Achieving Legitimacy: The Legal Relationship between Indigenous Peoples and the Canadian State

By

Kathleen Ladouceur

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs
in partial fulfillment of the requirements for the degree of

Master of Arts

in

Legal Studies

Carleton University

Ottawa, Ontario

Your file Votre référence
ISBN: 978-0-494-94320-5

Our file Notre référence
ISBN: 978-0-494-94320-5

Abstract

The Canadian state is founded on a history of exclusion of indigenous peoples, made objects of law in the international doctrines which informed the settlers of what is now Canada. Despite ongoing assimilation efforts, indigenous peoples have maintained their cultural and political distinction and continue to fight for the realization of their collective rights within the Canadian state. In adapting to a diverse citizenry, the Canadian state has included multiculturalism and multinationality in its national imaginary and governance structures, yet these models have failed to provide adequate self-determination and constitutional protection for indigenous peoples. While the courts and state have made advancements in articulating aboriginal rights, the focus on recognition as nation and peoples and on the distribution of rights has led to an impasse between the government and indigenous peoples, while indigenous peoples continue to be subjugated to an unjust governance structure. Despite ongoing injustice, the Canadian state can be legitimized if the space to contest the relations of governance is provided and the state is bound by an obligation to negotiate and amend the relationship.

Table of Contents

Introduction

It should concern all Canadians that to the extent that indigenous peoples are excluded from constitutional membership and denied their right to self-determination, the Canadian state is illegitimate. Founded on the premise that indigenous peoples were uncivilized and incapable of bearing sovereignty, the Canadian state assumed indigenous peoples and their land as jurisdiction of the Crown and intentionally interfered with their communities, cultures and governance. However, the natural law which once justified the Canadian claim of sovereignty over indigenous peoples and their land now recognizes indigenous peoples as peoples proper in international law, bearing an inherent right to self-determination, to form legal and political institutions of their own, and the right to compensatory financial support from host states in forming these institutions due to the damage perpetrated in the settling of the state. Canada, to recognize the rights of its citizens and to achieve democratic legitimacy, must amend the constitutional recognition of its citizen constituents to include indigenous peoples and provide the space for indigenous self-determination and participation in the federation.

Indigenous peoples do not seek secession from Canada, as the treaties established a sacred, eternal relationship between indigenous peoples and settlers. They seek self-determination, the internal aspect of sovereignty, and the rights and powers accorded to sovereign collectives. This internal form of self-determination is codified in the United Nations Declaration of the Rights of Indigenous Peoples[1] [UNDRIP] as not detracting from the sovereignty of their host states, which retain rights and responsibilities within the international community. S. James Anaya identifies

[1] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online: <http://www.unhcr.org/refworld/docid/471355a82.html> [UNDRIP]

five fundamental characteristics that are embodied in self-determination as freedom from discrimination, respect for cultural integrity, social welfare and development, lands and natural resources, and self-government.[2] Canada's recognition of the Aboriginal right to self-governance falls far short of this substantial self-determination, and the state is unwilling to release sovereign control particularly over lands and natural resources. However, Canada's sovereignty is already divided through its federal structure, whereby provincial and territorial governments embody the distinct identities of the citizens and peoples of the regions which also allows their diverse needs and interests to be represented in the governing bodies of the federation. Apart from the Inuit of Nunavut, indigenous peoples do not have participation in federal governing bodies which represent their distinctive peoples, needs or interests.

Further, in defining the Aboriginal right to self-governance, the state closed the constitutional conversation, limiting the Aboriginal right to within the existing constitution, in which Indians and the lands reserved for Indians are matters of federal jurisdiction. The Supreme Court of Canada [SCC] has found that Aboriginal rights are meant to reconcile pre-existing Aboriginal claims with Crown sovereignty, though this very definition makes them unable to do so; reconciliation of the pre-existing indigenous right to self-determination, and sovereignty as it applies to control of the land, is not possible within the constitution of a state which denies this self-determination and excludes the democratic consent of indigenous peoples to both the governance structures and the state itself.

More problematic is the definition of Aboriginal self-governance that places it within the existing Constitution, preventing Aboriginal peoples from contesting their status and the

[2] S. James Anaya, "Indigenous Peoples in International Law" (New York: Oxford University Press, 1996) at 94-125

relations of power within the state. This places no requirement on the state to negotiate and amend the governance relationship with indigenous peoples, who continue their struggles to be freed from governance structures to which they did not consent and which do not recognize their right to self-determination. This is a violation of the principles of freedom and democracy, unwritten principles of the Canadian Constitution, and is fundamentally unjust.

While unwritten constitutional principles help to guide the interpretation and negotiation of the relations of governance within the constitution, a permanent recognition of indigenous peoples and their participation in the shared sovereignty of the state are required. The Constitution establishes the foundation of the state, and the Canadian state must rid its foundation of discriminatory and racist exclusion of indigenous peoples, the First Peoples of Canada. This codification need not freeze indigenous peoples in history and restrict their rights, identities and participation in the state by current realities, as the Canadian Constitution is seen as a 'living tree' which grows with the Canadian state and people. The articulation of constitutional principles would enhance the social solidarity of the Canadian people, bringing indigenous peoples into the national imagination. Only by constitutional recognition of indigenous peoples as collective members of the state and granting them a space in which to negotiate the governance relations within the state can indigenous peoples become full citizens in the Canadian state, achieving self-determination and granting legitimacy to Canadian sovereignty.

The first chapter of this thesis outlines the historical development of the legal relationship between the Canadian state and the indigenous peoples within Canada. This chapter samples the philosophical foundations of the current contested relationship by looking at how indigenous peoples were viewed in the international law which justified Canada's claim to its territory and

the indigenous peoples within it, and the development of federal policy in Canada from its settlement through the official attempt to eliminate 'Indians' as legal persons in the *1969 Statement of the Government of Canada on Indian Policy*. Through an examination of the thematic stages of this relationship, the roots of the current debates become apparent as issues of treaty relations, sovereignty, territory, and citizenship are established. The constant theme in this chapter is the devaluation of indigenous culture and leadership through a Eurocentric view of civilization, which reflects a persistent paternalistic attitude of the Canadian state towards indigenous peoples.

Chapter two focuses on the struggles of Aboriginal people against state assimilationist policies, and analyzes the new frameworks of 'nationhood' and citizenship which capture these struggles. In adapting to a diverse citizenry, the Canadian state has included multiculturalism and multinationality in its national imaginary and governance structures. Multiculturalism fails to recognize indigenous difference and neither the Canadian state nor many First Nations have the capacity to support the requirements of multinationalism as a model for the relationship between all indigenous peoples and the state. The progress made within the Canadian state under these models has failed to provide the constitutional protections required by indigenous self-determination. This chapter highlights that the struggle for indigenous recognition is not only against a colonial seppressor, but against the state structure as well.

Chapter three provides an overview of the advancements of Aboriginal rights through the Courts and by state policy since Constitutional recognition of Aboriginal rights. Through the limitations of these advancements, the current struggles for justice by indigenous groups and nations, as well as the ongoing mistreatment by the federal government, the paternalistic attitude and unwillingness of the state to effectively divide sovereignty and control are clearly

demonstrated. The focus on distribution within a state based on misrecognition of indigenous peoples cannot lead to lasting reconciliation, so theorists have turned to theories of what binds diverse nations together. The ways in which minorities are recognized and protected within a state depend on the relationship between state parties, but Canada has closed this discussion and limited Aboriginal self-governance to within the existing constitution, subordinating it to federal authority. In the recognition of Aboriginal rights, Canada has recognized indigenous peoples as a distinct class of citizens but continues to resist the implications of this recognition.

Despite a history and continued practices of interference, assimilation and neglect by the Canadian state, indigenous peoples do not seek secession both because of social, economic and political realities as well as a particular perspective of treaties as sacred bonds. Indigenous peoples seek full, not equal, citizenship in the Canadian state. While the state and indigenous peoples cannot agree on issues of recognition and distribution, justice demands a change in their relationship. Chapter four outlines the need to democratize the struggle for recognition and distribution, as these contested issues can exist within a legitimate state if the space to contest these relations is provided and the state is bound by an obligation to negotiate and amend the relationship. Thus, only if lasting recognition of indigenous peoples as self-determining members of the Canadian federation is achieved in the Constitution can the Canadian state achieve legitimacy.

The natural law by which indigenous peoples were originally bound into relations of colonization, oppression and assimilation also brings about notions of basic justice.[3] The notion of basic human dignity, which constitutes the moral underpinning of natural law and the

[3] McLachlin, Beverley, CJ "Unwritten Constitutional Principles: What is Going on?" Speech given 1 December 2005 Lord Cooke Lecture, Wellington, New Zealand online <http://www.fact.on.ca/judiciary/NewZeal.pdf> at 6-7

unwritten principles of the Canadian Constitution, holds the requirements of "government by consent, the protection of life and personal security, and freedom from discrimination as core rights and values."[4] These principles have not been realized for indigenous peoples in Canada. They have not consented to the government, and the state is not an expression of the interests, will or cultures of indigenous peoples. These unfulfilled principles are enough to call for change in the relationship between indigenous peoples and the Canadian state, and they are upheld not only by concepts of natural law and justice, but by the principles of democracy and liberty as well. Only through the opening of Canada's discussion of sovereignty, social solidarity and constitutional recognition can the state achieve legitimacy.

[4] *Ibid* at 7

Chapter One: Justifying Conquest and Incorporating Indians

> At the dawn of Europe's age of expansion beyond the Mediterranean world, Western legal thought had legitimated a discursive foundation for Europe's will to empire. Conquest of infidel peoples and their lands could proceed according to a rule of law that recognized the right of non-Christian people either to act according to the European's totalizing normative vision of the world or to risk conquest and subjugation for violations of this Eurocentrically understood natural law.[5]

The European arrival on the Americas in the late fifteenth century required a change in the international legal order. Indians, named precisely by the European's ignorance of the land and its inhabitants, were beings with no legal recognition. As such, while the political race for territorial expansion and economic exploitation continued, intellectuals drew new systems to legally situate Indians and justify the colonial project. Francisco de Vitoria, John Locke, Immanuel Kant and others developed the basic tenets of international law to "account for the relations between the European and non-European worlds in the colonial confrontation."[6] The development of 'universal' natural law justified the colonial expansion of European states through many avenues as they came to 'know' Indians, including the objectification of Indians as possessing reason but lacking civilization, the moral obligation to cultivate bare lands, and the benefits to the local populations. Consistent with their Eurocentric paternalistic approach, settler societies built relationships with indigenous groups which initially served to foster positive relations of trade and coexistence, but later turned to protectionist assimilation as the Canadian state took shape. Indigenous populations were excluded from the realm of international law and the constitutional framework of the Canadian state, which pursued its dream of empire on those territories which the indigenous peoples shared with the newcomers, and on those lands which they did not.

---

[5] Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 67

[6] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004) at 3

Incorporating Indians & Treaty Relationship

> But the exercise of power as efficient colonizing force requires effective tools and instruments... Law and legal discourses were the perfect instruments of empire for Spain, England and the United States in their colonizing histories, performing legitimating, energizing and constraining roles in the West's assumption of power over the Indian's America.[7]

Antony Anghie explores how Vitoria, a Spanish jurist and philosopher, both reconceptualised existing doctrines and invented new ones in order to create a universal legal system in which Spain's colonial expansion into the Americas was justified.[8] Within Europe, rulers had long relied upon the Pope's authority to legitimize their conquest of "heathen territory" thinly masked as furthering the expansion of the Christian world. However, as Spain sought to conquer territories outside of Europe and encountered Indians who recognized neither European legal systems nor papal authority, Vitoria conceived of a natural law system administered by secular sovereigns, that is, state rulers. Vitoria's secular natural law was made to bind Indians through his depiction of the Indian character.[9] Departing from the period's tendency to depict Indians as uncivilized, barbarian, slaves, heathens, animals or sinners, Vitoria is heralded as the protector of native peoples against colonial exploitation for his recognition of Indians as formally equal to Europeans under natural law, and his admission of the Indians' rightful ownership of the land based on their prior occupation of and freedom on the territory.[10] He described Indians as having coherent political systems and possessing reason sufficient to determine moral questions.[11] It is this description as possessing reason that bound Indians to Vitoria's *jus gentium*, for as Indians bore reason they would be able to ascertain the universal law based on reason and thus follows its edicts.

---

[7] Williams, *supra* note 5 at 7-8
[8] Anghie, *supra* note 6 at 15
[9] *Ibid* at 17-19
[10] Williams, *supra* note 5 at 98-99
[11] Anghie, *supra* note 6 19-20

However, it becomes apparent that while Indians were formally equal in Vitoria's view, neither Indians nor their political or social systems were regarded as functionally equal. As European social order, political organization, progress and development were taken to be the markers of civilization and sovereignty,[12] Indians were deemed to be without sovereignty in Vitoria's conception. James Tully notes that Aboriginal governments used an ancient form of direct democracy which did not require the delegation of powers to an institutionalized legislature or executive,[13] and thus their forms of government were either unrecognizable or unacceptable to Europeans. Lacking in 'civilization', Indians were deemed to be less than capable persons and were relegated to the position of object of international law. For Vitoria, Spanish expansion was justified by the fact that Indians did possess reason, and thus could 'achieve perfection' through the adoption of the 'universally applicable practices' of European socio-political order. Thus, heedless of the Indians' own interests in acquiring those practices, Spaniards "acquire[d] an extraordinarily powerful right of intervention"[14] into Indian societies to educate, convert and civilize. Indian resistance to Spanish 'travel,' 'trade,' or 'proselytization' amounted to acts of war and justified Spanish retaliation.[15] Immanuel Kant, almost three centuries after Vitoria, refers to this as his third definitive article of perpetual peace in international law, the 'right of hospitality,' "which gave Europeans the right to engage in commerce with Aboriginal peoples and to defend their traders if the Aboriginal peoples [were] so inhospitable as to deny the right."[16] Spanish conquest is thus depicted as continual self-defense against Indian aggression. Vitoria's characterization of the Indians as possessing reason,

---

[12] Anghie, *supra* note 6 at 103
[13] James Tully *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 78
[14] Anghie, *supra* note 6 at 22
[15] Anghie, *supra* note 6 at 21
[16] Tully, *supra* note 13 at 81

being thus bound by *jus gentium* and capable of change, and of European customs as universal, meant that the practices which justified the expansion of Christendom under the Pope's authority were likened to secular activities such as travel and trade under the new secular system, and thus while the justification changed, the approach did not.[17]

European nations raced to claim territory in the 'new world' and dealt with indigenous peoples according to this conceptualization of indigenous peoples in natural law, that they bore legal personality but that this personality was inferior to that of the Europeans. Particularly in North America, and in what is now Canada, treaties were made between European states and trading companies (given legal personality by virtue of royal charter[18]) and the indigenous societies they 'discovered.' Indigenous groups entered into these treaties with explorers and settlers simply by extending to them the same tradition of treaty and confederation they had used among themselves for hundreds of years.[19] These treaties set out relationships of protection and cooperation, trade partnerships and mutual respect. For Europeans, treaties had less to do with respecting the rights and claims of indigenous peoples than with establishing alliances with them and staking claims against Europeans competitors for the 'new world'. Anghie points out that both the initial treaties themselves and the practices which followed indicated that both the European and indigenous parties understood themselves to be creating a legal relationship between equal parties.[20] He notes, "many states had conducted themselves on the basis that these treaties were valid. International stability would have been severely undermined if it suddenly became possible for states to question the arrangements, titles and interests which had been

---

[17] Anghie, *supra* note 6 at 23
[18] *Ibid* at 68
[19] Tully, *supra* note 13 at 121-122
[20] Anghie, *supra* note 6 at 69

ostensibly established by those treaties."[21] This is largely due to the competition between European states to acquire new lands, and with them, new economic resources. Indeed, the only legal restrictions on the actions of European states in the New World resulted from conflicts between European states, and not from any acknowledgement of the rights of its indigenous inhabitants.[22] The treaty process was undertaken precisely to acquire Indian 'interest' to establish a crown's right to deal with, or claim, a particular territory against another crown's interest in claiming those territories.[23]

Treaties and alliances with indigenous peoples were preferable to military conquest as means of securing title for a number of reasons. Trevor Purvis notes that local populations were often valuable allies for European nations, as indeed, newcomers were often reliant on the assistance of indigenous peoples for the provision of foodstuffs, as trading partners, and as "formidable allies in strategic-military confrontations with the belligerent forces of other indigenous groups and European powers competing for the same New World territories."[24] Thus, treaties and alliances with indigenous peoples were a means to securing claim to the land, a means of profiting from the land, and a means to surviving on the land.

Writings of the colonial administrators indicate that there was actually a mutual respect and recognition between colonial and indigenous representatives in the early years of settlement of North America. Chief Crown negotiator Sir William Johnson is quoted as explaining to the Lords of Trade in 1763:

---

[21] *Ibid* at 71
[22] *Ibid* at 103
[23] Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Rights of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 51
[24] Trevor Purvis, "Sovereignty, Nation and the Aboriginal Challenge: Beyond the Nationalities Principle" 2003 (Unpublished) at 157

> The Indians of the Ottawa Confederacy... and also the Six Nations, however their sentiments may seem misrepresented, all along considered the Northern parts of North America, as their sole property from the beginning; and although the conveniency of Trade, (with fair speeches and promises) induced them to afford to both us and the French settlements in their Country, yet they never understood such settlements as a Dominion, especially as neither we, nor the French ever made a conquest of them.[25]

Tully argues that the Crown used the term 'nation' very intentionally in regards to indigenous peoples.

> The negotiators were quite aware that the Aboriginal peoples did not have European-style states, representative institutions, formalized legal systems, prisons and independent executives. They observed the conciliar and confederal forms of government, consensus decision making, rule by authority rather than coercion, and customary law. Yet this did not cause them to situate the Aboriginal peoples in a lower stage of development. Quite the contrary. They were constantly instructed by the Privy Council to study and respect their constitutions and forms of government, ensure that they 'not be molested or disturbed' and punish the 'great frauds and abuses' committed against them by the settlers. Observers such as Cadwallader Colden, Benjamin Franklin, Baron de Lahonton and Joseph-Francois Lafitau repudiated the judgements of the modern theorists and sided with Joseph Brant. They suggested that Europeans were at the lower and more corrupt stage of development and that Aboriginal nations, with their participatory governments, service to the public good and great diplomacy, were similar in stature to the classical republics."[26]

Tully argues that the treaty system not only recognized Aboriginal peoples as equal, self-governing nations, but was meant to continue this form of recognition over time rather than extinguish Aboriginal title or governance,[27] a view that has widely been used to defend treaty rights and establish and negotiate self-governance and land-claims in recent decades.

Tully notes that neither the European negotiators nor the indigenous groups saw these treaties as a 'great founding moment' establishing a constitutional society, but "as one link in a chain of multinational constitutional agreements."[28] Each side recognized the other as nation, and accommodated the other's diplomatic practices. Tully utilizes United States Supreme Court

---

[25] Tully, *supra* note 13 at 119
[26] *Ibid* at 121
[27] *Ibid* at 123
[28] *Ibid* at 122

Chief Justice John Marshall's review of treaty history in the *Worchester*[29] case, finding that the three conventions of contemporary constitutionalism which bridge the diversity of the societies making the arrangements - mutual recognition, continuity and consent - were present at the time of the original treaty negotiations between the British Crown and the indigenous peoples of North America. He notes that the early treaties demonstrate that the Crown negotiators recognized the Indians as distinct political communities with territorial boundaries in which they had exclusive authority,[30] that is, as bearing the elements commonly associated with sovereignty. Tully notes that in light of this mutual recognition and that the right of 'discovery' only gave the European nation a right against other European nations and not against indigenous peoples, the only way for the Crown to acquire more land and establish and expand its sovereignty in North America was with the consent of the indigenous peoples.[31] Tully's findings here should not be taken as a widespread historical perspective, but highlight that some early colonists and legalists recognized a form of what is today regarded as inherent indigenous rights.

As the settlers became more independent in their new lands, having previously been reliant on indigenous communities for assistance and local knowledge, the relationship between settlers and indigenous groups changed. Indigenous peoples had come to rely on items they received through trade with the settlers, particularly where previously nomadic families and communities had come to settle around trading posts, while the settlers' need for items from the indigenous peoples lessened as the international fur trade diminished. Indigenous groups came to be seen by the settlers as 'dependent' communities, and the relationship between the new governments and indigenous people quickly deteriorated. The paternalistic attitudes of eurocentrism interpreted

---

[29] *Worcester v. Georgia* [1832] 31 U.S. 515
[30] Tully, *supra* note 13 at 124
[31] *Ibid* at 122

previous law and built new law to guide brutal violence against both indigenous individuals and communities; this suggests the rise of the legal positivist perspective in the management of the indigenous peoples of North America. It became quickly apparent that the treaties, where negotiated, were not to be honoured as mutual obligations. European settlers enjoyed the rights derived from the treaties, but refused to accept, and indeed continue to negate, the obligations therein.[32]

The 'Uncivilized Indian' and Sovereignty

> *Sheldon* v. *Ramsay (*1852)*:* It *never can be pretended* that these [Six Nations Tribe of] Indians while situated within the limits of this province, as a British province at least, were recognized *as a separate and independent nation,* governed by laws of their own, distinct from the general law of the land, having a right to deal with the soil as they pleased; *but they were considered as a distinct race* of people, consisting of tribes associated together distinct from the general mass of the inhabitants, it is true, but yet as British subjects, and under the control of, and subject to the general law of England. As regards their lands on the Grand River, the Indians had *no national existence* nor any recognized patriarchal or other form of government or management, so far as we can see, in any way.[33]

The North American colonies became more independent through the eighteenth century, relying less on the indigenous peoples for survival and trade. This caused a shift in the relationship between indigenous peoples and settlers, one that reflects that the indigenous 'nations' were not respected as 'nations' under international law. Indeed, Purvis notes, the term 'nation' developed through the colonial experience such that 'nation' became a preserve of 'the people,' "a people whose sovereign integrity was rooted in the institutions of their respective nation states," while sovereignty rested largely in the control of the land.[34] References to 'nation' in treaties came to recognize indigenous peoples as distinct peoples who were subsumed through the treaties as subjects of the Crown, rather than as distinct socio-political nations bearing

---

[32] Anghie, *supra* note 6 at 80
[33] *Sheldon v Ramsay* [1852] 9 UCR 105, in Clark, *supra* note 23 at 19
[34] Purvis, *supra* note 24 at 180-181

sovereignty. Indeed, international law at this time did not regard indigenous populations as subjects equal to Europeans, and the treaties signed in this period were not viewed as treaties according to international law but rather as unilateral acts within the domestic sphere.[35] As Chief Justice Marshall articulated in *Cherokee Nation v. State of Georgia*;

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[36]

Here, Marshall acknowledges the progression from natural law to positive law and demonstrates the foundational values of the European and settler jurisprudence as they approached the nineteenth century and beyond.

For Locke, who philosophized according to natural law at the time of colonial establishment, Indians were 'wild,' 'perfectly in the state of nature,' and thus incapable of entering into a social contract for their mutual benefit.[37] Indians failed to fulfil their responsibility under the law of nature to cultivate the land, which was a 'civilized' industry and thereby lost their rights to control the land. In Locke's view, Indians owned that which they cultivated; the fruits and vegetables they gathered, the fish they caught, and the meat they hunted, but not the land on which they found their resources.[38] The social contract, which people entered into primarily for the mutually beneficial protection of property, was the true indicator of

---

[35] Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Clarendon Press, 1995 [Kymlicka 1995] at 22

[36] *Cherokee Nation V. State Of Georgia* [1831]30 U.S. 1 at 17

[37] John Locke, *Two Treaties of Government* (London: J.M. Dent & Sons, 1924) at 124 in Purvis, *supra* note 24 at 43-44

[38] Tully, *supra* note 9

civil society.[39] As Indians did not individually 'own' property requiring such a contract, no socio-political community or civil society was recognised that could bear sovereignty. The land of the Americas was thus seen as *terra nullius*, void of any social or political claims that could preclude European title.[40]

Europeans were thus not only justified, but morally obligated to claim and cultivate the Americas, as "the 'waste' of these lands is elevated to the status of an affront to Natural Law."[41] As Indians lacked rights in the form of land title or property, Locke justified, as did Vitoria, European 'defence' against any Indian resistance of the European right and obligation to expand civilized trade and industry.[42] According to Locke's conception, Europeans were entitled to as much land as they desired without consent as long as there was 'enough and as good' left for others. Given that it was *terra nullius*, Indians had 'no reason to complain or think themselves injured' by European 'encroachment.'[43] Locke similarly expanded his defense by arguing that Indians benefitted from European settlement as they would assimilate to the "more advanced European state of constitutionally protected private property in land and commercial agriculture," which produced "more commodities and provides greater opportunities to work by expanding the division of labour."[44] Tully notes that "[i]t is difficult to overestimate the influence of this economic argument in the justification of planting European constitutional

---

[39] Purvis, *supra* note 24 at 31
[40] Locke, *supra* note 37 in Purvis, *supra* note 24 at 44
[41] Tully, *supra* note 13 at 74; Purvis, *Ibid* at 44-45
[42] Tully *Ibid* at 45
[43] *Ibid* at 74
[44] *Ibid* at 74

systems of private property and commerce around the world and in justifying the coercive assimilation of Aboriginal and other peoples."[45]

Property was also foundational to the positivist constructions of sovereignty at the time, and the 'failure' of Indians to dominate, cultivate, and hold land as property demonstrated their lack of civilization, and their unfitness for sovereign authority. Thomas Lawrence argues the notion of territorial sovereignty is fundamental to modern international law; positivists assert that sovereignty is 'most clearly defined as control over territory.'[46] Lawrence thus concludes that no matter how highly organized and civilized, it would be impossible for nomadic peoples who lacked territories in which they were the sole occupants (as the Indians were viewed) to be seen as sovereign. Kant took these principles one step further in articulating that the uncivilized peoples of America, having not made the transition to agriculture, property and government were people without constitutions,[47] an essential component of sovereignty. However, Kant notes, Europeans brought these things to the Americas, further justifying settler sovereignty through the written instruments of positive law, such as land titles, statutes and constitutions.

Henry Wheaton, writing in the nineteenth century, purports that it was not the universal natural law that bridged the gap between the Europeans and non-Europeans as Vitoria held, but "the explicit imposition of European international law over the uncivilized non-Europeans."[48] Non-European practice simply did not matter; indigenous peoples were excluded from the realm of law, unable to assert any legally cognizable right, proper or acceptable legal systems, or valid

---

[45] *Ibid* at 75
[46] Anghie, *supra* note 6 at 57
[47] Tully, *supra* note 13 at 80. It is also worthy to note that the Fathers of the American Constitution looked favourably on the Iroquois Confederacy - see Williams, *supra* note 5
[48] Anghie, *supra* note 6 at 54

membership in the international community.[49] It was this creation and maintenance of the division between the civilized Europeans and the uncivilized 'other' that allowed positivist jurisprudence to have intellectual and political force, thus granting power to the view of law as an instrument of Empire.[50] Anghie argues that positivist jurisprudence essentially combines 'anthropological insight with taxonomical precision' to order civilizations.[51] Anghie demonstrates that this distinction of civilization was drawn between societies, rather than political units such as nations or sovereigns, which allowed legalists to circumvent the previous recognition of non-European nations as sovereign, denying them the privileges and rights of this status. With the uncivilized thus excluded, positivists were able to construct colonies as the centre of imperial demonstration of international law,[52] effectively conquering heathens, civilizing barbarians and expanding international law to all corners of the earth.

Indeed, much of the land beyond the colonial settlements came to be under Crown authority not by treaty or conquest, but rather was simply assumed to be under colonial jurisdiction through the assertion by jurisprudence, of valid title by the Crown that first 'discovered' the land. Thus, the cartographical functions of colonial expeditions were of great importance in establishing claim over that which was previously *terra nullius.* The land which indigenous groups occupied was assumed to be sovereign Crown land from which the Crown designated tracts to be reserved for the Indians.

---

[49] Anghie, *supra* note 6 at 54, 61
[50] See Williams, *supra* note 5
[51] Anghie, *supra* note 6 at 78. See Edward Said, *Orientalism* (New York: Vintage Publishing, 1979)
[52] Anghie, *supra* note 6 at 64

Confederation, the Indian Act & Enfranchisement

As the eighteenth century unfolded, the colonies in North America became more independent from Europe and their local administrations received increasing powers delegated from their respective Crowns. British administrators realized that the success of the colonies depended on stable and peaceful relationships with indigenous peoples. To assist with this, King George III issued the *Royal Proclamation of 1763*, which established a number of protocols for dealing with Indians, including the delineation of a firm western boundary for the colonies, the affirmation that both the land beyond the settlements was reserved for Indians and that the Indians themselves were to be unmolested and undisturbed on these lands. In addition, the order was issued that only the Crown could purchase Indian land through a public negotiation process with the interested Indians.[53] For most non-Aboriginal scholars and legal theorists, the *Royal Proclamation* is hailed as the textual ground for Aboriginal Rights, a kind of Aboriginal *Magna Carta*.[54] Peter Kulchysky notes that the document's wording leaves ambiguity about the source of the Indian title contained in the Royal Proclamation – whether the Crown recognized the land for the Indians because of their previous occupation and thus their pre-existing title or whether the king granted this land to the Indians by his own authority, thereby creating their right[55] Tully provides some clarity, noting that the settlers of the American colonies, being 'farmers not lawyers,' accepted grants to their own land from the overseas Crown, despite having previously been in rebellion against the Crown and obedient to the colonial assemblies to which they had

---

[53] Canada, Aboriginal Affairs and Northern Development Canada *First Nations in Canada* online: <http://aadnc-aandc.gc.ca/eng/1307460755710/1307460872523> [*First Nations in Canada]*
[54] Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 7
[55] *Ibid* at 8

consented according to Locke's social contract.[56] In this way, the Crown is seen as creating the Indian title to the land, thus allowing its modification by future sovereigns.

Sir William Johnson led the Indian Department, founded in 1755, to act as an intermediary between First Nations and the British Crown. The primary role of this department was to maintain peace between the few British soldiers and traders scattered far from settlements and the indigenous peoples around them and to ensure the military and commercial interests of the Crown through alliances with indigenous peoples.[57] The Royal Proclamation designated the Indian Department as the primary point of contact between the colonies and Indians, and so it was this department that was responsible for negotiating land surrenders from various Anishinaabeg peoples after the American War of Independence, to accommodate the increasing settler population including many loyalist and Iroquois refugees from the United States of America.[58] The alliances between the settlers and indigenous peoples were very important to the Crown through the end of the eighteenth century and the War of 1812, when indigenous soldiers fought alongside settlers.[59] It was in the peaceful decades after this war, when the numbers of settlers grew dramatically, as did their need for land, that indigenous peoples ceased to be regarded as allies and came to be seen by colonists as dependents and impediments to growth.[60] The treaties of this era were 'land-surrender treaties,' which did not create sizeable reserves and resulted in not only loss of hunting grounds but lack of adequate living space for indigenous peoples. The relocation of dispossessed indigenous persons to reserves was intended to remove them from the more harmful aspects of colonial society, and allow them to "adapt to the new

---

[56] Tully, *supra* note 13 at 153
[57] *First Nations in Canada, supra* note 53
[58] *Ibid*
[59] *Ibid*
[60] *Ibid*

colonial reality at a controlled pace," as Sir Francis Bond Head stated in the 1836 establishment of the Manitoulin Island Reserve.[61] It was in 1839 that the first legislation aimed at Indian civilization, the *Crown Lands Protection Act*, was passed, which made the government the 'guardian' of all Crown lands, including Indian Reserve lands, which both limited settler's access to reserves and classified Indian lands as Crown lands to be protected by the Crown.[62]

As the need for land calmed and the attention of the colonists turned to other resources, the treaty form changed again. In the 1850s, the Robinson-Huron and Robinson-Superior treaties established the template for future treaties, including the post-Confederation numbered treaties. Unlike previous treaties, the Robinson treaties ceded indigenous lands and rights to the Crown in exchange for reserves, annuities and Indians' continued right to hunt and fish on unoccupied Crown lands.[63]

In 1850, the four colonies of the Provinces of Canada, Newfoundland, Nova Scotia and New Brunswick passed legislation that allowed each colony to manage the Indians and Indian land within their borders.[64] Each colony defined for itself who was an Indian by cultural practice, ethnic origins or by blood quantum.[65] In 1867, Canada was officially delegated executive powers by the British government through the British North America Act (now the *Constitution Act* 1867) to become a dominion within the British Commonwealth. Section 91(24) of the *Constitution Act* 1867 lists "Indians and the lands reserved for Indians" as an area of federal responsibility. Indians thus continued to be objects of law in the Canadian state to be managed

---

[61] *Ibid*
[62] *Ibid*
[63] *Ibid*
[64] James L. Dempsey, "Status Indian: Who Defines You?" in Duane Champagne, Karen Jo Torjesen & Susan Steiner, eds, *Indigenous Peoples and the Modern State* Walnut Creek: AltaMira Press, 2005 33 at 33
[65] *Ibid* at 33

by the federal government rather than subjects capable of governance. Canada 'inherited' the practice of identifying Indians by British traditions of patrineal lineage, constructing rules around how one became an Indian and how one could cease to be an Indian. This is another example of European practice being 'the only one that mattered' in the formation of law: Many – if not most - indigenous societies practiced matrilineal family structures.[66] The new state was also "bound by a continuing constitutional restriction, requiring colonial governments not to molest or disturb native governments on unceded territory,"[67] thus implying a similar situation to Marshall's 'domestic dependent nations.'

However, the constant tension between seeing indigenous peoples as simultaneously determinedly uncivilized barbarians and innocent backward societies in need of defense quickly tipped towards the latter.[68] 'Protection' of Indians rapidly morphed into an imperative of assimilation; 'protection' from the 'bad elements' of settler culture came at the cost of education in the values and customs of the settlers.[69] The 1857 *Act for the Gradual Civilization of the Indian Tribes of the Canadas*, which specifically outlined the practices through which indigenous customs, language, religion and labour practices would be destroyed, obtained new vigour following Confederation offering incentives for literate and debt-free Indians to adopt a 'civilized' life as a 'citizen'.[70] In 1869, the Government of Canada passed *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42,* which mandated elected chiefs and bound

---

[66] *Ibid* at 34
[67] Clark, *supra* note 23 at 59
[68] Purvis, *supra* note 24 at 162
[69] Dempsey, *supra* note 64 at 34
[70] Tully, *supra* note 13 at 90; *First Nations in Canada, supra* note 53

councils with limited bylaw powers and three year terms.[71] These were gradual steps toward the 1876 *Indian Act* which detailed the 'vast administrative dictatorship' that would oversee every aspect of indigenous lives.[72] This policy of protectionist assimilation has been the basis of governmental interaction with First Nations ever since.

Between 1871 and 1921, Canada negotiated the 11 numbered treaties, which cover land from Northern Ontario, the Prairies and the Mackenzie River up to the Arctic as a means of opening the Northwest Territories to agricultural settlement and the construction of a railway from the west coast to the Great Lakes,[73] allowing the exploitation of resources of the north and west for the profit and growth of the state. These treaties followed the model of the Robinson treaties, surrendering massive amounts of land and land title to the government while setting aside reserve lands and granting annuities and hunting and fishing rights on unoccupied Crown lands for Indians. These treaties also included hunting and farming equipment, schools and teachers, and ceremonial and symbolic elements. Many indigenous peoples pursued these treaties, generally looking for assistance in dealing with disease epidemics, famine, communal upheaval and changes in the economy.[74]

In 1888, Indian title – the ownership of land – was redefined as a 'burden' on the underlying Crown title. This meant that the Crown came to 'own' the land, relegating indigenous peoples' legal claims to the land as an undefined 'interest.'[75] In fact, Section 88 of the *Indian Act* affirmed – and continues to affirm - that while provincial laws of general application applied to status Indians unless they contradict federal or treaty rights, the federal government would still

---

[71] Canada online: <http://www.aadnc-aandc.gc.ca/eng/1100100010204/1100100010206>
[72] Tully, *supra* note 13 at 91
[73] *First Nations in Canada, supra* note 53
[74] *Ibid*
[75] Kulchyski, *supra* note 54 at 2

have the power to override treaty rights.[76] Indeed, the treaties of this era were to 'extinguish' Indian land title rights, essentially by purchasing them with gained land, one-time cash payments, or supplies such as agricultural equipment or housing.[77]

Indians received Indian Status under the *Indian Act* until such time as they were deemed 'civilized' and were thus enfranchised, that is, when they would be "...given all the benefits of citizenship and be removed from the restrictions of the Indian Act and become a *non-status Indian....*"[78] When voluntary enfranchisement proved unsuccessful in assimilating the indigenous populations, the government imposed mandatory enfranchisement mechanisms, such as the removal of status for a woman who married a non-Indian man as well as for Indians who served in the two World Wars, and the granting of the power of the Superintendent General to 'declare' any Indian over the age of 21 'fit' for enfranchisement.[79] Both subtle and outright assimilation practices were implemented, from the prohibition of traditional customs, languages and ceremonies, to forbidding the forming of Indian political organizations, to the forced removal of children from indigenous communities, to the imposition of routines of labour and religious practices. Routinization of the daily lives of indigenous persons was deemed necessary to the processes of civilization and assimilation, which were intended "to break down their ancient cultural ways and instil modern ones."[80] Indigenous populations were "coerced, cajoled, even forced to relocate for such varied reasons as administrative convenience, to make way for development, and to secure a human presence in remote areas, a presence which would, somewhat ironically, help to bolster the claims of the state in question to sovereignty over these

---

[76] *Ibid* at 9
[77] *Ibid* at 9
[78] Dempsey, *supra* note 64 at 34
[79] *Ibid*
[80] Tully, *supra* note 13 at 89

areas."[81] Under the *Indian Act*, indigenous government was replaced with the mandated elected chief and band councils in order to both facilitate the new federal government's administration of indigenous communities and to further assimilate Indians by removing their traditional governance systems.[82] Tully notes, "when these techniques of assimilation failed, they were returned to tiny areas of logged out and polluted land, called reserves, classified as obstacles to progress and left to gradually disappear because they were judged unfit for modern constitutional society."[83]

Enfranchisement & The White Paper

Following the two world wars the Canadian government renewed its efforts to 'integrate' indigenous populations. In 1956, Indians were recognized as citizens of Canada when Parliament amended the 1947 *Citizenship Act* to include "an Indian as defined by the Indian Act...."[84] It took until 1960 for Parliament to amend the 1952 *Canada Elections Act* to remove the section prohibiting Indians from voting. Lynn Chabot notes, however, that indigenous peoples were not actually consulted in either of these amendments;[85] that is, these changes - meant to bring Indians into fuller participation in the democratic government - were made without the input or support of indigenous communities. This enfranchisement of indigenous persons is said to have sparked the debates and anger against indigenous peoples as being

---

[81] Purvis, *supra* note 24 at 162
[82] *Ibid* at 163-164
[83] Tully, *supra* note 13 at 20, speaking of the Haida people in the late 19th and early 20th centuries
[84] Lynn Chabot, "The Concept of Citizenship in Western Liberal Democracies and in First Nations: A Research Paper" prepared for *The Governance Policy Directorate Lands and Trusts Services*, INAC, March 2007 at 27
[85] *Ibid*

"citizens plus" for having all the rights of Canadian citizens and additional rights by virtue of their ethnicity.[86]

The rise of the discourse of individual rights and responsibilities of the era combined with the predominant view 'that the squalor in which so many Aboriginal people lived was a direct result of their cultural backwardness and their insulation behind an edifice of special rights and government protections."[87] In 1969, the *Statement of the Government of Canada on Indian Policy*, also known as The White Paper, proposed to eliminate the special status of Indians in hopes of ending the discrimination against them. It proposed 'equality' by removing s.91(24) of the *Constitution Act 1867*, which singled out Indians as separate from Canadian citizens. It asserted that the 'principle of common services' should not be argued, "It is right."[88] Treaties were to be 'equitably ended' and remedies for the past did not need to be sought. This all followed Prime Minister Pierre Elliott Trudeau's philosophy that every individual must be equal before the law and before the state; treaties and the distinction of 'Indians,' in this view, undermined common citizenship.

At the time the White Paper was proposed, assimilation policies were common, both as a way to end racial segregation, as in the American civil rights movement, and as a way of bringing the Indigenous peoples into mainstream society and citizenship, as in Australia.[89] Assimilation policies were thought to be progressive. "The goal was to transform Indians into normal, taxpaying, service-receiving citizens of the province, indistinguishable from other

---

[86] Kulchyski, *supra* note 54 at 5
[87] Purvis, *supra* note 23 at 164
[88] Alan Cairns *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver/Toronto: University of British Columbia Press, 2000) [Cairns 2000] at 51
[89] *Ibid* at 51-53; Also see Jane Robbins "A nation within? Indigenous peoples, representation and sovereignty in Australia" (2010) 10:2 Ethnicities 257; Louise Humpage "Revision required: Reconciling New Zealand citizenship with Maori nationalism" (2008) 10:3 National Identities 247

provincial citizens, except presumably for fading memories of the bad old days when they were treated differently."[90] Objections from indigenous peoples and organizations[91], when heard, were dismissed. Indians, as framed by J.H. Sturdy, then minister in charge of a Cabinet committee on Indian Affairs, were 'children' who 'did not know what was good for them'.[92] Arthur Laing, then Minister of Northern Affairs and National Resources, is quoted in 1963 as saying "the prime condition in the progress of the Indian people must be the development by themselves of a desire for the goals which we think they should want."[93] These statements clearly demonstrate that the Canadian state continued to regard indigenous peoples in much the same way as the natural and positive theorists had – primarily as objects, rather than subjects, of law who would benefit from the imposition of European, settler and Canadian systems. The Canadian state, founded on international currents and inherited Crown laws, maintained a paternalistic attitude of colonization and civilization toward indigenous peoples. Significant damage was done to indigenous social, political and legal orders, from which indigenous communities continue to suffer and struggle to heal.

Still seen as inferior, indigenous persons in Canada have been granted legal citizenship, "the formal status of membership within a state"[94] which is accompanied by the basic political rights such as entry into the state territory. They had not been granted what might best be termed 'substantial citizenship'; those rights and responsibilities that demark and define participation in

---

[90] *Ibid* at 46

[91] There was even some support from indigenous groups for integration, primarily among urban Aboriginals who had given up their Indian identity, largely assumed to be choices made for the benefit of children or to avoid the stigma of being Indian, though not enough information is available on this matter – urban Aboriginals are only now beginning to received focused attention but have been largely disregarded throughout past and present policy debates. See Cairns 2000, *supra* note 88 at 58-61

[92] Cairns 2000, *supra* note 88 at 56

[93] In Cairns 2000, *supra* note 88 at 63

[94] Audrey Macklin "Who Is the Citizen's Other? Considering the Heft of Citizenship" *Theoretical Inquiries in Law* 2007 8(2) 333 at 336

the state, such as the enjoyment of state services, representation in governance structures, economic opportunities such as land control and self-determination powers. Audrey Macklin refers to the heft of citizenship, the weight, importance, or power that citizenship carries as a combination of social and legal elements in terms of rights the status procures and freedoms it allows. Here, social citizenship is in effect the rights and freedoms that allow participation in the state society, while legal citizenship permits the entry into the state and thus the ability to partake in social rights.[95]

The push for assimilation in the 1969 White Paper does, optimistically, demonstrate that the perspective of Indians had developed so that they were at least regarded as fully human, capable of being full citizens. As Peter Kulchyski observes, "While this policy may have been well intentioned, it amounted to a proposal of wholesale assimilation in the eyes of most Aboriginal leaders and was attacked until it was withdrawn in 1971."[96] While equality of status as citizens with equal rights and duties was framed as providing solutions to discrimination and inequality through integration, this proposition was received by indigenous peoples as a totalitarian, hostile attack on their very identity.[97] Indigenous peoples had never been given a voice in the determination of their social, political or legal status by the Canadian state. Nor were their voices heard in the legislated changes made to their communities, rights, lives or representation. As their voices rose against the 1969 White Paper and the paternalistic approaches of the state, they also fought against the actual concept and structure of the state. In the era of individual rights, of liberation through equality, the state structure was not ready to accommodate differentiated citizens. Canada, like other states, dealt with and even welcomed

---

[95] *Ibid*
[96] Kulchyski, *supra* note 54 at 5
[97] Kulchyski, *supra* note 54 at 1

diversity under a multicultural approach which divided private and public rights. This, however, was an insufficient model for the collective nature of indigenous culture and political-legal tradition. New concepts of statehood needed to be developed to address a divided citizenry.

Chapter 2: Citizenship & State Forms

Indigenous resistance is noted as being particularly powerful to the 1969 White Paper as it was seen as an attempt to erase indigeneity itself. Notwithstanding the flaws of the *Indian Act*, Indian Status was at least a recognition of difference between indigenous and non-indigenous citizens, and had associated rights and operated as a demarcation of collective socio-political membership. To lose this demarcation in favour of a theoretical equality with other Canadians would be to legitimate the colonial processes that had damaged and destroyed indigenous communities for so long. To accept common citizenship would be to accept the loss of indigenous identity, with its distinct political and social membership, and distinct rights and responsibilities.[98] Indigenous peoples fought against the equalizing principles of the 1969 White Paper and against equal citizenship based on their 'indigenous difference', defined by Peter Macklem as including cultural difference, prior occupancy, prior sovereignty, and participation in the treaty process.[99] However, differentiated citizenship presents a challenge not only to the paternalistic attitude of the Canadian state, but to the state form as well. The state has evolved to accommodate diversity in both multicultural and multinational forms, but these are both inadequate responses to the needs and rights of indigenous peoples in Canada. Indigenous 'citizenship' in Canada requires a look beyond the established state character to find ways in which indigenous self-determination can be realized in cooperation with the Canadian state.

---

[98] See Alan Hunt & Trevor Purvis "Identity vs. Citizenship: Transformations in the Discourses and Practices of Citizenship" (1999) 8:4 Social & Legal Studies 457 at 462-3

[99] Peter Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) p.4

Citizens Plus

Alan Cairns attributes the strength of the fight against the White Paper to three factors. First, the preparation for the White Paper included 'extensive consultation' with Indian leaders, whose input was completely ignored, leading to a sense of betrayal. Second, it was a focus of then-Prime Minister Trudeau, who reported spending "more time on Indian policy than any other issue in this first year of office,"[100] which built frustration among indigenous communities because of Trudeau's liberal, individualistic perspective which amounted to renewed assimilation policies. And third, the proposals of the White Paper completely ignored the direction of the 1966-7 *Hawthorn Report*, which advocated for a permanent, positive recognition of Indians as 'citizens plus,' advocating that "Indians were to be a bit more equal than other Canadians."[101] The Hawthorn strategy was based on the "twin premises that acculturation would continue and that an autonomous development path [for indigenous communities] was neither desirable nor available."[102] For Hawthorn and his colleagues, indigenous communities were considered to be villages rather than nations, and the move to the city was inevitable as indigenous persons were presumed to desire the same standard of living as the rest of North America, something that was unlikely in a reserve context.[103] This latter opinion was based on data that put 77 percent of Indians bands at less than 500 population, and 42 percent at less than 200.[104] Cairns believes these researchers underestimated the value of treaties and did not foresee future treaties as a means of settling land claims.[105] The 'citizens plus' concept, however, does

---

[100] Cairns 2000, *supra* note 88 at 52
[101] *Ibid* at 52
[102] *Ibid* at 163
[103] *Ibid* at 162
[104] H.B. Hawthorn, Ed. *A Survey of the Contemporary Indians of Canada* 2 vols. (Ottawa: Queen's Printer, 1966 and 1977) vol. 1 at 279, in *Ibid*
[105] *Ibid* at 163

not depend on these research errors. The 'citizens plus' advanced in the Hawthorn strategy recognized indigenous peoples as full Canadian citizens, granted the rights accorded to non-indigenous citizens as well as the rights particular to their indigeneity. This would have allowed indigenous participation in the structures of Canadian governance, access to state services and the rights accorded to citizens, as well as rights protecting cultural difference and self-determination abilities. This position was advocated by many indigenous groups, including the Manitoba and Alberta Indian Associations and Harold Cardinal, who led the attack on the 1969 White Paper.

The historical relationship between the state and indigenous individuals and groups was a combination of neglect, assimilation, abuse, interference, or dictatorship, all based on a paternalistic approach which saw European ways as superior to all others.

> It is only a half-truth to assert that most Indian people rejected the assimilation they were offered. While the official policy of the Canadian state was assimilation, the unofficial policy of Canadian society was too often discrimination. Insulted, humiliated, and rebuffed in their encounters with white society, Indians were unlikely to see assimilation as an escape from what they were told was a backwards culture.[106]

The policy counterattack to the White Paper was the 'Red Paper,' *Citizens Plus*[107], drafted by the Indian Association of Alberta under the leadership of Harold Cardinal and supported by the National Indian Brotherhood, an organization formed through the response to the White Paper, and which would later become the Assembly of First Nations. This policy, based on the principles in the *Hawthorn Report*, advocated that the 'entire Indian community' be brought into Canadian life. A major component of this is that local indigenous governments which held self-government ambitions should be respected and accommodated, which would encourage Indian

---

[106] *Ibid* at 65

[107] Indian Chiefs of Alberta *Citizens Plus: A Presentation by the Indian Chiefs of Alberta to Right Honourable P.E. Trudeay, June 1970* (Edmonton: Indian Association of Alberta, 1970)

peoples to take up their 'rightful place' as full-fledged, meaningful and contributing Indian citizens of Canada.[108] The presentation of this document to the federal government constituted a direct challenge to the federal policy, displacing the metaphor of a 'melting pot' Canadian society with that of a 'mosaic' society. Dave Courchene, then-President of the Manitoba Indian Brotherhood, spoke of the compatibility between being Indian and being Canadian, and is one of the first to be credited with designating his people as being "Indians of Canada."[109] The idea of "Indian citizens" with differentiated status and rights challenged the era's concept of the state, which was founded on popular sovereignty that recognized the legitimacy of the state as arising from the totality of its citizenry as a united people.

Citizenship

The term 'citizenship' generally refers to membership in a political state and designates the relationship between the individual and the state.[110] As the scale of states increased after ancient Rome, social solidarity replaced communal connections in uniting citizens through a matrix of equal rights and duties.[111] The evolution of citizenship continued as liberals, led by Locke, strove to ensure sovereignty was given to 'the people' by freeing citizens from unwanted intervention of the state and removing the state as the central guarantor of civil society; this created the focus on rights and privileges associated with modern citizenship.[112] The rise of nation-states in the eighteenth and nineteenth century led to the institutionalization of 'national'

---

[108] *Ibid* at 1-16
[109] Manitoba Indian Brotherhood *Wahbung: Our Tomorrows* (Winnipeg: Manitoba Indian Brotherhood, 1971) at 33
[110] See Will Kymlicka, "Multicultural states and intercultural citizens" (2003) 1:2 Theory and Research in Education [Kymlicka 2003] at 147; Andrea Baumeister, "Ways of Belonging: Ethnonational minorities and models of 'differentiated citizenship'" (2003) 3:3 Ethnicities 393 at 395
[111] Hunt & Purvis, *supra* note 98 at 463
[112] *Ibid* at 464

characteristics.[113] Nation-building is still achieved today through the 'modern project of citizenship' which seeks to reunite the state and the population through extending rights and obligations to all members of the nation-state. That citizenship is necessarily an exclusionary project is nothing new; citizenship has always been a debate over who is entitled to membership and who is not.[114] Defining a state's citizenship criteria is, in essence, defining the boundaries of the state's community. Thus, citizenship is perhaps the most important institution of the modern democratic state,[115] as ideally, it both grants the citizen the protection, entitlements and rights accorded to members of the state, binding them into the national imagination and building loyalty and patriotism as well as grants legitimacy to the state through the consent of its citizens.

Citizenship in the liberal conception represents the universal identity shared by the population of the state that transcends the differences between individual identities.[116] Will Kymlicka argues that, for liberal theorists, citizenship is not just a legal status, with associated rights and responsibilities, but also reflects one's identity; citizenship is an expression of one's political community.[117] Cairns notes that citizenship is an instrument used to encourage individuals "to develop positive attitudes to membership in the political community and to view the legally constituted political authorities as legitimate, in short, to see the state as their state, in whose development they actively participate."[118] T.H. Marshall articulated the classic citizenship paradigm for modernity by defining citizenship as "a personal legal status that is bestowed on full members of a political community and endows them with a set of *common* rights and

---

[113] *Ibid*
[114] *Ibid* 461
[115] Alan Cairns "Afterword: International Dimensions of the Citizens Issue for Indigenous Peoples/Nations" (2003) 7:4 Citizenship Studies 497 [Cairns 2003] at 501
[116] See Hunt & Purvis, *supra* note 98
[117] Kymlicka 1995, *supra* note 35 at 174-176
[118] Cairns 2000, *supra* note 88 at 501

duties."[119] Theoretically, all members of a political community have 'uniform' and 'equal' rights.[120] Marshall's theory identifies three components of citizenship. The democratic component of citizenship is closely linked with citizens' political rights to elect a government that represents those whom it governs. The juridical component is equated with the ability and practice of claiming and asserting rights. The identity component of citizenship relates to the national imagination, situating the self within, and binding the self to, the 'national community.' Marshall's theory assumes that the political, juridical and identity components of citizenship align citizens to a territorially bound polity.

This notion of citizenship is associated with the Nationalities Principle, the idea that every nation should or would have its own state. A 'nation' is sociologically linked to the idea of 'a people' or 'culture,' terms that are often used in their mutual definitions.[121] Using the term 'nation' carries significant socio-political weight, as the term instils a 'sense of the unity of community as having been constituted in time immemorial, and extending from present into an infinite future.'[122] This concept of nationhood is 'always founded partially upon myth, part reality,' as national histories are always constituted by a selective memory.[123] There are in fact two traditions of what 'nationality' means; the political concept and the ethno-cultural concept. The former implies a population dedicated to a common political project, where national membership requires dedication to this civic-national project; this is exemplified by the American Revolution, wherein the colonies united under the project of building a republic of

---

[119] In Jean Cohen, "Paradigms of Citizenship and the Exclusiveness of the Demos" 1999 14:3 International Sociology 245 at 251; see T.H. Marshall, "Citizenship and Social Class" in Jeff Manza and Michael Strauter, eds, *Inequality and Society,* (New York: W.W. Norton and Co., 2009) (First published 1950)
[120] Cohen, *Ibid* at 251
[121] Kymlicka 1995, *supra* note 35
[122] Purvis, *supra* note 23 at 92
[123] *Ibid*

equal men and individual rights distinct from the British crown.[124] The second form of nationality requires the restriction of membership to persons with particular ethno-cultural qualities, such as lineage or language.[125] In either form, national membership requires a loyalty to the 'national consciousness'[126] that unites the members in social solidarity and binds them together in a social contract, thus granting legitimacy to the governance structure. States are continually renewing their national identities through their national imagination, so as to keep the citizens bound in loyalty to the national community and maintain peace and functional governance. Social solidarity is particularly important throughout the formation of a new state as the establishment of a national identity and governance institutions must be strongly supported to achieve legitimacy internally and internationally, where states achieve membership through mutual recognition. Traditional notions of democracy are premised on the nationalities principle, presuming that the state embodies its 'nation' or 'people', who bear the right to self-determination through popular sovereignty.[127]

However, the nationalities principle is a fallacy; very few states have, or have ever had, a single national group. Whether due to war, mass migration, colonial legacy, or modern forces of globalization, states usually contain more than one societal group who compete to have their cultural, religious, linguistic or ethnic difference officially recognized by the state. This often causes tension in the political arena over which rights, if any, should be accorded to the minority group, and how those minority rights can be balanced with the rights of the majority. When these smaller groups succeed in having their claims to nationhood recognized by the state, the state

---

[124] Hunt & Purvis, *supra* note 98 at 9
[125] *Ibid*
[126] Marshall, *supra* note 119 at 154
[127] Will Kymlicka "Multicultural citizenship within multinational states" (2011) 11:3 Ethnicities 281 [Kymlicka 2011] at 287

becomes 'multinational.' Conflict arises when national groups are left out of the national imaginary, when national groups do not receive constitutional recognition, or when social solidarity is not strong enough to unite the state through the change. This can sometimes pose a threat to the state, casting into question whether the state has a legitimate claim to govern all of its territory and population.[128]

This is indeed the case in Canada. Indigenous peoples were not included in the social solidarity or the popular sovereignty which founded the Canadian state. Legally a lower class than citizen for decades, indigenous peoples continued to struggle against the state's assimilation policies after their formal enfranchisement. In demanding legal distinction from non-indigenous citizens, indigenous peoples struggle against a state structure which is not ready to accommodate their 'indigenous difference.'

The state has evolved in both theory and practice to accommodate diversity through multiculturalism and multinationalism, both of which Canada includes in its national imagination and social solidarity. These models grant different status and rights based on different recognition of minority groups within the state. Will Kymlicka distinguishes between recognition as 'national minorities', which arise from the incorporation of 'previously self-governing, territorially concentrated cultures into a larger state,' and recognition as 'ethnic groups,' which arise from individual and familial immigration.[129] Being multicultural means Canada officially grants to each individual citizen the same rights and responsibilities, regardless of ethnic particularity. The societal groups with different traditions, language and practices unite under common government as one Canadian 'people' who accept or tolerate each other's differences

[128] *Ibid* at 285
[129] Kymlicka 1995, *supra* note 35 at 10

under the communal identity as 'multicultural,' in the metaphorical 'melting pot' which the Red Paper rejected.

Multiculturalism

In Canada, ethnic groups are subsumed by the discourse of 'multiculturalism,' and the 'multicultural heritage' of Canadians is recognized and protected in the *Canadian Charter of Rights and Freedoms*.[130] In the liberal individualistic tradition, the *Charter* provides rights and protections such as the freedom of speech, association and cultural practice, which allow various ethnic, cultural, linguistic, or religious communities to continue their particular practices within, and subordinate to, the nation-state.[131] Inis Claude puts forward the liberal perspective that human rights are indeed a substitute for the protection of minority rights, as individuals who enjoy equal treatment do not have legitimate claims to particular accommodation of ethnic particularism.[132] This idea fails to account for the fallibility of theories in practice and the power-imbalance minorities face in the definition and recognition of rights. It also is out-dated by the recognition that differentiated approaches are needed to realize equal rights for different citizens in different circumstances. Further, the liberal focus on the individual fails as a response to collective demands, such as those made by indigenous peoples.[133]

Ethnic groups are assumed to be relatively small, dispersed populations, which generally cannot support distinct institutions such as schools, hospitals or autonomous governance. For ethnic groups in liberal democracies, ethnic, cultural and linguistic particularities are relegated to

---

[130] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, Article 27

[131] Kymlicka 1995, *supra* note 35 at 3

[132] Inis Claude, *National Minorities: An International Problem* (Cambridge: Harvard University Press, 1955)

[133] See Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition." (1992) 25 Cornell International Law 579

the private sphere, while the state and public realm purport to operate on a 'colour-blind' basis.[134] In this model, the political and juridical aspects of citizenship are equal for all persons, while certain rights allow for different identities to coexist. Kymlicka adds that affirmative action programs are actually demonstrative of this 'colour-blind' effort; to ensure that all 'colours' of the 'colour-blind' society have equal opportunity. Kymlicka also says that ethnic groups who become a minority within a state migrate with the *intention* of integrating into, and becoming full members of, the larger society they choose. While I find this generalization narrow and simplistic, I do agree that many of those who migrate to a different society, out of either desire or necessity, accept that integration into the new nation state requires working with the established languages, governance structures and 'national character' (such as statutory holidays based on national religion or history). This often means that their individual cultural, ethnic, religious or linguistic differences become part of the private sphere, in so far as ethnic minorities are also often constitute very small minorities vis-à-vis the total population of the state. However, Kymlicka fails to note that once an ethnic minority reaches a substantial portion of the population, their collective rights are presumably asserted through the practices of democracy, and the ethnic, cultural and social dimensions that are formally relegated to the private sphere will inform the political actions of the citizenry. In this way, ethnic groups, however, large or small, express their will through the democratic channels of the governance structure and influence both the decisions and the structures of the state that they have joined.

Multicultural citizenship allows the division of private rights, which allow individuals and communities to enact cultural, linguistic, religious or ethnic differences, while maintaining the commitment of all citizenry to the character of the unified state. For civic nationalists, the

[134] Kymlicka 1995, *supra* note 35 at 3-4

unifying constitutional values, such as freedom, democracy, and equality, override the 'particular attachments of citizens,' and are reinforced by a unified legal system and constitutional principles which guarantee identical rights and obligations to all citizens.[135] This model allows both for minorities that were present at the birth of the state to persist as well as for modern immigration to occur without affecting the design of citizenship – the relationship of each individual to the state remains homogenous. Soroka et al. argue that multicultural citizenship has had success in overcoming the challenges of the postmodern world, and that the real challenges to state character and legitimacy stem from the 'pre-modern' phase.[136] The rights and ambitions of indigenous peoples, however present challenges from the 'pre-modern' phase of Canada's development: the multicultural model is ill-suited to address rights of self-determination and the distinct social, political and legal order which indigenous groups seek to have recognized by the state.

Multicultural states vary in their exact arrangements according to their particular histories and situations, but Kymlicka outlines three common features of truly multicultural states. First, multicultural states have abandoned the nationalities principle, acknowledging the diversity of its citizens and constructing the state's legitimacy on liberal notions of individual equality where the state must belong equally to each citizen.[137] Secondly, the state must repudiate nation-building policies that seek to assimilate or exclude members of non-dominant groups. A truly multicultural state accepts that individual citizens can participate fully in political life without hiding their ethno-cultural identity, and accepts "an obligation to accord the history, language

---

[135] Baumeister, *supra* note 147 at 395
[136] Stuart Soroka, Richard Johnston & Keith Banting "Ties That Bind? Social Cohesion and Diversity in Canada" in Keith Banting, Thomas J. Courchene & F. Leslie Seidle, eds, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research and Public Policy, 2007) 561
[137] Kymlicka 2003, *supra* note 147 at 150

and culture of non-dominant groups the same recognition and accommodation that is accorded to the dominant group."[138] Thirdly, the multicultural state has to acknowledge any historical injustice committed against a national or minority group by older policies of assimilation or exclusion and demonstrate readiness to offer a remedy or rectification for them.[139] How these three features are actually realized, Kymlicka says, depends on many features, most notably

> on the capacities and aspirations of each group, which in turn depends on its numbers and territorial concentration, which in turn depends on the forms and levels of mistreatment it has received historically at the hands of the state. [140]

These can vary from fighting stigmas and barriers that prevent small, dispersed minority populations from integrating and being accepted as equal citizens, to territorial autonomy for a large, regionally concentrated minority population. The case of the latter brings the state into a multinational federation.

Canada's national imagination includes multiculturalism and diverse citizenry, and arguments could be made that it has begun to grant indigenous histories and traditions recognition and accommodation, as in the acceptance of oral histories as valid evidence in courts.[141] However, Canada's efforts at Kymlicka's third aspect of multicultural states are particularly inadequate, fitting with Trudeau's explicit denial that such remedies were needed. Canada's recent focus on residential schools fails to reconcile the rest of the policies of assimilation and exclusion while the state continues, as will be seen, to resists rectification for past and current injustices. More fundamentally, indigenous peoples are more than ethnic groups and the multicultural model is insufficient as a response to their right, as peoples and nations, to

---

[138] *Ibid*
[139] *Ibid*
[140] *Ibid* at 151
[141] See *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*]

self-determination. However, Kymlicka's alternative multinational approach also fails to provide an appropriate model to implement the 'mosaic' society with differentiated citizenship sought by indigenous leaders.

Multinationalism

The substantial difference between ethnic groups and national minorities, for Kymlicka, is that national minorities occupy homelands,[142] the implication being that nations derive particular rights based on occupation of the land prior to the formation of the state. National minorities, who come to be incorporated into the larger state, typically desire to maintain their distinct societies within the state as well as their autonomy and self-government.[143] This can be implemented in various ways, ranging from self-sufficient political units formally under the banner of another state, to having designated representatives of the national minority in the central governance structure. Generally, these national minorities are recognized in the state's constitution, the set of principles and precedents that establish the entity as a state and guide its governance.

Within a multinational federalism, designated territory provides the space for national autonomy whether in the form of a province in a federation, such as Quebec in Canada, or as an autonomous territory under the sovereignty of an otherwise unified state, such as Puerto Rico in association with the United States of America.[144] Multinational federations require a different model of citizenship, as citizenship in a multinational state can no longer be a uniform and universalizing belonging to the state, but must accept and even promote plural ways of belonging

[142] Kymlicka 1995, *supra* note 35 at 14
[143] *Ibid* at 10
[144] Puerto Rico held a status referendum November 6, 2012, in which 54% of the electorate expressed a desire to change the territory's relationship with the United States of America, of which 61% favour full American statehood. See Ben Fox, "Puerto Rico vote endorses statehood with asterisk" The Associated Press 7 November 2012

to a state. Here, the national imagination accepts that plural groups will cooperate in the state project while identifying primarily to their national group. Here, Kymlicka says the citizenship bond does not close the question of state legitimacy, as does traditional popular democracy, but rather opens it to how the state's claim over the nation and national groups is justified.[145] Functionally, this can unite a diverse people into a partnership, or it can create divisions and rivalry between populations who are, or are perceived to be, treated differently by the central government or receive a greater share of focus, resources or power than other groups.

Jean Cohen discusses citizenship in light of the 'postmodern conundrum,' "the notion that the state must be a sovereign totality – bounded, self-sufficient and exercising uniform control over its citizen-subjects – is no longer empirically accurate."[146] She notes that the state remains sovereign in many respects, but that the international system is such that states do not hold exclusive sovereignty over internal or external matters, given national and international groups, agreements and legal systems. This means that the old conception of legal personhood needs to be updated, as citizenship is now a membership status within a nation-state which is affected by sub-state national groups and international law in various ways. Cohen notes that some progress has been made through the granting of rights to non-citizens, but the components of citizenship need to be disaggregated and reinstitutionalized in new governance structures, locating the full definition of the totality of citizenship neither in individual states nor in the 'far-fetched' idea of a world government.[147] Cohen utilizes Marshall's conceptualization of modern citizenship, in which citizenship is a political principle in democracy, a juridical status of legal

[145] Kymlicka 2011, *supra* note 127 at 287
[146] Cohen, *supra* note 119 at 257
[147] *Ibid* at 258

personhood, and a form of membership that expresses identity.[148] She contends that while there will always be tension between the components, this can be mitigated through the delegation of each component of citizenship to either different levels or new combinations of institutions such as nation-states, 'sovereign federal mega-states,' and 'some sort of cosmopolitan world legal order.'[149] This is the model of citizenship which correlates to parallelism as an extreme form of multinationalism, where the nations within a state have little interaction, as each nation will govern their own affairs separately and independently, but within a larger context of cooperative coexistence with other, similarly constituted nations.

This model is already partially realized through Canada's federal structure. Partial disaggregation of all three aspects of citizenship is permitted by the division of jurisdiction between the federal and provincial and territorial governments. However, the national minority model fails to respond to the needs of indigenous peoples in Canada for a number of reasons. First, even those indigenous nations who made treaties were not party to the Canadian constitutional process; they were subsumed as a responsibility of the federal government, not having the same negotiation of jurisdictions or granting consent to federal jurisdiction. Of those with treaties, regardless of the motivation for signing, very few indigenous groups accept that treaties were intended to transfer rights of self-determination and confer Canadian citizenship.[150] Second, national ambitions, Kymlicka says, need to be supported by a variety of political powers and institutions.[151] Small populations are too dependent on the majority society to 'opt out.' Some indigenous communities could sustain autonomous institutions, such as in the form of a

[148] *Ibid* at 248
[149] *Ibid* at 265
[150] See Harold Johnson *Two Families: Treaty and Government* (Saskatoon: Purich Publishing, 2007)
[151] See Kymlicka 1995, *supra* note 35

town, but many are simply too small.[152] In some cases, indigenous communities are quite sizeable, but do not form the majority in a jurisdiction, often as a result of direct intervention by the Canadian state during the assimilation and exclusion eras. This is particularly the case of many First Nation and Métis communities, as Nunavut has given substantial territorial autonomy to the Inuit of that region. However, Nunavut remains the only federal region with a singular indigenous majority,[153] and is the only area of Aboriginal title to have participation in federal governance bodies. Third, even if territorial jurisdiction and governance institutions were possible for each indigenous community or amalgamation of indigenous nations, the sheer number of indigenous nations and the diversity among them makes the national minorities model impractical in the Canadian context. The administrative institutions necessary to sustain a transition from ten provinces and three territories to a federation including even just a dozen of the larger or amalgamated indigenous nations would be inefficient and unsustainable. Fourth, nearly half of indigenous individuals and families, while members of indigenous nations, live in a 'diaspora' and are integrated into cities and town of a non-indigenous majority or simply live off of reserved land.[154] These individuals have largely been ignored in the calls for indigenous self-governance, and do not fit within Kymlicka's national minorities model or ideas of parallel indigenous institutions, as the lack of territorial concentration complicates matters of jurisdiction, representation and administration.

---

[152] In 1997, two-thirds of Indian bands had on-reserve populations of less than 500 (Cairns 2003, *supra* note 115 at 503)

[153] 80% of Nunavut's population is Inuit. Indigenous peoples form 50.2% of the population of the Northwest Territories, of which 20% identify as Inuit, 17% as Métis and 61% are members of 14 different First Nations). Both of these territories operate their legislative assemblies through consensual democracy. See Canada, Parliamentaary Library Information and Research Service "The Arctic: Northern Aboriginal Peoples" InfoSeries PRB-08-10E 24 October 2008 and Government of the Northwest Territories "About the Government of the Northwest Territories" online: <www.gov.nt.ca/research/facts/index.html>

[154] See Cairns 2000, *supra* note 88

The failure of both the multicultural and multinational model in responding the rights and needs of indigenous peoples in Canada has resulted in enduring conflict between indigenous peoples and the state, while indigenous peoples continue to live in unjust and disadvantaged circumstances. Indigenous peoples are not ethnic groups that can be subsumed under the multicultural protections of Canada, and recognition as a national minority does not address the circumstances of the majority of indigenous peoples in Canada. The advancement of indigenous rights continues to face not only the paternalism of the state, but also the challenge of identifying ways in which their rights to self-determination could be realized within the state structure.

Chapter 3: Aboriginal Rights and Constitutional Relationship

Indigenous peoples gained recognition of their collective rights through the assertion of nationalism, achieving differentiation within the Canadian state. Following the constitutional recognition of Aboriginal and treaty rights, the participation of indigenous leaders in the constitutional conferences signalled a respect for indigenous leaders, sovereignty and governance new to the Canadian state. However, the failure of these conferences to articulate a constitutional place for indigenous peoples resulted in continued subordination to the federal government, which the federal government has attempted to perpetuate. The constitutional protection of distinctive rights divided the Canadian citizenry, but did not define the relations of governance or the principles which were to guide the state after this distinction. The struggle to articulate Aboriginal rights and to settle land claims agreements has thus been frustrated by the continued subordination of Indians and the lands reserved for them as federal jurisdiction, a subordination which the federal government has sought to maintain in its limitations of Aboriginal rights. The perpetuation of this subordination is a denial of democracy, and delegitimizes its claim over indigenous peoples and their land.

Recognition of Difference

The White Paper was withdrawn by the federal government in 1971 in response to the massive opposition by indigenous peoples and organizations. This defeat was significant, not only as a policy, but as a psychological and political victory signalling the beginning of the end of state paternalism toward Aboriginal people and nations.[155] It was clear that assimilation had failed, that indigenous peoples were not disappearing, and that indigenous voices must be heard.

---

[155] *Ibid* at 165

The language of 'citizens plus' faded by the late 1970s both as a form of advocacy for indigenous peoples and as a target of non-Aboriginals. It was replaced by discussion of Aboriginal Rights and the language of 'nations.' This move to 'nationalism' also represented a return to tradition – rather than advocating for individual rights as 'citizens plus,' advancing claims as 'nations' implied that indigenous leaders spoke on behalf of their collectives and that the collective nature of indigenous groups is essential to their social, political and sacred institutions. As nations, indigenous organizations began seeking Aboriginal title from 1969, and the discussion of Aboriginal rights was gaining recognition, even being published in legal textbooks by 1972.[156]

In 1973, the SCC affirmed that the Nisga'a nation had Aboriginal title over its territory, with three judges asserting that the title had not been extinguished.[157] This recognition was a great enhancement to the bargaining power of indigenous peoples vis-à-vis governments as it is a recognition of prior sovereignty, and that indigenous peoples had indeed lived in organized societies prior to European contact. This meant that indigenous peoples "would no longer be referred to as they had been in earlier court decisions as 'wholly without cohesion, laws or cultures, in effect a subhuman species."[158] This represented a change in the basic foundations of the relationship between the state and its 'wards,' recognizing indigenous peoples as civilized and sovereign nations.

The *Constitution Act 1982*, with the *Charter of Rights and Freedoms*, recognized the unique constitutional position of 'Aboriginal' peoples in Canada. Section 35(1) of the

---

[156] See Peter A Cummin & Neil H Mickenberg *Native Rights in Canada* (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Company Limited, 1972)
[157] *Calder v British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1. Note that the three asserting continued title did not form the majority.
[158] Cairns 2000, *supra* note 88 at 171, referring to *Calder v British Columbia, Ibid* at 93 and 346

Constitution Act 1982 reads "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."[159] This moves the concept of Aboriginal rights from the common law in which it can be altered by the government, to constitutional status that prevents their extinguishment through simple legislation. The recognition of "Aboriginal peoples" also distinguishes them as a distinct class of citizens, as distinct peoples, within the Canadian state.

The *Constitution Act* 1982 not only recognized Aboriginal and treaty rights, but called for four constitutional conferences that, in turn, took place between 1982 and 1987. The first conference led to a constitutional amendment which recognized rights arising from modern land claims agreements and a commitment to include Aboriginal leaders in the constitutional conferences that dealt with their rights. These conferences symbolized the nation-to-nation relationship with Aboriginal leaders sitting at the constitutional bargaining table with federal and provincial first ministers.[160] The 1983 conference did lead to the clarification that modern land claims agreements bore the constitutional protection of 'treaty' rights.[161] However, parties failed to reach an agreement, according to the federal government, "in the absence of a clear understanding of the content of a right to self-government."[162] Provincial and federal leaders resisted the idea of 'inherent' Aboriginal rights, while indigenous leaders would not accept 'contingent' Aboriginal rights. Aboriginal peoples were excluded from the constitutional negotiations that led to the 1987 Meech Lake Accord and it was largely due to their protests of

---

[159] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, Section 35
[160] Cairns 2000, *supra* note 88 at 67-68
[161] Assembly of First Nations "Assembly of First Nations – the Story" online: <http://www.afn.ca/index.php/en/about-afn/our-story> [AFN Story]
[162] Canada, Political and Social Affairs Division "Aboriginal Self-Government" (Current Issues Review 96-2E, 1999) online: <http://www.parl.gc.ca/Content/LOP/researchpublications/962-e.pdf> [96-2E]

both their exclusion from and the content of this Accord that it was defeated in 1990.[163] The negotiations for the failed 1992 Charlottetown Accord[164] included, among other things, creating a new constitutional space for Aboriginal peoples. This accord proposed an Aboriginal third level of government, and signalled, in the inclusion of Aboriginal representatives, that non-Aboriginal governments do not speak for Aboriginal peoples within their electorates. Aboriginal peoples were to be removed from federal and provincial jurisdiction to the extent that they assumed jurisdiction over themselves.[165] They were to have designated representation in the House of Commons; guaranteed Senate seats alongside provincial seats, to assist in the preparation of the list of candidates for appointment to the Supreme Court and to have their consent required for constitutional amendments that directly affected Aboriginal peoples. Additionally, Métis were to be brought under federal jurisdiction while Métis nations were to be enumerated and registered, and Aboriginal leaders were to receive an exemption from the *Charter* to allow for traditional methods of leadership selection.[166] The Charlottetown Accord described the role of Aboriginal governments as "(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and (b) to develop, maintain and strengthen their relationship with their lands, waters and environments so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies."[167] The Accord was largely premised on a constitutional theory of parallelism for those communities desiring such independence, which was also supported by the

---

[163] *Ibid*
[164] *Charlottetown Accord: Draft Legal Text* (Ottawa: Supply and Services Canada, 1992) Print
[165] Cairns 2000, *supra* note 88 at 68-69
[166] *Ibid* at 67-70
[167] *Ibid* at 56-57

1995 Royal Commission on Aboriginal Peoples report.[168] This independence, the complete opposite from past policy of assimilation, was agreed to by all governments in 1992 but the accord failed to pass the national referendum.[169] The discussions of constitutional vision were abandoned.

Deep Diversity and Constitutional Patriotism

The collapse of constitutional discussions has had many impacts. Indigenous peoples are recognized in the Canadian Constitution as having distinct rights, separating them from non-indigenous citizens. However, no relations of governance were established to guide the legal development and self-determination of indigenous peoples in Canada. Neither were principles or values articulated within the Constitution to guide the interpretation and development of this relationship. Cairns characterizes Canada's historical record as displaying the recurring messages that the state wanted to erode identity differences that challenged its legitimacy, or to at least contain them within the civic community.[170] This makes the establishment of new relations of governance all the more important for indigenous peoples. Indigenous peoples have persevered despite historic and present injustice, and continue to demand adaptation by the state and citizenry to include them in the national imagination and state structure in a way that recognizes their 'indigenous difference.' Recognizing the limitation of Kymlicka's models, the debate on how minorities should be recognized has turned to what binds the citizenry together, preventing nations from seceding and uniting diverse peoples into a common national project.

---

[168] Canada *Report of the Royal Commission on Aboriginal Peoples* 5 vols (Ottawa: Queen's Printer, 1995) [RCAP]
[169] Aboriginal voters held a similar rejection rate as non-Aboriginal voters, though a much smaller proportion of Aboriginals voted as compared to non-Aboriginals. Significant concerns over the content of self-governance were raised, and many indigneous persons and groups did not approve of the negotiation process. See Christa Scholtz, "Aboriginal Communities and the Charlottetown Accord: A Preliminary Analysis of Voting Returns" Presented to the Canadian Political Science Association Annual Meeting June 2008, Vancouver British Columbia, online: <www.cpsa-acsp.ca/papers-2008/Scholtz.pdf> and 96-2E, *supra* note 162
[170] Cairns 2003, *supra* note 115 at 502

As observed above, creating a sense of social solidarity in democratic societies is a necessary facet of state-building. Insofar as the modern democratic state requires the support of its people for many of its objectives, so too does it need to shape its people into some degree of unity to enable functional governance.[171] However, the degree of solidarity necessary and how it is implemented are topics of ongoing debate.

Charles Taylor's concept of 'deep diversity' refers to a 'plurality of ways of belonging.' While sharing some elements with Kymlicka, such as the liberal focus on the individual and protective measures for minority cultures and groups within a multinational state, Taylor focuses his model on recognition as closely linked with cultural survival.[172] In Taylor's model, Kymlicka's notion of ethnic minorities touches the first level of diversity, which reflects differences in culture and background, 'but where there is a shared notion of what it means to belong to Canada.'[173] Second level diversity, or 'deep diversity,' refers to belonging to Canada through some constituent element, and refers to Quebecois and Aboriginal peoples.[174] Taylor proposes 'deep diversity' as a reconciliation of liberal individuality and group-based rights, as members of different minority, cultural and national groups 'belong' to the state in different ways, making the primary locus of political identity the national group.[175] Much like Joseph Caren's model of differentiated citizenship,[176] Taylor goes beyond cultural rights, which are

---

[171] *Ibid* at 504
[172] John Erik Fossum "Deep Diversity versus constitutional patriotism: Taylor, Habermas and the Canadian constitutional crisis" (2001) 1:2 Ethnicities 179 at 181
[173] *Ibid* at 185
[174] *Ibid*
[175] Baumeister, *supra* note 147 at 394
[176] See Joseph Carens *Culture, Citizenship, and Community: Contextual Political Theory and Justice as Evenhandedness* (USA: Oxford University Press, 2000)

designed to protect members of minority groups from discrimination, to establishing corporate cultural rights designed to guarantee the long-term protection of culture and identity.[177]

> Cultural protection is thus ultimately bound up with a group's notion of dignity, and cultural identity is closely linked to a person's self-identification. The self-respect of an individual is closely linked to the esteem in which that person's national group is held... Cultural protection, therefore, may seem to take precedence over the group's ability to revise their ends.[178]

Much like asymmetric federalism, where indigenous nations would have the ability to both participate in and 'opt-out' of federal arrangements, this presents an innovative response to the challenges faced by multinational states, and underlies the model of parallelism advanced by treaty federalists and the Royal Commission on Aboriginal Peoples.[179] Taylor does recognize that social solidarity is necessary for the functioning of a free democratic society, and advocates for mutual understanding and a sense of civility among citizens.[180] However, the definitive protection of cultural minorities is criticized in terms of theoretical and practical application.

Andrea Baumeister remarks that Taylor and Carens' preoccupation with Quebec, which shares a broad range of cultural commitments and liberal values with Canada, lead them to underestimate the difficulties in maintaining a genuinely differentiated citizenship.[181] She contends that a modern state can only secure legitimacy if all citizens can participate in political processes on equal terms and are shown equal respect, which is achieved when the diverse histories, needs and goals of various communities are acknowledged and a 'genuinely shared culture' of the multicultural society is developed as a basis for civic integration and mutuality.[182] What Baumeister proposes here is the substance of Jurgen Habermas' constitutional patriotism.

---

[177] Baumeister, *supra* note 147 at 398
[178] Fossum, *supra* note 172 at 184-5
[179] See Youngblood Henderson, James Sakej "Sui Generis and Treaty Citizenship" (2002) 6:4 *Citizenship Studies* 415 ; RCAP, *supra* note 168
[180] Fossum, *supra* note 172 at 184
[181] Baumeister, *supra* note 147 at 406-7
[182] *Ibid* at 407

Habermas criticizes Taylor's deep diversity and its focus on cultural protection, saying Taylor's reading of liberalism "calls into question the individualistic core of modern conception of freedom."[183] Habermas asserts that the public autonomy of citizens is protected through popular sovereignty, expressed in rights that allow freedom of speech and assembly, while the private autonomy of citizens is protected via the classic human rights, such as liberty, through the constitutional state.[184] These two systems, popular sovereignty and classical human rights, are mutually dependent and presuppose each other, and are the preconditions for legitimate political and legal systems.[185] These systems of rights are based on universalizable principles, applying equally to all citizens. Advancing beyond Kymlicka's multicultural model, Habermas allows for claims of differentiation but says they must be assessed for how they affect the internal relation between citizens' public and private autonomy. Claims for differentiation can only be accepted if "all who are potentially affected by it consent to it after having participated in rational discourses,"[186] an utterly unrealistic criteria. Differentiation can be justified, for Habermas, because the application of universal principles reflects the context-specific and ethically defined nature of law.[187] In other words, the application of law depends on the ethical-cultural community, and different laws or different equalities are enforced as per the community's character. This character is the substance of Habermas' Constitutional Patriotism, "an ethically informed and culturally grounded support for differential rights in a multicultural context," because constitutional patriotism binds the society through the universalizable legal principles that underlie the application of law. Group-differentiated rights can be justified insofar

---

[183] Jurgen Habermas "Struggles for Recognition in the Democratic Consitutional State" in C. Taylor & A. Gutmann, eds, *Multiculturalism* (Princeton: Princeton University Press, 1994) in Fossum, *supra* note 172 at 109
[184] Fossum, *Ibid* at 191
[185] *Ibid*
[186] Habermas, *supra* note 183 (Fossum's Translation)
[187] *Fossum, Ibid* at 193

as they provide citizens with the resources they need to actualize their basic civil and political rights, such as cultural rights permitting language-specific governmental services. Accordingly, any rights that weaken or challenge the universal principles or 'established procedure' cannot be accepted.[188] Cultural distinctiveness, he says, cannot be established 'once and for all,' but is constantly changing.[189]

Habermas's constitutional patriotism bears some positive elements, such as the recognition that the underlying universal principles can be applied in different ways according to the culture in question. This is an extremely important observation, one that rings true with the international community in its articulation of indigenous rights in UNDRIP.[190] However, that Habermas requires consensus from all who may be affected is problematic at best, given that the struggles for minority rights are often fought among societies who, while multicultural, are not intercultural.[191] It submits the minority to the willingness of the majority to see its perspective and undertake the necessary changes to rectify the situation, which places the minority at a disadvantage: the minority must not only prove their worth but also requires the majority's will to allow the realization of their rights. The realization of one's rights only by another's will is unlikely where it appears to be in conflict with the interests of the majority. Conversely, Taylor's deep diversity may jeopardize popular sovereignty to protect the minority, and may restrict the possible inclusion of new or other national minorities, as well as the adaptation of the recognition of minorities and their rights, through the view of constitution as contract.

---

[188] Fossum does not clarify this statement, but presumably he is referring to constitutional procedures as legal and political procedures can carry many injustices that may need to be corrected

[189] Fossum, *supra* note 172

[190] See UNDRIP, *supra* note 2

[191] See Kymlicka 2003, *supra* note 147 and Bhikhu Parekh *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London: Macmillan, 2000) for intercultural dialogue

Canada seems to have chosen Taylor's prioritization of cultural protection, officially at least, through constitutional recognition of Aboriginal and treaty rights. Within the Canadian state, concerns that there be flexibility adequate to allow the evolution or adaption of codified rights is addressed through the view of the Canadian Constitution as a 'living tree' document that is meant to grow and be interpreted according to national development. However, with the collapse of constitutional negotiation, this recognition establishes that Aboriginal Peoples are indeed a distinct peoples within the Canadian state but continues to situate them under federal jurisdiction, denying the self-determination inherent in being a distinct people. In articulating that distinct rights are accorded and without articulating the constitutional character of the state or addressing the relationship between the state and indigenous peoples, Canada fails to provide a clear constitutional base for the relationship to grow. Thus, the progress made in the recognition of indigenous peoples, their rights, and the supporting governance structures has been piecemeal and inadequate.

Advancement of Aboriginal Rights by the Courts

The federal government has neither defined, nor given boundaries to, the 'existing' Aboriginal and treaty rights that are affirmed in s.35. Many indigenous individuals and groups have taken their demand for rights to the courts, and the task of defining Aboriginal rights has fallen to the SCC. This is at 'disproportionate' cost to Aboriginal communities, according to the United Nations Committee on the Elimination of Racial Discrimination 2007, due to the 'strongly adversarial positions taken by the federal and provincial governments."[192] This is seen, for example, through the $3.1 million the federal government spent in unsuccessfully arguing

[192] United Nations Committee on the Elimination of Racial Discrimination (CERD) *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada* UN Document, CERD/C/CAN/CO/18 (25 May 2007) at 22.

legal technicalities to try to keep the First Nations child welfare case, which is seeking federal funding for First Nations child care equal to provincial standards for non-Aboriginal children, from going to court.[193]

The SCC has held that s.35 is directed toward "the reconciliation of pre-existing Aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory,"[194] and has many times said that negotiation is preferred to litigation for such reconciliation.[195] Among the significant advances the SCC has made in articulating Aboriginal rights are the recognition of treaties as solemn and sacred promises and the accompanying guidelines for the interpretations of treaties,[196] the finding of the source of Aboriginal rights as being from the collective lives and traditions of indigenous people rather than from the Crown,[197] determining that Aboriginal titles are held collectively and require self-government powers,[198] outlining the application of provincial law to Aboriginal Rights,[199] and the stipulation that the honour of the Crown requires negotiation 'leading to a just settlement of Aboriginal claims' where treaties are not concluded.[200] These rulings recognize indigenous difference and articulate the according rights in ways the state has resisted. The SCC has recognized and protects the collective nature of Aboriginal rights and title, and had defended indigenous peoples from state encroachment on their land and rights. While many of its

---

[193] Scoffield, Heather "Ottawa spends $3-million to battle first nations child welfare case" The Globe and Mail (The Canadian Press) (1 October 2012) online: <http://www.theglobeandmail.com/news/national/ottawa-spends-3-million-to-battle-first-nations-child-welfare-case/article4581093/>; CBC News "Court victory for First Nations child welfare" The Canadian Press (April 18 2012) <http://www.cbc.ca/news/politics/story/2012/04/18/pol-first-nations-court-welfare.html>

[194] *R v Van der Peet* [1996] 2 S.C.R. 1010 at 166 [*Van der Peet*]

[195] See *Delgamuukw, supra* note 141 and *Thilhqot'in Nation v. British Columbia* [2007] BCSC 1700 at 1373

[196] See *R. v. Badger* [1996] 1 S.C.R. 771 Justice Cory recognized the sacred nature of treaties at 793

[197] *R v Sparrow* [1990] 1 S.C.R. 1075 and Duncan Ivison, "The Logic of Aboriginal Rights" (2003) 3:3 Ethnicities 321 at 326

[198] *Delgamuukw, supra* note 141 at 137-138, 166

[199] See for example, *Delgamuukw, supra* note 141

[200] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 at 20

decisions have been criticized for having limited interpretations of Aboriginal rights, the SCC has maintained the Crown's fiduciary duty toward indigenous peoples and has repeatedly stated that the Crown must negotiate with indigenous peoples in good faith in matters than concern their peoples and lands. In calling for fair negotiations, the SCC advocates for a change in the relationship and approach of the state from adversarial, requiring court settlements, to respectful cooperation.

While the SCC has made significant progress in the elucidation of the substantive character of Aboriginal rights, it has made one paramount error in its definition of Aboriginal cultures which Aboriginal rights are meant to protect. Cultures are not stagnant; they develop over time, with technology, trade and contact with other cultures. In the *Van der Peet* case, Chief Justice Antonio Lamer defines Aboriginal rights as those activities which are "integral to the distinctive culture of the Aboriginal group claiming the right."[201] In explaining what is 'integral', he continues,

> [T]he test for identifying the Aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contract with Europeans.[202]

The Court characterized the 'special status and constitutional status of Aboriginal rights' as existing to reconcile "pre-existing Aboriginal rights with the assertion of Crown sovereignty."[203] The legally relevant date for this reconciliation is pre-contact[204]; within this context, current reconciliation is not possible as it fails to recognize indigenous peoples and indigenous culture

---

[201] See *Van der Peet, supra* note 193 at para. 46 (Lamer, CJC)
[202] *Ibid* at 44 (Lamer CJC)
[203] See John Borrows "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/1998) 22:1 American Indian Law Review 37 at 44; *Van Der Peet* at 31
[204] The Powley case rejected this criterion for defining Metis rights, as it would effectively the Metis as a distinctive rights-bearing people, and instead compared the practice in question to a site-specific date just prior to "effective European Control" in the area. See *R v Powley* [2003] 2 SCR 207

for who and what they are today. Aboriginal practices have evolved both alongside technological, social and natural advancements and because of intentional interference by the Canadian government. John Borrows continues,

> Aboriginal rights protect only those customs which had continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.... This decision relegated Aboriginal peoples to the backwaters of social development, deprived them of protection for practices that grew through intercultural exchange, and minimized the impact of Aboriginal rights on non-Aboriginal people.[205]

This is in direct contrast to the rights of non-indigenous peoples on this land, whose rights have developed as a direct result, as seen in Chapter 1, of the relationship with indigenous peoples, treaty negotiation and the development of social and political institutions on this land since contact with indigenous peoples. The first settlers were dependent on indigenous knowledge and assistance to survive, and the economic expansion that has grown Canada through history is based on land and resources on formerly (or presently) indigenous land, and the capacity of non-indigenous industry has grown through expansion based on technological advances and participation in the international sphere. As pre-contact culture is no longer possible, given the loss of land and changes in indigenous lifestyle since contact, the specific protection of pre-contact practices restricts the ways in which indigenous peoples can adapt to modern realities and maintain their identity. Therefore, defining Aboriginal rights by pre-contact cultural realities attempts to erase the violence against indigenous persons, peoples and cultures from Canadian history by separating the serious struggles Aboriginal communities currently face from their colonial causes, thus requiring less of the state to make amends and provide assistance for indigenous communities. This exemplifies the error Habermas found in Taylor's theory of defining minority cultures according to a constitutional contract, as the view of constitutional

---

[205] Borrows, *supra* note 203 at 44-45

definition as a contract solidifies a time- and perspective- specific understanding of a people which negates cultural growth and change. However, Canada's Constitution is not meant to be interpreted as a contract, but as a living document, thus allowing for change over time, though this option for growth was not granted to Aboriginal rights.

The dissenting opinions in this case raise important points, ones that reflect a more respectful and realistic view of culture. Justice Heureux-Dubé says that a 'dynamic right' approach should be taken in interpreting Aboriginal rights, as protected in s.35(1), to permit the evolution of these rights over time.[206] "According to this view, Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live."[207] Finding against the majority, Heureux-Dubé fairly determined that the sale of fish at question in this case is indeed the modern form of the salmon trade for sustenance and support that has always been part of Sto:lo culture. Justice McLachlin distinguishes between an Aboriginal right and the exercise of an Aboriginal right, where the former is a broad, general, and remains constant over time and the latter may take many forms and vary in region and time. "The rights are ancestral: their exercise takes modern forms."[208] McLachlin rejects both the 'integral part' and the 'dynamic rights' approach as too broad, indeterminative and categorical. Instead, given the fiduciary duty of the Crown and the fact that the Crown's title is subject to existing Aboriginal interests (which can only be removed by solemn treaty with due compensation) the right in question is the right of the Aboriginal people to continue to sustain themselves from the land and adjacent waters as they have always done. The protected right is

---

[206] *Van der Peet, supra* note 193 at 163-165, per L'Heureux-Dubé
[207] *Ibid* at 172, per L'Heureux-Dubé
[208] *Ibid* at 238, per McLachlin

not the right to trade, but in the context, "trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised."[209]

It must be noted that the SCC is an institution of the liberal democratic structure of the Canadian government, which includes Parliamentary sovereignty. As such, the majority upheld the unquestioned sovereignty of the Crown as bearing more weight than Aboriginal rights.[210] The SCC has managed to avoid directly addressing an Aboriginal right to self-determination, utilizing the government's concept of self-government as an expression of self-determination.

Advancements in Aboriginal Relations by the State

In 1995, the federal government formally acknowledged that self-government was an inherent right as recognized in s.35.[211] 'Inherent' is meant to signify that the source of the right is not the Canadian state or the Crown, but that this right arises from the Aboriginal peoples' long occupation and government of the land prior to European settlement.[212] Implementation of self-government "should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society."[213] This self-government policy outlines that:

---

[209] *Ibid* at 278, per McLachlin
[210] See, for example, *Ibid at* 49
[211] Canada, Aboriginal Affairs and Northern Development *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (2010) online: <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#scopn> [Canada's Approach]
[212] 96-2E, *supra* note 162
[213] Canada's Approach, *supra* note 222

- self-government will be exercised within the existing Canadian Constitution.
- the *Canadian Charter of Rights and Freedoms* will apply to Aboriginal governments.[214]
- federal funding for self-government will be achieved through the reallocation of existing resources.
- where all parties agree, rights in self-government agreements may be protected in new treaties under section 35 of the Constitution, as additions to existing treaties, or as part of comprehensive land claims agreements.
- laws of overriding federal and provincial importance will prevail, and federal, provincial, territorial and Aboriginal laws must work in harmony.[215]

The first point is particularly important to this discussion – given the failure of previous constitutional conferences and a desire to place controls on the constitutional discussions following Quebec's 1995 secession referendum, the government wanted to ensure Aboriginal self-government efforts did not re-enter constitutional discussions. Further, this continues to situate "Indians and the land reserved for them" as federal jurisdiction within the Canadian Constitution which permits the federal government to alter the content of self-government that is available for treaty negotiation. Another example of contractual recognition, the closing of the constitutional discussion denies the possibility of dissent and changes to the policy and governance relationship, denying democracy.

The federal government has defined the scope of "Aboriginal jurisdiction or authority as *likely* extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."[216] The elements that may be negotiated for Aboriginal self-government include the establishing of governing structures, membership, marriage, adoption and child welfare, education, health and social services, administration of Aboriginal laws, natural resources management,

---

[214] Many indigenous peoples oppose the application of the Charter to aboriginal governments, as it interferes with traditional governance models. More than 300 First Nations and Metis Chiefs even protested in London in 1979 to try to stop the patriation of the *Constitution Act* 1982. See AFN Story, *supra* note 161

[215] 96-2E, *supra* note 201

[216] Canada's Approach, *supra note* 211. Emphasis mine.

direct taxation and property taxes of members, and licensing, regulation and operation of businesses located on Aboriginal land.[217] The policy stipulates that in other areas which require cooperation between Aboriginal and non-Aboriginal governments, such as environmental protection, assessment and pollution prevention, and fishery and migratory birds co-management, federal and provincial laws would prevail over Aboriginal laws when conflict arises,[218] again situating Canadian sovereignty and authority as superior to Aboriginal 'interests.' Aboriginal governments and institutions are excluded from powers related to Canadian sovereignty, defence and external relations, and other national interest powers.[219] The policy also outlines that recognition of the inherent right to self-government does not end the 'unique, historic and fiduciary' relationship with Aboriginal peoples in Canada, although Crown responsibilities will lessen as Aboriginal institutions assume greater control over the decision-making that affects their communities.[220] Correspondingly, where Aboriginal groups desire the Crown to 'have certain ongoing obligations,' the self-government jurisdiction and authority of that group will be limited. In other words, the greater support an indigenous community needs from the state, the less ability that community will have to determine its destiny.

As of October 2010, 18 comprehensive self-government agreements, involving 32 communities, had been completed and some 393 Aboriginal communities were represented at 83 tables at various stages of negotiation with the Canadian government.[221] This demonstrates extremely slow progress, and indigenous peoples are still looking to the

---

[217] *Ibid*
[218] *Ibid*
[219] See *Ibid* for elaboration of these categories
[220] *Ibid*
[221] Aboriginal Affairs and Northern Development Canada *Fact Sheet: Aboriginal Self-Government* (2010) online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294> [Fact Sheet]

courts to protect their treaty rights from government encroachment.[222] Grand Chief Edward John wants it to be known that many First Nations in British Columbia are unable to continue negotiations because of the crippling debt accumulated in the process, despite UNDRIP's stipulation that financial and technical assistance will be provided by the state. He notes that the federal government's approach to this has been to provide up to 80% funding support for treaty negotiations as advance loans to First Nations, which are drawn against final treaty settlements.[223] This means that some First Nations will receive as little as 20% of the treaty settlement, and that others who fail to complete negotiations will simply be saddled with debt.

John attributes the lack of reconciliation in treaty negotiations in British Columbia, both when successful and when unable to reach agreement, to the 'unreasonable negotiating mandates of Canada and the province."[224] First Nations here, and elsewhere in the country, object to the Crown's requirement that their rights be "exhaustively" set out in the written agreement which follows treaty negotiations, achieving a "full and final settlement" of their claims to Aboriginal title and rights.[225] Canada further requires that First Nations must agree to indemnify Canada and the province 'in respect of legal claims regarding the existence of Aboriginal rights, including title, that are other than, or different in attributes or geographic extent from, the rights as set out in the agreement."[226] This precludes any future modifications or additions to treaty rights, which prevents adaption to

---

[222] For example, Grassy Narrows's efforts to prevent Ontario clear cutting, see *Keewatin v. Ontario (Minister of Natural Resources)* [2011] ONSC 4801

[223] Grand Chief Edward John, "Chapter 3: Survival, Dignity, and Well-Being: Implementing the Declaration in British Columbia" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 47 at 50-51

[224] *Ibid* at 50

[225] *Ibid*

[226] *Ibid*

ecological or cultural change over time and places struggling nations, who may then have to settle for less than they want out of the inability to maintain lengthy and costly negotiations, at a perpetual loss. Canada claims that it has ceased to extinguish Aboriginal and treaty rights and that through this new process Aboriginal rights are only 'modified'. It must be noted, however, that international human rights bodies have repeatedly found no distinction in practical effect between 'extinguishment' and 'modification.'[227] In denying future adaption and requiring indemnification on all matters beyond the 'final' agreement, Canada is denying not only the adaptation of indigenous rights but the democratic requirement of continued consent of the governed, again restricting the rights and relationship of the state with indigenous peoples when such limitations are inconsistent with the constitutional character of the state.

Current Issues

Along with the misrecognition of indigenous peoples and their continued exclusion from real self-determination powers within the Canadian state, the federal government continues to resist its obligations to treat indigenous peoples as full citizens and has even revived its assimilation efforts. This came to international attention as the squalid conditions of the Attawapiskat community led to a declaration of a state of emergency, highlighting the similar conditions in innumerable communities throughout the country.[228] Recently, the First Nations Child and Family Caring Society has garnered significant attention the disparity in services

---

[227] John *Ibid.* Also see e.g. United Nations, Human Rights Committee *Concluding observations of the Human Rights Committee: Canada* UN Doc CCPR/C/79/Add.105 (7 April 1999) at 8; United Nations, Commission on Human Rights *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, Rodolfo Stavenhagen: Addendum: Mission to Canada* UN Doc. E/CN.4/2005/88/Add.3 (2 Dec 2004) at 20, 99

[228] See CBC News "Attawapiskat a 'deep concern' for UN rights official" (20 December 2011) online: <http://www.cbc.ca/news/canada/story/2011/12/20/attawpiskat-un-rights.html>

provided to First Nations and non-indigenous children, such as Indian Affair's lack of funding for libraries, music programs or science laboratories for schools on reserves.[229] Similarly, the disproportionate number of indigenous children in state care has been dubbed the 'Millennium Scoop' in reference to the 'Sixties Scoop' of indigenous children taken to residential schools.[230] Despite Aboriginal peoples representing roughly 4% of the Canadian population, a rising 30-40% of children in state care are indigenous,[231] which in translates to over 27,500 First Nations children in state care in 2010 compared to 10,294 in residential schools in 1965.[232] Provincial governments are not beyond scrutiny either, as Ontario is appealing the court order to prevent the province from granting logging license to the territory of Grassy Narrows, signatory to Treaty No 3.[233] There are many examples of the state's continued neglect of, and interference with, indigenous peoples in Canada, and the continued encroachment of the federal and provincial economic endeavours into areas where Aboriginal claim is expressed or title is established must be seen in the same government's slow progress to in establishing modern land claims agreements.

In addition, the Harper Conservative government has tabled a number of bills which interfere with domains its own policy lists as matters of internal self-governance of Aboriginal communities, utilizing unilateral legislation to govern indigenous peoples and communities. This

---

[229] Cindy Blackstock "Mosquito Activism" 20 October 2012, Kairos Re:Generate Conference, Cornwall Ontario
[230] CBC News "First Nations Children still taken from parents" CBC 2 August 2011 online: <http://www.cbc.ca/news/canada/story/2011/08/02/pol-first-nations-kids.html>
[231] Cheryl Farris-Manning and Marietta Zandstra "Children in Care in Canada: A summary of current issues and treads with recommendations for future research" 2003 Child Welfare League of Canada online: <http://www.nationalchildrensalliance.com/nca/pubs/2003/Children_in_Care_March_2003.pdf>
[232] Blackstock, supra note 229. These estimates do not include First Nations children in provincial care arrangements.
[233] See Gabrielle Giroday "Grassy Narrows applauds Appeal Court logging decision" Winnipeg Free Press (23 March 2012) online: <http://www.winnipegfreepress.com/breakingnews/Grassy-Narrows-applauds-Appeal-Court-logging-decision--143972636.html>. Appeal is not yet complete; the deadline for factums for intervener status was October 15, 2012.

is possible as the content of Aboriginal self-government is not constitutionally protected, as is the jurisdiction of provinces or territories. There are currently six bills before Parliament[234] which unilaterally repeal sections of the Indian Act, or alter their application in significant ways, along with the First Nations Property Ownership Act and First Nation Education Act, which are expected in early 2013.[235] These bills take a particularly individualistic perspective rather than the communal character of indigenous peoples in prioritizing individual rights and individual property, and in some cases replace, and in others contradict, provisions on communal rights. The Assembly of First Nations has said that individual property ownership is "a concept that is in direct contradiction to First Nation sacred responsibilities and distinct relationship to our territories," and views the legislation as an imposition of the colonizer's system.[236] Some chiefs have proposed the implementation of collective solutions that are already in practice on some reserves, while others do support privatization as a move towards freeing indigenous communities from the restraints of the *Indian Act*.[237] Regardless of whether the content of these provisions is beneficial to or desired by indigenous peoples, it is undemocratic that indigenous consent is not required for the changing of laws which affect their jurisdiction, governance and matters of daily life.

On August 24, 2012, a new step in the Canada-First Nations Joint Action Plan was announced by the Conservative government and the leaders of the Assembly of First Nations,

---

[234] Specifically, C-428, C-27, S-2, S-6, S-8, and S-207, Available through LEGISinfo database, online: <www.parl.gc.ca/LegisInfo>

[235] Russell Diabo "Harper Launches Major First Nations Termination Plan: *As Negotiating Tables Legitimize Canada's Colonialism*" (2012) 10:7-10 First Nations Strategic Bulletin 1; Dr. Pamela Palmater, "A brief overview of Bill S-2: Family Homes on Reserve Act" 15 November 2012 online : < http://rabble.ca/blogs/bloggers/pamela-palmater/2012/11/brief-overview-bill-s-2-family-homes-reserve-act>

[236] Josh Wingrove "Ottawa plan to allow private property on reserves reignites debate" The Globe and Mail (06 August 2012) < http://www.theglobeandmail.com/news/politics/ottawas-plan-to-allow-private-property-on-reserves-reignites-debate/article4466019/>

[237] *Ibid*

agreeing "to put sound education programs in native schools, to eliminate obstacles to creating jobs for on-reserve Indians, and to improve the governance of reserves," which will progress along with continued negotiation of land claim and self-governing agreements.[238] The Assembly of First Nations describes its position as facilitating dialogue between First Nations and the Crown[239] while the federal government seems to treat the Assembly of First Nations as a parallel indigenous representative institution. This parallel model is not established or protected in the Constitution and is thus subject to the political will of the government, as is the content of negotiations.

Aboriginal and Northern Affairs Minister John Duncan commented that "there is a huge generational change... within the Indian community," where current leaders are leaving behind the focus on treaty rights and self-government and are "really heading toward economic development, education, and good government in a major way."[240] Duncan's comments demonstrate either a misunderstanding or attempt to downplay the relationship and goals articulated in the stated purpose of the Crown-First Nations gatherings as including continued negotiation and movement toward self-governance. Assembly of First Nations Chief Shawn Atleo remarked that improving the standards on reserves does not come with an abandonment of asserting native jurisdiction. "First Nations can do both," he said, they can "accomplish success in education that will light the fire of potential in our young people."[241] Indigenous leaders continue to fight for collective rights and new relations of governance which respect indigenous collective self-determination.

---

[238] Jeff Ibbitson, "Ottawa, native leaders commit to sweeping overhaul of reserve life" The Globe and Mail (24 August 2012) <http://m.theglobeandmail.com/news/politics/ottawa-native-leaders-commit-to-sweeping-overhaul-of-reserve-life/article2053099/?service=mobile>
[239] AFN Story, *supra* note 161
[240] Ibbitson, *supra* note 238
[241] *Ibid*

Judge A.C. Hamilton asserted in a 1995 federally commissioned report that "a sense of paternalism continues to permeate the [comprehensive claims] policy and to poison relations between Canada and Aboriginal peoples."[242] And while these poisoned relations continue to play out, indigenous peoples remain under federal jurisdiction and continue to struggle for both a change in the relationship and adequate services, rights and support to heal and grow their communities. The possibilities for accommodating the self-determination rights of indigenous peoples, thereby legitimizing Canada's sovereignty over indigenous peoples and their territory, depend on Canada's willingness to open the conversation not only on indigenous rights, but also on the fundamental relationship between indigenous peoples and the Canadian state, as laid out in the Constitution.

[242] The Honourable A.C. Hamilton *Canada and Aboriginal Peoples: A New Partnership* (Ottawa, Minister of Indian Affairs and Northern Development, 1995) at 11,33 in Cairns 2000, *supra* note 88 at 63

Chapter 4: A Democratic Arena

> Purported decolonization and watered-down cultural restoration processes that accept the premises and realities of our colonized existence as their starting point are inherently flawed and doomed to fail. They attempt to reconstitute strong nations on the foundations of enervated, dispirited and decultured people. That is the honest and brutal reality; and that is the fundamental illogic of our contemporary struggle.[243]

For the moment, Canada and indigenous peoples seem to be at an impasse. Canada is unwilling to relinquish control of its territory and resources to indigenous peoples as it sees this as a diminishment of its sovereignty, even where clear Aboriginal title is being enforced by the courts. The state has closed constitutional discussion in its limitation on Aboriginal self-governance. Indigenous peoples are either found to be asserting a nationalism that the Canadian state resists, or to be simply accepting the payments and compromises of the government. Whether the latter stems from a sense of entitlement, apathy, broken spirit, or inability to hold out for an alternative, is not within the analytical scope of this paper. Those claiming nationalism are working within foreign systems of representation, negotiation and judicial proceedings, forced to compromise their traditions to make them cognizable to the Canadian legal system. This would seem to constitute a functional recognition that these Canadian systems are valid to adjudicate their claims; however, when considered against the explicit expression of these systems as illegitimate assertions of authority, the courts can be seen as the only available option for the protection of Aboriginal and treaty rights.

The Canadian Constitution presents the recognition of Aboriginal peoples as a distinct class of citizens, yet does not provide for a relationship with indigenous peoples as self-determining peoples. The Constitution is the appropriate place for such a framework, as it 'lays

---

[243] Alfred, Taiaiake & Jeff Corntassel "Being Indigenous: Resurgences against Contemporary Colonialism" in Richard Bellamy, ed, *Politics of Identity IX* (Oxford, Blackwell Publishing, 2005) at 612

down the fundamental laws which establish the form of government, the rights and duties of citizens, the representative and institutional relations."[244] As Tully said, constitutions provide mutual recognition, continuity and consent, each of which the Canadian constitution lacks for indigenous peoples. Constitutional recognition of a group's identity, rights and relationship with the state ensures the legal protection of that group, regardless of the state's political or social conditions.

Recognition by the Canadian state and courts that indigenous rights stem not from the Crown but from their distinctive culture and prior occupation highlights the need for change in the relationship between indigenous peoples and the Canadian state. It is absurd that, despite this recognition, the federal government continues to assert its authority to define, limit and manage the rights of indigenous peoples whose self-determination and thus sovereignty is prior to that of the Canadian state, particularly as it was recognized in the inclusion of Aboriginal leaders in the constitutional conferences that non-indigenous leaders do not speak for the indigenous peoples in their electorates. Given the current impasse of the government which is unwilling to relinquish real power to those it will not recognize as self-determining nations, and indigenous peoples who are equally unwilling to relinquish nationhood and unable (due to historic and ongoing cultural and community damage) to present other alternatives for distinctive participation in the Canadian state, these issues cannot, for now, be resolved. Canada unjustly continues its mismanagement and illegitimate governance of indigenous peoples who have not consented to its authority and indigenous communities continue to suffer. This relationship needs to be addressed immediately and steps can and must be taken even without resolving the issues of state form and recognition.

---

[244] Tully, *supra* note 13 at 59

Indigenous Citizenship in Canada

Canada has taken a mixed approach to its inclusion of indigenous peoples in the Canadian state. On the one hand, in the recognition of Aboriginal and treaty rights in the Constitution as well as the approach used in both the Charlottetown Accord negotiations and in the current Canada - First Nations conferences, Canada has demonstrated an acceptance of the nation-to-nation relationship requested by indigenous peoples which is theorized in the deep diversity model. On the other hand, the federal limitations of self-government powers, the lack of consistent and mandated federal process of indigenous representation and participation in national discussions, and the federal policy which permits economic interests to override Aboriginal and treaty rights, demonstrate Canada's unwillingness to go beyond the constitutional patriotism of limited cultural rights justified by concepts of popular sovereignty.

Indian Status and the enfranchisement of indigenous peoples were first an assimilation effort, and then a naturalization effort, both of which failed as indigenous communities fought to maintain their distinct social, political and cultural identities. However, the state has never truly accepted indigenous peoples as full citizens and has continued to interact with indigenous peoples on sufferance based on the Indian Act, a document which continues to regard Indians as wards of the state and control their membership and rights to a far greater extent than non-indigenous citizens. Their Canadian citizenship, in Macklin's terms, bears little heft; it permits entry and movement within the state, but Indian Status seems to restrict both the provision and quality of services as well as participation in the political, social and economic spheres of the Canadian society. As such, 'Aboriginal citizenship' is at best partial and reflects an apparent reluctance by the Canadian state to grant Aboriginal people a citizenship that is both full and respectful of their place within Canadian society historically and in the future.

The very term 'Aboriginal,' which groups together status and non-status Indians, Inuit and Métis, reveals the extent to which the state is unwilling to recognize indigenous peoples. It is a term that has been become widely accepted as the 'politically correct' and proper way to refer to indigenous peoples in Canada, but one which occludes the vast diversity it contains. Indeed, the Métis were generally treated as ordinary citizens, and the state's policy towards them has been described as 'assimilation by neglect' resulting in "abject poverty, marginalization, and social disintegration."[245] Historically distinguished from Indians in policy and practice, Métis have been recognized as "distinctive rights-bearing peoples" who are protected in s.35(1). The first Métis right to hunt and fish was recognized by the SCC only in 2003.[246] Membership is now established primarily through provincial councils, which offer Métis identification cards based on self-identification, acceptance within a Métis community and ancestral connection to a historic Métis community, standards that are much more acceptable and respectful than those set for Indian Status.[247] It is only since 2008 that the Government of Canada has started to seriously negotiate with the Métis National Council to establish representation and a formal relationship. Similarly, the Inuit were generally ignored by the Federal government, having contact only with members of the Royal Canadian Mounted Police, missionaries, the Hudson's Bay Company and whalers, until the 1953 establishment of the Department of Northern Affairs and Resources Management. They were officially brought under federal jurisdiction when the SCC ruled in the *Re Eskimos*[248] case that Eskimo were "Indians," largely by virtue of the term "Savages" used in

---

[245] Cairns 2000, *supra* note 8 at 36
[246] *R. v Powley*, *supra* note 204
[247] *Daniels v Canada (Minister of Indian Affairs and Northern Development) [2013] F.C.J No 4*, January 8, 2013 held that Metis and non-status Indians are within federal jurisdiction under subsection 91(24) of the Constitution Act 1867, are owed a fiduciary duty by the federal Crown, and had a right to good faith negotiation and consultation with the Crown in respect of their rights as Aboriginal peoples.
[248] See *Reference re: British North America Act, 1867 (U.K.), s.91 (The Eskimo Reference) [1939] S.C.R. 104*

the official documents, though they were not subject to the *Indian Act*.[249] However, the presence of the federal government was extremely scarce in Inuit territory until the construction of radar lines during the Second World War and Cold War.[250] Having never signed treaties or surrendered land, Inuit have successfully negotiated four land claims agreements with the Canadian Government in Nunavik (1975), Inuvialuit (Northwest Territories, 1984), Nunavut (1993) and Nunatsiavut (Labrador, 2004),[251] and maintain a majority population within these regions. The Nunavut Territory was constitutionally recognized in 1999, and remains the only jurisdiction of Aboriginal Title to have representation in the Parliament and Senate. First Nations histories are incredibly diverse, and are governed through the *Indian Act* without representation or authority in the federal bodies which determine this governance. Given the incredibly different histories, legal status and cultures of the Métis, Inuit and the diverse peoples characterized as 'Indian,' the grouping of these categories into 'Aboriginal' seems to be yet another violence to the diversity of indigenous identities, a recent and continuing assimilationist practice. This is important in the context of recognition, as occluding the diversity 'Aboriginal' contains prevents the recognition and articulation of the different rights and governance relationships granted to different indigenous groups. The lack of recognition of indigenous diversity also deprives both the unrecognized indigenous peoples and the non-indigenous citizenry of having an accurate national imagination, preventing intercultural understanding and the bonds of nationhood.

Tully notes that the legal and political language used in assessing claims to recognition, "continues to stifle cultural differences and impose a dominant culture, while masquerading as

---

[249] See *Ibid*
[250] Cairns 2000, *supra* note 88 at 36
[251] Inuit Tapiriit Kanatami *Vision of Self-Government* online: https://www.itk.ca/about-inuit/vision-self-government

culturally neutral, comprehensive or unavoidably ethnocentric."[252] Taiaiake Alfred and Jeff Corntassel note that 'Aboriginalism' is a legal, political and cultural discourse designed "to serve an agenda of silent surrender to an inherently unjust relation at the root of the colonial state itself" and that it is a 'powerful assault' on indigenous identities, but which must be accepted in the politico-economic context of historic and on-going dispossession in which indigenous communities must cooperate individually and collectively with the state to ensure their physical survival.[253] Kulchyski defends the term, suggesting that it is useful in negotiating the boundary between Aboriginal and non-Aboriginal peoples,[254] but he fails to account for the multiplicity of boundaries between the different indigenous peoples and non-indigenous communities, individuals and governments resulting from diverse histories and relationships. Most indigenous advocates and communities continue to use other terms, such as the common groupings of "Inuit," "Métis," "First Nations" as well as specific and cultural terms, such as Anishinaabe or Nehilawe, in their naming and reference to indigenous communities, asserting their own political and social identity and agenda against the 'Aboriginalism' of the state.

This 'Aboriginalism' is used in the definition of distinct rights in the Canadian Constitution, rights which are themselves debated not only in content but in form. However, there is growing consensus among scholars and legalists that equality means sometimes treating people differently,[255] and that rights are the best method to reconcile different equalities to common citizenship. Some indigenous theorists argue that Aboriginal rights are simply the 'benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to

---

[252] Tully, *supra* note 88 at 35
[253] Alfred & Corntassel, *supra* note 243 at 598-9
[254] Kulchyski, *supra* note 54 at 5
[255] See Hunt & Purvis, *supra* note 98; Ivision, *supra* note 197; John Chesterman & Brian Gilligan "Indigenous People and Citizenship" 50th Anniversary of Australian Citizenship Conference, Melbourne, July 1999

enter the legal and political framework of the state."[256] The SCC's perspective is similar, that Aboriginal rights exist to reconcile pre-existing Aboriginal claims with the assertion of Canadian sovereignty, though in Canada indigenous peoples did not choose to abandon their autonomy. Alfred's perspective aptly reflects the tone of present discussions, but also reveals the problematic nature of Aboriginal rights where they are interpreted as being sufficient compensation for past atrocities or current injustice. As Duncan Ivison notes, "Aboriginal rights refer to those powers and capacities that are a necessary (although hardly sufficient) condition of Aboriginal peoples being treated equally, given the legacy of colonialism and the challenges they face today in living decent lives according to their own rights."[257] He contends that Aboriginal rights promote equality between Aboriginal and non-Aboriginal peoples in both the formal sense, by recognizing indigenous peoples in international and municipal law, and the substantive sense, in that they provide for means to answer the disadvantages indigenous peoples face.[258] Paul Joffe agrees that rights are the appropriate response to the acute poverty facing Indigenous peoples in different regions of Canada, as this poverty is closely related to a denial of human rights as it results from colonization, dispossession and discrimination.[259] John Chesterman and Brian Gilligan note that indigenous rights and citizenship rights should not be run together, that citizenship should not be equated to justice.[260] They are noting that the ongoing denial of services is a clear denial of citizenship rights, and that even if indigenous individuals and communities were to obtain full services, this would not be sufficient for meeting their rights as indigenous peoples, which require the collective rights associated with nationhood. This

---

[256] Ivison, *supra* note 197 at 323
[257] *Ibid* at 338
[258] *Ibid* at 336-337
[259] Paul Joffe "Chapter 5: Canada's Opposition to the UN Declaration: Legitimate Concern or Ideological Bias?" in *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* Jackie Hartley, Paul Joffe & Jennifer Preston, eds, (Saskatoon: Purich Publishing Ltd, 2010) 70 at 74
[260] Chesterman & Gilligan, *supra* note 255 at 9

highlights the need for discussions on constitutional recognition and the creation of spaces for negotiation between the self-determining collectives that form the Canadian federation.

Joffe asserts that the rights-based approach is capable and necessary to capture both the individual and collective nature of indigenous rights,[261] which corresponds with the idea of a 'third generation' of rights and the acceptance of collective rights by the international community and by Canada via the acceptance of national minorities. Here, collective rights function for indigenous peoples as individual rights do for citizens, composing the content of the relationship between the group and the state and providing protections against state encroachment. Most importantly, Joffe argues that a rights approach is necessary because rights are profoundly interrelated, within the Canadian and international governance systems, with the principles of democracy and the rule of law.[262] These principles could guide the renewal of a just relationship between indigenous peoples and the Canadian state.

Why Reconcile?

Tully calls it 'one of the most generous acts of recognition in history' that the Aboriginal nations negotiated, and continue to negotiate, recognizing the legitimacy of the Crown governments and working out the relationship with the colonial oppressor.[263] Harold Johnson outlines his view of the relationship between Canada and indigenous peoples in his book, Two Families: Treaty and Government.[264] Writing as the voice of the Cree, with the support of his chief and an explanation of the Cree advocate as speaking for seven generations past and seven generations to come, Johnson outlines a seldom heard version of treaty history which aligns with

[261] Joffe, *supra* note 259 at 73
[262] *Ibid* at 74
[263] Tully, *supra* note 13 at 123
[264] *Supra,* note 150

the original purpose of treaties as securing rights to the land against other European states. Speaking to the descendants of the settlers, he says:

> You have a treaty right to occupy this territory. The only coherent theory that provides for your sovereignty that is not based on supremacist ideology is that you obtained the right to be here through negotiation and agreement. Your rights to take and use the natural resources abundant in this territory, your rights to enjoy the bounty of the earth, were given to your family by mine at treaty. All the wealth has come from the earth, whether it was trees, grazing land, or nutrient-rich soil, or minerals, oil, and gas, or granite for your buildings. The treaties gave you access to the wealth you now enjoy.[265]

Through his book, Johnson demonstrates a common indigenous perspective that the way forward, for true reconciliation and a strong future relationship between indigenous peoples and the state, begins with the recognition of the relationship established by the original treaties: that of familial adoption.[266] It is important to understand here that many indigenous groups effectively define themselves communally not according to a social contract but in terms of a spiritual compact.[267] For indigenous peoples, treaties were not legal contracts that could be broken and then remedied. Rather, treaties represented an unbreakable sacred bond, meant to last 'as long as the sun shines, the river flows and the grass grows.'[268] Treaties were never meant to give up indigenous rights to self-determination or land title. In fact, indigenous peoples could not transfer land title as they did not own land; land was a gift from the Creator to be shared by all.[269] Rather, indigenous peoples signed treaties in respect of the European tradition at the same moments in which they performed Indigenous ceremonies including the making and exchanging of wampum belts, the giving of gifts, feasts and sacrifices. These were ceremonies of adoption,

---

[265] *Ibid* at 25
[266] *Ibid*
[267] Cindy L. Holder & Jeff Corntassel "Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights" (2002) 24:1 Human Rights Quarterly 126 at 23
[268] Romeo Saganash and Paul Joffe "Chapter Nine: The Significance of the UN Declaration to a Treaty Nation" in *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* Jackie Harley, Paul Joffe and Jennifer Preston, eds, (Saskatoon: Purich Publishing Ltd, 2010) 135
[269] Johnson, *supra* note 150

wherein indigenous peoples recognized Europeans as brethren, agreed to share the land with them, and agreed to coexist cooperatively, but with neither dominating the other.

It is in light of this perspective, as well as the social, economic and political realities outlined above, that indigenous communities do not seek secession, and may even willingly agree to the external 'sovereignty' of the Canadian government. The concept of 'sovereignty', along with others like 'citizen' and 'Indian', are not ones that were part of indigenous perspectives or languages, which use words that express one's relationship to others in the community.[270] Sovereignty, as absolute authority over particular contiguous territories and the peoples within them, simply was not part of any noted North American indigenous perspective on land or society. First wielded in North America on behalf of the foreign monarchs and then as the collective will of the settler peoples, sovereignty meant alienation and subordination, dispossession, and inhumane treatment to indigenous peoples.[271] Historians and legal theorists apply the concept of sovereignty retrospectively to indigenous peoples and their relationship with the land having recognized among them the elements of sovereignty. This term has been taken up by indigenous peoples to make their claims cognizable to the Canadian courts in seeking territory on which to enact their self-determination without interference and without the imposition of systems and rules unfamiliar to their traditions. The idea that a sovereign granted socio-political membership in the form of citizenship differs distinctly from the kinship system of membership and recognition used by indigenous populations in both internal and external affairs. As the modern 'sovereign' states were drawn without respect for indigenous territories,

---

[270] Assembly of First Nations "Group Focus Report on Membership and Indian Status" Held Ottawa March 17&18th, 2008, online: <http://firstnationcitizenship.afn.ca/uploads/B6_AFN_Focus_Group_on_Membership__Status.pdf> accessed on December 14, 2011 at 7

[271] Anghie, *supra* note 6 at 105

modern state borders do not represent divisions between indigenous groups. Indigenous groups can be intra-national or international according to state boundaries, and indeed these groups unite across state boundaries in organizations for a variety of purposes.[272] They do not seek the establishment of independent 'sovereign' states as they are present in and across such states, and they do not seek equal citizenship as their membership identity and culture is not defined by the regulations of modern citizenry. Rather, indigenous political movements seek the realization of their inherent right of self-determination, to rebuild and continue to exist as 'peoples,' alongside the citizens of the modern states, in cooperative coexistence.

Distribution and Recognition

The dominant academic and, to an extent, the failed political discussions thus far have focused, as Tully notes, on the theories of justice which adjudicate claims to distribution of rights and recognition of citizens. After constitutional discussions failed to allow for indigenous self-governance, Canada continued to build its relations with indigenous peoples on an unjust foundation of colonial conquest and oppression. This is seen in the unilaterally designated statuses given to indigenous peoples, the unilaterally designed negotiation processes, the unilaterally appointed boundaries to the rights and content of self-government and the lack of consistent, formalized mode of contestation and discussion of the status quo. Tully recommends that the focus be shifted from the struggles themselves to the arena in which the struggles occur, in order not to discover and codify the exact form of recognition or distribution, but to ensure that these games are played according to the primary values of democracy on which the state is built.

[272] E.g. The Inuit Circumpolar Council is a widely respected international indigenous political organization.

Issues of distribution and recognition are necessarily interrelated. When the systems of distribution are challenged, as they are in regards to the services provided to indigenous communities such as education and housing as well as in the designation and realization of rights, the heart of the issue is the system of recognition. If indigenous peoples were to be recognized as equal citizens, services and rights would need to be equalized, and while the distinction is made that they, unlike non-indigenous citizens, are under federal jurisdiction and are set apart from non-indigenous citizenry with designated reserves and particular relationships with the federal government, they are not seen as citizens with equal rights to equal services. The affirmation of 'Aboriginal' rights and treaty rights in the *Constitution Act* 1982 gave a certain level of stability in recognition, requiring that distribution be dealt with – that is, that they be substantiated through the recognition of particular rights and the establishment and realization of treaties. However, while indigenous peoples continue to be a responsibility of the Crown, under federal jurisdiction and federal administration, their rights to self-determination, as recognized in UNDRIP and as citizens of a democratic nation, cannot be realized. If the struggles for distribution and recognition are to be settled and the relationship between indigenous peoples and the Canadian state truly reconciled, the full democratic citizenship of indigenous persons needs to be realized and the collective rights of indigenous peoples need to be constitutionally codified. A constitutional recognition of indigenous peoples and nations within the Canadian state would mean a redistribution of political and economic powers, and would necessarily change the distributive processes within the state.

Tully argues that struggles for recognition arise in four dimensions of constitutional and legal contexts. Firstly, it is in a constitution that members are recognized according to their

respective identities and that their rights, duties and powers are enumerated.[273] Secondly, the constitution sets out the relations of governance among the members, that is, it sets out a fair system of social cooperation over time through laws and procedures.[274] Thirdly, a constitution sets out the processes for discussion and amendment of the recognized identities and relations of governance among them.[275] And finally, a constitution and the ways in which it is interpreted include the principles, values, and goods that are essential to the identification of members, relations of governance and the discussion and amendment of these identities and relations over time.[276] Struggles for recognition seek change in the first component and therefore to the second, via the third component, by means of presenting an alternate experience or interpretation of the fourth component. That is, in seeking recognition within the democracy, groups seek to change the established recognitions and the relations of governance among them, utilizing the processes for discussion and amendment set out, by presenting that their current misrecognition or non-recognition requires changes based on the values set out in the constitution. Much like Habermas' constitutional patriotism, it is the commitment to these principles, values and goods and the mechanisms for dealing with the ever-present disagreements among citizens and their political traditions and interpretations that allow the legitimate and practical functioning of the democracy. The SCC has agreed: a free and democratic society is not based on an inscrutable set of rules but on a 'continuous process of discussion' involving the "right of dissent, the duty to

---

[273] Tully, James "Struggles over Recognition and Distribution" *Constellations* 7(4) 2000 Blackwell Publishers Ltd: Oxford 469-482 [Tully 2000] at 472
[274] *Ibid* at 473
[275] *Ibid*
[276] *Ibid*

acknowledge dissenting voices, and the corresponding amendments of the rules of the democracy over time."[277]

In struggles for recognition, mutual recognition is essential. The struggle for recognition cannot be recognized if its resolution requires the misrecognition or non-recognition of others.[278] In Canada, recognition requires not a mutual recognition between Aboriginal people and the Canadian state, but mutual recognition of indigenous peoples (requiring mutual recognition among themselves as well as between their diverse selves and the non-indigenous citizenry and governance relations), the provinces, and the federal government, among others. Recognition is not a dialogue between the self and other, as proposed in classic theories of recognition, but a 'multilogue,' as Tully puts it, in a "complex, multilateral web of relations and their affects among actors of different types."[279] This complex reciprocal recognition requires democratization of struggles for recognition, but further, the principles of democracy require it as well. "As far as possible, the rules in accordance with which citizens recognize one another and govern themselves should be based on the agreement of the governed or their representatives... If it is not, then their action is coordinated non-democratically, behind their backs, and they are to that extent unfree."[280] Tully asserts that the democratization of struggles over recognition will bring stability 'for the rights reasons,' as the members of the proposed identity and those members whose identity is affected by it support the negotiated mutual recognition and

[277] Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, sections 68-69, in *Ibid* at 474
[278] *Ibid* 474
[279] *Ibid* 474-5
[280] *Ibid* 475

resolution based in the principles, values and goods they share as democratic citizens of the larger society.[281]

Tully notes that the ideal of reciprocity, reaching agreement, listening to the voices of all affected and stability by means of broad support, are never actually achieved, for five reasons. First, given that the negotiations are designed and engaged in within an asymmetrical power relation, the resolution will ultimately bear the character of the asymmetrical power discussion through its effects on the negotiators, and parts of the asymmetry may not even be visible until after the resolution is implemented.[282] Second, negotiations will result in a compromise rather than consensus.[283] This represents a departure from Habermas' approach, in that it recognizes the reality of negotiation and the need to move toward justice. Third, negotiations must cease at some point in order for a decision to be made, often by an arbitrator, which means that not everyone will be heard or have a chance to respond satisfactorily, or at all.[284] Fourth, reasonable disagreement will arise over the implementation of the resolution, as well as through its daily and annual effect.[285] Lastly, and paramountly, the identities of those seeking recognition are not static and change not only during the negotiation and implementation of the resolution, but through time after the resolution is in place.[286] Therefore, recognition, in theory and practice, cannot be seen as an end state, but "as a partial, provisional, mutual and human-all-too-human part of continuous processes of democratic activity in which citizens struggle to change their rules of mutual recognition as they change themselves."[287] However, these five problems with the ideal

---

[281] *Ibid*
[282] *Ibid*
[283] *Ibid* 475-6
[284] *Ibid* 476
[285] *Ibid*
[286] *Ibid*
[287] *Ibid* 477

of constitutional patriotism do not diminish the legitimacy of the resolutions found through democratic means of discussing and amending the recognition of identities and relations of governance, even if they bear elements of injustice and non-consensus, if the citizens are still free to contest and renegotiate the rules of recognition.[288]

Tully notes that identities are not static they cannot be codified once and for all, reiterating Habermas's point. This highlights the error in the current restriction of Aboriginal rights to the definition of practices which were central to pre-contact cultures and do not allow the evolution of indigenous cultures since contact. However, to create democratic systems of governance and dissent, indigenous peoples would need to be brought into the Canadian state as collectives bearing the right to self-determination through the legitimization of governance institutions to which they identify and to which they have consented. This provides lasting protection for indigenous peoples from state encroachment, as the removal from federal jurisdiction grants power to indigenous peoples and ensures a fair negotiation between indigenous and the federal governments. Situated within the 'living tree' character of the Canadian state, this protection allows for growth and change over time to ensure that while indigenous rights, governance relations and power within the state are protected, they are not frozen. In Tully's formulation, the current system cannot be deemed to be legitimate as the federal government has said that the constitutional discussion is closed, and the Aboriginal right to self-government exists within the established framework. The establishment of permanent forums of dissent and negotiation between state members as well as the establishment of principles, values and goods that comprise the national character, embodied by the inclusion of all forms of indigenous and non-indigenous citizens, is required.

---

[288] *Ibid* 478, also see James Tully "The Agonic Freedom of Citizens" Economy and Society 28:2 (1999) 161-82

Conclusion

Indigenous peoples and their land were colonized by what is now Canada and have yet to achieve the self-determination to which they are inherently entitled. During the colonial era, natural law both recognized indigenous peoples as reasonable persons and misrecognized their social and political orders as being uncivilized as measured against European standards. Positive law came to subjugate indigenous peoples to the state and was used to mobilize and justify significant harm to indigenous persons, families, communities, and cultures. These are not struggles of the past, but are ongoing as indigenous communities seek internal healing and renewed relationships with the Canadian state and provinces based on mutual recognition, continuity and consent – the three conventions of contemporary constitutionalism.

Canada's efforts to assimilate indigenous peoples through a multicultural national imagination have been resisted by indigenous peoples, who defend their 'indigenous difference' and demanding recognition by the state. Due to their cultural difference, prior sovereignty, prior occupation of this land, and their participation in the treaty process, they bear the right to self-determination. They bear collective rights, above and beyond the individual rights accorded to all Canadian citizens. They are the first *nations* of Canada, in both the ethno-cultural and political meanings, well established prior to the European arrival to North America and, with growing populations, continuing into the future. However, the multinational approach, while providing inclusion for Inuit participation in the federal governance structures and self-determination in the territory, is not a model that can be replicated for other indigenous groups given the proportion of indigenous peoples who are not territorially concentrated and the lack of capacity by smaller or struggling indigenous communities. This is not to say the multinational model cannot work in the future, with a significant restructuring of the Canadian state, however, it is not a model that

can be implemented today as a complete and adequate response to the needs of indigenous peoples. A singular system is not required, as the diversity of indigenous peoples and their circumstances will require a diversity of responses, but the space in which to negotiate these relations should be a united system that will bring all constitutional members to a fair and just recognition from which to negotiate. Justice and democracy must not wait; indigenous persons and peoples are owed the same rights to self-determination as the rest of Canadian citizens. Indigenous self-determination is separate from the self-determination of the Canadian people, as they are distinct peoples bearing collective rights to determine their own membership, political identity and destiny.

The reconciliation of the rights of indigenous peoples with the Canadian state cannot be achieved through Aboriginal rights as they are currently formulated. The rights of indigenous peoples, including the right to self-determination, cannot be defined by the pre-contact era and cannot be subordinated to federal or provincial interests. The unilateral federal authority over indigenous peoples, particularly through the Indian Act, continues a patriarchal domination of the colonial era, and seeking court protection from state encroachment requires indigenous peoples to prove their claim to an institution of the encroaching state. Reconciliation can only be achieved when indigenous peoples are empowered to negotiate and cooperate with the state on fair terms, when representation of their interests is part of the federal structure and their consent is required in matters which affect them. Constitutional recognition of indigenous peoples, their right to self-determination, and the relations of governance between them and other state bodies would grant continuity to indigenous peoples regardless of the social, economic, and political environment of the state.

The imposition of foreign governance onto indigenous peoples delegitimizes Canadian sovereignty, as the Canadian state does not represent the will of its entire people. The willingness of the state to close the conversation on constitutional relationships and constitutional principles should cause concern for the entire Canadian people. This willingness indicates that the state is ethnically, culturally and/or politically discriminatory or that the state is willing to remove democratic principles to maintain its authority. It demonstrates that the government is willing to ignore the democratic and 'living tree' character of the Constitution, unilaterally changing the fundamental character of the state, an affront to Canadian citizens.

Real reconciliation between indigenous and non-indigenous Canadians, their rights as individuals and as collectives, can only be achieved through real recognition of each other. Non-indigenous Canadians and governments must recognize indigenous peoples as self-determining peoples, and provide space and support for indigenous communities to heal socially and politically, in order to have a fair and just place from which to negotiate a new relationship. To begin, the perspective in approaching the conversation needs to change. Both sides need to come to the conversation ready to answer two questions. First, by whose authority are you here, and second, how can we work together? These questions, which represent the core of the issues involved in the debate around how indigenous peoples can be incorporated into the state, have been raised by indigenous elders in meeting representatives of the state, such as when the leaders of Grassy Narrows First Nation met with the Ministry of Natural Resources to establish title. The state must recognize that in its current formulation, it does not have sovereign authority over indigenous peoples and their land. The SCC is upholding this principle, and continues to call on the state to negotiate in good faith with indigenous peoples in matters affecting their interests.

Basic principles of justice, liberty, and democracy, as well as internationally recognized rights of indigenous peoples to self-determination, require that the Canadian state constitutionally entrench a mode of contestation and amendment of the relations among all federal parties, including indigenous peoples. Once recognized as constitutional parties, indigenous peoples will have a fair place from which to contest the forms of recognition and distribution within the state. Only with such a process can the Canadian state achieve legitimacy.

Bibliography

Legislation

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Charlottetown Accord: Draft Legal Text (Ottawa: Supply and Services Canada, 1992) Print

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provision of the Act 31st Victoria, Chapter 42 1869 online: < http://www.aadnc-aandc.gc.ca/eng/1100100010204/1100100010206>

Jurisprudence

Calder v British Columbia (Attorney General) [1973] S.C.R. 313

Cherokee Nation v State of Georgia [1831] 30 U.S. 1

Delgamuukw v British Columbia [1997] 3 S.C.R. 1010

Haida Nation v British Columbia (Minister of Forests) [2004] 3 S.C.R. 511

Keewatin v. Ontario (Minister of Natural Resources) [2011] ONSC 4801

Reference re: British North America Act, 1867 (U.K.), s.91 (The Eskimo Reference) [1939] S.C.R. 104

Reference re: Secession of Quebec [1998] 2 S.C.R. 217

R v Badger [1996] 1 S.C.R. 771

R v Powley [2003] 2 SCR 207

R v Sparrow [1990] 1 S.C.R. 1075

R v Van der Peet [1996] 2 S.C.R. 1010 at 166

Sheldon v Ramsay (1852) 9 UCR 105

Thilhqot'in Nation v. British Columbia [2007] BCSC 1700

Worcester v Georgia [1832] 31 U.S. 515

Secondary Sources

Alfred, Taiaiake & Jeff Corntassel "Being Indigenous: Resurgences against Contemporary Colonialism" in Richard Bellamy, ed, *Politics of Identity IX* (Oxford, Blackwell Publishing, 2005) 598

Anaya, S. James *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996)

Anghie, Antony *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004)

Assembly of First Nations

- "Group Focus Report on Membership and Indian Status" Held Ottawa March 17&18th, 2008, online: <http://firstnationcitizenship.afn.ca/uploads/B6_AFN_Focus_Group_on_Membership__Status.pdf>
- "Assembly of First Nations – the Story" online: <http://www.afn.ca/index.php/en/about-afn/our-story>

Baumeister, Andrea "Ways of Belonging: Ethnonational minorities and models of 'differentiated citizenship'" (2003) 3:3 Ethnicities 393

Blackstock, Cindy "Mosquito Activism" 20 October 2012, Kairos Re:Generate Conference, Cornwall Ontario

Borrows, John "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/1998) 22:1 American Indian Law Review 37

Canada

- Aboriginal Affairs and Northern Development Canada *First Nations in Canada* online: <http://aadnc-aandc.gc.ca/eng/1307460755710/1307460872523>
- Political and Social Affairs Division "Aboriginal Self-Government" (Current Issues Review 96-2E, 1999) online: <http://www.parl.gc.ca/Content/LOP/researchpublications/962-e.pdf>
- Aboriginal Affairs and Northern Development Canada *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (2010) online: <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#scopn>
- Aboriginal Affairs and Northern Development Canada *Fact Sheet: Aboriginal Self-Government* (2010) online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>
- Parliamentary Library Information and Research Service "The Arctic: Northern Aboriginal Peoples" InfoSeries PRB-08-10E (24 October 2008)
- *Report of the Royal Commission on Aboriginal Peoples* 5 vols. (Ottawa: Queen's Printer, 1995)

Cairns, Alan
- *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver/Toronto: University of British Columbia Press, 2000)
- "Afterword: International Dimensions of the Citizens Issue for Indigenous Peoples/Nations" (2003) 7:4 Citizenship Studies 497

Carens, Joseph *Culture, Citizenship, and Community: Contextual Political Theory and Justice as Evenhandedness* (USA: Oxford University Press, 2000)

CBC News
- "Attawapiskat a 'deep concern' for UN rights official" (20 December 2011) online: <http://www.cbc.ca/news/canada/story/2011/12/20/attawpiskat-un-rights.html>
- "Court victory for First Nations child welfare" The Canadian Press (April 18 2012) <http://www.cbc.ca/news/politics/story/2012/04/18/pol-first-nations-court-welfare.html>
- "First Nations Children still taken from parents" CBC 2 August 2011 online: <http://www.cbc.ca/news/canada/story/2011/08/02/pol-first-nations-kids.html>

Chabot, Lynn "The Concept of Citizenship in Western Liberal Democracies and in First Nations: A Research Paper" prepared for *The Governance Policy Directorate Lands and Trusts Services*, INAC, March 2007

Chesterman, John & Brian Gilligan "Indigenous People and Citizenship" 50th Anniversary of Australian Citizenship Conference, Melbourne, July 1999

Clark, Bruce *Native Liberty, Crown Sovereignty: The Existing Aboriginal Rights of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990)

Claude, Inis *National Minorities: An International Problem* (Cambridge: Harvard University Press, 1955)

Cohen, Jean "Paradigms of Citizenship and the Exclusiveness of the Demos" 1999 14:3 International Sociology 245

Cummin, Peter A & Neil H Mickenberg *Native Rights in Canada* (Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Company Limited, 1972)

Dempsey James L., "Status Indian: Who Defines You?" in Duane Champagne, Karen Jo Torjesen & Susan Steiner, eds, *Indigenous Peoples and the Modern State* Walnut Creek: AltaMira Press, 2005) 33

Diabo, Russell "Harper Launches Major First Nations Termination Plan: *As Negotiating Tables Legitimize Canada's Colonialism*" (2012) 10:7-10 First Nations Strategic Bulletin 1

Farris-Manning, Cheryl and Marietta Zandstra "Children in Care in Canada: A summary of current issues and treads with recommendations for future research" (2003) Child Welfare

League of Canada, online:
<http://www.nationalchildrensalliance.com/nca/pubs/2003/Children_in_Care_March_2003.pdf>

Fossum, John Erik "Deep Diversity versus constitutional patriotism: Taylor, Habermas and the Canadian constitutional crisis" (2001) 1:2 Ethnicities 179

Fox, Ben "Puerto Rico vote endorses statehood with asterisk" The Associated Press 7 November 2012

Giroday, Gabrielle "Grassy Narrows applauds Appeal Court logging decision" Winnipeg Free Press (23 March 2012) online: <http://www.winnipegfreepress.com/breakingnews/Grassy-Narrows-applauds-Appeal-Court-logging-decision--143972636.html>

Government of the Northwest Territories "About the Government of the Northwest Territories" online: <www.gov.nt.ca/research/facts/index.html>

Habermas, Jurgen "Struggles for Recognition in the Democratic Consitutional State" in C. Taylor & A. Gutmann, eds, *Multiculturalism* (Princeton: Princeton University Press, 1994)

Hamilton, A.C. *Canada and Aboriginal Peoples: A New Partnership* (Ottawa, Minister of Indian Affairs and Northern Development, 1995)

Hawthorn, H.B., Ed. *A Survey of the Contemporary Indians of Canada* 2 vols. (Ottawa: Queen's Printer, 1966 and 1977) vol. 1 at 279

Holder, Cindy L. & Jeff Corntassel "Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights" (2002) 24:1 Human Rights Quarterly 126

Humpage, Louise "Revision required: Reconciling New Zealand citizenship with Maori nationalism" (2008) 10:3 National Identities 247

Hunt, Alan & Trevor Purvis "Identity vs. Citizenship: Transformations in the Discourses and Practices of Citizenship" (1999) 8:4 Social & Legal Studies 457

Ibbitson, Jeff "Ottawa, native leaders commit to sweeping overhaul of reserve life" The Globe and Mail (24 August 2012) <http://m.theglobeandmail.com/news/politics/ottawa-native-leaders-commit-to-sweeping-overhaul-of-reserve-life/article2053099/?service=mobile>

Indian Chiefs of Alberta *Citizens Plus: A Presentation by the Indian Chiefs of Alberta to Right Honourable P.E. Trudeay, June 1970* (Edmonton: Indian Association of Alberta, 1970)

Inuit Tapiriit Kanatami *Vision of Self-Government* online: <https://www.itk.ca/about-inuit/vision-self-government>

Ivison, Duncan "The Logic of Aboriginal Rights" (2003) 3:3 Ethnicities 321

Joffe, Paul "Chapter 5: Canada's Opposition to the UN Declaration: Legitimate Concern or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 70

John, Grand Chief Edward "Chapter 3: Survival, Dignity, and Well-Being: Implementing the Declaration in British Columbia" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 47

Johnson, Harold *Two Families: Treaty and Government* (Saskatoon: Purich Publishing, 2007)

Kulchyski, Peter *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994)

Kymlicka, Will

- *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Clarendon Press, 1995)
- "Multicultural states and intercultural citizens" (2003) 1:2 Theory and Research in Education 147
- "Multicultural citizenship within multinational states" (2011) 11:3 Ethnicities 281

Locke, John *Two Treaties of Government* (London: J.M. Dent & Sons, 1924)

Macklem, Peter *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001)

Macklin, Audrey "Who Is the Citizen's Other? Considering the Heft of Citizenship" (2007) 8:2 Theoretical Inquiries in Law 333

Manitoba Indian Brotherhood *Wahbung: Our Tomorrows* (Winnipeg: Manitoba Indian Brotherhood, 1971)

Marshall, T.H. "Citizenship and Social Class" in Jeff Manza and Michael Strauter, eds, *Inequality and Society,* (New York: W.W. Norton and Co., 2009) (First published 1950)

McLachlin, Beverley, CJ "Unwritten Constitutional Principles: What is Going on?" Speech given 1 December 2005 at Lord Cooke Lecture, Wellington, New Zealand online <http://www.fact.on.ca/judiciary/NewZeal.pdf>

Palmater, Pamela "A brief overview of Bill S-2: Family Homes on Reserve Act" 15 November 2012 online : < http://rabble.ca/blogs/bloggers/pamela-palmater/2012/11/brief-overview-bill-s-2-family-homes-reserve-act>

Parekh, Bhikhu *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London: Macmillan, 2000)

Purvis, Trevor "Sovereignty, Nation and the Aboriginal Challenge: Beyond the Nationalities Principle" 2003 (Unpublished)

Robbins, Jane "A nation within? Indigenous peoples, representation and sovereignty in Australia" (2010) 10:2 Ethnicities 257

Said, Edward *Orientalism* (New York: Vintage Publishing, 1979)

Saganash, Romeo and Paul Joffe "Chapter Nine: The Significance of the UN Declaration to a Treaty Nation" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration of the rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 135

Scholtz, Christa "Aboriginal Communities and the Charlottetown Accord: A Preliminary Analysis of Voting Returns" Presented to the Canadian Political Science Association Annual Meeting June 2008, Vancouver British Columbia, online: <www.cpsa-acsp.ca/papers-2008/Scholtz.pdf>

Scoffield, Heather "Ottawa spends #3-million to battle first nations child welfare case" The Globe and Mail (The Canadian Press) (1 October 2012) online: <http://www.theglobeandmail.com/news/national/ottawa-spends-3-million-to-battle-first-nations-child-welfare-case/article4581093/>

Soroka, Stuart, Richard Johnston & Keith Banting "Ties That Bind? Social Cohesion and Diversity in Canada" in Keith Banting, Thomas J. Courchene & F. Leslie Seidle, eds, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research and Public Policy, 2007) 561

Tully, James *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995)

- "Struggles over Recognition and Distribution" (2000) 7:4 Constellations 469
- "The Agonic Freedom of Citizens" Economy and Society 28:2 (1999) 161-82

Turpel, Mary Ellen "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition." (1992) 25 Cornell International Law 579

Wingrove, Josh "Ottawa plan to allow private property on reserves reignites debate" The Globe and Mail (06 August 2012) <http://www.theglobeandmail.com/news/politics/ottawas-plan-to-allow-private-property-on-reserves-reignites-debate/article4466019/>

Williams, Robert A. Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990)

United Nations, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online: <http://www.unhcr.org/refworld/docid/471355a82.html>

- Committee on the Elimination of Racial Discrimination (CERD) *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada* UN Document, CERD/C/CAN/CO/18 (25 May 2007)
- Human Rights Committee *Concluding observations of the Human Rights Committee: Canada* UN Doc CCPR/C/79/Add.105 (7 April 1999) at 8
- Commission on Human Rights *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, Rodolfo Stavenhagen: Addendum: Mission to Canada* UN Doc. E/CN.4/2005/88/Add.3 (2 Dec 2004) at 20, 99

Youngblood Henderson, James Sakej "Sui Generis and Treaty Citizenship" (2002) 6:4 *Citizenship Studies* 415