Self-determination, Citizenship, and Federalism: Indigenous and Canadian Palimpsest

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Executive Introduction

The Saskatchewan Institute of Public Policy is pleased to publish this paper, as part of our mandate to improve awareness and stimulate debate on matters of importance to Saskatchewan. The paper Self-determination, Citizenship, and Federalism: Indigenous and Canadian Palimpsest* is an examination of the theoretical, policy, and legislative bases of colonialism towards First Nations and Metis, and of antidotes to that colonialism.

Good public policy is always located in a theoretical framework, although sometimes that framework is implicit rather than explicit. Good policy is thoughtful rather than mechanical; it is proactive rather than only reactive; it is courageous and it addresses obvious and urgent human, environmental, and political needs. Implicit theoretical frameworks and the assumptions that flow from them are the most difficult ones to confront. This paper tackles the task of making explicit the implicit colonial foundations of many public policy assumptions concerning indigenous peoples, and it should be helpful for those reflecting on the policy options before government, and on analysing government’s priority objectives and the means chosen for achieving them.

Saskatchewan is rich in its strong Aboriginal populations. To date, systemic barriers, jurisdictional quarrels, and even inappropriate and inadequate policy measures have limited Aboriginal contributions to Saskatchewan’s public, political, and economic sectors. That must change: demographic projections suggest that the future is young and Aboriginal, and it is in these hands that the future of the province largely lies. This paper offers some theoretical and concrete political ways to approach future policy differently than has been the practice in the past. We think that, at a minimum, the process of thinking things through will be helpful to reconceptualising policy initiatives.

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* “Palimpsest”– an over-written manuscript on which traces of the original text are still evident – has been used in the title because of the aptness of the metaphor it provides to the superimposition of Canadian colonial policies respecting Aboriginal peoples, on the permanent foundation of Aboriginal reality that persists despite earlier policies designed to eliminate all such traces.
Introduction

Canada is, in historical terms, a fairly recent political manifestation. The name, so myth tells us, is drawn from some Aboriginal language, though opinion differs on which one, or what the literal translation was. Nor does that precision matter. It is the history of the name itself that is significant, a mutated fragment of a language of an indigenous nation, which pre-existed but leaves its mark on the colonial state. Turtle Island is a name, or approximation of a name, used by several Aboriginal nations to refer to this continent. It is also a mythic reference, drawn from the cosmology of some indigenous cultures, in the way that “the Dominion” reference to Canada is derived from the biblical myth of Genesis. Historically a geographical rather than political designation, Turtle Island is now a political invocation. There were and are politics, of course, between the many nations resident on Turtle Island, including the sequence of colonial populations that eventually formulated Project Canada. Turtle Island, and other original names, exist as a palimpsest for the myth and reality of contemporary Canada, whose name comes from Turtle Island folk who are themselves contemporary residents (if not all unequivocally citizens) of Canada. Palimpsest can be written or experienced, but all layers of palimpsest define its totality.

The meaning and practice of self-determination, citizenship, and federalism are imbued with the histories of colonising and colonised populations and with the power relations between these now contemporary communities. The recent past – a couple of centuries – has been characterised by relationships of dominance and subordination; of colonising occupier and the displaced and regulated colonised. Subsequent to the historical treaty-making phase that ended with Treaty 11 in 1921, indigenous peoples were invisible in the dominant political landscape
until the 1960s, apart from nominal federal policy pursuant to the Indian Act.¹ Non-status Aboriginals didn’t get even that much attention. Profound injuries exist in the bodies, souls and histories of the indigenous now, evidence of Wrong Relationship.² Yet settler communities and indigenous ones – and the many different forms of hybridity that human relationships between the first two have created – live here, now, and must find a space for accommodation. The preponderant weight of that accommodative obligation falls to those who have benefited from colonisation. Reconciliation is in the best interests of both, for the health of Turtle Island and its many nations, and the viability of Project Canada are served by reconciliation.³

Conceptual Tools for Revisiting Relationship

Canada is a colonial state, with contemporary dominance over colonized nations. Yet, international law and Canadian constitutional law arguably prefer meta-constitutional political orders in which fundamental human rights are guaranteed by democratic and representative state governments. The colonial state is both the abuser and the guarantor of indigenous human rights. As Canada becomes more responsive to its role as guarantor, it’s political culture and elites are less comfortable with state violations of indigenous human rights. Indigenous nations, too, contest state oppression nationally and internationally, using the tools of politics, law, and public opinion. The result is a set of shifts toward ameliorating the historic and contemporary

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1 The 1983 Penner Report said that “In the evolution of Canada from colonial status to independence, the Indian peoples were largely ignored, except when agreements had to be made with them to obtain more land for settlement.” Report of the Special Committee, Indian Self-Government in Canada. Ottawa: Canadian Government Publishing Centre, Supply and Services Canada, 1983:39. Hereafter cited as the Penner Report.

2 A current example is the still outstanding claim of the now aged Aboriginal veterans of both World Wars, who were denied the benefits and supports given to other Canadian veterans. The Canadian government refuses to settle this claim honourably, offering only token (and largely rejected) compensation as of 2002.

3 The 1996 Royal Commission on Aboriginal Peoples called for a new relationship, but a decade earlier, the Penner Report had also made that call. “A new relationship would be beneficial to Canada ... In a democratic age, it is incongruous to maintain any people in a state of dependency.” The Penner Report at 41. Both reports have been much ignored by federal and provincial governments.
negative consequences of colonisation, and toward a political state that can be described as ‘post-colonial’. ‘Post-colonial’ implies “colonialism [is] finished business”. (Smith 1999:98) But Canada is not currently in a post-colonial state of grace.

Canada also struggles with the perpetual political contestation of identity, agency, and structure that originate not only from colonized indigenous nations, but especially from the contemporary Quebecois descendants of an original colonial component of the state. Certain other provincial governments have adopted this pose of claiming political, economic, identity and cultural claims in contradistinction to the federal whole. In the elusive search for constitutional peace and jurisdictional rationality; for coherent political culture; and for the prerequisite affirmation of identities, some Canadian scholars and activists have taken up the latent potential of citizenship and of federalism to meet demands of often contradictory constituencies. Citizenship must be practised within the federal structure, itself subject to change further to the contestation of citizens and communities claiming sovereign capacity. Federalism is a structural arrangement enabling divided sovereignty, and the practice of relationship between disparate components, each unique but also attending to an encompassing state that is understood to be more than the sum of its constitutional parts. In practice, in the conditions of colonisation in Canada, federalism “promotes unequal distribution of political influence”. (Borrows 1997,420) Canadian federalism permits conversation and negotiation between the national and provincial governments, but there are no formal mechanisms to facilitate similar conversations with Aboriginal governments. “With no formal tools to allow for this communication, Indigenous

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4 This was most evidently a feature of provincial consensus in the Meech Lake Accord, as the quid pro quo for consensus was the guarantee that powers made available to Quebec, to recognize it’s unique position in Canada, would be available to all provinces.

5 The interested reader is referred to the work of Charles Taylor, Will Kymlicka, Joseph Carens, Linda Trimble, and Alan Cairns, a partial list of the most important contributors to this subject.
peoples must use very blunt instruments to make their point, such as highly charged political demonstrations, blockades, and litigation.” (Borrows 1997, 444-45)

These ideas – human rights, citizenship, and federalism – are central to the Canadian conversations about how the colonial state, colonized nations, and non- or pan-nationally located hybrid populations can understand their historical and contemporary relationships. Less clear are the pathways to decolonisation that do not run through the standard domestic and international dogmas concerning state sovereignty, national composition, and contested claims to resources and territory. Yet, theorists and practitioners of international politics are partial in their representations of the world, educated in and perpetuating the ideas and ideologies of dominant formulations. Indigenous peoples must be able to raise other problématiques and propose other theories of political coherence and co-existence, if they are not to be captured by the language and contained by the ideas of those who oppress them. Linda Tuhiwai Smith identifies this profound intellectual danger in her observation about the “reach of imperialism into ‘our heads’”. (Smith 2001, 23; also 133-34) John Borrows has implied something similar about indigenous intellectual originality in his contention that Canadian law is informed by “First Nations law” and should take more systematic and conscious account of it, in the service of a better quality of justice. “First Nations law originates in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are enunciated in the rich stories, ceremonies and traditions of the First Nations.” (Borrows 1996, 646)

Post-colonialism, in conditions of continued co-existence framed by more equitable power relations and processes of reconciliation, implies that the colonizer also changes. Post-colonialism is far more radical than the various ‘self-government’ options that have been floated
to date, because it requires the effective indigenisation of the state, its institutions, economy, cultures, and populations in ways that have never been contemplated by those with power. Post-colonialism requires not concessions, but mutual accommodations for a common (though not necessarily assimilated or homogenized) future. The processes and institutions of a re-imagined political order must be a representation of indigenous aspirations, symbols, and practices as well as those of the colonizers.

Indigenous peoples in Canada are culturally, historically, geographically, and politically diverse, though all share the experience of colonial domination. While the focus of non-Aboriginal Canada is generally on the status Indian constituency with a land base, at least as many indigenous people are landless, and urban, with the Inuit entirely distinct from other Aboriginal peoples. The 1867 Constitution contemplated two orders of government, provincial and federal, with constitutionally defined sovereignty and jurisdictions, and mechanisms for relating to each other. Yet, Aboriginal intellectuals and activists generally take the view that this order was enforced on Aboriginal nations, which had and continue to assert original sovereignty and flowing from that, the right of self-determination. This claim constitutes a profound challenge to the legitimacy of the sovereignty and constitutional organising structure of the Canadian state. It also challenges the accommodations the state has offered – inadequate Indian Act revisions\(^6\), land claims processes circumscribed by requirements for extinguishment of Aboriginal title, and various delegated non-constitutional governance packages – as a mess of politico-administrative potage. Foundationally, then, the contemporary relationship between

Aboriginal and settler Canadians is corrupt because the original relationship is colonial, with all of the violence that implies. The kinder, gentler contemporary colonial relationship is still conditioned by domination and legitimated by racism.

Over the years, federal and provincial governments have dealt with Aboriginal peoples as a subject matter over which the two dominant orders of government claim, and deny, jurisdiction. Aboriginal peoples are treated as civic problems, economic liabilities, and political conundrums. Historically, at least some Aboriginal people have found their interests used as a political frisbee between the federal and provincial governments, as each denied jurisdiction and therefore economic and political responsibility for Aboriginal constituencies. Off-reserve status Indians, and all Aboriginal peoples except for reserve-based status Indians, are typically considered by the federal government to be a subject for provincial responsibility. Some provinces have tried to claim that all Aboriginal people are or should be federal responsibilities, regardless of residence, especially in the calculation of funding formulas for shared-cost programs. Municipalities, creatures of provincial governments, (except in the territories, where they are federal creatures) also have a track record of claiming to have no responsibility for funding the social, economic and political claims of urban Aboriginals unless dedicated funds are provided from federal or provincial governments. In the political frisbee game, the interests, citizenship claims, and human rights of Aboriginal people are casualties. Worse, the message Aboriginal peoples continuously get is that they are considered liabilities rather than assets to the communities in which they live.

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7 Section 91(24) of the Constitution Act 1867 gives the federal government exclusive jurisdiction over Indians and lands reserved for Indians. The first significant federal-provincial legal contest using Indians was played out in the St. Catherines Milling and Lumber Co. v. The Queen (1888) 14 App. Cas. 46, in which the province of Ontario and the federal government used Indian rights as a proxy in their dispute about jurisdiction over land and resources; the decision held that Indians had only a “personal and usufructory right” to their traditional land. Despite the centrality of Indian interests to the case, no Indian community was represented in court.
Both of the 1867 orders of government are uncomfortable with the proposition that there are three orders of government and the third is Aboriginal. This, of course, implies a measure of political sovereignty, constitutional legitimacy, and original jurisdiction that emerges into the existing federal mix, supported by the 1982 Constitutional recognition of Aboriginal peoples and their rights. Aboriginal and treaty rights are constitutionally guaranteed to Indians, Inuit and Metis in Canada. (Section 35, *Constitution Act of 1982*) These rights are conferred by the colonial state through the mechanism of citizenship in the colonial state, while they simultaneously challenge the state’s sovereignty – its right to assume jurisdiction over territory and populations. These rights were given shape, scope, and federal and provincial political support in the lamented, failed Charlottetown Accord, characterised by the Assembly of First Nations National Chief Matthew Coon Come as “the all-time high point in Crown-Aboriginal relations”. (2002:70)

Arguably, the first of these rights is self-determination, which inures to peoples. Self-determination encompasses cultural, economic, legal, political, and jurisdictional content, arguably including self-definition (Green 2003b) – the last presented more recently as citizenship. This is not citizenship in the state, but in a pre- or post-colonial indigenous political entity. Further, a trilateral federalism impels a different political economy than the one currently existent. Not all Aboriginal jurisdictions may choose the liberal capitalist paradigm of development, though some individuals and some political leaders do. Corporate interests are especially alive to the implications of this, and they have political influence with federal and provincial governments. Most traditional indigenous cultural and philosophical imperatives

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8 Anaya argues that “Extending from core values of human freedom and equality, expressly associated with peoples instead of states, and affirmed in a number of international human rights instruments, the principle of self-determination arises within international law’s human rights frame and hence benefits human beings *as human beings* [emphasis in original] and not as sovereign entities as such.” S. James Anaya, *Indigenous Peoples in International Law*. New York: Oxford University Press, 1996, at 76.
direct communities to non-capitalist, co-operative and collaborative economies. Smith suggests: “Indigenous peoples offer genuine alternatives to the current dominant form of development. Indigenous peoples have philosophies which connect humans to the environment and to each other and which generate principles for living a life which is sustainable, respectful and possible.” (1999:105) (Yet, she also acknowledges that “A new generation of indigenous elites also walk across the landscape with their cell phones, briefcases, and assets.”) (Smith, 1999:99)

Consider the transformation of indigenous peoples from subjects lacking the capacity for citizenship (the franchise was not extended to status Indians until 1960), and the 1969 federal proposal to eliminate Indian status, reserves, and treaties;\(^9\) to the Supreme Court’s 1973 recognition of aboriginal title in *Calder v Attorney-General of British Columbia* ([1973] S.C.R. 313), a decision which invited Canadians to “seriously contemplate the possibility that Aboriginal peoples would be a permanent part of the political and legal landscape” (Borrows 2001, 18); the emergence of indigenous peoples as victims of human rights violations by Canada;\(^10\) the Constitutional recognition of Aboriginal peoples and their rights; and now, the framing of those rights by activists and intellectuals as including self-determination. In 1983 the Special Committee on Indian Self-Government reported to Parliament, noting that it’s mandate had been *restricted* [by Parliament] to status Indians and advising that related matters requiring

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9 The 1969 federal white paper *Choosing A Path*, introduced by then-Minister of Indian Affairs Jean Chretien.

10 In 1977 Sandra Lovelace, a Maliseet Indian woman, successfully prosecuted a claim against Canada through the United Nations Human Rights Commission (UNHRC), for violating her cultural rights, guaranteed in Section 27 of the *International Covenant on Civil and Political Rights*, by instituting the sexist provisions of the *Indian Act* membership provisions that stripped Lovelace of her Indian status upon her marriage to a non-Indian. The Lubicon Lake band, under chief Bernard Ominiyak, has also been successful in its claim that Canada and Alberta have violated the human rights of the Lubicon band’s members. The UNHRC found Canada to be in violation of Article 27 of the International Covenant on Civil and Political Rights (which protects culture) and wrote: “Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.” United Nations Human Rights Commission, 38th session, International Convention on Civil and Political Rights CCPR/C/38/167/1984. See also Catherine J. Iorns Magallanes, “International Human Rights and their Impact on Domestic Law on Indigenous Peoples’ Rights in Australia, Canada, and New Zealand”. In Paul Havemann, ed., *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand*. New York: Oxford University Press, 2000:256.
further study included “a means for band control of membership criteria ... in accord with international covenants” (Penner Report 1983, vii.) In this trajectory, Aboriginal capacity for citizenship has gone from inadequate unless remedied by measures ascertained by the colonial state – for example, through gaining a university degree and renouncing one’s Indian status – to leapfrogging over the unmediated universal citizenship applied by the state, to the ambivalent claims now to either dual Aboriginal and Canadian citizenship, or to claims to membership in a decolonising Aboriginal entity in opposition to Canada.

The federal policy lens for considering status Indian issues has, since the 1983 Penner Report, been ‘self-government’. It is not clear that ‘self-government’ is a panacea for the social and economic pathologies afflicting most indigenous peoples. Self-government is not an uncontroversial decolonisation mechanism; (Green 1997) nor is it clear how governance by communities may function if those communities are indeterminate or diasporic (urban, non-status, Metis or hybrid); if they are unaccountable to the principles of international human rights law; or how these communities will be articulated in relation to the constitutionally recognized governments and financing mechanisms of the Canadian state. More recently, self-government has been superceded in some circles by the language of self-determination, located as a human right.

The Right of Self-determination

Originally exercised as sovereignty by indigenous communities and nations, and radically constrained by colonial force and policy, self-determination continues as a fundamental human right recognized in international law, arguably affirmed by the Canadian constitution. James Anaya defines self-determination as “a universe of human rights precepts concerned broadly
with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies.” He considers it to be a collective right, and its content and application to be understood in relation to the consensus on colonialism’s illegitimacy and the universal benefit of internationally recognized rights. (1996, 75-80) Anaya argues that international human rights law imposes a duty on states to guarantee enjoyment of indigenous rights and to provide remedies for their violation; and that securing indigenous peoples’ rights requires “contemporary treaty and customary norms grounded in the principle of self-determination”. (1996, 129-133) This is consistent with the principles articulated in the Draft Declaration on the Rights of Indigenous Peoples, currently proceeding through the United Nations bureaucratic hierarchy en route to the General Assembly for ratification, or for rejection.

Self-determination first moved into elite policy language in respect of Aboriginal peoples in 1977, in the landmark Mackenzie Valley Pipeline Royal Commission inquiry chaired by Thomas Berger. (Berger 1977; Penner Report 1983, 41) Self-determination in the Canadian context is generally (but not unanimously) taken to mean “within Canada” – that is, without violating the state borders and sovereign character of Canada. It is typically associated with what has come to be called self-government. Self-government, according to Michael Murphy, “is the most fundamental of all democratic rights, and ... provides the framework within which most other rights derive their force and significance”. (Murphy 2001, 109) Conceptually, however, self-government only makes sense as a claim for those who have been denied self-determination: those who control the levers of political power and who are comfortable with its structural and constitutional practices have no need to place ‘self’ before ‘government’.

The self-determination exercised by indigenous peoples on Turtle Island was impeded by colonialism initiated by several European states. Colonialism did not affect all at the same time,
nor in the same way: consequently the experience, analysis and decolonisation strategies of Aboriginal peoples varies. Following Confederation in 1867, however, colonialism advanced in tandem with the implementation of the 1868 National Policy: Aboriginal peoples were impediments to the economic and social vision of the Founding Fathers and therefore, policy and legislation for removing the impediment emerged.\footnote{This included the making of the numbered treaties, the creation of reserves, the Indian Act and related policy regimes imposed by Indian Agents and enforced by the North-West Mounted Police and subsequently the RCMP, and the subjugation and dispersal of the Metis.} That is, Canada’s political elite was explicit in legislating and bureaucratizing the practice of colonialism in Canada. Law was an instrument in the service of this elite, which was actively securing the interests of elite capitalist classes. The consolidation of law, policy, popular culture and economics into an edifice that denied indigenous authenticity and violated indigenous sovereignty and human rights continues to frustrate decolonisation efforts while it perpetuates the racism and race privilege that legitimated the entire original colonial project. (Green 1995, 2003a)

So it is ironic that it is law that has led the political elites of the colonial state to reconsider Aboriginal rights and subsequently, to revisit the indigenous-colonial relationship; the 1973 Supreme Court decision in \textit{Calder} acknowledged that aboriginal title existed. This acknowledgement led the assimilationist then-Prime Minister Trudeau to concede that aboriginal and treaty rights had more legal purchase than he had thought, and ultimately, \textit{Calder} and subsequent legal decisions impelled Canadian governments to reconsider their political authority in relation to indigenous contestation. The 1982 \textit{Constitution Act} section 35 recognition of aboriginal and treaty rights emerged not as \textit{noblesse oblige}, nor as gift, but as a result of the weight of law on the Canadian constitutional patriation process: these rights were recognized because they had to be recognized. The 1983 constitutional amendment that gave constitutional
protection (as treaties) to contemporary land-claims agreements strengthened the Aboriginal constitutional presence. The Penner Report (1983, 43) intimated at the legal, constitutional, and structural sea-change flowing from this:

According to traditional constitutional interpretation prior to the recognition and affirmation of ‘existing aboriginal and treaty rights’ in the Constitution Act, 1982, all primary legislative powers were deemed to be vested either in Parliament or in provincial legislatures. The inclusion of existing aboriginal and treaty rights in the constitution may have altered this situation. If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers.

Canada briefly grasped that with the political and public support for the Aboriginal component in the Charlottetown package, but with the collapse of Charlottetown and subsequently, the collapse of public support for broad constitutional transformation initiatives, federal and provincial governments backed away from the transformative politics of decolonisation, to ones like that of the current federal government, characterised by Matthew Coon Come as “a neo-colonial, assimilation and extinguishment agenda”. (2002:72).

The legal struggle is framed on a case by case basis: hunting rights here, federal probity there, and so on, but the broader struggle is about self-determination, and about the accountability of colonial governments for their relationships with indigenous peoples. And, because colonialism is understood in international law to be a wrong and an injury to human rights, and because human rights include the right of peoples to self-determination, and because international law informs domestic law, Canada has moved, equivocally, to rupture the historical colonial relationship and bind indigenous communities to the state with sets of intergovernmental and occasionally constitutional agreements. Equivocation is evident in contradictory policies and legal decisions, which above all seek to protect the political and economic status quo. Decolonization is an indeterminate process and a capacious category, including not only the separation option, but also what Benedict Kingsbury calls “relational self-determination”
predicated on “the structuring and maintenance of relations, rather than separation”. (Kingsbury 2002, 111) Elsewhere, this has been framed as including the possibility of an integrated self-determination that effectively indigenises, and therefore legitimates, the colonial state. (Cairns 2000, 90 and throughout.)

**Citizenships and Identities**

Citizenship has become a focus of political theorists and of political contestants especially subsequent to the 1982 Constitution. It is both a contested term and a normative goal, as demonstrated by Alan Cairns’ argument in *Citizens Plus*. (Cairns 2000) Citizenship is considered by Cairns and others to be the grand unifier of Canadian diversity that makes the many parts cohere. Yet, for others, citizenship is at best an unattained promise; at worst, a colonial imposition. (Green 2003b) The *Hawthorn Report’s* proposal for “citizens plus”, radical at the time, proposed Aboriginal rights be additional to Canadian citizenship. Hawthorn had it backwards: by definition, Aboriginal rights come first, and Canadian citizenship is additional. This is not merely a semantic quibble. Canadian citizenship can only be a legitimate package for Aboriginal people to the extent that it is additional to state-recognized Aboriginal rights. Citizenship, then, would be less a colonial imposition and more a mechanism for Right Relationship in a decolonising community.

There is no consensus among political and intellectual elites about the relevance and applicability of Canadian citizenship to Aboriginal peoples. In 1969, Harold Cardinal, then-head of the Indian Association of Alberta, noted that Canadians “have to accept and recognize that we are full citizens, but we also possess special rights”. (Cardinal 1969; Cairns 2000, 10) Political scientist Taiaiake Alfred dismisses Canadian citizenship in favour of traditionally-
resonant political identity of sovereign Aboriginal nations. (Alfred 1999) Cairns advocates a common contemporary citizenship that links the tension between the historical legacies of imperialist assimilation, and advocates of “maximum exit”. (Cairns 2000, 9) Between these positions lies much political terrain.

Kevin Bruyneel documents the range of opinion on citizenship in the candidates for National Chief of the Assembly of First Nations at the 1997 leadership convention. In reply to a question from the floor, “Do you consider yourself to be a Canadian citizen”, three candidates claimed dual citizenship in their First Nations and in Canada; three rejected Canadian citizenship, with different provisos. Most interesting of these three was the reply of the incumbent National Chief, Ovide Mercredi, who indicated that prior to serving as National Chief he considered himself to have dual citizenship, but that following six years of leading the AFN (a period fraught with conflict with the federal government and especially with the Minister of Indian and Northern Affairs), he considered himself Cree, not Canadian. “(P)eople can’t serve two masters, only one.” This can be contrasted with the reply from the successful candidate Phil Fontaine, who said “Aboriginal people in Canada have a right to both Canadian citizenship and Aboriginal citizenship, with all the rights and responsibilities that go with both”. (Bruyneel 2002, 21-22)

Logically, then, Aboriginal peoples hold Aboriginal rights and additionally, the rights to and of Canadian citizenship, to the extent that those secondary rights do not conflict with Aboriginal rights. Aboriginal rights are the enabling factor for Canadian citizenship. Similarly, the reality of Aboriginal rights in relation to the colonial state produces a legitimating mechanism for non-Aboriginal citizenship. Canadian citizenship, like Canadian sovereignty, relies on Aboriginal concurrence through processes of indigenisation for its legitimacy. Until
those processes are undertaken, Canadian citizenship and sovereignty remain suspect in their origins in a colonial relationship.

Indigenous national self-definition in opposition to the colonial state poses certain conceptual and political challenges. The universalist formula for citizenship assumes that particular characteristics of citizens are irrelevant in framing the relationship of citizens to the state. Oppositional identities reject the state’s assumption of the sovereign and self-determining capacity of colonized nations, and claim the right of self-definition for politically significant communities. Liberatory claims are sometimes nationalist, and nationalist claims are sometimes problematically fundamentalist, deploying racist conceptions of the ‘we’. Yet, Aboriginal and post-colonial governments are equally bound by the international human rights regimes that constrain their erstwhile colonisers, and this may challenge how the ‘we’ is identified, and national boundaries maintained. Therefore, boundary maintenance via membership and citizenship codes cannot be based on race or racist formula such as blood quantum – currently used by some First Nations governments.

Citizenship claims so formulated are particularist, not universal. In the construction of the parameters of the particularist criteria for inclusion in a citizenship that is arguably an expression of the human rights of self-determination and of the right to live in one’s cultural community, there is some potential for human rights violations, depending on the procedures for claim, for appeal, and the consequences of being in or out for citizen claimants. At core, this is a question of who decides, and on what grounds and for what purposes that someone belongs to an Aboriginal community exercising its human right to self-determination.
Determining and Deterministic Identity

Ethnic subordination is a problem usefully considered through the lens of critical race analysis and as a human rights problem. Such analysis foregrounds racism, colonialism (and hence, particular political economies), democratic inclusion and participation issues. Kinship and culture are repositories of the nation, inter-generationally, in which rights are held relative to the colonial state as well as relative to the nation of identity. Kinship and culture are not racial identities, and they are specific, not amenable to homogeneous identity markers such as the bureaucratic creation ‘Indian’.

Differences, including identity differences, “appear to generate conflict only when they are associated with inequalities in either material benefits or political power”. But when they do generate conflict, they become resources to be shaped and mobilized for political struggle. (Simeon 2002, 33) In the context of struggle, there are competing views of identity and history, of meaning, of culture, of authority; these become argumentative formula legitimating political objectives. Not only is identity fluid, but it is manufactured as well as experienced, in the forge of the political process of constructing consensus through mythic, empirical, and theoretical means.

Self-definition, membership, or citizenship regimes are crucial not only because they are exercises in self-determination and boundary maintenance, but because they establish the community of rights-bearers with claims against the nation, community, or state. Those without status are denied access to entitlements of status; perhaps more importantly, they are denied meaningful recognition of identity. This is especially problematic for those who identify with a minority community but find themselves excluded, to a majority that is historically oppressive and at best, oblivious; at worst, racist, toward Aboriginal people.
The Canadian colonial state has established and policed Indian status in order to define a policy community, and bureaucratically administer policy for the defined community. Indian status, however, says nothing about identity of a particular community, or nation. It is a restrictive pan-national formula that erases indigenous particularity. Nor does it speak to the complex and not always solidaristic relationships between indigenous communities. Rather, it homogenizes history, cultural particularity, and political aspirations into the category ‘Indian’ even as it restricts that legally potent status to a select list of recognized Indians based on patrilineality and colonial recognition.12

Yet, the problematic colonial construction and recognition of Indian status is also legitimated by the invocation of status entitlements by the colonized! For example, the status Indian organisation, the Assembly of First Nations, contests the colonial state first responsible for the construction and bureaucratisation of the whole notion of status, with liberatory claims limited to status Indians and not extended to other Aboriginal people. Indeed, historically some status activists have been hostile to the inclusion of non-status and Metis lobbies in the political arena of colonial - Aboriginal engagement. Within the status constituency, individuals and communities who are party to treaties make claims that again, are particularistic and that divide the colonized Aboriginal claimants into categories of rights claimants.

Does this pose a problem for decolonization? It may, for the community of identity largely restricts itself, and therefore its leadership recruitment and political theory and analysis to a small similarly-interested segment of the entire colonized community. This in turn erases the national and historical particularity of both settler and colonized communities, while it maintains a colonial relationship: the legitimation of colonial definitions, in selecting who to talk to, and

about what subjects. Further, the ethnic or racial pan-Indian category may be so simplistic a category that it is politically impotent as an instrument for decolonization.

Even when measures of decolonization occur, they are attacked by elements in the settler population with arguments grounded in law and economics, but ultimately reducible to the rejection of measures which constrain white privilege. Consider, for example, the Campbell government’s 2002 ‘referendum’ on treaty negotiation in B.C.; the reaction of white fishers to the Marshall decision; and the negative reaction of Jacques Parizeau to the tentative Quebec - Innu treaty, on the grounds that it compromised Quebec’ sovereignty. “Quebec has the right intentions in trying to settle native land claims, he said, but it should avoid giving up too much and it should keep the federal government out of the talks.” (Seguin 2002, A1,A9)

Towards a post-colonial federation, and federalism

A definitive characteristic of the multinational state of Canada is it’s federal organisation, constitutionally encoded, and refereed by the judiciary. Traditionally conceived of as the contested distribution of jurisdictional powers and equally contested notions of national compact and community, federalism is capacious in both its political flexibility and in its mythic symbolism. Indeed, since 1982, federalism in practice and as a subject of academic study, has shifted from a focus on the competitions and collaborations of governments, to the “mobilization and empowerment of social groups that defined their interests in non-territorial terms”. (Simeon 2002, 7) But most Aboriginal nations have territorial claims. Can federalism accommodate a post-colonial relationship, one that must be constructed through confrontation with the colonial past and therefore, name historical accountability and contemporary liability? The answer lies in law and politics, not in technical or structural limitations. As Borrows has argued, courts have
defined and re-defined the federal relationship and the jurisdiction of its components by drawing on federalism’s unwritten principles; they should be able to do the same for the interpretation of [historic and contemporary] treaty relationships by looking to Aboriginal traditions and oral histories. (Borrows 2001, 627) The politics, however, are fraught by the fact of electoral majoritarianism, capitalism, and white privilege. The class and race interests of the majority are expressed through the superficially neutral electoral system, which produces false majorities for largely unrepresentative governments. What purchase do Aboriginal alternatives have against this reality? And yet, it is not only Aboriginal people who would benefit from an indigenised federal structure, but the depth and breadth of Canadian democracy and political culture.

Constitutional politics has expanded federalism’s players from the constitutionally recognized two orders of government, to include the citizens’ communities that contributed to the debate over and content of the 1982 package and subsequently, to the Charlottetown Accord. Citizens have become players in federal engagements. Yet, as Peter Russell has noted, this intense and often symbolic politics “raises the fundamental question of whether the citizens of a nation-state share enough in common, in terms of their sense of political justice and collective identity, to go on sharing citizenship under a common constitution.” (Russell 1993, 75) Citizens surged to the foreground of the constitutional arena in two ways: first, as players in the constitutional debates, and secondly, as the bearers of the rights and freedoms guaranteed in a

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13 I use the terms “white” and “white privilege” not to indicate ethnic colonial categories, but to indicate that in a racialised society such as Canada, certain forms of privilege are normatively incurred by the fact of racial dominance. The converse, racial discrimination, is also normatively true: it inures to those who are seen as suspect outsiders, others, by the dominant white community. For a useful discussion of how racism functions to protect white privilege see Joel Olson, “Whiteness and the Participation - Inclusion Dilemma”, Political Theory, Vol.30, No.3, June 2002.

Charter that made explicit governments’ accountability, through the courts, for their observance of these rights and freedoms. Recent constitutional debates, most importantly preparatory to the Charlottetown Accord, included citizen, Aboriginal organisation, and interest group participation by consent of governments. (Russell 1993, 168-69) Simultaneously, Aboriginal peoples joined the conversation not only (and sometimes not at all) as citizens, but as historic communities with rights, including the right to self-determination, against the colonizing state of Canada that presumed to hold Aboriginal citizenship and contain Aboriginal self-determination. Federalism, and Canadian constitutionalism, was no longer only about the two orders engaging each other over jurisdictional disputes. Citizenship was no longer an individual’s passive relationship with government.

But more profoundly, as Russell suggests, (1993) the Canadian constitutional and federal process has been fraught by an ambivalence about the nature of the political project of Canada, an ambivalence that foundationally is about the lack of a coherent corporate identity. Kevin Bruyneel talks about this ambivalence as the result of triangulated political geometry between Quebec, Anglo-Canada, and Aboriginal Canada, a geometry in which each component of the equation is established in tension with other components, and in which state sovereignty and national identity are always contentious. (Bruyneel 2002) In Canada, identity is always contextual, conditional, and referenced to the historic political forces that came together in the crucible of colonialism and now struggle to be politically and historically authentic, in the context of the contemporary state.

Successful at incorporating many identities and federal regional entities, the Canadian state nevertheless is evidently not amenable to consensual definition. It is assuredly more than the sum of its parts, and more than its bureaucratic and political apparatus. Canada is seeking
authenticity; it is authentic in each of its parts, but as a whole it lacks coherence because it
denies, whitewashes, and fineses its history.

**Conclusion**

Relationship is the constant shifting motif in federalism and citizenship. Right Relationship,
formulations that are grounded in international human rights law and consensual politics, may
produce stability and coherence for a post-colonial Canada. Or, Right Relationship will emerge
as a negotiated and maintained process between a reconfigured post-colonial Canada and post-
colonial, physically incorporated but conceptually separate Aboriginal jurisdictions. The Royal
Commission on Aboriginal Peoples proposed renewed relationships by way of treaty negotiation
and implementation, processes assuming the sovereign capacity of all parties. John Borrows has
suggested the far more radical measure of legitimisation via indigenisation of the state. (Borrows
2000) But Right Relationship will not be a variant of that suggested by the Supreme Court of
words, that “colonialism is a justifiable infringement of Aboriginal title”. (Borrows 2001, 648)

How can this difficult birth of a contemporary, composite, authentic political culture be
expedited? The palimpsest must be read in all of its complexity, and all stories honoured in
meaningful ways. Without that, Canada will remain stuck, a colonial entity designed by and for
economic elites who in turn were and are serviced by political elites. The quest for indigenous
self-determination is contrary to those elite interests, and it is incomprehensible to the racist
superficial consumer mass culture that has been so carefully cultivated by the colonial state over
the years. Canada’s corporate identity can emerge by a process of indigenisation, a process
which requires the settler state, its sovereignty and its constitution, to be authenticated especially
by indigenous consents, indigenous participations, indigenous reconstruction, indigenous mythology. In other words, mutual recognition with meaningful political consequences will generate a sense of common purpose via the state structure and will reshape the structure of federalism and the function of citizenship by facilitating self-determination. Finally, identity emerges both personally and corporately by acknowledging all of our history, as part of the narrative process of national formation identified by Said: “nations are narrations”. (1993, xiii) As identity is acknowledged for its political and historical significance, it paradoxically becomes less significant: those who are secure in their personal and community identities do not need to politicise or racialise them. As identity claims become less fraught by being more mutually accepted, space will emerge for the children of processes of hybridity and ultimately, for cultures of hybridity, thereby eroding racial and racist categories in favour of historical and cultural ones. Then, Canadians will be positioned to accept both our diversity and our common humanity in a collectively envisioned future.
References


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