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A Study on the Relationship between Canadian Aboriginal Peoples and the Canadian State

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EXECUTIVE SUMMARY

Aboriginal peoples are considered as one founding nation of Canada. Before European settlers arrived, Aboriginal peoples already had governance structures and legal systems. Aboriginal peoples had two choices: either adapt or assimilate to the foreign culture and system, or to keep its own and ignore the settlers, which ended up in conflict. The relationship between Aboriginal peoples and the settlers started through the signature of treaties. This relationship began with the French who arrived first and continued with the British, who won the war against the French in the 1860s.

Through the enactment of legal bodies, such as the British North American Act and the Indian Act, the rights of Aboriginal peoples in Canada were not recognized nor protected. It was until the Constitution Act of 1982 when Aboriginal peoples had their collective rights recognized. However, there are still many flaws within the Law, and precedents need to be created through certain Supreme Court decisions about inherent or treaty rights of Aboriginal peoples. The creation of precedents is very recent, as the enactment of the Constitution happened only twenty-four years ago.

Despite there are Aboriginal peoples in Canada, one cannot depict the three of them as one unit, as there are many differences between them, and therefore, they have received different treatment by the Canadian state. Such differences have created conflict and divisions, and therefore to try to give all Canadian Aboriginal peoples the same treatment is a mistake, as they differ all from one another, and even within their own people. The relationship between Aboriginal peoples and the Canadian state needs to be redefined and try to pass into a post-colonial era in order to find harmony between them.



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RÉSUMÉ

Les peuples autochtones sont une nation fondatrice du Canada. En fait, les peuples autochtones ont déjà des systèmes légaux et des structures de gouvernance avant que les colonisateurs sont arrivés. Les peuples autochtones ont eu deux options : s'assimiler à la culture étrangère ou bien maintenir ses propres méthodes et ignorer les colonisateurs. Cette situation a terminé en conflit. Le rapport entre les peuples autochtones et les colonisateurs a commencé par les traités. Cette relation a commencé premièrement avec les Français qui sont arrivé avant que les Britanniques et a continué avec les dernières, car ils ont gagné la guerre contre la France dans les années 1860s.

Il s'était par la formation des corps légaux, comme l'Acte nord-américain et l'Acte indienne que les droits des peuples autochtones au Canada n'étaient ni reconnus ni protégés jusqu'à la rédaction de la Constitution de 1982 pour laquelle les droits collectifs des peuples autochtones ont été reconnus. Néanmoins, il y a encore beaucoup des fautes dans la loi. Il faut créer des précédents pour la Cour Suprême du Canada sur certains droits inhérents aux peuples autochtones. La création des précédents c'est très récent car la rédaction de la Constitution a pris lieu il y a 24 années.

Les peuples autochtones au Canada sont très différents et on ne peut pas les montrer comme une unité. Par conséquence, ils ont reçu un traitement différent pour la partie de l'État canadien. Ces différences ont créé des conflits et des divisions. En effet, le désir de donner le même traitement aux tous les peuples autochtones c'est une erreur, car il y a des vraies et grandes différences entre eux et entre chaque un d'eux. Le rapport entre les peuples autochtones et l'état canadien a besoin d'être redessiné en même temps qu'essayer de passer à une époque post-coloniale pour trouver l'harmonie entre eux.

RESUMEN

Los pueblos indígenas constituyen una nación fundadora de Canadá. De hecho, antes de la llegada de los colonizadores europeos, los pueblos indígenas contaban ya con sistemas legales y estructuras de gobernabilidad. Los pueblos indígenas tenían dos opciones: o adaptarse y asimilarse a la cultura y sistemas extranjeros, o mantener su propia cultura e ignorar a los colonizadores, lo cual fue origen de conflicto. La relación entre los pueblos indígenas y los colonizadores comenzó a través de la firma de los tratados. Esta relación tuvo su origen con los colonizadores franceses, los cuales fueron los primeros europeos en llegar, y luego con los británicos, los cuales ganaron la guerra en contra de los franceses alrededor de los años 1860s.

Cabe mencionar que los derechos de los pueblos indígenas en Canadá no fueron reconocidos ni protegidos a través de la formación de cuerpos legales, tales como el Acta Británica de Norte América y el Acta Indígena. Fue entonces hasta 1982 que los derechos colectivos de los pueblos indígenas fueron reconocidos. Sin embargo, existen todavía algunas lagunas dentro de la ley y se necesita la creación de antecedentes a través de decisiones de la Suprema Corte de Justicia de Canadá que trate de los derechos inherentes y derechos derivados de los tratados entre los pueblos indígenas y el estado canadiense. La creación de precedentes es muy reciente, toda vez que la Constitución fue creada hace apenas veinticuatro años.

A pesar de que existan pueblos indígenas en Canadá, éstos son tan distintos que no pueden concebirse como una unidad y, por lo tanto, han recibido un trato diferente por el estado canadiense. Tales diferencias han creado conflicto y divisiones y es un error tratar de darles el mismo trato. Ciertamente, todos se diferencian el uno del otro y también entre ellos mismos. La relación de los pueblos indígenas y el estado canadiense necesita ser redefinida y se debe tratar de pasar a una era post-colonial para encontrar la armonía entre ellos.

Introduction

Many men and women have built with their heart and spirit a political, economic, and social order, especially in harmony with the land they love as their mother. That is the source of existence of Canada. (Sioui, 2001) Aboriginal peoples are considered as a founding nation of Canada. Aboriginal peoples constitute the first inhabitants of Kanata, which means *village* in Aboriginal language, and along with the European settlers, represent a founding nation of this beautiful country.

Either a member of a First Nation, an Inuit, or a Métis, Aboriginal peoples were already organized according to their own culture and traditions before the settlement of Europeans. Identity, as a result, plays a big role determining the belonging to a certain nation or to the Canadian state. Aboriginal peoples might identify themselves as members of their own nation and/or might consider themselves as Canadians. This is a choice that Aboriginals have as peoples.

From an Aboriginal point of view, Canada was a French creation, where Québécois and French Canadians are considered as the first non-Aboriginal heirs of Canadian territory. Canada reflects that it founds its identity within the source of its existence created by the respectful and harmonious order between Nature and Mother Earth. Hence, Sioui, who is a representative of Aboriginal peoples, demands the Canadian state the recognition of the special place of Aboriginal peoples in Canada as well as of French Canada. It is said that Canada would not be the same without Aboriginal peoples and Quebec. (Sioui, 2001)

It is expected that there will be a reconciliation of Aboriginal peoples with states, as Aboriginal peoples still suffer conflict within their relationships with settler states. For some Aboriginal peoples, this means an opportunity to improve their quality of life. For others, to obey the state means to lose independence and to be culturally separated, this means assimilation. (Borrows, 1995-1996)

The present paper represents an overview of the evolution of legal and political framework of the relationship between Canadian Aboriginal peoples and the Canadian state, starting from First Nation's Law, the Hawthorn Report and the White Paper, the Charlottetown Accord, the Report of the Royal Commission on Aboriginal Peoples, and the Treaties signed between Aboriginal peoples and the Canadian sovereign. Later on, an overview of Canadian Aboriginal peoples, of Aboriginal and Treaty rights, as well as of the Crown's duty to consult will be studied.

I. Legal & Political Framework for the Aboriginal Peoples/Crown Relationship

First Nation's Law

First Nations law has been ignored and has been considered inferior due to the incompatibility with Common law. Some Aboriginal leaders consider that Canadian courts need to use First Nations law for solving disputes on Aboriginal rights. There have been reviews on Canadian case law to recognize the use of First Nations law in the resolution of disputes about Aboriginal affairs. Even though there has been a strong influence of European law, the Supreme Court of Canada has acknowledged First Nations principles, whose flexibility would allow them to be recognized as law by non-Aboriginals. Indeed, it is important to use First Nations law by lawyers and courts in Canada so that Aboriginal law is recognized for being an integral, relevant part of Canadian law. (*ibid.*)

Canadian contemporary law regarding Aboriginal peoples partly originates in many complex systems of law founded by First Nations customs and conventions. It also finds its sources in British and U.S. Common law as well as in international law based on spiritual, political and social customs and conventions of European countries. Despite the fact that Canadian law has been applied on the base that First Nations customs and conventions were inferior, many of them were incorporated into Canadian law. (*ibid.*)

Since Aboriginal rights are recognized as pre-existing, customary, *sui generis*, beneficial, personal, and dependent on the goodwill of the Sovereign, Canada has paid attention to non-Aboriginal bodies of law which consider the emanation of Aboriginal legal rights only from the Sovereign. This fact created little protection for Indigenous peoples, the obstruction of Aboriginal land rights, the repression of treaty rights, and the restriction of sovereign rights, as Canadian courts did not rely on First Nations legal sources. Canadian jurisprudence on Aboriginal issues requires courts to apply the principles of First Nations law. The Supreme Court of Canada has found out that in case of conflict, pre-existing First Nations customs and conventions should be given precedence. If Aboriginal and non-Aboriginal interests are in conflict, this situation leads to ambiguity and uncertainty on the interpretation of Aboriginal rights. Therefore, First Nations laws should be protected from conflicting non-Aboriginal laws. (*ibid.*)

First Nations Law is based on the teachings and behaviour of respected individuals and elders, and a story is more important than food to stay alive. Those stories expressed in communities represent their wisdom in conflict resolution. In this sense, these narratives precede the Common law. These traditions and stories are similar and different from case law precedent. They are similar to legal precedent because they provide reasons for the establishment of principles. Both Common law cases and Aboriginal stories record the way disputes were resolved in the past. First Nations stories are interpreted by wise individuals and presented in the best way to solve the dispute. They differ as well in form and content than those Common law cases, as First Nations use oral tradition, in case modifications are made to the story. This means that the context is dynamic and is always changing, although the main components of the story do not change. As well, the content differs because each First Nation has a rich culture, different from Western values. (*ibid.*)

Besides, Indians were still considered as a racial minority, and that it was good that the Indians could have the benefit of full participation as citizens of the Canadian state. This issue was analyzed in the Hawthorn Report and the White Paper.

The Hawthorn Report and the White Paper

Since there was intent to force assimilation and the government's neglect of Aboriginal peoples due to their poor socio-economic situation, a research team which was conducted by Harry Hawthorn, a professor from the University of British Columbia, was formed by academics in order to make research on the social, and educational conditions of Indians in their communities. (Newhouse & Belanger, 2001)

As a result, the *Hawthorn Report* refused assimilation and proposed, instead, the concept of "*citizens plus*" to make clear that Indians could benefit from obtaining Canadian citizenship and, at the same time, keep their rights that were protected through their Indian status and treaty arrangements. (*ibid.*) It is worth to mention that assimilation has been opposed to the recognition of Indigenous peoples, and there are opposed views regarding Indigenous citizenship. On the one hand, some analysts claim that Canada has displaced this will of assimilation through the recognition of Indigenous peoples as "*citizens plus*", as besides having the right of being a citizen of the Canadian state, they would also hold their Indigenous citizenship. On the other hand, some others claim that the judicial system in Canada is trying to keep away the issue of Indigenous citizenship while recognizing Aboriginal rights only if they result from the immutability of their culture. (Denis, 2000)

The Hawthorn Report was rejected by Trudeau's Liberal government in 1968, and his Liberal government released the Statement of Indian Policy, the *White Paper*, whereby the government of Canada tried to abandon the fiduciary responsibility towards Aboriginal peoples and, at the same time, delegate programs and social services to provincial

governments so that the federal government would distance from previous treaty responsibilities and obligations. Indian leaders did not like the fact the White Paper tried to separate legal status in order to eradicate it. However, the Liberal government pointed out that this status was the result of separating them from other Canadians. In this way, there would not be equality among Canadian citizens. (Newhouse & Belanger, 2001).

Through the *White Paper*, the Indian Act of 1876 would disappear, as it was considered to be the origin of Aboriginal rights along with the Department of Indian Affairs and the appointment of a special commission to consult with Indians as to satisfy their claims. It was thought that for the first time in Canadian history, there was a modern try to merge Indian policy through one document. (*ibid.*)

The Indigenous community clearly opposed to the White Paper, as they argued that they possessed rights from treaties in addition to the rights they possess as Canadian citizens. Hence, they were considered as *citizens plus*. The Indian Chiefs of Alberta were the first ones to respond to the White Paper through their statement better known as *Citizens Plus or the Red Paper*. Indian leaders and Prime Minister Trudeau met in order to create an open relationship between the Canadian federal government and Canada's Indian population and declare the Red Paper as the official Indian response to the White Paper. They argued treaties are the basis for this key relationship whereby the federal government recognized First Nations as sovereign nations with the right to self-government. (*ibid.*)

The Road to Self-Government and the Charlottetown Accord

The main two demands of First Nations within the Canadian federation and the Charlottetown Accord of 1992 were the recognition of the inherent right of self-government for Aboriginal peoples, and the creation of the third order of government, the Aboriginal government. The Accord aimed to

include this inherent right within Section 35.1 of the Constitution, and that this right should be interpreted as a third order of government in Canada. In fact, it proposed that section 35.1 be amended as to include the recognition of the inherent right of Aboriginal peoples in Canada to self-government. (Long & Chist, 2000)

Many treaty-based First Nations, who opposed the Charlottetown Accord, considered that this Accord implied that this right to self-govern themselves was created by the Canadian state, as opposed to constitute an inherent right which is recognized by historic treaties that were negotiated on a nation-to-nation basis and, hence, be recognized as international agreements. Thus, these agreements should be conducted on a nation-to-nation basis and not through the process that involves the provinces. (*ibid.*)

The Charlottetown Accord was a failure, and this has a negative impact towards Aboriginal peoples, as meeting their demands for self-government was suspended. The Inuit's demands for self-government were met by the Royal Assent given to both the Nunavut Land Claims Agreement Act and the Nunavut Act, as well as to Nunatsiavut. The Métis, however, have not gained much through non-constitutional initiatives in part because there is no unification of the provinces, as there are no community land bases for them. The defeat of the Charlottetown Accord gave the Royal Commission on Aboriginal Peoples a greater compromise, as there are a lot of expectations as to develop recommendations to solve the problems that have existed for decades. (Isaac, 1992)

Royal Commission on Aboriginal Peoples

The relationship between the Canadian state and the Aboriginal peoples is clearly studied within the public inquiry led by the Royal Commission on Aboriginal Peoples (RCAP) of 1996. The nation model is reaffirmed within the RCAP Report as well as the notion of Aboriginals with a land base. The Report of the RCAP is a legitimating tool of the

state. The RCAP Report reinforces the nation as the cultural model of the state and affirms the dependent relationship between nation and territory. (Andersen & Denis, 2003)

The RCAP Report affirms the nation-to-nation model as the foundation of the renewed relationship between Aboriginals and the Canadian state. All its recommendations for governance, treaty processes, and lands and resources are based on the nation as the basic political unit of Aboriginal peoples and geographically linked to a land base. The problem lies with Aboriginal peoples who are not situated on defined territories and who live off a recognized Aboriginal land base. In this way, urban Natives become marginalized, as self-government negotiations are based on the supposition of a land base. The government of Canada argues that in order to get involved in serious discussions of self-government, Aboriginal peoples must assume a land base. In fact, prior to the RCAP Report, the nation model was inherently land-based, i.e. the assumption of a land base should be *a priori*. (*ibid.*)

The Royal Commission on Aboriginal Peoples was the biggest and most expensive public inquiry ever undertaken in Canada. The commission interviewed hundreds and hundreds of Aboriginals and finally submitted their point of view in five volumes. This public inquiry constituted a symbolic ritual between the state and society, as well as a source of legitimating the relationship between the Canadian state and its Aboriginal peoples. (*ibid.*)

The RCAP Report reflects the following main recommendations:

- Aboriginal peoples need the Crown to implement, renew, and fulfill the terms of their historic treaties.
- Aboriginal peoples require a process to establish new treaties between the Crown and non-treaty nations in regions where no treaties exist.
- Aboriginal peoples require a larger land base over which they can be self-governing to secure culturally appropriate land and resource use.
- Aboriginal peoples need policies and principles that would recognize Aboriginal title as a legal interest in land

and that would require Aboriginal consultation or consent prior to federal and provincial use of that land.

- The Crown should actively pursue its special fiduciary obligation to preserve Aboriginal lands and resources.
- There should be negotiation and implementation of Métis rights to land and governance.
- Aboriginal peoples require Canada's attentiveness and responsiveness to the international legal principles that outline the government's responsibility for recognizing and protecting Aboriginal rights, lands, and resources. (Royal Commission, Vol. 2, Recommendations 2.2.2, 2.2.3, 2.2.6, 2.4.2, and 2.4.1)

The impartiality of the RCAP Report constitutes its legitimacy and its distinction between the state and civil society. RCAP Report constitutes a paradox for itself, because even though there were economic and human efforts to conduct this inquiry, not much is done about the recommendations contained in the final report, as very few recommendations have been really implemented. (*ibid.*)

The RCAP's recommendations regarding treaties, treaty making, Aboriginal land base, Aboriginal title, and Métis rights to land and governance still need to be observed, as whereas the Report has influenced government policy, Aboriginal peoples rights have not been recognized. (Borrows, 2000-2001)

The RCAP brought both Aboriginal peoples and the Canadian state together in their relationship through dialogue and thus, became the basis for policy negotiations between them as well as the construction of political projects, which will conform to the nation model. However, there is the dominant presence of the Canadian state that marginalizes the social power of Aboriginal communities through assimilation. (Andersen & Denis, 2003)

The relationship between Aboriginal peoples and the Canadian state have also been characterized through dialogue and negotiations established in treaties.

The Treaties

Aboriginal peoples have already been celebrating treaties between them as to establish relationships among nations and their lands before settlers arrived to Aboriginal lands. The treaties were written in their hearts and minds and recorded on trees, and rocks, and they were considered as sacred and were given the highest respect. Failure to observe them would cause economic difficulties, political instability, and war. (Borrows, 1995-1996) Indeed, Indigenous Peoples themselves – long before the Europeans colonized their lands - had been organized in federations or confederations through treaties. Thus, it is pertinent to say that neither federalism nor treaties were directly inherited from Western traditions. (Green, 2004)

When settlers arrived to Aboriginal lands, they established peace, friendship, and respect treaties with Aboriginal peoples, and they were given the Aboriginal formality. (Borrows, 1995-1996) Aboriginal peoples agreed to cooperate and live harmoniously with the British sovereign and keep the promises and relationship *as long as the sun shines and the water flows*; the British assured not to interfere with Aboriginal order, culture, and traditions. These were expressions of autonomous wills, and the treaties involved binding obligations on each nation. (Youngblood, 2002)

The treaties created a free association with the sovereign. Since they legitimize the British presence in the Aboriginal territories, they were and remain the original constitution of Canada. Treaty federalism is the foundation of provincial and federal authority in North America under subsequent imperial acts. (*ibid.*)

Treaties remained to be the basis of relationships of the Aboriginal and non-Aboriginal worlds, and Canadian courts still have recourse to them. These treaties, which were contracted before and after the Confederation of 1867, guide the courts to take an approach to the issues, resolving any ambiguities in favour of Aboriginal peoples, as Aboriginal peoples led the interpreter to consider the possibility that not

only the written words contained the entire meaning of the treaty.¹ Yet, these treaties changed forms, as they started to be written by the non-Aboriginal peoples. More importantly, there was an outburst of difficulty in their interpretation and with it, great misunderstandings that led to violent conflict. (Borrows, 1995-1996)

Consequently, interpretation of the treaties has been the source of conflicts. Settlers have a liberal treaty interpretation, so interpretation varies to that of the Aboriginal peoples. This liberal treaty interpretation has led to assimilation, and each time a court falls over a treaty's meaning because it lacks information or evidence, this creates a bias in favour of the Crown, to the detriment of Aboriginal people. The RCAP recognized this problem, and regretted that treaties do not look at the First Nation perspective, and that there is also a narrow perspective on the Canadian state's side. In sum, the rights of Aboriginal peoples become domesticated and subordinated to the Crown. Thus, the Crown is the dominant contributor in the treaty relationship, which illustrates the maintained colonial nature of the relationship between the Crown and Aboriginal peoples. (*ibid.*)

The Western tradition on treaties has its origin on Roman Law, which was based on the principle of *pacta sunt servanda* – treaties shall be honoured in good faith -, which was the base of sacredness and solemnity of the agreements, and each treaty party should keep its promises. On the opposite, Indigenous Peoples had already well-established diplomatic alliances among nations, which permitted free trade, sharing of resources, safe passage, military alliance, and economic help. In the event there were more people within a territory, an alliance would be formed. Hence, these are the origins of *treaty federalism*, which are the essential

¹ The Confederation was regulated by the Constitution of 1867, which foresaw two main orders of government: federal and provincial, each with its own defined sovereignties as well as certain mechanisms of intergovernmental relationships. This kind of political regime that was imposed to Indigenous Peoples, affirmed their original sovereignty as well as their right to self-determination. (Borrows, 1995 – 1996)

relationship between Aboriginal Peoples and the Canadian State. Treaty federalism can be incorporated into the constitution to form *treaty constitutionalism*, which would allow the accommodation of the right of self-determination or autonomy of Indigenous Peoples within federal states. (Green, 2004 & Youngblood, 2002)

Numbered Treaties

These treaties were signed between 1871 and 1921, and cover mainly Northern and Western Ontario, the three Prairie Provinces (Alberta, Saskatchewan, and Manitoba), as well as the Northwest Territories. The courts consider these treaties as sacred, and it has been clear that the Crown can modify, breach, or extinguish them only if its action is justified. There are many cases that show the way courts have interpreted treaties in such a way that pan-Canadian rights are allowed to expand and weaken Aboriginal rights. Nowadays, the signature of treaties has basically been known as modern-day treaties or land claim settlements. (Borrows, 2000-2001)

Treaty Initiatives

The RCAP recommended the formation and implementation of treaties to both the Crown and to Aboriginal peoples. In this sense, the RCAP suggested the enactment of a Royal Proclamation and the creation of a legislative scheme to administer the treaty process. This has not happened, but, instead, there have been province and regional policy initiatives. This is better known as the domestication of colonialism, which considers Aboriginal peoples as entities that should be subordinated to the Canadian state. In other words, modern treaty initiatives demand that Aboriginal peoples obey the rules of the Canadian state and not the other way around. This reflects a dominant and assimilative view from the Canadian state. (*ibid.*)

The RCAP also recommended the formation of institutions that would solve treaty disputes in order to remove them from courts and settle them within a flexible framework. Hence, both treaty commissions and an independent lands and treaty

tribunal should be created as permanent, neutral, and independent bodies. Both First Nations and Canadian governments have opened treaty institutions, and the Indian Claims Commission wants to be replaced by an independent claims body to advance in its effectiveness. In fact, a lands and treaty tribunal could help Aboriginal peoples in facing the colonial way of having their lands and resources managed by the state. Treaty commissions would create the recompilation of both official and unofficial views. (*ibid.*)

II. Canadian Aboriginal Peoples

Within the Constitution Act of 1982, there are three sections that refer to Aboriginal peoples:

1. Section 25, which establishes that in case of conflict on the rights of Aboriginal peoples and the application of the Charter of Rights and Freedoms, there is protection of the rights of Aboriginal peoples from any legal interpretation that would decrease their force;
2. Section 35, which defines Aboriginal peoples of Canada: the Indians, Inuit and Métis. Aboriginal and treaty rights are recognized and affirmed.
3. Section 37, which would gather conferences in order to discuss constitutional matters that would affect Aboriginal peoples of Canada as well as to identify and define Aboriginal and treaty rights. The conferences ended in 1987 as they failed to obtain agreement. (Elliot, 2000)

Canadian Aboriginal Peoples belong to different cultural groups, as they descend from the original inhabitants of North America. Thus Section 35 recognizes the following:

(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, Aboriginal peoples of Canada include the Indian, Inuit and Métis peoples of Canada. (Constitutional Act 1982, online: www.laws.justice.gc.ca)

Hence, the Canadian Constitution of 1982 recognizes three groups of Aboriginal Peoples:

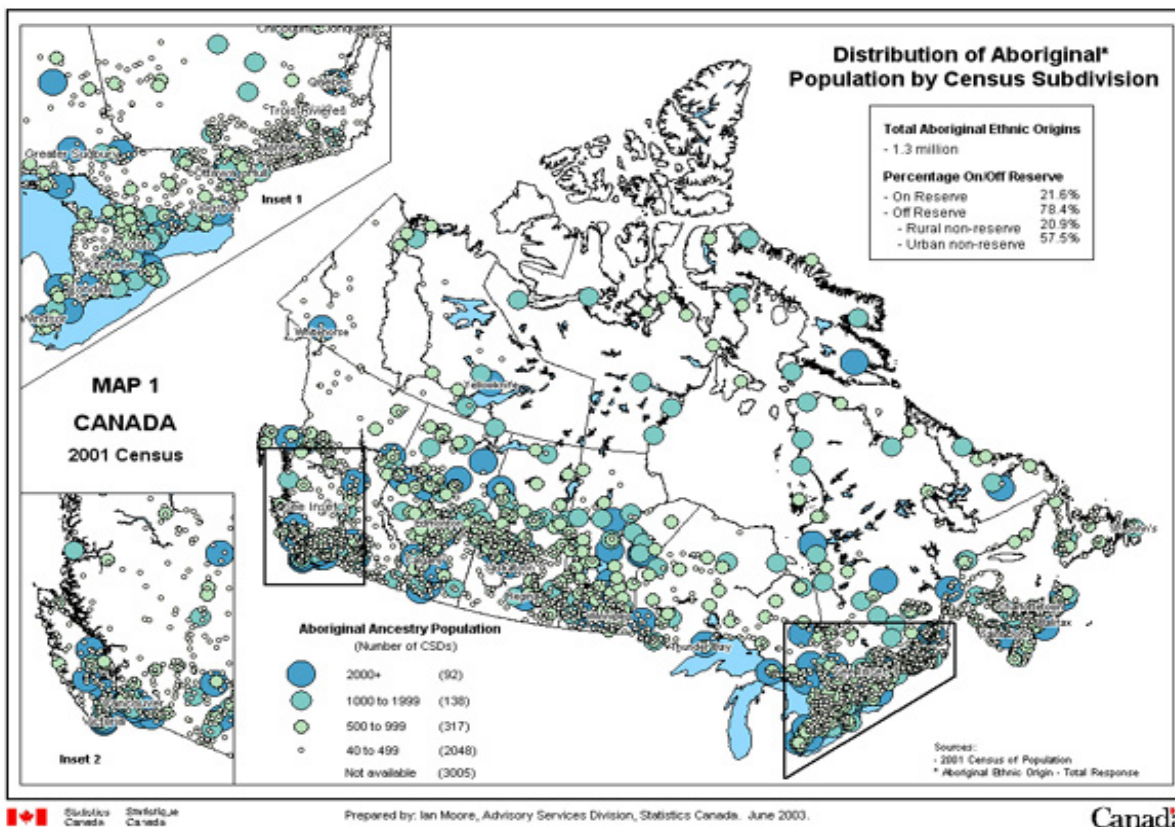
1. The *Inuit* (which means ‘the people’ in Inuktitut) who live in the Arctic and sub-Arctic regions, mainly in Nunavut, the North-western Territories, Labrador, and Northern Quebec;
2. The *Métis* whose unique culture combines both Aboriginal and non-aboriginal; and
3. The *Indians or First Nations Peoples*.

	Aboriginal Population Size	OFF Reserve
Canada	1,319,890	78%
NL	28,065	98%
PE	2,720	86%
NS	33,415	78%
NB	28,465	79%
QC	159,905	80%
ON	308,105	87%
MB	160,250	68%
SK	135,035	65%
AB	199,015	81%
BC	216,110	80%
YT	6,990	72%
NT	18,955	30%
NU	22,665	100%

Source: Statistics Canada 2001 Census

Source: Congress of Aboriginal Peoples website (www.abo-peoples.org)

The following charts show the Aboriginal population in Canada as of the Census of 2001:



Source: Congress of Aboriginal Peoples website (www.abo-peoples.org)

First Nations

In accordance to the RCAP, a small group of Aboriginal peoples who lie in a single locality and that are part of a larger Aboriginal people is given the term of First Nation. As well, a First Nation belongs to those signatory to one numbered treaty. (Newhouse & Belanger, 2001)

Indians or First Nations people may be classified into Status Indians, Non-Status Indians, and Treaty Indians through the Indian Act of 1876. A *Status Indian* is the person who is registered in the official record, the Indian Register established by the Indian Act, which identifies all Indians in Canada. The Indian status has changed many times since the first lists of those persons recognized as Indians were prepared. A *Non-Status Indian* is an Indian who is not registered as so under the *Indian Act*, either because this person did not apply for registration, or because an ascendant is not entitled to be registered under the terms of the Indian Act. (INAC)

Treaty Indians are those persons who are either registered or associated with a treaty band and who are descendants of Indians who negotiated a treaty with the British Crown. Some bands or a group of Indians that have been declared by the Governor in Council as a band under the Indian Act prefer to be known as First Nations persons for whom lands have been set apart as *reserves or First Nation communities* for the use of an Indian group and for whom money is held in trust by the Crown. (*ibid.*)

The Indian Act establishes specific federal government obligations as well as regulates the administration of Indian reserve lands, funds, and resources. This Act entails the Minister of Indian Affairs and Northern Development to administer some funds that belong to First Nations and Indian lands, as well as the approval of First Nations by-laws. (Elliot, 2000)

Section 87 of the Indian Act requires that Indians living on reserve are *tax-exempt*. However, this exemption does not apply to both Métis and Inuit who generally do not live on reserves or First Nation communities. This exemption has existed since before the Confederation in order to recognize the unique constitutional place of First Nations in

Canada. The courts have established that the exemption's purpose is to protect the entitlements of Indian people to their reserve lands and that their property is not subject to taxation. In this way, a Status Indian working on reserve is not entitled to the income tax payment. As well, Status Indians living on reserves do not pay GST (Goods and Services Tax) and the HST (Harmonized Sales Tax). (*ibid.*)

Indigenous peoples have accepted the nation model as a way to get rid of the heritages of colonialism. Thus, the Dene Nation of the Northwest Territories and the Inuit Tapirisat became the first Aboriginal groups to declare nationhood within Canada in 1975. This is the result of the Aboriginal reaction to the *White Paper of 1969*, which intended Indians to assimilate into the Canadian way. This also is the result of some court decisions regarding the nature of Aboriginal rights. (Denis, 2000)

The federal, provincial, and municipal governments have the responsibility of offering off-reserve Aboriginal peoples with social services in order to confront social problems that would ensure them a good quality of life. Thus, urban Aboriginal policy should involve all these three levels of government through intergovernmentalism, as another voice is needed. Indeed, urban Natives become marginalized, as self-government negotiations are based on the supposition of a land base. The government of Canada argues that in order to get involved in serious discussions of self-government, Aboriginal peoples must assume a land base. (Hanselmann & Gibbins, 2003)

First Nations peoples in cities have low educational levels, low labour opportunities, and therefore, higher unemployment rates as well as lower income levels. As opposed to First Nations, urban Aboriginal communities are heterogeneous, as they cover other First Nations communities, Métis, Inuit, and non-status Indians, they have no land base, their identities within the urban context are variable and complex, and they possess a great diversity of circumstance, as they range from street people to university graduates and professionals. Hence, there is an extreme contrast with reserve-based First Nations, and it is difficult to create an appropriate

governmental voice for urban Aboriginal peoples.(*ibid.*)

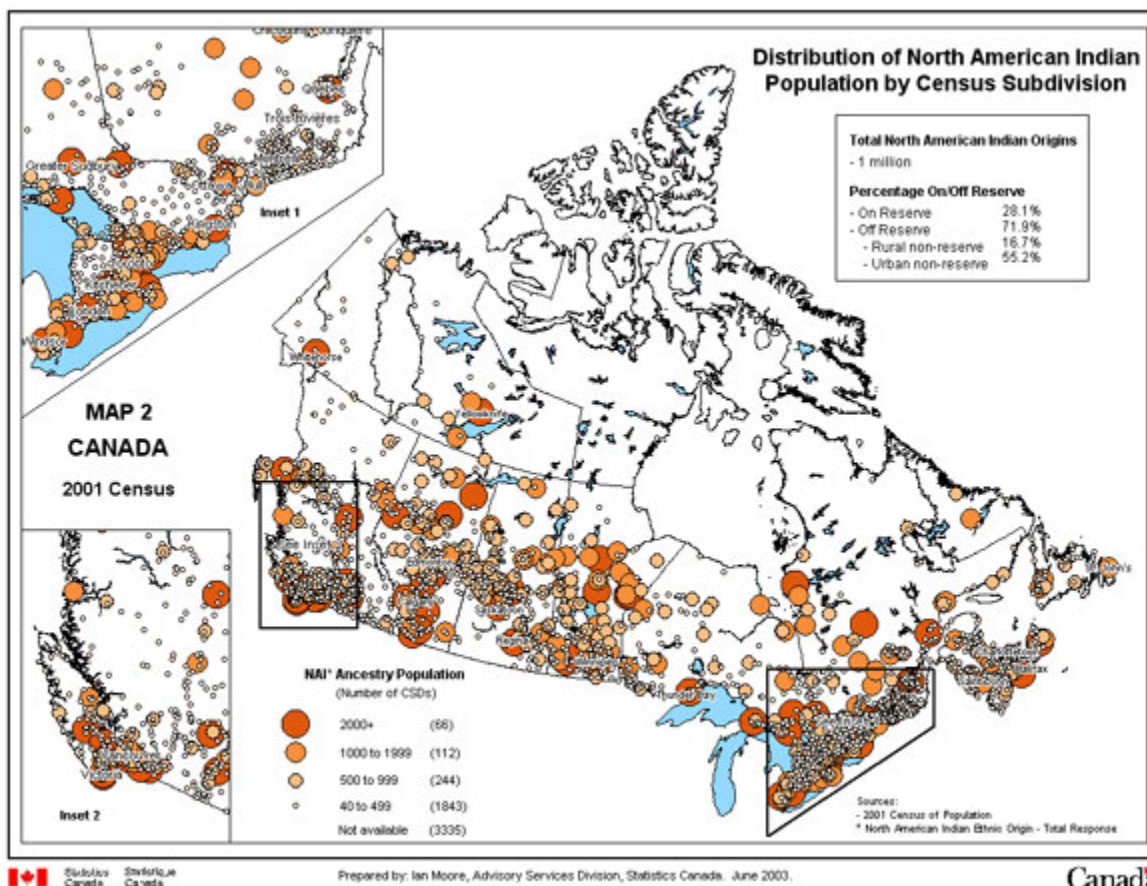
The Royal Commission on Aboriginal Peoples believes that urban Aboriginal peoples do not have the same level of services that on-reserve persons. Some recent research shows, however, that there has been some implementation of policies and programs directed to urban Aboriginals, which mainly face challenges regarding income support, family violence, childcare, addictions, suicide, and human rights. (*ibid.*)

It is important to mention that Aboriginal women played an important part within Aboriginal governance, forming matriarchal cultures, but due to colonial influence, Aboriginal community governance structures are patriarchal. The *Indian Act* did not recognize Aboriginal women’s rights regarding marrying non-Native men, so they lost

their membership and status within their nations. Hence, this enfranchisement led many women to abandon their communities, creating a great division among Indians. (Graham & Wilson, 2004)

Indians were reinstated their status through *Bill C-31*, and even though Indians regained their status, they were known as *Bill C-31* Indians, which constituted another way of divisionism. *Bill C-31* reinstated Indian status to around 114,000 persons who lost their status under the Indian Act. As well, it normalized the rules that define the Indian status, and it granted First Nations the opportunity to develop band citizenship. The implications of this Bill in the long-term constitute the fact that there will be no status Indians on First Nations reserves, and the increment of divisions among First Nations will have an impact on Aboriginal self-government. (*ibid.*)

The following chart shows the distribution of North American Indian population as of the Census of 2001:



Source: Congress of Aboriginal Peoples (www.abo-peoples.org)

Métis

The Métis Nation is considered to be a founding nation of Canada. In fact, their existence in the West before the creation of the Confederation became essential for the development of the East. The fur trade and political/economic development on the St. Lawrence River and Eastern Great Lakes would not have existed. As well, the Métis Nation made possible the openness of the prairies to agriculture and settlement. The Métis were historically identified as the children of French fur traders and Cree women of the Prairies or of Scottish traders and Dene women in the North. There is controversy as to whether or not the term Métis is used to identify those persons of mixed blood or mixed origin (First Nation and European), but one thing is certain: Métis do not identify as First Nation people, Inuit, or Non-Aboriginal persons. (Borrows, 2000-2001)

At the time of the formation of the Confederation with Sir John A. Macdonald, the Métis obliged him to recognize their concerns. The Red River Métis created a temporary government that was granted authority to discuss the conditions of union with the Confederation. They developed a locally created Bill of Rights that expressed their requests, and after many hard negotiations, they reached an agreement that was named the Manitoba Act, 1870. The Métis Nation recognizes this treaty as a means of recognition and affirmation of their nation-to-nation relationship with Canada. (*ibid.*)

There has been a continuous struggle between the Métis and the Canadian state since the middle of the XIX century mainly because of the preservation of the lands and the rights of the Métis. The government and the courts should recognize and affirm the existence of the Métis as a people as well as their existence in order to end this battle. (Telliet, 2000)

In this regard, the RCAP suggested that Métis land and resource issues should be negotiated under a nation-to-nation basis. In this way, the Commission argued that the Métis rights should be recognized in the same way as those from First Nations and Inuit peoples. Indeed, their title and rights were eroded neither in the Manitoba Act, 1870 nor in the Dominion Lands Act, 1879. (Borrows, 2000-2001)

A case that depicts s. 35 Aboriginal rights is the Supreme Court decision over the *Powleys*.

It is through the *Powley's* decision whereby the Supreme Court of Canada addressed the constitutional rights of the Métis as distinctive collectivities. (Graham & Jake, 2004) This case represents the first opportunity the Métis peoples had in order to have their rights recognized within S. 35 of the Constitution Act of 1982. The *Powley decision* dealt with the Aboriginal right to hunt for food. (Dalton, 2005) This decision involved the right to hunt a moose without a license, as the Powleys argued they possessed an existing Aboriginal or treaty right to hunt. (Telliet, 2000). The Powleys were charged for hunting contrary to the Ontario *Game and Fish Act*, and they were pleaded not guilty because they argued they had the right to hunt for food in that place. Furthermore, the Act was violating their rights under s. 35.1. The Superior Court level, the Ontario Court of Appeal, as well as the Supreme Court of Canada favoured the Powleys through the reaffirmation of the Aboriginal right to hunt for food as Métis peoples. The Court found out they were Métis who resided on a community based at Sault Ste Marie, and that they possessed existing Métis harvesting rights, and that there was no infringement of the law. (Dalton, 2005)

With the *Powley decision*, the Court established three main aspects that define the Métis identity for claiming rights under s. 35: self-identification, ancestral connection, and community acceptance. This is to be genuinely self-identified as a member of a Métis community, to belong to the Métis community by either birth, adoption, or other means, as well as to be accepted by the Métis community due to involvement in the community, shared customs, traditions, and contextual understanding of the community. (*ibid.*)

The term Métis in s. 35 of the Constitution Act, 1982 does not encompass all individuals with mixed Indian and European heritage; rather it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive

collective identity, living together in the same geographical area and sharing a common way of life. (*ibid.*)

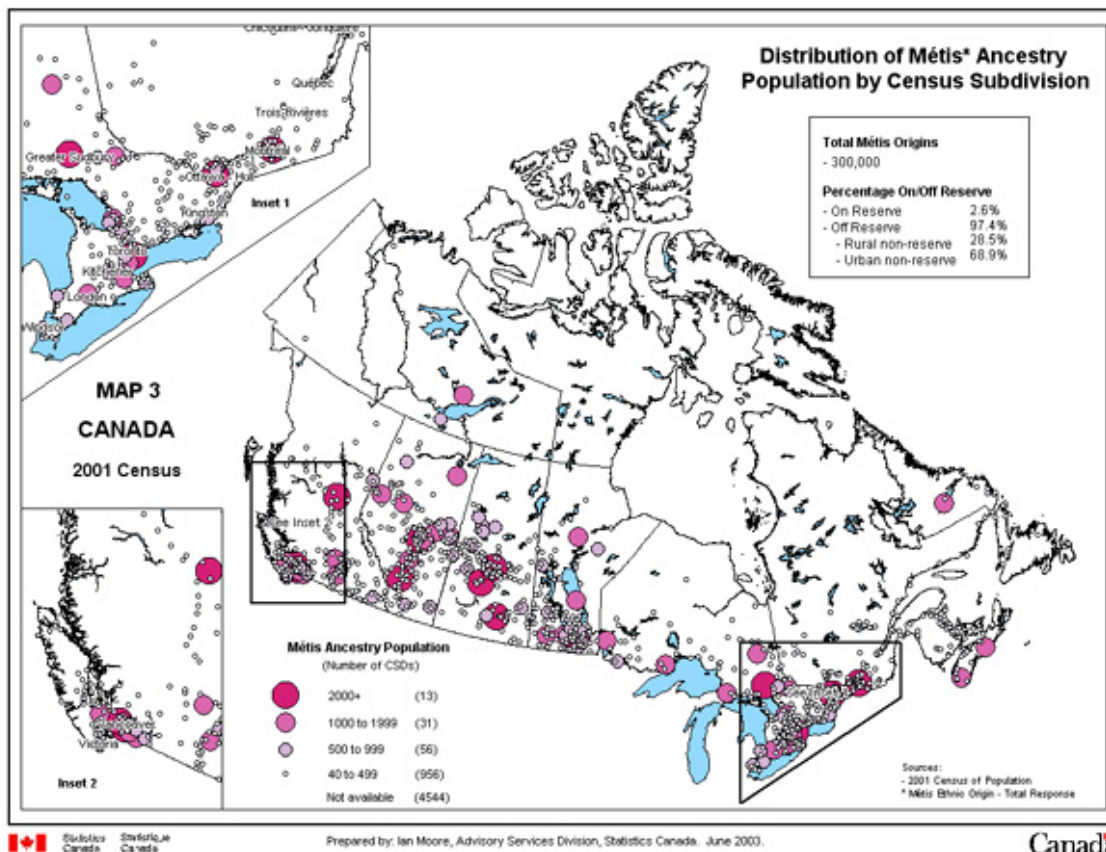
Municipal, provincial, and federal governments have not fully recognized Métis lands and resources rights, as there are permanent problems of Métis identification, for there has never existed a status and registration system for the Métis people controlled by the government. As well, the rights of the Métis Nation are not conceptualized in the same manner as those of First Nations and Inuit. It seems that legislators are waiting to see the approach to Métis land rights, which implicates a challenge to initiate the RCAPS's recommendations. (Borrows, 2000-2001)

It is worth to mention that there is the need to develop a stronger national structure that would meet the needs of the Métis Nation through a Métis Nation Constitution, which is taking into account a consultation process throughout the Homeland. It

has been said that Constitutions are the mirror that reflect the soul of a nation, as they assert the variety and diversity of culture, language, and regions of the nation. As it is well known, a Constitution is the supreme law of a nation, and is given legal supremacy over the other legislative bodies. (Graham & Wilson, 2004)

There might be a new constitutional space that recognizes the Métis jurisdiction for Métis people that would provide the federal government to legislate regarding the Métis Nation. This provision would avoid and reduce provincial involvement with the Métis. The Métis would work with both levels of government – federal and provincial – in order to focus on the recognition and assumption of Métis jurisdiction. This new jurisdiction, under Section 91(24) of the Constitution Act, 1982, would equalize the Métis people with First Nations and Inuit in order to offer Métis certain programs, and unify the Métis provincial bodies. (*ibid.*)

The following chart shows the distribution of the Métis ancestry population in Canada as of the census of 2001:



Source: Congress of Aboriginal Peoples website (www.abo-peoples.org)

Inuit

The Inuit presence in Canada is located in Labrador (Nunatsiavut), Northern Quebec (Nunavik), Nunavut, and the Inuvialuit Settlement Region in the Northwest Territories. These territories are based on land claims agreements, which are important but do not deal with all the economic, social, and cultural issues of the Inuit, as they reflect clear rates of low income, unemployment, high cost of living, bad housing conditions, high index of infectious diseases and shortness of life expectancy. (ITK)

The Inuit have exercised their right of self-determination through a public form of government. They settled their land claim, and they chose to form a new territorial government in the Eastern Arctic, which is best known as Nunavut - Our Land in Inuktitut, the Inuit language. It is said that since the Inuit comprise 80% of the population within this region, they were able to pursue self-determination. They were actually influenced to follow this kind of government through the lived experience of the Inuit of Greenland who have an arrangement with Denmark. (Jull, 2001)

The events in Nunavut had demonstrated that federalism is able to hold the Inuit aspiration for self-determination within a state. Nunavut recognizes the Inuit language and culture and it gives them autonomy in their own land. Even if the Inuit population lower towards a minority, they would still be able to exercise their right of self-determination through self-government, which is close to the meaning of self-rule on federalism terms. (ITK)

Nunatsiavut, "our beautiful land" in Inuktitut, includes the lands in the Labrador Inuit Land Claim Settlement Area. Nunatsiavut will govern itself by the Labrador Inuit Constitution, which is based in democratic principles and recognizes that not only the Inuit live in Nunatsiavut. Its government has established that both men and women are equal, that there is a need for political, social, and cultural institutions, and that it recognizes its commitment to the Canadian Charter of Rights and Freedoms. (Jull, 2001)

The main economic and social problems Inuit face are the issues of housing, education, unemployment, health, and the environment. Shortage of housing is the root of the problems, as it is the essence of the overall social economic approach. Overcrowding housing has led small children to be ill of tuberculosis and other respiratory diseases. Besides this, there are industrial pollutants that deposit into the Arctic ecosystem and food chain, and these are affecting Inuit health. It is worth to mention that Inuit health issues are not mainly physical but also mental, as there is a high suicide rate among the youth, and there are not enough mental health programs for Inuit. (*ibid.*)

It is clear that Aboriginal living conditions are unbearable and disgraceful, and the federal government is moving towards an Aboriginal policy under the umbrella of First Nations. The problem lies on the fact that within INAC, the Department of Indian and Northern Affairs Canada, there is no single division or public servant responsible only for the Inuit. Some persons within the federal government might believe that because land claim agreements or modern treaties were ratified and Nunavut was created, the Inuit challenges have been resolved. (ITK)

After an overview of Canadian Aboriginal peoples, it is worth to study the importance of distinguishing whether or not there is an Aboriginal sovereignty as opposed to a colonial one.

III. Aboriginal & Treaty Rights, a Question of Sovereignty

Aboriginal and Treaty Rights

There are two opposed positions regarding the recognition of Aboriginal and treaty rights by the Canadian state:

- (a) The recognition and existence of these rights is contingent or dependent of recognition by the Canadian state. This thesis is consistent with the preambles of the Constitution Act of 1867 and 1982, as any Aboriginal or treaty right should be dependent on the existence of the existence of Canada as a state.

The government of Canada has believed that Canadian state sovereignty extinguished Aboriginal sovereignty. The Aboriginal right to self-government is dependent to the state. The Court decisions do not refute the thesis of the Attorney-General of Canada that First Nations might not have had sovereignty before the European settlers arrived to Canada and that even if there was, it was extinguished by the assertion of sovereignty by Britain and then Canada. According to the Common Law, there are four principles whereby a state can justify the acquisition of new territories: conquest, cession or formal transfer – like a treaty-, assertion of sovereignty without a treaty or the military, or settlement of territory previously unoccupied or unrecognized as part of another political entity. (Asch, 1992)

It is dangerous to assert that Aboriginal nations gave their lands as formal cessions based on their free will whereby they would cede unilateral sovereignty to the British Crown. In short, the colonialist settlement thesis lies at the core of Canadian constitutional identity regarding the justification of the occupation of the landmass of Canada in the face of Aboriginal claims to self-determination and self-government. Thus, Canadian constitutional ideology is colonial and assimilative. In fact, the settlement thesis is implicitly colonialist and suggests inferiority of Aboriginal nations in Canada. Aboriginal leaders plan to achieve recognition of their sovereignty as an inherent right to self-govern themselves, and never to overturn the sovereignty of the Canadian state. (*ibid.*)

Delgamuukw is one of the most important decisions/rulings of the Supreme Court of Canada on Aboriginal rights under s. 35(1). It demonstrates that the Canadian common law system is based on the conception of *one sovereign*, the Crown, and this situation makes the granting of self-determination or self-government rights more difficult, as there are conflicting jurisdictional issues between the Crown and Aboriginal peoples. In fact, the Supreme Court of Canada has established that there should be reconciliation between Aboriginal prior sovereignty and general Aboriginal rights under section 35(1) with the Crown's sovereignty. (Dalton, 2005)

When talking about Aboriginal and Treaty rights, it is worth to mention that the judiciary has established that the Crown has the duty to consult with a First Nation in case it would like to pursue an action that threatens or interferes with existing Aboriginal / treaty rights recognized and asserted by s. 35(1) of the Constitution Act of 1982. This duty to consult needs the wish of the Crown to negotiate an agreement that specifies the rights of the parties when an action that it takes negatively involves Aboriginal interests. The basic purpose of s. 35(1) is the reconciliation between the sovereignty of the Crown and the pre-existing Aboriginal societies. (Lawrence & Macklem, 2000)

The Supreme Court of Canada establishes the relationship between the Crown and First Nations by establishing that the Aboriginal title is guarded as a constitutional right and that the Crown should consult with a First Nation prior it undertakes an action that might obstruct a First Nation's title. In other words, the duty to consult from the Crown constitutes a legal requirement that would determine the constitutionality of engaging in an action that breaches an Aboriginal / treaty right of a First Nation. This prior, informed consent of First Nations is considered by the judiciary to achieve reconciliation between First Nations and the Crown. (*ibid.*)

The *duty to consult* belongs to the Crown and third parties when there is the risk of infringement of an Aboriginal or treaty right; however, this consultation should be *a priori*, rather than *a posteriori*. However, some cases establish that the duty to consult takes place only when the Aboriginal / treaty right in question has been recognized as existing within the meaning of s. 35(1) either by treaty or litigation. This consultation should be done in good faith and referring to the concerns of Aboriginal peoples. In case the Crown breaches its duty to consult if an action of the Crown constitutes a violation of an existing Aboriginal/treaty right recognized and affirmed by s. 35(1), then this action should be declared *unconstitutional*. It is worth to mention that inadequate funding may prevent a First Nation to provide the Crown with relevant information. (*ibid.*)

The other position regarding Aboriginal and Treaty Rights is the following:

- (b) Aboriginal rights existed before the Canadian state and their existence does not depend from the creation of Canada. Hence, these rights are inherent and do not need explicit legislative sanction. This theory is recognized by Section 35 of the Constitution, which refers to the *existing rights of Aboriginal peoples*. (Asch, 1992)

The position of the Supreme Court of Canada does not annul the sui generis, inherent Aboriginal rights by the assertion of Canadian sovereignty; on the contrary, those rights continued to exist without the need for constitutional protection. Recent Supreme Court decisions have established that Aboriginal sovereignty did exist and was recognized by the British Crown. In short, the Supreme Court has not definitively established the fact that there was indeed the Aboriginal right to sovereignty. (*ibid.*)

Aboriginal and treaty rights establish the right of Aboriginal Peoples to live in a territory where governments respect their diverse heritage – these constitutional rights are inherent rights and are not delegated by the British sovereign. These sui generis rights are the basis of convergence of a postcolonial and intercultural Canada. (Youngblood, 2002)

The Right to Self-determination

As peoples under international law, Aboriginal Peoples declare they have the right to self-determination within existing states. This right divides into two directions:

- a) Autonomy increase for Indigenous Nations
- b) Greater participation in the decision-making institutions

In this sense, section 35(1) of the Constitution Act of 1982 is able to accommodate three levels of sovereignty: federal, provincial, and Indigenous, as this provision establishes that the inherent right of Aboriginal self-government is recognized as a right that is treaty-protected for Aboriginal Peoples. Indigenous Peoples in Canada would like to have self-government in order to keep their values,

traditions and ways of life, languages, and cultures within a contemporary perspective. Aboriginal Nations can negotiate self-government agreements with federal and provincial governments in order to incorporate a third level of government. The Royal Commission on Aboriginal Peoples (RCAP) has thought that a third chamber of Parliament would involve the three orders of government and that an Aboriginal Parliament should exist besides the House of Commons and the Senate in order to create state dispute resolution mechanisms, to develop treaty-making and treaty-renewal processes. This third level of government within the Canadian State would give Aboriginals a permanent voice in the decision-making processes. (Green, 2004)

It is worth to mention that the *Canadian State has a paradoxical position* towards Aboriginal Peoples, due to the fact that it both protects and violates the rights of Indigenous Peoples. On one side, the Canadian State continues to dominate the colonized nations and, on the other side, the fundamental principles of Constitutional Law and the adhesion of the Canadian State towards International Law makes one think that Canada favours the establishment of political orders where fundamental human rights are guaranteed by democratic and representative governments. Aboriginal Peoples have denounced in the international arena and international tribunals the violation of their human rights. (*ibid.*)

Indigenous self-determination means different things within the context of International Law and within the Canadian context. No agreement has been made on what Indigenous self-determination involves. Since Aboriginal communities constitute peoples, they should be treated within the context of International Law. Thus, the right of self-determination involves the right to live their lives according to their own norms, laws, and cultures. (Dalton, 2005)

There are two kinds of self-determination:

- *External*, whereby a state involves a defined territory, a permanent population, and a government, as well as its ability to establish relationships with other states.

The majority of Aboriginal peoples claim that self-determination means autonomy and freedom from state interference in order to allow the transmission and preservation of culture to future generations. They claim that they rebel against assimilative, colonialist dominations. Hence, Aboriginal peoples believe that the right of self-determination is a precondition to other subsequent rights. Hence, this kind of self-determination is more controversial due to the portrayal of independent statehood, which could signify secession of Aboriginal peoples from the Canadian state as well as jurisdictional conflicts. (*ibid.*)

- *Internal*, which is resolved to support and preserve Indigenous cultural differences within an existing nation-state.

These conceptions of internal self-determination stress the relevance of the preservation of culture within states, and do not require secession or independence. (*ibid.*)

It is clear, thus, that self-government for Aboriginal peoples constitutes a key of the rebuilding of the relationship of the Canadian state with Aboriginal peoples. A more participatory role of Aboriginal peoples within the federal electoral process and the institutions of Canada's Parliament are required. Aboriginal Electoral Districts (AEDs) is a proposal that reflects that there should be an effective representation of Aboriginal peoples through democratic equality. Proportionality of representation is necessary to facilitate the expression of the differentiated citizenship of Aboriginal peoples, as they constitute distinct peoples or nations within Canada. Since Aboriginal peoples are different from Canadians, the only way to be equally represented is to have Aboriginal representatives within Parliament, that is, through mirror representation, which includes persons who share the same perspectives of life due to ethnic, religious, gender, or class experiences. (Schouls, 1996)

There is the disadvantage, however, that there would still be a misrepresentation of Aboriginal peoples due to the proportion of the Aboriginal

population to be represented in Parliament. As well, there is a diversity of Aboriginal peoples, as to who is Indian, Inuit, Métis, status and non-status Indians, urban and rural residents, tribes, nations, treaty and non-treaty Indians, men and women. The main obstacle is the fact that Aboriginal peoples would identify themselves or their citizenship with their own Aboriginal nation, rather than with the Canadian state. (*ibid.*)

Conclusions

There is no unity among Aboriginal Peoples in Canada. There are many differences among Aboriginal peoples, as the Inuit, Métis, and First Nations diverge from one another in history, culture, language, traditions, and ancestry. Even within First Nations, there are a lot of differences of on/off-reserve Indians, status, non-status, or treaty Indians. Therefore, it would be difficult to say that Aboriginal peoples constitute the same Indigenousness in Canada.

Aboriginal peoples still suffer conflict within their relationships with settler states. It is expected that there will be a reconciliation of Aboriginal peoples with states. For some Aboriginal peoples, this means an opportunity to improve their quality of life measured in education, housing, and per capita income. For others, to obey the state means to lose independence and to be culturally separated, this means assimilation.

The relationship between settler populations and colonized Indigenous nations should be critical, and it is only through a process of decolonization that Canada can surpass its colonial origins, strengthen its identity, and move towards a post-colonial order.

This order should be portrayed by the idea of constituting a shared space, in which both populations can coexist and be able to reconcile their differences. It is only through a process of decolonization that Canada would be able to become a truly postcolonial society as well as to affirm its identity.

The advantages of this transformation for the Canadian state would reflect a socio-economic

stability, increased economic capacity, a great cultural enrichment, as well as respect from the international community. As well, Indigenous Peoples might propose some coexistence and political strategies with the Canadian state. A post-colonial vision would imply the coexistence between Indigenous and non-Indigenous peoples.

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