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Principles for Treaty Making

by Gordon Gibson, The Fraser Institute

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Introduction

Notwithstanding all of the well-publicized difficulties, it is clear that the business of treaty making with aboriginal tribes will continue in Canada, and especially in British Columbia. For those who are concerned with the course of the current process, there is an obligation to suggest alternate approaches. In discussing this, a few caveats should be noted at the beginning.

First, one should say what treaty-making does *not* achieve. Many people think that treaty making is synonymous with the comprehensive resolution of aboriginal/non-aboriginal issues. ***This is simply not true.*** Treaties are chiefly of importance to status Indians living on Indian lands. But this is a minority of aboriginals.

Of the approximately 1.1 million Canadians identified by the 1996 Census as of aboriginal ancestry, almost 300,000 no longer self-identified as aboriginals as such. The assumption is that they have made the choice to integrate into the larger society, and apart from special considerations such as occasional cultural contacts or cash entitlements from treaty settlements, which are probably rare for this category, treaties mean little.

Beyond that, of those who *do* continue to self-identify as aboriginals, only about half are, or will be, highly affected by treaties.

Some of these approximately 800,000 self-identifiers were Métis, Inuit, or non-registered Indians. Of the approximately 488,000 registered Indians identified in the 1996 Census, about 54 percent lived off-reserve, mostly in urban settings. Adjusting for known data problems[1] the off-reserve proportion declines to a bit under 50 percent. While these people may have a legal connection with treaties (by way of ratification voting, for example) by far the major impact of treaties will be within the boundaries of the identified land base. Natives living off their land base and urban natives will continue to live under ordinary provincial laws and receive provincially-delivered services[2] unless they choose to return to the land base. (Such a return, of course, even in the face of fewer opportunities for employment, is one of the hopes of some aboriginal treaty makers.)

An example of this on-reserve/off-reserve disconnect was seen in the ratification vote for the Nisga'a Treaty in the fall of 1998. According to government statistics, some 3,300 Nisga'a should have been eligible to vote. In spite of extensive advertising and other attempts to register people, in spite of the great importance of the vote, and in spite of the special arrangements in the treaty to provide for "urban locals" in Vancouver, Prince Rupert, and Terrace, only about 2,400 persons actually voted. On the reasonable assumption that most of the "missing" 900 were off-reserve, that suggests an off-reserve participation rate in this once-in-a-lifetime event that could rationally be expected to have positive financial consequences for those voting, of only about 50 percent.

1 Counts were not possible or were incomplete on 77 reserves containing perhaps 44,000 people, and another 10,000 or so in prisons were not included. In addition, these figures are difficult to reconcile with the legal status lists maintained by Indian Affairs because of different conceptual bases.

2 In addition to some federal entitlements. The question of who pays—the federal or provincial governments—for provincial services to Indians, remains a large issue.

More generally, statistics from the somewhat earlier Royal Commission on Aboriginal Peoples (RCAP) suggested that for self-identifying aboriginals[3] overall, only about 35 percent live on-reserve, and of the balance, some 45 percent live in urban areas (very broadly defined) while the other 20 percent are rural.

In short, while treaties, which contemplate reserve-type situations, are extremely important to some aboriginals, that cohort is only something like one-third of the total census-identified aboriginals, and less than one half of the self-identified. Far too little attention is paid to the off-reserve group, and yet aboriginal ghettos are becoming a major issue in western cities such as Winnipeg, Regina and Saskatoon,[4] and very important in Vancouver's Downtown Eastside.

Those left out

It is a shocking truth that while the privation and adjustment problems of reserve Indians arriving in urban settings are often greater than those of foreign immigrants arriving in Canada, the latter have a major financial and institutional support system, while the urban Indians are largely ignored.

Notwithstanding this, ***RCAP data show clearly that in terms of jobs, incomes, education, life expectancy, lesser reliance on welfare, lower family violence, and other such indicators, off-reserve Indians and other aboriginals do much better than those on-reserve.*** Of course, treaties seek to increase the incentives for Indians to stay on-reserve. That amounts to a clear choice in favour of the one route of the above three that has historically yielded by far the worst socio-economic outcomes (the other two involving greater or lesser contact with the general, off-reserve community).

Equally strange is the near-total indifference of most of the Indian Industry[5] to the estate of the roughly 300,000 people of aboriginal ancestry who no longer self-identify as aboriginals. These are people who appear to have "voted with their feet" in a cultural sense, and become ordinary Canadians. How well are they making out? The best the $58 million Royal Commission could do was to footnote that there is some evidence that these people have "socio-economic characteristics quite similar to Canadians as a whole."

Think about that for a moment. If this is the case, those of aboriginal ancestry who have left the culture (in a self-identification sense) are quite similar to ordinary Canadians in terms of health, suicide, employment, incomes, education, substance-abuse, and so on. What does this suggest? Benign neglect of such an important question is understandable in terms of what turned out to be the Royal Commission's agenda. Still, it is surely not right in human terms that the Commission's researchers were not instructed to follow this question to its logical end.

Treaties as the "flavour of the decade"

The above said, the more glamorous treaty issues are centre stage in British Columbia, and under current thinking of government and aboriginal

3 That is, including about 200,000 Métis and about 40,000 Inuit, plus non-registered North American Indians.

4 1996 Census figures give the aboriginal identity population percentages in these three cities as 6.9, 7.1, and 7.5 percent respectively.

5 Defined as those who gain a major share of their income or status as a result of the separate category of "Indian" existing in Canadian law and administrative practice, including bureaucrats, lawyers and other professionals, specialist academics and native leaders; more on this later in this text.

leaders will increasingly become so across the country. Many may feel, as Pierre Trudeau famously said almost thirty years ago, that it is unconscionable that Canadians should be making treaties among themselves. That remains my personal view in this context.[6]

There are indeed outstanding items to be settled between aboriginals and others, but these issues can and should be seen as simply very important matters of the law of property rights. Remedies (including compensation) should be resolved by negotiation if possible, or some mix of litigation and legislation if need be.

The courts at all levels have consistently expressed a preference for the parties to settle their differences by negotiation, but have not insisted on treaties as the final settlement instrument. However treaties, which are given constitutional recognition and protection under S.35(3) of the 1982 Constitution (as amended in 1984), arguably can give a degree of certainty not available in an ordinary agreement. This is particularly important in British Columbia, given the immense legal uncertainties stemming from the Supreme Court of Canada's 1997 Delgamuukw decision.

The essence of Delgamuukw is that Indian title existed in BC prior to the effective extension of British sovereignty, and continues to exist as a burden on land titles unless properly discharged. Where title still resides in the Crown, the burden must be recognized and dealt with by agreement. When title has been or will be irredeemably infringed (as is permitted for good public purposes, presumably including the grant of fee simple title to private interests), compensation is due.

From the point of view of all concerned, this uncertainty needs to be resolved. From the point of view of *governments*, compensation for past infringement is a very touchy issue, both in terms of overall dollars, and public reaction. Accordingly in British Columbia, both those Indians who are the legitimate inheritors of Delgamuukw rights and governments have an incentive to sort these issues out in a mutually agreeable way. One technique for doing so is to make treaties which, with respect to the subject area of the province, trump the Delgamuukw uncertainties as a result of the constitutional primacy referred to above.

Political realities are also important, and the flavour of the decade is "treaties" as the vehicle for settling outstanding issues. The concept fits well with the "nation-to-nation" perspective accepted by governments in both Ottawa and Victoria (though not by the Official Opposition in either capital). If governments insist on continuing down this path, we need to study the best way of so doing.

Unfortunately, the process followed to date, which has found its first full flowering in the Nisga'a Treaty, has been extremely controversial with the public. That is not good. Quite independent of the merits of the Nisga'a Treaty itself, in a democracy the issue of process is central. Better ways—ways more fully supported by the general public—should be found. Indeed, if the current government of BC is replaced by the Opposition (as the polls indicate will be the strong likelihood at the moment) better ways will *have to* be found, given the Opposition's rejection of much of the current policy.

6 Trudeau would probably have conceded, and I certainly do, that our constitution itself constitutes a "treaty among Canadians" in establishing the federal principle and provincial governments. Trudeau's Charter of Rights and Freedoms could equally be so described. A supreme irony is that Section 35 of his 1982 constitutional amendments is the legal underpinning for the treaty process. But Trudeau would have perhaps responded that, all of that said, federalism can only be stretched so far, and that the creation of closed societies in citizenship terms goes farther than the elastic will allow.

But those who have difficulty with the approach being taken to treaties at the moment have an obligation to propose a better way. That is the purpose of this essay.

Constraints

As we consider the fundamental principles that should inform a new treaty process, we must remind ourselves that all future actions must be taken in the light of the historical situations we have inherited. Therefore an "ideal" set of principles, such as those that follow, may require political adaptation to the case at hand. The history and circumstances of every tribe are different; their needs and goals are different. Solutions that vary from this or any other purely principled point of view may well be necessary for agreement. However, policy makers should at least have a place to start, from which point they can make such changes as they believe reality requires.

As a second, somewhat related caveat, some of the principles set out below will be deeply threatening to the practical interests of members of the "Indian Industry." This group has blossomed in the past generation to include many thousands of participants, including members of Indian elites, bureaucrats, members of the aboriginal bar, and a myriad of consultants, who gain their livelihood solely as a result of the existence of legal and other differences between Indians and ordinary Canadians. Without such differences, their present work and/or status would not exist.

It is not surprising, therefore, that these industry participants are overwhelmingly dedicated to maintaining and serving these differences. It is their *raison d'etre*. Many of the members of this industry, like any other so closely linked to the well-being of people, want a better world, and are thoroughly and selflessly dedicated to their work. But for most of us who are ordinary human beings, experience teaches that any change which poses a threat to our status and income is invariably and fiercely resisted. The arguments used against change by members of the industry seldom refer to this deeply personal interest, but it is a fact of life.

As the principles to be set out below would, over time, reduce the legal and policy frameworks that sustain differences between Indians and ordinary Canadians (leaving only those differences voluntarily chosen by individuals following their own cultural wishes), one may expect the leadership of the Indian Industry (i.e., those with the greatest stake in the maintenance of difference between Indians and others) to oppose change with vigour and tenacity. This observation does not of itself challenge any given position taken, but rather suggests that all arguments in this field need to be examined with special care.

As a third caveat, and as noted above, the author believes that the concept of treaties between groups of Canadians defined on the basis of their racial and/or cultural heritage is in and of itself objectionable. That said, 132 years of constitutional mistakes (beginning with the singling out of "Indians" in the BNA Act, 1867) and Supreme Court decisions may arguably have left treaties as the easiest option, short of amending the Constitution, which is an even more difficult exercise.

Again, continued litigation might well yield faster answers than the interminable talks we have seen to date, but each side is worried about "rolling the dice." We will almost certainly see further litigation to clarify some legal issues, but negotiation will equally likely be the tool to finish the job of settlement. Thus, to that extent, what follows is a "practical" approach, and the best we can do under the circumstances of history.

Principles and requirements of treaty content

A treaty, as used in the North American aboriginal sense, is an instrument designed to settle past

and existing differences, and provide for future relationships. In many ways, questions of *process* are as important as questions of substance. Both will be canvassed here.

Mandating and ratification

Treaties are agreements between two or more collectivities. When collectivities make agreements, it is important that they have the widest possible support. In earlier times in European history, treaties were made by leaders, with little concern for the wishes of their people.

However, the practice on the aboriginal side of the table seems to have always been more consensual. Advance discussion on the aboriginal side today often (though not always)[7] can provide for a well-mandated set of negotiators, a well-informed membership, and a direct voice of each member in ratification once the mandate is actually achieved.[8]

That said, aboriginal mandating typically supports the options held out by the elites, which options always support their own continued hegemony. No mandating in favour of a level playing field for urban Indians outside of elite control, or in favour of individual as opposed to collective rights (cash distributions of all settlement proceeds, for example) will easily get through this sieve.

There is a major lack of aboriginal mandating in one other very important sense. Territorial *overlaps* exist on many of the land claims in British Columbia. The Nisga'a settlement is currently in litigation brought by two neighbouring tribes, claiming an award of their land to the Nisga'a band. Since the foundation of treaty negotiations in British Columbia is based on land claims, the territorial bounds of those claims should be made specific, distinct, and mutually exclusive (unless there is an agreement as to joint tenancy) *before* negotiations are begun.

The lack of such a requirement is a serious flaw in the BC Treaty Commission process.[9] Some aboriginal spokesmen say this requirement for the elimination of overlap is simply an attempt to divide the aboriginal side. The other side of the table should say, reasonably, that in the first place, areas of misunderstanding should be reduced, and second, one should not have to pay for the same thing twice.

There is another technical, but extremely important aspect of mandating from the aboriginal side. To the extent that what is being negotiated is the resolution of Delgamuukw rights, it must be the possessor of those rights who is at the table. Unfortunately, band groupings, or even tribal councils, may not be synonymous with the owners of Delgamuukw rights. A striking example is apparent in the Okanagan, where the Westbank Band is close to an Agreement in Principle, but is almost certainly not the holder of Delgamuukw rights for the area.

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7 See the internal dissention of the Caldwell Band, Fraser Institute Public Policy Sources forthcoming, regarding settlement negotiations, and the confusion among memberships of many bands regarding the federal Bill C-49 legislation on land management.

8 It must be noted, however, that mandates are achieved only slowly, and many of the current negotiations at the BC Treaty Commission table are hampered by the snail's pace of the mandate development on the aboriginal side.

9 There have been continually moving goalposts here. At first, governments took the position that no Agreement in Principle (AIP) stage negotiations would be started without the resolution of overlap issues. This was shifted to allow negotiations, but not actual approval of the AIP. The current claim is that the actual treaty itself will not be signed without overlap resolution, but as Nisga'a demonstrates, even that rule has already been breached.

As a practical aspect of mandating, it must also be asked whether the aboriginal entity at the table is of sufficient size to have the ongoing capacity to use extensive treaty rights. Even the Nisga'a—one of the larger groupings—certainly do not have anything like the human resources and population density to use a fraction of the stipulated self-government powers which exceed those of even the largest municipality. Some of the bands in negotiation have as few as 400 hundred members, and the largest is under 10,000. Does this make sense?

The mandating practice on the non-aboriginal side of the table is still rooted in earlier times. To be sure, the negotiators have instructions from governments, but none from the people or the people's representatives—i.e., elected MPs or MLAs. Far from seeking mandates from the citizenry, governments[10] in Canada and British Columbia have not even sought negotiating mandates from their legislatures. ***This is simply unacceptable in so fundamental an area, and is a direct cause of much of the controversy in British Columbia today.***

For example, the terms and implications of the Nisga'a Treaty came as a great surprise to most British Columbians. Governments went through certain "consultation" motions, but concealed information about negotiating targets, minimized problems, and chose not to highlight questions of principle for public debate. Accordingly, when the final treaty was first unveiled, public opinion was well disposed, but confused. Initial goodwill has soured as the implications sink in. With growing familiarity the public balance of opinion has, as at this writing, turned clearly against the treaty.[11]

While there is room to discuss different forms of ratification in the far larger non-aboriginal public (as distinct from the direct referendum vote available to each Indian person), it is absolutely clear that the mandating process at the beginning must be thorough and unambiguous. Only thus can general public support be gained. The idea is not to hamstring the negotiators in such matters as quantum of land or cash for settlement purposes, but rather to define the principles and the boundaries of discussion. (For example, will the Charter apply fully to Indian organizations through the waiving of S. 25, or not? Is a "Third Order" of government on the table?)

The choice of negotiator is also of great importance. For the aboriginal side of the table, this is a weighty matter, to be much discussed. For the government side, the general practice has been to give the lead to the federal or provincial aboriginal department (Indian and Northern Affairs, or the Ministry of Aboriginal Affairs). This is wrong. These ministries are deeply conflicted.

Federal and provincial aboriginal departments have a fiduciary and/or advocacy relationship for their aboriginal clientele. Thus, they cannot properly at the same time represent the larger public interest. Governments have sought to compensate for this by having mandates flow from Cabinet, but the fact is that Indian matters are seen by most Ministers as misery best left to others, i.e., the responsible departments. Fortunately, the immense financial and political consequences of treaty making will increasingly bring negotiators squarely under the control of the First Minister, or the Finance Minister in the future.

Within the mandating context, it is also important to consider the positions of third parties and local governments. These private and public entities

10 Unless otherwise noted, "governments" include both Canada and BC.

11 Marktrend survey, September 1999.

have large and legitimate interests in the negotiations of treaties. Attempts have been made to involve these interests on an ongoing basis, but they have been clearly unsatisfactory. The secrecy that shrouds the real horse-trading and decision-making is the barrier here. Clear public mandating about principles will make these tensions easier to resolve.

Reconciliation

Reconciliation is the fundamental articulated goal[12] of the treaty process, emphasized frequently by the courts. There is a general wish among all Canadians that we should live together in goodwill and harmony. That means it is highly desirable that arrangements be voluntarily accepted by all concerned if reconciliation is to be achieved. It is this very strong wish by the majority of Canadians that gives great bargaining strength to the numerically tiny aboriginal side of the table. Aboriginals must agree, or the deal may not meet the "reconciliation" test.

However this does not imply an aboriginal veto on all future arrangements. In democracies everywhere, majorities reserve the right to eventually impose reasonable ground rules on minorities if that is the only way to resolve urgent and important questions. Even in the face of constitutional difficulties, ways can invariably be found to do this. Thus for example certain outstanding issues in the BC treaty process could be resolved, *in extremis* and lacking agreement, by federal legislation. But minorities have their legal and public relations weapons as well, thus arguing powerfully for agreement.

It is true that court decisions have been very important in enhancing the aboriginal bargaining position, but ultimately public opinion is the strongest force in the balance of power at the bargaining table. Of course, since public opinion in this area is woefully uninformed on the hard issues of winners and losers, and on the controversial enhancement of difference between Canadians rather than a convergence to equality, that opinion is also subject to change and erosion as the treaty process unfolds. Indeed, that is clearly in progress today.

At the end of the day, full reconciliation may not always be possible. There will always be people on each side of the table who believe that even a generally agreed outcome was not the best that could be obtained. But reconciliation remains a worthy goal.

12 Indian spokespersons often say, however, that the *actual* goal of governments is certainty of land tenure, and that reconciliation is secondary. In this they are no doubt correct.

Finality

This is a bottom-line goal for most non-aboriginals, and probably for most aboriginals not a part of the Indian Industry. However, a significant number of the Indian elite draw their status and livelihood from *non*-resolution. Finality is not in their personal interest. They attempt to justify this by an in-principle argument against the traditional treaty words of "cede, release, and surrender" with respect to potential claims not covered by the treaty, and to give the lack of finality institutional life in requirements for ongoing consultations and negotiations and co-management schemes.

On the other hand, "when it's over, it's over" is the intent of ordinary people. This treaty making among Canadians is a very painful, costly business that is bearable only because of the hope that there will be an end to it sometime.

From the aboriginal side, "resolution" has an additional component, specifically, giving constitutional protection to treaties. This is because there are historically unusually favourable negotiating conditions now from the aboriginal perspective, which conditions are unlikely to endure as the public gains a greater understanding of the issues. Therefore, any agreement which could be re-opened later might be attacked and undermined in the future, unless constitutionally protected.

This approach of constitutional protection of treaties, however, has the effect of casting the arrangements in concrete. This, in turn, leads to caution on both sides and a quest for perfection. The "best deal" becomes the enemy of a "good deal"—the latter, of course, far more easily achievable. Indeed, it is in part this "forever" problem that makes agreements so difficult to arrive at.

This "forever" problem also makes it all the more undesirable to try to constitutionalize such continually evolving areas as governance. Times change, and as will be suggested later, governance should be and remain a delegated (i.e., non-constitutionalized) matter.

Finality is very difficult to achieve. Partly this is because no one can know what a court will say in the future about any form of words, however perfect. More importantly, finality is a threat (both practical and psychological) to a lot of people who have lived their lives focused on grievance and its redress. It is awfully hard to renounce a major basis of one's life, in saying that the issue is finally over.

That said, and all of the difficulties canvassed, without the maximum practical finality there is no point in doing the hard dealing. There must be a payoff in treaties for all parties in interest, or agreements simply will not happen.

Clarity

This requirement may seem obvious, but experience has shown that clarity may be traded off in order to reach agreement by way of papering over hard issues. *The appearance of agreement through clever words when agreement does not in fact exist is a favour to no one* (except those with short-term political interests), and stores up grief to be amplified to the detriment of future leaders and generations.

This is especially important given the recent practice of courts to stretch words beyond any point imagined in long-ago agreements. The BC Court of Appeal decision in Halfway River First Nation v. B.C. is a textbook case in such an exercise, as is R. v. Marshall (popularly known as the Atlantic lobster victory of the M'ik Maq) in the Supreme Court of Canada.

Treaty agreements must be excruciatingly clear if they are to achieve their objective.

Equity

The overwhelming majority of Canadians want to be "fair" in terms of quantum of settlement. Unfortunately, this broad area of public generosity does not necessarily overlap with the minimum expectations of Indians, who have been led to believe by a generation of fuzzy-talking politicians that just about anything is possible. These misled expectations may for many citizens escape the bounds of generosity into the land of the ridiculous. But that said, the markers so far laid down by the courts suggest that we are going to be talking about very large sums of money and areas of land.

Additionally, Indians do not see settlements as being in any sense voluntarily "generous." They see them as a matter of right, grudging concessions gained only after a long struggle. Therefore, non-aboriginal Canadians should not expect any sense of gratitude whatsoever for settlements reached.

Fortunately, there are two mitigating factors for this problem of differing expectations. First, the real-world negotiating experiences of both federal and provincial negotiators in the BC treaty process has educated governments immeasurably as to the magnitude of their problem. Their increasingly harder lines in turn have gradually educated Indian negotiators as to realistic possibilities. Unhappily, both sides are caught in the expectations of their constituencies, who want to pay less on the government side and expect much more on the Indian side. There is no way to square this circle except by lengthy and painful grinding of the immoveable object against the irresistible force.

The happier factor is that in economic terms, this question of the quantum of generosity doesn't really matter as much as the huge numbers (in terms of land and cash) would seem to indicate. The political reality is that Canadians generally are determined that a social safety net will be furnished, in quantities as required, to everyone

who needs it. This is as true of Indians in need as anyone else. Therefore, a great deal more cash and other resources will have to be dedicated to improving the native condition whatever happens. Huge dollars are inevitably involved. The issue is how best to spend them.

From this point of view, the only question is the timing and manner of payment. Will it be by way of continuing the pattern of endless, soul-destroying welfare, or by a new way of capital payments (in cash and kind) and investment in human resources that establish an ongoing patrimony to displace welfare payments?

As to transfers of land, does it really matter in economic terms whether the government of British Columbia owns a forest and uses the proceeds to subsidize an Indian band, or whether the band owns the forest and takes the profits directly?[13]

Cynics may rightly argue that history teaches us that capital payments or asset transfers to any disadvantaged group are often soon dissipated without enduring effect. However, if, at a minimum, the payments concerned meet the test of reconciliation and finality, so that from that date forward Indians are treated as ordinary Canadians from a social policy standpoint, then that in itself is a development of great value.[14] And of course, capital payments may, in fact, be used to great advantage, depending upon the prudence of the recipients.

Disentanglement

It is a curious reality that notwithstanding the stated wish of Indian bands to get on with their lives under their own control, and the wish of governments to extricate themselves from the myriad problems of the existing situation, treaty solutions arrived at to date or under negotiation tend to provide for a good deal of two-way responsibility and continuing entanglement of one party with the other. For example, the Nisga'a Treaty provides for up to 50 future sets of negotiations or consultations.

To a certain extent this is unavoidable. For example, when a senior level of government provides ongoing funding for a social program purpose, ongoing negotiations, expected program standards, and auditing are required. This is true whether the recipient of the funds is a native government or a municipality or a voluntary agency.

But some of the greatest problem areas are totally avoidable, particularly with respect to resource administration. Provisions for "co-management"

13 Indeed, from a strictly economic point of view, it can be argued that private ownership of any given forest will probably lead to better management.

However, that is not the end of the story. The economic loser in this transaction is the provincial taxpayer, while the economic winner is the federal taxpayer, whose subsidy obligation is reduced by the new revenue produced by the former provincial crown lands. As the magnitude of the numbers involved becomes more apparent, the existing cost-sharing arrangements will have to be revisited, to the additional cost of Ottawa.

14 Of course, large capital payments are much harder to justify if the two tradeoffs of Indians becoming "ordinary Canadians" and the goal of finality are not available.

of timber, wildlife, and fishery resources are simply a recipe for continuing disagreement and bureaucracy.[15] This is one of those areas where the Indian Industry (on both sides of the table) is set on building in its own continuing importance, rather than working itself out of business.

To the maximum extent possible, treaty arrangements should allow each party to do its ongoing routine business without reference to the other. It does not matter a great deal whether, for example, a given block of wildlife resource or timber is under the control of a tribal council (or any other private owner, or a municipality, for that matter) or the provincial minister. Where it does matter is having it nominally under the control of *both*.

In the same vein but as an even greater problem, the Nisga'a Treaty provision that the government of British Columbia must consult with the Nisga'a government on any future legislation that might affect the subject matter of the treaty is simply too broad, to the point of being ridiculous. No municipality, even the largest, has such an undertaking, nor should much smaller Indian governments.

Equality in Law

Treaties should aim at the long term result of Indians being equal with other Canadians before the law. This is not in any way to deny the existence of aboriginal rights and title which have been discovered (and continue to be found) by the courts. Rather, it is to say that modern treaties should have as one of their invariable objects the conversion of such distinctions into cash or into the same class and kind of property rights (the ownership and control of land and capital, for example) available to all other Canadians.

It must be said at once that this simple long-term goal is revolutionary in terms of existing government policy. ***That existing policy is to codify and constitutionalize differences between Indians and other Canadians.*** For reasons argued elsewhere[16] the author believes this policy to be the root source of the current unhappy estate of Indians in Canada, and to be immoral in the broadest sense of the word.

The three following principles are derivatives of this broader one of eventual equality.

Municipal-type government

Senior governments have committed to the concept of a "Third Order of government" for aboriginal peoples without ever defining (even in their own private thinking) what that meant. The Third Order concept is also the bedrock underpinning the recommendations of the Royal Commission on Aboriginal Peoples. However, no court has found any constitutional support for this idea. Indeed, the Appeal Courts of both Ontario and British Columbia have explicitly rejected the concept as being inconsistent with our constitution.

The Appeal Court of BC noted[17] that sovereignty is fully exhausted between the federal and provincial orders of government. There is no more left to go around. Of course, the Supreme Court of

15 See again, Halfway River First Nation.

16 See Gordon Gibson, *A Principled Analysis of the Nisga'a Treaty*, Fraser Institute Public Policy Sources #27, 1999.

Canada may yet invent some different perspective, but for the moment, absent a constitutional amendment,[18] governmental powers for sub-units must be delegated; they are not inherent or sovereign.

There are three theoretical ideas underpinning the demand for a Third Order of government. One is that Indians are different from other Canadians. According to this argument they are somehow more different from the rest of us than are men from women, than old from young, than those of Scots heritage from Chinese, than gay from straight, than left-wing socialist from hard-right capitalist, than religious from atheist, than hermit from Hutterite, and so on. Our ordinary governments in Canada manage to span all of these huge differences quite nicely, but, it is claimed, Indians are so extraordinarily different as to require a Third Order of government. I reject that idea as patent nonsense.

The second theoretical idea is that because the ancestors of modern day Indians were in Canada before the ancestors of most other Canadians, the Indian governance structure that was in place at the time of contact should in some way be re-instituted today. Why this should be is never satisfactorily explained. But governance structures in all societies around the world have changed beyond recognition over the past couple of centuries, mostly for the better. Surely the tests for governance structures for today should be grounded in utility rather than sentiment.

The final idea is that the Third Order is required (so goes the argument) as the indispensable condition for the preservation of aboriginal culture. No such legal discrimination has been necessary to preserve the aforesaid Hutterite culture on the Canadian prairies, nor the culture of the Jewish people around the world in the face of much persecution. Perhaps it is thought by the proponents of this theory that aboriginal cultures are less robust things, but is the preservation of *any* culture at the expense of other citizens (for such things are not cheap in dollars or, in this case, violence to other Canadian ideas such as equality and non-discrimination on the basis of race) a proper object of government? This is a truly fundamental question. I would argue that the preservation of any culture is the responsibility of its adherents, and the role of government is simply to be neutral.

The true, immediate, practical advantage of a Third Order really accrues to the Indian Industry, wherein are found the vast majority of the few Canadians seeing any sense in such an idea. A Third Order identifies elites, preserves them, and gives them status and pay. Priestly elites in the past found this to be usefully the case, and cultural elites are at it here. But is this solution good for the society that has to support it?

Equally, is this Third Order solution good for the very people it is ostensibly designed to serve? As argued elsewhere,[19] it is much more likely to be a bad thing. You do a small group of people no favour by drawing a circle around them and calling them basically different.

There is no greater evidence of this point than to note that existing Indian Act band governments are already a sort of "Third Order" in all impor-

17 In Delgamuukw. The Supreme Court of Canada dodged the issue in its final decision.

18 One of the most serious challenges to the Nisga'a Treaty is that it may be a *de facto* constitutional amendment, through the back door of S.35. This is now before the BC courts and will no doubt be resolved by the Supreme Court of Canada in the end. Until then, every "Third Order" solution that is proposed will be under a legal cloud.

19 *A Principled Analysis of the Nisga'a Treaty* includes a section on the morality (or otherwise) of subjecting one subset of Canadians to a different and arguably oppressive legal regime based strictly on the accident of their birth.

tant respects save constitutional entrenchment. While providing massive funding, the federal government has at the same time withdrawn so far from interference in the internal affairs of most bands—even to the extent of failing to require proper accounting for funding, according to the Auditor General—that band governments are, to all intents and purposes, already examples of race-based governance of Indians by Indians. To put it mildly, results have not been universally positive in terms of democracy, social outcomes, accountability, or economic development. Would one seriously advocate constitutionalizing this experience?

Now, a very different and more respectable argument is that governmental or other services to people will be more effective if delivered in a culturally sensitive way. This argument has great weight, but such a system does not require a Third Order. As an example, it is one thing, for example, to have some Chinese-speaking public servants delivering services to the tens of thousands of Chinese-speaking people in the Vancouver suburb of Richmond, but quite another to suggest a Chinese Order of government.

I conclude that municipal-type governments used successfully for the governance of small communities all over Canada are far more appropriate than the constitutionalized Third Order kind. There is plenty of room for experimentation, as long as the governmental structure is of a *delegated* nature—i.e., instituted by legislation passed by existing levels of government, and capable of change in the light of actual experience with how things work.

Indeed, even such a governance scheme as that contemplated in the Nisga'a Treaty might well be tried with the consent of the governed, if only to show by experience whether it is or is not as deeply flawed as I think it is. However, any such trial should be an *experiment*, not a constitutionalized Third Order cast in concrete as is the current plan.

The experimental approach also leaves room to try out various solutions to one of the most vexing of questions, namely the right (or not) of non-aboriginals to vote for municipal-type aboriginal governments on the grounds that they live in the area to be thus governed. The approach I prefer is simply extending the franchise to all, in the usual way. A sensitive definition of territory (which in crass political parlance would be called "gerrymandering") can in many cases yield predominately aboriginal areas with aboriginal-dominated local governments. The new territory of Nunavut is one such example, though an extremely costly one.

Of course there are other cases, such as Westbank or Sechelt in BC where (because of extensive residential leasing to non-Indians bringing in band revenue) the aboriginal component of the territory would be swamped.[20] The solution adopted in Nisga'a and evolving in Sechelt and Westbank provides for *no* voting rights (save for advisory organs) for non-natives in local government, and two parallel sets of laws and representation as to Indian and non-Indian, with Indian law designed to has as little an impact as possible on non-Indians.

However, apart from the deservedly bad odour in which they are held around the world, total "separate-but-equal" structures are simply not possible. Local schools and hospitals are attended by everyone (unless we want separate schools and hospitals), and local roads are driven on by everyone. Local commercial law, with Nisga'a paramountcy under the treaty, affects Nisga'a and non-Nisga'a alike. The Nisga'a/West-

20 This is not the case in the Nisga'a territory, where very few non-Nisga'a live.

bank/Sechelt approach has been to provide for some non-Indian advisory input. These are legitimate experiments. But Sechelt, most importantly, is *not constitutionalized*.

Another theoretical approach which will no doubt be explored over the years to come is that of a *tradeoff* between powers and representation. In other words, the fewer powers wielded by an Indian government, the less the requirement for non-native representation. Were the powers cut back to simple aboriginal asset management, no non-native representation at all would be called for.

In the end, and with all of the above argument and uncertainty, this is the essential issue: constitutionalized Third Order or not? The issue cannot be finessed. It must be faced. The Third Order solution is not an appropriate part of treaties.

Small Governments, Large Powers

Third Order governments as visualized by the Indian Industry have tremendous powers. On a world scale, these "tremendous powers" are trivial. Yet from the point of view of an Indian subject to a Third Order government, the powers are indeed overwhelming.

Imagine you live in a municipality where the Mayor and Council have an absolute veto over whether you have a house or not, whether your plumbing gets fixed, whether you have access to the transportation pool, whether your child can get a scholarship to university, and whether you have a government job when such jobs are about the only ones available.

Imagine that the Mayor and Council can really run the education system rather than the professionals if they so chose. Imagine this same group has total control over business licensing (including paramountcy over *all* federal and provincial powers, which no municipality has) and over property zoning. Imagine all of this with essentially no outside appeal, no matter what might be said.

Imagine, most frighteningly, that most of the money that flows through your community is controlled by politicians.

Imagine further, that the system is set up to deliberately minimize citizen contact with other governments, in terms of services or financial payments and receipts.

Imagine that elections are decided by a few handsful of people voting basically along family lines, the "ins" versus the "outs."

This is what can happen with small governments wielding large powers. This is the fact of government on many reserves today. The unhappy results have absolutely nothing to do with ethnicity or culture. People are people all around the world. Power corrupts. That is why free societies always seek to control power in designing governance systems. We should not be so blind as to ignore the possibility that pervasive treaty-conferred power might not corrupt its aboriginal recipients just as surely as if they were non-aboriginal.

When governments are given power over the people to the extent that those governments can control elections by controlling voters, "democracy" ceases to have meaning.

The model treaties before us today would constitutionalize such powers and cast them in con-

crete. By contrast, the standard municipal model, well understood throughout British Columbia with its limitations on power and institutionalized checks and balances, makes such a nightmare scenario impossible.

Asset Management

The matter of administering commonly held property is a very different issue. Much of the work of the Third Order of government proposed in the Nisga'a Treaty would relate to asset management, and those aspects of the treaty can be easily preserved.

Administration of Indian community property by organizations controlled exclusively by Indians is nothing different in principle from the many corporations and societies that manage property under ordinary Canadian law. There is no conflict here.

However, Indian asset management entities as set up in the Nisga'a Treaty (or by Band Councils across the country, for that matter) are no ordinary societies or corporations, which are merely instrumental or supplementary to most private property holdings in Canada. Rather, they are holding vehicles for essentially the entire asset base of a community in many cases.

It can be argued, and I do so here, that community ownership of most property is inferior to private ownership of most property, in terms both of husbandry and freedom. Indeed, that is one of the major lessons of the twentieth century, in the economic and political failures of the communist experiments. And in respect of the freedom issue, power over asset management (through the bestowal or withholding of benefits or related jobs) can become just one more route by which a government has the power to control its people and their votes.

Of course, adopting the communal property route as a part of treaty settlements is a judgement to be made by the owners of Indian property and no one else.[21] But other choices should be open, and assessed and chosen by the community, rather than having this single model not just assumed, but actually imposed by treaty. Other Canadians have no right to use their legal power to impose such a model as a matter of law, which is what the Nisga'a Treaty (for example) does.

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21 In this context the repeated emphasis of the Supreme Court of Canada on the collective nature of aboriginal rights is a most perverse doctrine. It is an obstacle that must be gotten around.

Individual Empowerment

Are treaties properly seen as settlements with Indian ***collectivities*** or with Indian ***people***—individuals who make up collectivities? This is an immensely important question.

Should all of the fruits of settlement in terms of cash, land, and ongoing financial support accrue to the collectivity and to the control of the elite managers? Or should some portion, large or small, accrue to individuals?

Should the majority of a collectivity be allowed to make a choice about the system for all individuals, or should individuals affected by a treaty settlement have the choice of saying in effect, "I will take my share and get on with my individual life." My view is that individuals should have that latter option.

There is no proposal that will be so strenuously resisted as this one, for it has the potential to dramatically undermine the power of Indian elites and the Indian Industry. The standard defensive argument of the industry is that such a concept will lead to "cultural genocide" (respect for accurate or moderate language is often missing in these debates) by undermining the collectivity. This is nonsense.

Cultures survive according to their usefulness to individuals. They have no merit or entitlement to support beyond that. By analogy, would anyone seriously argue that the government of Canada should control most of the spending in the country so that Canadian culture could be protected, rather than leaving most choice in the hands of individuals? Of course not.

Private property and individual choice are the very bedrock of Canadian society, and indeed, of freedom itself. Certainly any individual has the right to make him or herself "not free" by ceding their property and decisionmaking to others, but do we have the right to ***impose*** that on anyone? In structuring treaty benefits to accrue strictly to the collectivity, we do exactly that.

Some will point to the Delgamuukw decision, wherein the Supreme Court opined that aboriginal title is a collective right. They will say that the court leaves us no choice on collective ownership. They forget or ignore the fact that one function of treaties is to ***replace*** Delgamuukw with a negotiated solution. That solution can contain whatever distribution of property rights the parties may agree upon.

Negotiators for Canada and British Columbia should maintain a policy of structuring treaties to allow individual members of the tribe concerned some major element of choice in terms of how he or she may choose to take the fruits of the settlement.

Quite apart from notions of private property and choice, ***this system is also the only one that begins to be fair to urban or "off-lands" Indians.*** Under the present system, almost all benefits accrue only to those who choose to reside on the tribal lands. Many people may not wish to do so for whatever reason, including access to employment and urban amenities. An individual entitlement by choice allows such a person access to at least some portion of their notional share of the overall settlement.

Transparency

A final matter of great importance is that of transparency. Nothing is more important to a functioning democracy and true accountability than the public right to know precisely what its governments are up to.

In terms of the accountability of Parliament, while taxpayers currently fund almost all of the activities of Indian governments, court decisions (which Parliament could have overturned but has not) have led to the existing practice whereby the actual use of these public funds by Indian bands is unknown to the public. This is wrong in principle. It is unthinkable that some of the waste and corruption reported from various small Indian governments—reports which may only survey the top of the iceberg—could have reached such an advanced stage were there public, Parliamentary scrutiny of all public funds flowing through Indian governments.

More importantly, as the Auditor General has frequently noted, without such details the general public is prevented from properly assessing the success or failure of existing Indian policy.

Treaty settlements will do nothing to remove this issue from the table. Indeed, the almost $500 million Nisga'a Treaty settlement will not reduce the $30 million per year taxpayer support of band government activities. Quite the contrary: funding will increase by almost 10 percent in order to look after the new costs of the bureaucratic structure set up by the treaty, and the treaty provides that less information than ever will be available to the general taxpayer.

Indeed, Section 2-44 of the Nisga'a Treaty provides that "... information that Nisga'a government provides to Canada or British Columbia in confidence is deemed to be information received or obtained in confidence from another government"—i.e., protected from Freedom of Information laws.

All new treaties should contain a provision that so long as external governments provide more than a certain fraction of Indian government revenues, say 10 percent, the full books should be available to the public.[22] This is, of course, the case with any municipality in BC, with *no* minimum limit. A government is not a private society, like a shopping centre. A government is public property, and so should be its information.

With respect to the Nisga'a Treaty which provides no such comfort, it may be possible to build such a requirement into financing agreements, but it also may be that S.2-44 above would preclude even that protection.

Apart from the legitimate concerns of the general taxpayer, there is a concern with respect to internal Indian government democracy. Without knowing how the funds are being used, tribal citizens cannot assess whether they are being properly spent. Indeed, as frequent newspaper stories attest, with respect to existing band practice, even band members often cannot gain access to the detailed books of account, in spite of material claims of abuse.

Section 11-9(l) of the Nisga'a Treaty says that the Nisga'a constitution must "require a system of financial information comparable to standards

22 This applies only to the use of public funds. With respect to the administration of own-source funds, that is a matter of internal democracy. See below.

generally accepted for governments in Canada." The difficulty is, the financial accountability of federal and provincial governments is not very good, and only works at all because of an active Opposition and press—institutions unlikely to be active in very small governments. The "full, true, and plain disclosure" which governments require of corporations is a far higher standard. That, or the municipal standard is more appropriate for treaties.

As an example of how apparently comforting words (such as those about financial accountability consistent with those of other governments) can have little meaning, one need only look at Section 11-9(k) of the Nisga'a Treaty which requires that "... all Nisga'a citizens are eligible to vote." And indeed they are under the Nisga'a constitution. The problem is that off-lands citizens have a vote worth only (roughly) ten percent the value of an on-lands citizen in electing the Nisga'a legislature. Is this right and proper when the Nisga'a government disposes of a patrimony equally owned by all?

The bottom line is this: where treaties establish Indian governments, they should include very strong Freedom of Information provisions, both for citizens of the Indian government, and for general taxpayers as long as they are significantly funding the Indian government.

Important Other Matters

Contrary to the view many hold, ***freedom from taxation*** is not a constitutionally recognized aboriginal right. Where it exists, it normally flows from Section 87 of the Indian Act, which obscure provision itself has been stretched beyond recognition by the courts.[23]

Indeed, the taxation exemption in the Indian Act had two intellectual justifications. The first was to insulate Indian lands from local tax seizure. The second was to recognize that since Indians did not have the vote, they should not pay tax. However, when the right of the franchise was restored 40 years ago, the mirror responsibility of paying taxes was ignored. Just as "taxation without representation" is wrong, so is representation without taxation. Responsibility and entitlement are two sides of the same coin.

Modern treaties such as Nisga'a will increasingly pretend that Indians will pay ordinary tax like anyone else. A careful reading of the Nisga'a Treaty will reveal that Indian government (i.e., non-taxable) ownership of almost all assets, and the ability to gift the fruits of these assets to tribal members, will mean that the taxation claim is more political and cosmetic than real. Free or deeply discounted housing and services will end up as tax-free benefits for which ordinary Canadians would have to pay in after-tax dollars.

As a second miscellaneous but important matter, the role of the BC Treaty Commission needs to be re-examined. This supposedly neutral facilitator has clearly had its thumb on one side of the scales. When assessed by its results, the Commission should simply be ended.

23 For example, a Federal Court decision recently held that Indians could be "leased" to off-reserve employers and pay no taxes as long as the leasing company had an on-reserve address.

Conclusion

Making treaties among Canadians is a very important business. It is essential that the principles to be followed are well articulated, understood, and supported by the general community. That has not been the case to date.

The principles cited above are intended to contribute to that end. There are four over-riding ideas.

The first is the importance of maintaining flexibility as we proceed with experiments in this field so littered with past failures, rather than constitutionalizing solutions before they have been tried and found successful.

The second is ensuring that solutions have general community support, not just in the tribe concerned, but in the province and the country. If such support is missing, the solutions will fail, no matter how theoretically brilliant the construct.

The third is an insistence on the dignity and worth of individuals, with the collectivity being in a subordinate position. Its powers must always be justified by, and only with reference to, service to the individual.

The final idea, which runs through every particular question to be considered, is that of maintaining the maximum possible harmony with the rest of Canadian society. The practical reason is that without a broad consensus on common citizenship values, funding and other relationships will always be at risk in the trials and strains that always come with an uncertain future. To put it plainly, solutions that are not supported by Canadians generally will not in the long run be funded by Canadians generally.

But even more basic than that, Canadian values such as equality, democracy, accountability, the coupling of entitlement with responsibility, tolerance of diversity, mobility rights, and so on, are so fundamental and cherished that it is difficult to see how any relationship *not* based on such things could long or happily endure.

These value references are not mere platitudes. They are genuine issues when one assesses proposals for embedding by treaty small, special-purpose, closed, and culturally homogeneous societies in a large and pluralistic open society.

About the Author

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This paper is the a publication under a study program funded by the John and Lotte Hecht Foundation. 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.

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