The treaty provision of material resources to aboriginals is designed to deal with both the compensatory aspect of the past<sup>3</sup> and the wherewithal for a productive future. The quantum here is essentially a matter of negotiation and pragmatism to be worked out by political leaders and I will not comment upon it in this paper. (However, the proposed governance structure to manage these resources will be examined.)

### Recognition

Equally, I will say little on the subject of recognition, except that it has two aspects. One is the simple recognition that, for better or worse, there is a classification of persons in Canada known as aboriginals, and a recognition that there are traditional and existing social structures involved. All of this is simply a matter of fact rather than controversy.

The other goal of the concept of recognition as seen by many aboriginal leaders is to obtain a preliminary stipulation that we are here dealing with collectivities which have a moral (as distinct from legal, which is a separate question) entitlement to

2 For a review by this author see *Comments on the Draft Nisga'a Treaty*, Fraser Institute Public Policy Source no. 18, January 1999. See also Stuart Adams, *Understanding the Nisga'a Agreement and Looking at Alternatives*, Fraser Institute Public Policy Source no. 17, January 1999. For a variety of other views see *B.C. Studies*, No. 120, Winter 1998/99, University of British Columbia. The Nisga'a Treaty itself is available from the B.C. Ministry of Aboriginal Affairs.

3 Governments like to downplay that aspect, fearing precedent. The compensation rights confirmed in *Delgamuukw* have not yet been addressed by the courts, and could be very large or quite small.

special treatment in the Canadian state. That I reject as a preliminary stipulation. Some may arrive at that conclusion after analysis, but it is not appropriate at the beginning of thinking about first principles to assume a major conclusion.

## Empowerment

What remains for this discussion of the three underlying concepts is that of empowerment, and apart from the above cited resources, the essential ingredient said to be needed for empowerment is the set of legal powers generally referred to as “self-government.”<sup>4</sup> This idea is the primary source of controversy surrounding the Nisga’a Treaty.

It should be said *en passant* that two peculiar circumstances elevate this part of the Nisga’a Treaty to a high range of importance. The first is the “forever” problem. The Treaty is to be constitutionally protected. It therefore must be as right as human minds can make it, and we are short of experience—especially successful experience—with this idea of Indian government.

The second elevating force is the “template” problem. Premier Glen Clark must rue the day he used the word to describe the treaty, but there can be no doubt that if ratified, the Nisga’a Treaty as written will set a standard to be met or exceeded by all other aboriginal politicians involved in the 50-plus treaty negotiations under way in British Columbia.

Needless to say, when you put “template” and “forever” together, this focuses attention and unease. Were there agreement that the Nisga’a adventure in self-government would not be

constitutionally protected until it had the benefit of years of successful operation, this would vastly ease the pressure, but the parties to the Treaty do not seem willing to contemplate that.

## Justifications for the Indian government concept

There appear to be three ideas that justifications the Indian government concept, and they are as follows:

- Government closer to home is likely to be better government;
- 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 Indian government will unleash productive incentives and responsibilities stifled by the present system.

Each of these statements invites hard questions.

For example, the “government closer to home” idea is a concept beloved of decentralists, but one which must deal with other issues of resources, economies of scale and democratic accountability. It seems unlikely, for example, that the Nisga’a governance provisions have been designed with the tests of “subsidiarity” in mind. The governance provisions almost certainly pose problems inherent to all small scale governments.

The “particularities of aboriginal communities” are really issues of cultural sensitivity which can be dealt with in many other ways.

4 Words can be the enemy of thought. The abstract principle of “self-government” is to be supported for all individuals and collectivities. The controversy arises when, as in the Nisga’a Treaty, the particular form of “self-government” that is to be imposed and maintained by the force of external law may have counterproductive impacts on individuals inside or outside the collective. To clearly identify exactly which form of the abstractly desirable “self-government” we are talking about, I will use the words “Indian government” to distinguish the particular model being established in the Nisga’a Treaty.

As to “dignity, empowerment and self-esteem,” there is a powerful argument in favour of belonging to a proud and vital community. But the issue then becomes, “What is the appropriate community, and how is it connected with the wider world?”

This “wider world” question is of greatest importance when one recalls that in BC, about half the Indian population now lives off-reserve, mostly in cities, and there has been no serious contemplation of the extension of Indian government to aboriginals not on Indian territory. In addition, much evidence exists to suggest that aboriginals off-reserve tend, on average, to do better according to most socio-economic indicators than their on-reserve counterparts.

Because of the number of Indians now living off-reserve, any comment on a new form of Indian government in BC, such as that proposed for the Nisga’a, has to note that *at best*, such government will serve a minority of Indians. That need not be a bad thing. Gary Sandefur, a senior sociologist at the University of Wisconsin, makes an interesting case that Indian reserves should function as did the Catholic church until this century in semi-feudal rural communities from Poland to Quebec. In these transitional cultures the church was a repository of conventional wisdom, which can provide individuals a psychic base upon which people build their lives. But—and this is a crucial difference with proposed Indian governments—the church did not typically control sufficient economic wealth or legal power to determine the economic and legislative fate of the parish. It is an argument of this paper that this “sanctuary” model must be based upon free choice and offer individual growth as well as collective identity if it is to be useful.

In addition, and as a practical matter, there is already a good deal of experience with Indian governments, both in Canada and the United States. None of them have had as much power as that

proposed for the Nisga’a, and none of them have had the elements of constitutionally protected sovereignty. On the other hand, many existing Indian governments have enjoyed a great deal of de facto independence. The results of past experiments have at best been mixed, whether for reasons of the Indian territory being too poor, or cultural problems within the band being severe, or size and structure being too small, or some other reason altogether.

With all of those caveats, I proceed to a principled examination of the Nisga’a Treaty’s version of Indian government, and do so from the various viewpoints indicated above.

## Federalism

Federalism is one of the greatest inventions in governance. The ability it gives for different people to get on with their different lives while still working together on the things they hold in common is a proven winner. Canada is, of course, a federation, but some of its more important collectivities are not recognized in the federal structure. Thus, many thinkers have seized on the idea of Canada as a “multi-national state” as a necessary extension of the work of Confederation. The extra “nations” are French Canada and various aboriginal tribes.

A majority of Canadians have an instinctive aversion to this idea. It has nothing to do with intolerance of the idea of some people being “different.” Live and let live is a powerful component of the values of this perhaps most ethnically diverse nation on earth. The aversion arises from a sense that members of the new “nations” to be recognized in a multi-national Canadian state will somehow be better than ordinary Canadians, in that they will receive special attention, or subsidies, or legal powers. With respect to Quebec we have seen this aversion in controversies over entrenching a “distinct society” clause, even if it is a nearly empty phrase.



To give a concrete example of the distinction, Hutterite colonies are very different places from most Canadian communities. However, as voluntary organizations with no legally buttressed or financially subsidized differences, no one can have any objection to their lawful activities, however different from the norm. On the other hand, an Indian government, having powers vastly superior to those of any municipality and major financial subsidies, causes unease. Life on the Hutterite colony may well be much farther from the Canadian mainstream than life on the Nisga'a lands, but the difference is a matter of continuing choice, not legal fiat. The issue is thus not tolerance of difference per se, but of differing systems and entitlements.

In addition, Canada's federalism has always worked best where Canadians in their capacity as provincial citizens (or Hutterites, to stretch a point) have been required to pay for their provincial programs with own-source taxation. It works less well when provinces are financial wards of Ottawa—and Indian governments have been and will be financial wards in a manner far more dramatic than any Atlantic province.

With those caveats, to which we shall return, the principle of federalism is broadly supportive of Indian government, as long as it is based on clearly defined geographical territories. (Non-territorial federalism has been the object of some academic research, but little real-world experience.)

However, there must be a test for the appropriate division of powers in the context of federalism. Without arguing the point further here, the sensible test seems the European notion of *subsidiarity*, which holds that decisions should be made by the smallest units of society properly resourced for the particular purpose in terms of knowledge, finance, being able to deal with externalities, and so on. In terms of application to a Nisga'a arrangement of one central and four village governments for a few more than 2000 people on Nisga'a

lands, subsidiarity might preclude some of the powers contemplated in the Nisga'a Treaty.

## Democracy

Democracy and its concomitant, accountability, are absolutely fundamental to the Canadian view of an acceptable governance system. Some aboriginal organizations speak from time to time of "traditional" or "custom" forms of governance, often with elements of heredity, but my guess is that no government of Canada would ever agree to constitutionalize an Indian government model that was not based on democracy.

That said, democracy depends upon much more than form. It must have the substance of a genuine control of the leadership by the governed. At a minimum, that means clear information flows on matters of public importance and regular opportunities to vote on who shall lead.

It also requires the ability to cast a free vote, and this goes beyond the machinery of the secret ballot. A free vote requires a free voter, and here we come to a fatal and perhaps irremediable flaw in small governments with large powers.

Small governments with large powers may acquire the ability to control the citizens, rather than vice versa. Of course large governments may do this as well, but in practice bureaucracy often provides checks and balances. Top down control is easier in small situations. This is a worldwide phenomenon, totally independent of culture.

The proposed Nisga'a government—a small one—would have very large powers. Because most cash and resources in the economy will flow through the Nisga'a government by virtue of the terms of the treaty, people will be uncommonly dependent upon and beholden to that government. This dependence will not be merely for municipal type services (roads, garbage and so on), but also for matters of intense and immediate im-

portance to the individuals concerned, matters such as housing, social assistance, and even employment. The Nisga'a state will control so many things. Health and education will presumably be available to all, but higher education and extraordinary health measures will be rationed and discretionary as they always are. There will be strong and obvious incentives for citizens of this government to go along with those in power in order to get along with their lives.

The Nisga'a Treaty has attempted to build in standards and balances for democratic accountability, and the Nisga'a tradition of leadership is an honourable one. But remember, this is a template, so it will set the rules for others. Also, times and people change. The Nisga'a Treaty's attempts at balance and democratic accountability may be quite inadequate against a determined attempt at small-group control some time in the future.

The problem of democratic accountability is escalated because the Nisga'a government will largely be using "other peoples' money," through federal and provincial transfers flowing through the Nisga'a state.<sup>5</sup> When local taxpayers pay the bills, they have a powerful incentive to control the government. When the bills are paid by outsiders instead, the locally governed have every incentive to conspire with the local government to extract maximum gain from external sources, rather than prudently use the available resources. Tom Flanagan of the University of Calgary has put this well with his dictum that, just as you shouldn't have taxation without representation, nor are you likely to get good representation without full taxation.

In short, on the "Democracy" test, there are grounds for concern about the Nisga'a Treaty scheme. Of course there have already been many

examples of abuse of the conjunction of "large powers and small governments" by various Band Councils across the country, and a grass-roots (largely female) movement to fight for accountability has now sprung up on the prairies. The problem is a real one, and the Nisga'a plan would not only increase the powers available to small governments, but constitutionalize them.

## Freedom

Freedom is generally seen as a basic good in our society, as long as it does not tread upon the freedom of others. (I speak here of individual freedoms. The matter of the collective is considered below.) The essence of freedom is having resources, choices, options. The basis of having options—freedom—rests upon cultural and material endowment. The cultural foundation of freedom is the broadest possible education. The Nisga'a Treaty has no obvious implications here, except that it may increase the inducement to remain in a remote area, less culturally rich in most dimensions save that of its aboriginal culture. That trade-off can only be assessed by the individuals concerned.

However, the Nisga'a Treaty has major implications in terms of *material* options available to the individual.

In part, Western history has been the development and diffusion of private property. This is not to exclude public property or enter into a debate on the proper balance between the two, but the twentieth century has demonstrated clearly that those states with the greatest respect for private property tend to be those with the greatest prosperity and freedom. The Nisga'a Treaty does have implications in this respect.

<sup>5</sup> The federal negotiator estimated that 75 percent of Nisga'a government funding would still have to come from external sources after 15 years.



Specifically, almost the entire material endowment of the Nisga'a people is to be owned and controlled by the Nisga'a government. Neither the treaty nor the ratification process gave individual Nisga'a the option of owning and controlling their share, or even part of their share, of the land and capital and other asset endowment established by the Treaty. This is a serious concern. Freedom is not only a good in itself; it is central to a functioning democracy, as noted above.

To be fair, the Nisga'a Treaty does not forbid or impede the accumulation or possession of private property by Nisga'a, except such measures as may potentially be imposed through the usual method of taxation, on which the Treaty has little of precision to say. There is also provision, but no requirement, for the creation of privately owned lands, with certain restrictions.

## Citizenship

The Nisga'a Treaty provides that Nisga'a citizens basically obtain citizenship by aboriginal heredity, or adoption. Only Nisga'a citizens may vote.

There is a special wrinkle here whose implications are not yet clear. Every Nisga'a citizen is to have a vote, but the majority of Nisga'a live off the lands, and these people will have only 3 in a total of roughly 30 representatives in the Nisga'a legislature. Almost all representatives will come from the four villages, i.e., will be elected by Nisga'a living on Nisga'a lands. Unless this is somehow compensated in ways not set out in the published constitution, that would seem to create

*de facto* two classes of citizenship and certainly not "one person, one vote."

That Nisga'a *alone* can vote sets up a closed society. This was not at all unusual in earlier times. The glories of ancient Greece, for example, were built on a class of citizens and a class of slaves. Modern society, however, is almost universally based on citizenship conferred simply by residence.<sup>6</sup> Territorial citizenship automatically means an open society.

Closed societies are recognized for many special purposes. Trade unions and credit unions and partnerships are examples. However, these rarely touch the basics of an individual's life, and where they come close (union closed shops, for example), they become controversial.

There are at least two reasons why the ownership of government by a closed society is problematic. The first is that barriers to mobility almost invariably work against those putting up the barriers in the long run. A closed society is almost certainly going to be less vital and interesting than an open one, nor will it present as many opportunities to its members.

It may be objected that, valid or not, this is the business of the Nisga'a themselves. That is not correct. In the first place, my calculations suggest that only about 44 percent of adult Nisga'a actually endorsed the treaty.<sup>7</sup> In the second place, Nisga'a children not yet born have no voice in that decision. In the third place, the only way that the Nisga'a society can effectively be closed is by laws passed and enforced by the rest of us. We

6 Age restrictions continue to apply, as may required periods of residence, but for all practical purposes, if I have been born into or moved to Canada, I am entitled to citizenship wherever I live.

7 Official results show that 1,451 of 2,376 eligible voters supported the treaty. However as Minister Jane Stewart confirmed in a letter dated November 20, 1998 to Liberal leader Gordon Campbell, "Of the roughly 5,500 Nisga'a Nation citizens, about 40 percent are under the eligible voting age." That suggests that a complete voters' list, comparable to those assembled for federal and provincial elections, would have shown some 3,300 names. I do not know why the enumeration was so incomplete, but there can be little doubt that the affirmative vote of eligible citizens was well below 50 percent.

cannot evade responsibility. We will return to this issue under the rubric of morality.

The second reason that the ownership of a territorial government by a closed society is problematic is that it will affect the lives of territorial residents who are not citizens. In the Nisga'a territory there are relatively few such people, and they could easily be given full citizenship with no threat whatsoever to Nisga'a ethnic control of government. However, that has not been done, and this therefore becomes a test case for the many other areas where there are significant numbers of non-aboriginals on aboriginal lands.

It is true that non-aboriginals have no vote for the band councils on any aboriginal lands at the moment, but there is a difference. The federal government, for which everyone can vote, has ultimate control over any band council. Where that ceases to be so, as *de facto* happened to the leaseholders on the Musqueam Reserve in Vancouver who thought they had a deal with the federal government but found that no longer to be true, much trouble can arise.

The Nisga'a case would go a bridge farther. Under Indian government of this kind, major powers—not just municipal powers, but full control of trade and commerce (with paramountcy) and other important day-to-day governance issues affecting non-aboriginal lives—would be beyond their control.<sup>8</sup>

The usual objection is that curing this problem would require citizenship for everyone and a possible swamping of the Indian vote. That is true. That is the issue that must be faced squarely: ought Indian-controlled governments to control the wide powers affecting non-Indians, as set out in the Nisga'a Treaty, or should the powers of such governments be restricted to matters di-

rectly related to "Indianness," i.e. management of lands and assets, cultural issues, and so on.

This question may be ducked in the Nisga'a case because the number of people involved seems so small, but the issue will not go away. The so-called "Sechelt model" seems acceptable to some, though more experience is required. The saving grace of such experiments is that they are not cast in constitutional concrete, and can indeed be adjusted over time if experience so requires. (Of course for those who believe that a constitutionalized third order of government is required, adjustment on the basis of experience is exactly what they do *not* want.)

The final question under this heading of citizenship has been raised by Alan Cairns, distinguished UBC Professor Emeritus in Political Science. The issue he raises is this: the evolving relationship of aboriginals and non-aboriginals within Canada presupposes continuing, cooperative, and generous arrangements, often costly in economic or other terms to non-aboriginals. (That is not to say the costs ought not to be paid. This particular argument is a political, not a moral one.)

Mutual cooperation and the bearing of costs that do not evidently meet the test of self-interest can only be supported when all share citizenship. This is the reason for strong support for equalization by Canadians in "have" to those in "have not" provinces, for example. How far, asks Cairns, can differences in the condition of citizenship—"distinct societies" if you like—go before the essential political support for the legal and economic costs falters, and the arrangements fail as a result?

Indeed, one of the strongest arguments for holding a referendum on the principles of BC treaties is that this is the most certain guarantee that the

<sup>8</sup> Taxation remains an open question. The treaty provides for the potential delegation of provincial taxing powers.

bargain, whatever it is, has the required majority citizen support.

### The individual and the collective

There is an easy assumption in much of the literature and often in the public mind that collectivities are worth supporting, in and of themselves, simply because they exist. Mind you, this is seldom put to a hard test. Indian government proposals do exactly that.

If we consider any collectivity of human beings that makes claims on persons outside the collectivity, two hard questions must be asked:<sup>9</sup> what is the worth of that collectivity to its members? what is its worth to outsiders?

To demonstrate that these are the *only* two questions, we must ask: does any collectivity have any free-standing value, other than the sum total of its values to persons? We often speak as if that is the case as if, for example, multicultural collectivities are a free-standing good, quite independent of their value to persons. Significant federal and provincial cultural expenditures are made based on this, though of course they are actually made in the pursuit of votes.

My own view is that no collectivity has a free-standing value. In other words, one can only justify special measures by outsiders (or insiders!) to buttress the Nisga'a collectivity by way of law or cash or personal efforts by relying on a positive assessment of its value to persons.

The writer is not equipped to assess the value of the Nisga'a collectivity to its members. This collectivity has endured an awfully long time as a functioning political entity. That establishes a *prima facie* case that at least for those persons actively participating in it, the collectivity has a net

positive value to them. However, one can also observe that considerably more Nisga'a people live off Nisga'a lands than on. By making such a move these people have cut themselves off from the Nisga'a government (as it is presently organized) and the benefits of much federal money plus other important cultural resources. What conclusion can one draw as to the value of the Nisga'a collective to these people?

Will the under-representation of those Nisga'a citizens living off the lands de facto limit their entitlement to Nisga'a government assets and benefits? Will they enjoy equally the fruits from the large land and capital endowment, for example? No one knows. It will be in the hands of the Nisga'a government, largely elected by persons living on Nisga'a lands.

The other side of the coin is the value of the Nisga'a collective to *non-Nisga'a*. I emphasize the word *collective*. We are not talking about Nisga'a *persons*. All Canadians have an equal value as persons. We are talking about the value of the Nisga'a *collective* to outsiders.

Again, one must carefully draw distinctions. To the extent the Nisga'a collective has property rights or other rights in law, it does not matter what any one thinks about it. It is simply a fact to be accepted. The honouring of law and due process is such a fundamental characteristic of Canada that it is beyond this debate.

But beyond the issue of legal entitlement, what is the value of the Nisga'a collective to outsiders? Everyone will have to answer for themselves. A not inconsiderable group of people would say that a culture has a value in and of itself, and therefore deserves to be supported quite independently of other considerations. But my guess is that most people would say something like this:

<sup>9</sup> Of course, this does not apply to claims such as property rights of the collectivity. The reference is on claims based on continuing social consent, the budgets of Indian governments for example

to the extent the Nisga'a collective helps with our common obligation to other Canadian citizens, or to the extent that it delivers services more efficiently or otherwise assists the public interest, it has value; beyond that it has none. If that is indeed the majority approach, and it was applied, it would bring about a revolution in Canadian aboriginal policy.

This is not an easy issue, above all for the people most concerned. As Simon Fraser University Professor John Richards has observed

A Punjabi peasant who immigrates to become a taxi driver in Vancouver undergoes a cultural shock, but it is less than that of the Indian who moves from Lac La Ronge to Regina. There is something to the anthropologists' argument that the decisive cultural break in history is between hunting/gathering and settled agriculture. The former did not require major long term investments in capital goods and a collective ethic was conducive to group survival. On the other hand, to be efficient, both agriculture and industry require long term investments and an ethic that legitimizes private property. (*Market Solutions for Native Poverty*, Toronto: C.D. Howe Institute, 1995.)

In part, the Nisga'a Treaty can be seen as a fight against such a "cultural break." Is that useful to the individuals concerned?

There is much room for dialogue on this issue. In terms of impact on individual lives, there can be no doubt but that the most important stake in this debate is held by the Nisga'a themselves—i.e., what is the *internal* value of the collective as compared to other schemes, other means of distribution of assets, and so on?

## Equality

There are few more powerful words in the political lexicon than "equality," and also few more capable of differing interpretations. The major fault lines run along the dimensions of formal versus substantive equality, or equality of opportunity versus equality of results.

This paper will resolutely avoid that political thicket, and deal only with the following fact: there is virtual unanimity in Canada that formal equality or equality of opportunity is a minimum standard. And, quite simply, the Nisga'a Treaty fails this minimum standard. Nisga'a citizens will not be equal to other Canadians. In some areas they may be superior (e.g., the ability to vote for and obtain the services of one extra government, and to continue to claim the special attention of the federal government). In some areas they may be the losers. For example, they will bear the burden that rests on anyone singled out on a basis (such as race) deemed illegitimate by most people. They will experience the perverse incentives of law and cash inducing a burgeoning young population to continue to reside in a beautiful but remote area largely devoid of non-government jobs and lacking in non-aboriginal cultural amenities. And, by virtue of Section 25, the Charter protections available to most Canadians will continue to be attenuated for Nisga'a citizens.<sup>10</sup>

Finally, the non-aboriginal residents of Nisga'a territory will clearly not be equal to Nisga'a residents. There is a definite Charter issue for them here, and indeed it has already been introduced into the court process.

10 Section 25 of the Charter is as follows: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims, agreements or may be so acquired."



## Morality

Finally and most fundamentally, by setting up special legal/financial/policy regimes for aboriginal Canadians, we interfere with their lives in unusual ways. How do we justify this?

As a thought experiment, consider a newborn Canadian. As a general proposition we say that this new person comes into the world with certain rights and freedoms as embedded in the laws and policies of our society. As a practical matter society cedes the support and socialization of the newborn to the parents in the ideal case, but stands ready to backstop these efforts to guarantee a minimum standard of access to health and education, and freedom from fear and abuse and so on. While obviously parents have differing resources, as a society we try not to advantage or disadvantage any youngster as compared to any other, except that where parental resources are wanting for any reason, we try to help.

Now consider the case of a newborn Indian child. We immediately adopt an approach based on race. This new child is subject to a particular set of laws while other children are not; this child is subject to many incentives and disincentives (such as to where to live, what culture to adopt) directed either at the child or her parents. Broadly, the outcomes appear to be similar for the Indian child of today as for the Indian child of 50 years ago, though the policy mix has changed. (Some civil rights have improved among Indians, as have some services such as education. But on the other hand, the effects of the welfare regime have clearly worsened.)

Edmund Burke's idea of government included the concept of an intergenerational contract. The role of the contract is to preserve the good parts of our past, and pass them on to our children. Just as aboriginals have valuable cultural traditions, so do the rest of us. Indeed, most people would argue that the essence of Canada is contained in the

liberal, individual, free and democratic traditions we enjoy. The omnipresence of highly subsidized, collectivist, and powerful Indian governments may significantly reduce the real options available to children born therein.

What right has our society to treat any newborn child differently from another, based strictly on whether or not the parents appear on a long list of names in Ottawa identifying who is and who is not an Indian? What right has society to construct a strong set of incentives to adhere to a particular collective which may or may not be a constructive addition to the child's welfare? The *parents* have that right under our usual practices, but it is not the parents who set the special laws and policies and incentives. That is done by the rest of us. From where do we gain this right to so interfere in a new life?

This is a revolutionary question. Every person who supports the Nisga'a Treaty must be prepared to give an acceptable answer to it. No marks will be given for the argument that we must help those who need help. That is already agreed, on a totally non-racial basis. Whence comes our right to subject Indians to a different legal and policy regime from other Canadians and, in the Nisga'a case, put that regime into the constitution to govern generations unborn?

## Experience

To those who would refute the above arguments or would sweep them aside as unimportant in some greater scheme of things, I close with a strong argument of simple pragmatism.

Human beings learn by experience. All the experience we have to date with more modest forms of Indian government—and indeed many of the policies other than governance embedded specifically or by necessary implication in the Nisga'a Treaty, such as communal ownership of assets—suggests caution in pursuing this course.



The Nisga'a Treaty is in many ways "more of the same": more of Indians-as-different, more of closed societies, and more power to their elites. The results of this "Indians-as-different" approach are known to all. It has been a human tragedy by many social, economic, and cultural measures, notwithstanding a great deal of money and the best of intentions in recent years. That tragedy should introduce a bit of humility into the plans of the policy makers.

It would cost absolutely nothing to take the safer approach with respect to this new experiment in Indian government. The safer approach is to test the plan in action for a reasonable time before casting it in constitutional concrete, as the Nisga'a Treaty intends to do.

Certainly, we could try an experimental approach. It should be beneficial to all concerned. There is no court-ordered imperative that new governance systems be implemented at all, let alone constitutionalized. The Supreme Court of Canada in *Delgamuukw* declined to consider the matter of Indian government, but in *Pamajewon*

made it clear that *if* (and they explicitly made this a hypothetical statement) if Indian government existed at all as a constitutional matter, it would be a narrowly construed thing. In addition, the two senior benches that have clearly commented (the appeal courts of British Columbia and of Ontario) have definitely ruled that there is no room in the constitution as it stands for any third order of government.

In other words, the Nisga'a Treaty is a *voluntary* constitutional adventure. It is not always possible to experiment with proposed changes before they are irrevocably set, but there is no such impediment to experimentation here.

## Conclusion

Indian government is a conceptual mistake. One may agree or disagree with that conclusion, but surely it would be the course of wisdom to remove the governance aspects of the treaty from constitutional entrenchment, pending satisfactory experience with a few working models.

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## About the Author

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Mr. Gibson has also written Fraser Institute books and monographs in the filed 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*.