ON THE NISGA'A TREATY

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I CANNOT COMMENT ON THE DETAIL of the Nisga'a treaty, which is now up for ratification, but there are certain broad features of it that seem to be essential. However, these seem to be exactly the ones that are being heavily criticized in the BC press. If the kind of thinking that is expressed in some of the comments prevails, all hope of a genuine settlement between Canadian governments and Aboriginals will be dashed.

What are these criticisms? I want to talk about two here.

1. The first is that the deal is "racist." This is a hot-button word to throw into the debate. As one who has heard Quebeckers called "racist" because they prize their autonomy, I know that this word needs to be taken with a grain of salt. But those who use it are not offering an argument; they are trying to stop people thinking by provoking them to go into a spasm of negative reaction. And this hardly helps.

What does "racism" mean? Well, one meaning applies to Nazis, members of the Ku Klux Klan, and the like. They operate out of a doctrine that a certain group is biologically inferior and so adopting policies that reflect that inferiority, including depriving the target group of certain rights and capacities that others enjoy. No one is adopting such a doctrine in the present case, and no group is being thus targeted. The whole thing comes down to something much less dramatic.

It is that by the Nisga'a treaty, and probably a host of others across the country, certain powers of self-government will be given to a group that is defined by descent; that is, a group that others can't join at will. A minute's reflection will show that this is an essential part of any serious proposal for Aboriginal self-rule.

It is one thing to belong to a group like Quebec, for instance, or the rest of Canada, which is open to accept immigrants and give them citizenship because it is powerful enough to impose the condition that the newcomers integrate in some serious way into the already existing society and culture – that they learn the language, that they take on the political culture, that their children be educated by schools licensed and controlled by the receiving society, and so on. This is something that no Aboriginal society is large and powerful enough to require of newcomers, with the possible partial exception of the new Nunavut jurisdiction in the North – and even there it can only be done in a very limited way.

What would the average Canadian say if some outside group demanded the right to enter the country, to be given instant voting rights, without accepting any obligation to learn the language, or accepting the central values of the society, or accepting any other condition that we now impose? And when we refuse, they would call us "racist" ...

The only way to have genuine Aboriginal rule, which would not turn into a rule that might liquidate the Aboriginal society and culture, is by some restriction on membership of the kind that has been agreed to in this case. The analogue of the Canadian practice of receiving immigrants is not open membership in Aboriginal communities, because in the Canadian case this doesn't come without serious attempts at integration, either required by law or dictated by the conditions of life here; and no such attempts would be required or forthcoming in the case of Aboriginal societies.

At this point, I expect that many Canadians are ready to say: "Well, so much the worse for Aboriginal societies." But this is unacceptable. In fact, it would mean a return to the approach of thirty years ago, where the mainstream Canadian society was supposed to do everything it could to assimilate Aboriginals and then ensure their equality as Canadian citizens culturally indistinguishable from all others.

Now there are three reasons why we can't go back to this. The first is that many Aboriginal groups don't want to go this route. Now there are still a lot of Canadians who don't find this a convincing reason. They don't see why they should give these minorities what they want. Perhaps they still think that the old assimilationist policy was the right one.

But here we come to the second reason: this policy was a resounding failure on its own terms. Its goal was to give substantial equality to

Aboriginals as individuals, but the present condition of life of many Native Canadians shows how far we are from this goal. What is more, experience has shown in a host of areas that people can't take their place as equals in a modern democratic society if they are given no control over the process of integration, if they are treated as passive recipients of favour, and if they are not given some say in the process. It was partly the realization of this fact that brought about the change in outlook in Canadian society, the abandonment of the old White Paper approach of thirty years ago, and the beginning of the process of defining Aboriginal rights.

But this brings me to the third and most powerful reason we must go the route of Aboriginal government. We're not just dealing with any minority of disadvantaged Canadians. These people have rights in virtue of having been functioning societies on this territory when the ancestors of non-Aboriginal Canadians came. We can't just assume that the disposition of their rights is something that we non-Aboriginal Canadians can decide entirely on our own.

2. This brings me to the second point that I find very disturbing in the discussion. People talk about the "creation of a new level of government." Mr. Gordon Campbell, the Leader of the Opposition, in an article in the *Vancouver Sun*, asks his readers to "imagine if your elected representatives passed an amendment to the constitution of Canada that would forever deny you the right to vote for your local government" (11 August 1998, A11). Quite a frightening prospect, out of the blue; suddenly out of the homogeneous mass of Canadian citizens, some would get rights that would be denied to others. This sounds scandalous.

But this kind of imaginary exercise assumes that we are all homogeneous in our rights; in other words, it assumes away Aboriginal rights. It assumes that all Canadians together have the right to decide how to determine the shape of Aboriginal self-rule. And since the vast majority of Canadians are non-Aboriginals, they will in fact define the shape, whatever the Aboriginals feel. This is the kind of thinking that underlies the demand for a referendum on the Nisga'a treaty.

But to proceed this way would be legally and morally wrong. It would be legally wrong, because we can't ignore Aboriginal rights. They are now part of our Constitution, since 1982 (or at least they were given formal constitutional recognition in 1982). We can't consider these matters to be decidable in the ordinary way of constitutional

amendment, by the decision of qualified majorities (e.g., majorities in seven provinces, constituting 50 per cent of the population). They have to be agreed upon bilaterally.

We are not in the process of deciding new constitutional provisions but of giving flesh and substance to a provision that we have already adopted. And the nature of this provision – Aboriginal rights – rules out that the majority determine the content of this right unilaterally.

But even if it were legal to proceed this way, it would be a betrayal – a betrayal of those who were living in this country when we non-Aboriginals arrived. In many cases, we just took over, without negotiating any agreement or coming to a deal on how to co-exist. The non-Aboriginal majority might now have the power to ignore the Aboriginal demands to negotiate a deal by simply asserting a brutal right of conquest. That is certainly how a lot of Europeans operated in the Western Hemisphere. But Canadians decided in 1982 not to operate this way.

And surely we were right. It is not only a matter of living on the cusp of the twenty-first century, where the accepted international standards in this regard have evolved considerably and international instruments are being negotiated on the rights of Aboriginal peoples. It is also a question of how we want to live as Canadians. And we decided that a way of living that creates an inextinguishable sense of grievance and betrayal among minorities is not for us. The basis for Canadian society has got to be a social contract that everyone can freely and willingly accept.

For all these reasons, we decided to go the route of negotiated Aboriginal self-rule. The Nisga treaty is an important milestone in this process. Let it not be rejected for reasons that amount to a profound denial of what our Canadian Constitution enshrines and our Canadian society is based on.