

The Relational Model of the Right to Self-Determination of Indigenous Peoples in Canada

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Abstract

The thesis investigates the ways to improve Aboriginal representation in Canada's central legislature. Using the framework of M. Murphy's relational model of self-determination and D. Fontana's government in opposition rules, the author of the thesis argues that a separate indigenous parliament is the best model to increase political input of Aboriginal peoples at the federal level, which is also consistent with the long-term requirement of a stable liberal democracy. Although there is a feeling of skepticism to legislative bodies that formulated laws and strategies of assimilation and historic disenfranchise, the idea of electoral participation is still compelling to both indigenous and non-indigenous leaders and academics, mainly because representation as a form of political voice can advance indigenous self-determination. Murphy's relational model of the right to self-determination speaks to both the autonomy and the interdependence of indigenous and non-indigenous communities. It accentuates the co-existence of Aboriginal traditional governance structures with non-indigenous practices, principles and arrangements. A separate indigenous parliament appears to be the embodiment of this model.

Furthermore, historically Canada's Constitution does not institutionalize a coherent theory of limited government, checks and balances, and the separation of powers. It is only with the enactment of the Charter of Rights and Freedoms in 1982, the Constitution came to be defined as a contract between people and their governments rather than legal relationships between governments. The proposed representation model of a separate indigenous parliament can represent a constraint or a check to the classical mechanism of separation of powers. Thus this institutional arrangement can create a more robust version of representative democracy by encouraging a broader range of perspectives to be aired and giving more legitimacy for the democratic institutions.

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Table of Contents

TABLE OF CONTENTS	1
INTRODUCTION	2
1. CANADA: HISTORICAL-CULTURAL AND INSTITUTIONAL CONTEXT	7
1.1 OVERVIEW OF KEY HISTORICAL EVENTS	7
1.2 THE INSTITUTIONAL CONTEXT	11
1.2.1 <i>The Distribution of Powers since Confederation 1867</i>	14
1.2.2 <i>The Canadian model – a middle ground in-between the accomodationalist and integrationalist approaches</i>	18
1.3 CONTROVERSIES AROUND ENFRANCHISEMENT	21
1.3.1 <i>State efforts to include indigenous peoples into the electoral system</i>	21
1.3.2 <i>The history of state manipulation of indigenous status: indigenous representation and citizenship in Canada</i>	23
1.3.3 <i>The Final Review of Pros and Cons</i>	27
2. THE RELATIONAL MODEL OF SELF-DETERMINATION	31
2.1 SELF-DETERMINATION: ITS FUNCTIONS, ASPECTS, AND APPROACHES	31
2.1.1 <i>The “peoples” approach</i>	35
2.1.2 <i>The “territorial” approach</i>	35
2.1.3 <i>Types of Self-Government Agreements in Canada</i>	37
2.2 TWO CONCEPTIONS OF THE RIGHT TO SELF-DETERMINATION: AUTONOMIST AND RELATIONAL	41
2.2.1 <i>Relational model of the right of self-determination and liberal multiculturalism</i>	43
2.3 FAILED PROPOSALS FOR ELECTORAL REPRESENTATION OF INDIGENOUS PEOPLES	47
3. GOVERNMENT IN OPPOSITION RULES: A SEPARATE INDIGENOUS PARLIAMENT	51
3.1 GOVERNMENT IN OPPOSITION RULES: A SUMMARY OF THE THEORY	52
3.2 A SEPARATE INDIGENOUS PARLIAMENT AS A NON-CLASSICAL INSTITUTIONAL MECHANISM FOR THE SYSTEM OF CHECKS AND BALANCES	57
3.3 EVALUATION OF APPROACHES TO INDIGENOUS REPRESENTATION AT THE FEDERAL STRUCTURE	61
CONCLUSION	63
APPENDIX	66
GLOSSARY OF TERMINOLOGY	77
BIBLIOGRAPHY	80

Introduction

This thesis explores the right to self-determination of indigenous peoples in Canada. In the discussion over a more precise understanding of the concept of self-determination in the application to indigenous peoples in the international law and in the domestic jurisdiction of democratic states, many scholars¹ emphasize that its understanding and implementation is narrowed to provincial-territorial levels, namely to the right to self-government within autonomous units of a state. As a result, there is lack of indigenous political representation in and influence on government operations. Moreover, this narrowed reading of the concept of self-determination has a backlash on the current electoral system that creates an impediment to an increase in the political representation of indigenous peoples.² In Canada, historically indigenous peoples were excluded from the communication with the nation-state and hence from the decision-making process that has affected their individual and collective identities and welfare. The current electoral system perpetuates this tendency.

In most respects Canada³ is an example of a decent democratic state that was actually the first country in the world to adopt multiculturalism as an official policy in order to accommodate

¹ Anaya, James. 1996. *Indigenous peoples in international law*. New York: Oxford University Press, Dalton, Jennifer E. 2006. *Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government*. *Canadian Journal of Law and Society*, Volume 21 (1), Murphy, Michael A. 2008. *Representing Indigenous Self-Determination*. *University of Toronto Law Journal* 58 (2):185-216, Williams, Robert A. 1990. *Peoples' Survival in the World*. *Duke Law Journal*: 660–704, Stavenhagen, Rudolfo. 2004. *Indigenous Peoples in Comparative Perspective – Problems and Policies*.

http://hdr.undp.org/en/reports/global/hdr2004/papers/hdr2004_rodolfo_stavenhagen.pdf (accessed December 2010).

² Josefsen, Eva. 2003. *The Saami and the National Parliaments – Channels for Political Influence*. Resource Center for the Rights of Indigenous Peoples, Schmidt, Jennifer. 2003. *Aboriginal Representation in Government: A Comparative Examination*. Paper prepared for the Law Commission of Canada, Henriksen, John B. 2008. *Key Principles in Implementing ILO Convention No. 169*.

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf (accessed April 2011), Murphy, Michael A. 2008. *Representing Indigenous Self-Determination*. *University of Toronto Law Journal* 58 (2):185-216, Niemczak, Peter & Jutras, Célia. 2008. *Aboriginal Political Representation: A Review of Several Jurisdictions*.

³ See, Scott W. 2010. *The History of Canada*. Amenia, NY: Grey House Publishing, 1: For seven consecutive years in the 1990s, the United Nations Human Development Program proclaimed Canada to be the best country on earth, according to the index that includes quality of life, income and education. By 2005, the UN ranked Canada fourth in the world

the needs of immigrants, national minorities and indigenous peoples.⁴ The Canadian Constitution Act of 1982 provides for the recognition and affirmation of existing Aboriginal and treaty rights. Still the nature and scope of the right to self-government powers remain elusive.⁵ Furthermore, Canada was the first country to establish itself as a parliamentary federation, a federal system in which sovereignty is divided between central and regional governments.⁶ Interestingly, historically courts had impact on weakening federal powers and strengthening provinces. As a result, for instance, provincial powers extend to electoral representation: provincial governments define the boundaries, powers and method of election.⁷ In addition, in November 2010 Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples, confirming its commitment to respect and protect human rights and fundamental freedoms as well as the collective rights of indigenous peoples.

Thus, constitutional mechanisms are in use, there is a federal structure of institutions, and policies that should empower indigenous peoples are in place. However, the situation in Canada is far from offering bona fide results. The voices of indigenous communities are not heard at the federal level due to the lack of indigenous political representation, mainly conditioned by the single plurality system. The suggested proposals (the creation of Aboriginal electoral districts, the establishment of one Aboriginal province out of reserve lands, and the creation of a separate Aboriginal parliament) for an institutional mechanism that would harmonize local self-government with an effective voice in central institutions (Jennifer Schmidt, Michael A. Murphy, Peter Niemczak and Celia Jutras) have been discussed but so far have not been given further life.

⁴ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*. Oxford: Oxford University Press, 2007

⁵ Dalton; Hurley, Mary C. 2009. Aboriginal Self-Government. Social Affairs Division. <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0923-e.htm> (accessed May 2011)

⁶ Cameron, David R. 2005. Canada <http://www.forumfed.org/libdocs/FedCountries/FC-Canada.pdf> (accessed March 2011)

⁷ Simeon, Richard and Papillon, Martin. Canada. <http://www.federalism.ch/files/categories/IntensivkursII/Canadag2.pdf> (accessed March 2011)

The puzzle that the thesis intends to disentangle is *How to improve indigenous representation in Canada's federal structure?* Or, in other words, *how to implement effectively the right of indigenous peoples to self-determination that stretch from the right to self-government at the provincial-territorial levels to representation at the federal level?* In order to answer this question, research focuses on the following subquestions: What are the institutional settings in force that ensure the coexistence of different interests and perspectives in Canada? What are the nature and scope of federal and provincial powers in terms of civil and political rights in particular? How does the historical formation of the concept "right to self-determination" inform us about its meaning in the past and in the contemporary realities? What is Canada's understanding of the right to self-determination? What are the mostly debated institutional mechanisms aimed to guarantee the political input of indigenous peoples at the federal level? Why is a Separate Indigenous Parliament the best model of indigenous representation? How the theory on government in opposition rules advances this model of indigenous representation in central legislature?

My argument is that the relational model of the right to self-determination recognizes the reinstatement of autonomy over political, social and cultural development of indigenous groups while acknowledging their need for multiple points of access to political power and decision-making. Michael Murphy notes that in Canada the main focus is on self-government rights, and as a result, franchise and political representation of Aboriginal peoples remain not a top issue at the public agenda. In this respect the relational model of self-determination is of importance as it is based on the principle of co-equality, mutual consent, partnership and the interdependence of both indigenous and non-indigenous communities. A separate indigenous parliament is viewed as an institutional arrangement living up to the relational model of the right to self-determination

at the federal level, and representing the legislative government in opposition rules⁸ that act as a check on the classical separation of powers in a parliamentary system.

The thesis proceeds with exploring the above questions in the following way. **Chapter 1** introduces the historical context and the evolution of the division of powers through major social and political changes in Canada. The chronology of key political and social events frames a discussion over the historical legacies of injustices done to indigenous population and state efforts for redress through the franchise system. An insight into the evolution of the division of roles and responsibilities between central and regional governments since the patriation of Canada in 1867 will help to identify governmental approaches used to recognize, institutionalize and empower differences while preserving the territorial integrity and political unity. **Chapter 2** discusses the normative grounds for indigenous political representation. It provides a brief overview of the historical roots of the right to self-determination and then focuses on the delineation of two conceptions of the right to self-determination, autonomist (past) and relational (contemporary). The relational model of the right to self-determination recognizes the right to self-government and representation in central institutions. Within the discussion of institutional and electoral reforms, specific options to improve Aboriginal representation in Canada's federal structure are elaborated. In **Chapter 3** a specific model of indigenous representation, a Separate Indigenous Parliament, is analyzed through the lens of Fontana's legislative government in opposition rules. Its applicability to the Canadian context is considered. In this respect the experience of the Nordic countries with the Sami Parliaments will be instructive in terms of revealing the shortcomings of this representation model. Although the social and cultural positions of indigenous peoples in the Nordic countries and in Canada are comparable, the thesis

⁸ Fontana, David. 2009. Government in Opposition Rules. Yale Law Journal 119:548 <http://yalelawjournal.org/the-yale-law-journal/content-pages/government-in-opposition/> (accessed April 2011)

focuses on the case study of one country. Thus the evaluation of the competences of the Sami Parliaments in Sweden, Norway and Finland as well as the overview of guaranteed seats to indigenous groups in New Zealand and the US State of Maine is supplemented by the Appendix. At the end of this thesis, final conclusions will be drawn on the best ways to improve Aboriginal representation in central legislature. In addition, suggestions for further research on the devolution of powers between federal and provincial governments and indigenous representation at the provincial-territorial level will be considered.

1. Canada: Historical-Cultural and Institutional Context

In this chapter the chronology of key political and social events frames a discussion over the evolution of the division of powers in Canada⁹ and the historical legacies of injustices done to indigenous population as well as state efforts for redress through the franchise system. An insight into the evolution of the division of roles and responsibilities between federal and provincial governments since the patriation of Canada in 1867 will help to identify governmental approaches used to recognize, institutionalize and empower differences while preserving the territorial integrity and political unity as well as to determine separate and overlapping policy areas between center and provinces.

1.1 Overview of key historical events

To understand Canada's present, and importantly, its future development, it is worth getting insight into its past, particularly the most important historical events. "Canada is the most unlikely of region for nation building."¹⁰ In his recently published book on the history of Canada, Scott W. See notes that observation, made by Prime Minister Wilfrid Laurier at the turn of the last century, seems to be markedly insightful, even after adding another one hundred years. He remarks that even after peeling away nationalistic overtones, Canada's history is fundamentally a tale of survival.¹¹

Canada's early history was shaped in the late eighteenth and nineteenth centuries by political struggles between imperial powers, English and French, raring for mastery of the New World. But before this contest, the clash was between the original inhabitants of North America and Europeans; this protracted era is called the contact period (prehistory - 1663). See narrates that from the European perspective, Canada was an obstacle or an objective. Driven by an

⁹ Scott W See. *The History of Canada* (Amenia, NY: Grey House Publishing, 2010). 421

¹⁰ Scott W. See, 4

¹¹ Ibid.

exploratory spirit, Europeans were striving to find a short western ocean route to the riches of Asia, and then a secondary plan emerged, i.e. to exploits the waters, soils, and rocks of northern North America. See assumes that for a flourishing mixture of Native peoples, Canada had been “an austere yet often bounteous home for countless generations.”¹² Thus this vast continent became the arena for a clash of peoples and cultures that constitutes much of Canada’s early colonial history. See acknowledges that a wealth of scholarly literature and popular literature on Native peoples in the past generation has brought Aboriginal peoples from the relegated position – “background to the European invasion [or] anecdotal supplement” – to “an essential part of the historical admixture for a rounded understanding of the Canadian past”.¹³

In the fifteenth century there were a number of European sea powers – Spain, Portugal, England, the Netherlands and France – contending for this territory. As the history would show, France ended up focusing a great deal of energy in the region now called Canada. Interestingly, one of the French explorers, Jacques Cartier, lent an Iroquoian word for a “village” to the land the French intended to master.¹⁴ The Age of New France had lasted from 1663 to 1763. For a long time Quebec has been “an experimental model for settlement and a New World land grant system, a fur trade outlet, and a missionary base for reaching deep into the continent.”¹⁵ With royal funding, New France flourished as an agricultural, fur trading, and commercial outpost for the French up to the eighteenth century. See notes that the French extensively relied on Native peoples in their fur trading network. At the same time throughout this period the French and their allies clashed with the Iroquois that was one of the strongest tribal networks in the Northeast. By the eighteenth century, the colony exhibited a unique culture and set of values. The population of

¹² Ibid, 25

¹³ Ibid, 26

¹⁴ Ibid, 34

¹⁵ Ibid, 40

New France became *Canadien*; most of the inhabitants were humble subsistence farmers who yet enjoyed a freedom of movement and certain benefits within the seigneurial system.¹⁶ See notes that the English, and their American colonial allies, had been affecting New France from the earliest moments of exploration. Importantly, New France's population was roughly 50,000 in the mid-eighteenth century in comparison with almost one million American colonists. The colony had only a few key ports and cities. See also observes that there were certain deficiencies and flaws in their colonial design, problems that play at hand to the English and their American allies later.

See narrates that the flashpoint for the final war between the English and French came along the Ohio country. George Washington, a youthful militia officer from Virginia, clashed in 1754 with French forces and was defeated in the conquest for control over the Ohio River. Two years later, the European Seven Year's War (1756-1763) broke out. The situation of the French was precarious, and their Native alliances had eroded, and in comparison with the increasingly unified British American colonies, they looked like "a poor match."¹⁷ The Treaty of Paris in February 1763 ended the Seven Year's War and brought a swift end to New France.

After four large scale wars and a number of minor skirmishes, the English, with their American allies, defeated New France. The complex problem pertaining to the administration of newly won possessions, the colony's governance and economy, and the fate of the Roman Catholic church arose in front of the British. See notes that "the post-Conquest era until the mid-nineteenth century would be a series of experiments and a strengthening resolve of both French Canadians and English-speaking Canadians to exercise more control over their lives in the larger

¹⁶ Ibid, 51: The seigneurs were vassals of the crown; they were delegated land-granting responsibilities from the crown. So, they acquired large parcels of land to subdivide and distribute to tenant farmers.

¹⁷ Ibid, 59

embrace of the British Empire.”¹⁸ For instance, See remarks that the Royal Proclamation of 1763 is an example of assimilative attempts. Although the Proclamation promised popular representation for Quebec, “Roman Catholics were prohibited from holding offices, and lacking formal recognition, the Roman Catholic church and the seigneurial system were left to wither.”¹⁹ After the flaws were recognized in the original plan, the British responded with a statute, the Quebec Act, passed in 1774. It was an adjustment in British policies in Quebec and a reaction to growing disobedience in the American colonies. The statute led to essential consequences in both Canadian and American history. Under the statute, the boundaries of Quebec were expanded to encompass the rich fur trading region of the Great Lakes to the Mississippi River. In addition, it recognized the seigneurial system, permitted the continued operation of the Roman Catholic church, and accepted Quebec’s distinct civil laws. Moreover, the Quebec Act established governance by a legislative council that would be appointed, not elected. Elite French Canadians could take advantage of this opportunity and hold appointed positions after taking an oath.

Britain’s Constitutional Act of 1791, also called the Canada Act, divided Quebec into two provinces along the Ottawa River. Lower Canada, more populous with approximately 100,000 Canadiens and 10,000 anglophones, lay to the east. The Upper Canada, present-day Ontario, contained roughly 20,000 residents. See comments that the land grant systems, civil laws, and religious orientation of the two colonies systems, civil laws, and religious orientation of the two colonies reflected the traditions of the majority groups. The Constitutional Act also provided for representative assemblies. Although British control remained firmly entrenched in both provinces, the fact of the creation of Upper Canada represented a physical as well as symbolic division of the French and English in British North America.

¹⁸ Ibid, 65

¹⁹ Ibid, 69

In the following section political, economic, and social developments of the Canadian society, defined by different cultures and religions of European-based groups and Native peoples, will reveal approaches used to accommodate diversity and at the same time to proceed with nation-building scenario.

1.2 The Institutional Context

The present Canada is the second largest country in the world consisting of ten provinces and three northern territories, which have more limited self-governing authority than do the provinces.²⁰ Canada's government springs from the fountain of Western, democratic and liberal traditions. The dynamics of the Canadian federalism is largely influenced by the changes in the economic, social, political and cultural environment. The section proceeds with a sketch of Canada as a parliamentary federation, then attention is given to the structure of the Parliament, and finally, to the judiciary.

Canada is a parliamentary democracy. The head of the State is her Majesty Queen Elisabeth II, represented in Canada by the Governor-General at the federal level, and Lieutenant-Governors provincially. Canada was the first country to establish itself as a parliamentary federation, a federal system in which sovereignty is divided between central and regional governments. Like in Australia, both orders of government – federal and provincial – follow the principle of the British parliamentary democracy. Canada's parliamentary federation has produced strong executive-led government in Ottawa and in the provincial capitals, which –

²⁰ Scott W. See, 13: “provinces, in order of joining Confederation, are as follows: Ontario, Quebec, New Brunswick, and Nova Scotia (1867), Manitoba (1870), British Columbia (1971), Prince Edward Island (1873), Saskatchewan and Alberta (1905), and Newfoundland (1949). The three territories are the Yukon and the Northwest Territories, and Nunavut, a self-governing territory of mostly Inuit created in 1999.”

combined with a weak Senate – had led to executive domination of relation between and among the federal partners.²¹

The legislative and executive branches are tightly bound but the power is highly concentrated in the hands of the executive, especially the first ministers (the federal prime minister and the provincial premiers).²² The legislative power is shared between the Senate, the upper house of the Canadian Parliament, and the House of Commons. In the Senate there are 105 members, “appointed by the Governor-General based on the recommendation of the Prime Minister according to a system of rough regional representation [though not by province] and political considerations (often reward for loyal service to the party in power).”²³ As this chamber is not democratically elected but instead, appointed, its role as a representative of provincial populations or governments within the federal legislature is vitiated and considered as a house of prime ministerial patronage, namely lacking democratic legitimacy. Although possessing a veto power in the adoption of legislation together with the House of Commons, the Senate rarely exercises it and is unlikely to do so.²⁴ Simeon and Papillon note that Canadians discussed a number of reform proposals, such possible models as the German Bundesrat and the American and Australian Senates but still the Senate plays a weak role in working out a balance between the federal and provincial governments.²⁵ The electoral system in Canada divides the country into 301 geographic constituencies. In each constituency the candidate who polls a plurality of votes is elected to Parliament. In other words, Canada has a single member plurality (“SMP”).²⁶ Importantly, the operation of the Canadian electoral system is considered to be a primary factor

²¹ Cameron, 109

²² Richard Simeon and Martin Papillon

²³ Ibid, 112

²⁴ Cameron

²⁵ Simeon and Papillon

²⁶ Knight, Trevor. 2001. Electoral Justice for Aboriginal People in Canada. McGill Law Journal. <http://lawjournal.mcgill.ca/documents/46.4.Knight.pdf> (accessed May 2011), 1068

in the under-representation of Aboriginal people. Knight refers to L. Young to indicate “the logic of the SMP system pushes parties to select candidates who have the characteristic of the majority of the riding. Given that Aboriginal people are dispersed across the country, few Aboriginal candidates are selected to run, and even fewer elected.”²⁷

Canada is a constitutional federation. Until 1949, the supreme authority, interpreting the Canadian constitutional law and practice and settling disputes between the two orders of government was the British Judicial Committee of the Privy Council (JCPS), a part of the British House of Lords. Since the abolishment of appeals to JCPS, the Supreme Court of Canada has been the ultimate judicial authority that is based on federal legislation, rather than a constitutional one, and its judges are appointed solely by the government of Canada on the basis of regional criteria but with no formal provincial role. The division of powers is enforced by the courts, which can deem that federal or provincial legislation exceeded the powers (*ultra vires*) assigned to them. Historically, the courts had a notable impact on the division of powers: “they turned the centralist constitution of 1867 almost on its head, weakening federal powers and strengthening the provinces.”²⁸ Another impact of the courts was in the adoption of the amending formula. It is noteworthy that the 1867 Constitution was an act of the British Parliament that only the United Kingdom had the right to amend. The Convention established that Britain would do it only upon Canada’s request. However, until 1982, Canadians could not agree on a domestic procedure. At this point it is worth paying attention to Canada’s two principal constitutional

²⁷ Knight, 1069:

²⁸ Simeon and Papillon; Cameron, 109: originally Canada was founded in 1867 as a centralized government, with key powers invested in Ottawa. However, in the course of time Canada came to be highly decentralized due to a number of factors, to name but several: first, judicial interpretation of division of powers favored largely provincial governments over the federal government; second, due to incapability of central institutions represent Canada’s regional diversity, there has been popular support for the assertion of provincial power, especially in stronger provinces; third, in the nineteenth century provinces were bearing responsibility for such areas as health care, welfare, and education without any governmental supervision, and in the twentieth century the provincial grip over these areas extended; and fourth, the Quebec nationalism in the post-World War II has helped to force a process of decentralization from which other provinces have benefited.

documents, the Constitution Act, 1967 and the Constitution Act, 1982, in order to identify the distribution of powers declared there. The Constitution Act, 1867, or also known as “the British North America Act” was an Act of the British Parliament that created Canada out of three original colonies and provided the federal and parliamentary structure[; it offers] general provisions for the distribution of powers, and the establishment of Parliament, the provincial legislatures and the courts.”²⁹

1.2.1 The Distribution of Powers since Confederation 1867

There is a need to provide a historical overview of the division of powers between central and regional governments and trace the evolution of their duties and responsibilities in the contemporary times. This analysis will be of value for the discussion over the proposals of indigenous representation models, recommended to Canada by the Royal Commission on Aboriginal Representation, and the evaluation of their shortcomings. Under the Constitution, provincial governments define boundaries, powers, method of election, and revenues of local governments. So, the analysis of the provincial powers would be contributive to the understanding of what could be done at provincial level in terms of the improvement of Aboriginal political representation.

The Confederation Settlement in 1867 and the Division of Powers

Simeon and Papillon argue that the Canadian federation was created through two approaches, “coming together” and “coming apart,” and this has continued until the present. After the British defeated the French, one of the questions was how to enable two linguistic communities to co-exist. The solution, proposed by the British Commissioner, Lord Durham, in 1838 was to put two linguistic groups together into a single political unit, Canada, and soon the

²⁹ Cameron, 109

assimilation of the French to British values could be observed. Simeon and Papillon comment that this classic experiment of British colonialism was not so successful, and Canada quickly took on the character of a consociational democracy with parallel French and English administrations. Federation made the division between a predominantly English-speaking Ontario and a predominantly French-speaking Quebec possible.

There were also pragmatic reasons that prompted the adoption of the “coming together” approach. As the British were getting involved in free trade, they were economically vulnerable. The presence of the United States, fresh from its civil war made them politically and militarily vulnerable as well. In the Constitution Act, 1867, the federal government was given the basic powers necessary to pursue continental nation-building, such as the regulation of trade and commerce, defence, navigation and shipping, banking, currency, and other such matters. The federal government was also given exclusive jurisdiction over “Indians and Land reserved for Indians” and the responsibility for criminal law. Provinces were allocated such responsibilities as management of public lands, establishment of hospital and charity institutions, local government, the incorporation of companies, and the administration of justice, and exclusive control over education (subject to some rights for religious minorities). Importantly, the Constitution Act, 1867, did not include a bill of rights. It is only with the enactment of the Canadian Charter of Rights and Freedoms in 1982, the Canadian political culture shifted from the perspective of a Constitution as a contract between governments to the Constitution as a contract between people and their governments.³⁰

The Evolution of the Division of Powers

Federalism is a process, not a fixed state. In this respect Simeon and Papillon note that throughout the first decades the federal government exercised its power over provinces,

³⁰ Simeon and Papillon

including the powers of reservation and disallowance, but with the influence of a powerful set of factors, the federal dominance began to erode. This wave of factors was as follows: economic recession in the late nineteenth century that undermined federal government's legitimacy; strong provincial leaders evolved to challenge Ottawa; provincial jurisdiction over such matters as hydroelectric power, mining, and the emerging welfare state, became important to the national agenda; judicial decisions began to favour provinces.

By 1920s Canada's federalism represented a dualist system. Simeon and Papillon remark that with the consequences of the Great Depression of 1930s, many came to believe in strong federal government to alleviate this crisis. However, the federal powers for disallowance and reservation were only in the Constitution plus the courts were quite distance from the center. All the factors provoked concerns over the obsolescence of federalism.

After the Second World War, Canada embarked on the construction of the Keynesian welfare state. Although a stronger governmental role in economic management and in provision income security and social services were introduced, still building blocks of economy were in the hands of the provinces. Through a constitutional amendment, this dilemma was reconciled and major new responsibilities were transferred to the federal government, for instance, in respect to unemployment insurance and pensions. The further transfer of responsibilities was blocked by Ontario, British Columbia, and Quebec. Thus the key federal power – spending power – is implicit in the constitution. Nevertheless, the federal government provides funds for matters within provincial jurisdiction and can exercise control over the implementation of the policy programs, by attaching conditions to these funds. The “shared cost programs” became a vehicle for expansion de facto concurrency between central and provincial governments.

By 1970s the welfare state was almost complete, and Canada became preoccupied with regionally divisive issues, such as Quebec's "Quiet Revolution" in the 1960s. By the turn of the century, two more issues were at work: the fiscal crisis of the state and the consequent rise of neoliberal ideas, reflected in the drastic reduction of federal transfers to the provinces, following the 1995 budget.³¹ The intergovernmental response to worries about the further development of country-wide standard in social policy was the establishment of the Social Union Framework Agreement in 1999 that set pan-Canadian objectives and an intergovernmental consensus to achieve them collectively.

The fusion of institutional, cultural, and economic factors have influenced the complex pattern of the division of powers in Canada. To name but several of them, the Westminster pattern of parliamentary government, which places negotiation between strong executives at the center of the process, the institutional design of the federal Parliament, which empowers regions and leads their interests to be expressed through strong provincial governments, and the role of the courts, which in early years undercut federal power and later focused on balancing federal and provincial powers.³² Importantly, such the division of powers endows each order of government with a range of substantive responsibilities and policy instruments. Simeon and Papillon infer that it enables each order of government to act in almost every way it chooses. Thus Canada has two powerful orders of government, central and regional. The way this division of powers operate or should operate in the future could offer a resolve to the underrepresentation of indigenous peoples in the federal structure.

³¹ Simeon and Papillon

³² Ibid.

1.2.2 The Canadian model – a middle ground in-between the accomodationalist and integrationalist approaches

Federalism and federation are concepts that are used to understand “how people organize and reorganize themselves voluntarily to live together side by side in peaceful neighborly association [and] how we organize human relations in order to achieve welfare.”³³ The difference between two is that federalism means a recommendation or an active promotion of support for federation while a federation is a particularly kind of a state, “a distinctive organizational form or institutional fact the main purpose of which is to accommodate the constituent units of a union in the decision-making procedure of the central government by means of constitutional entrenchment.”³⁴ It is noteworthy that there are different models of federation and the configurations of cleavage patterns are various both in a territorial and non-territorial sense.

In the literature there are two approaches advised, accomodationalist and integrationalist. Arend Lijphart argues that accomodationalist approach is used to recognize, institutionalize, and empower differences through a range of constitutional instruments available to achieve this goal, such as multinational federalism, legal pluralism (for example, religious personal law), other forms of non-territorial minority rights (minority language and religious education rights), consociationalism, affirmative action, and legislative quotas. An objection, raised by Donald Horowitz is that such practices may entrench, perpetuate, and exacerbate the very divisions they are designed to manage. That is why he offers another range of alternative strategies, falling under the rubric of “integrationism,” that blur or transcend differences. Examples of such strategies would be: bills of rights, enshrining universal human rights enforced by judicial review; policies of disestablishment (religious and ethnocultural); federalism; and electoral

³³ Burgess, Michael. 2006. *Comparative Federalism: Theory and Practice*. London: Routledge: 3

³⁴ *Ibid*, 2

systems designed specifically to include members of different groups within the same political unit and to disperse members of the same group across different units.

Sujit Choudhry argues that the Canadian model represents a mixture of accommodationist and integrationist strategies that extends far beyond multinational federalism. A close scrutiny of the concrete legal and institutional details of the Canadian order provides both conceptual clarity and texture to the debate over the relative merits of integration and accommodation as constitutional techniques for the management of minority nationalism. Such scrutiny is of importance as its value extends beyond the Canadian case to other multinational polities. Choudhry makes four main points³⁵:

(1) Although semantically different, both terms - accommodation and integration – are both directed toward the same goal, i.e. maintaining the territorial integrity and political unity of the state. In case of Canada, multinational federalism was designed to keep Canada together by removing Quebec’s motive to secede. So, integrationist and accommodationist constitutional strategies are not necessarily in opposition when used as alternative means to the same end.

(2) Although accommodation and integration are alternatives, they are not mutually exclusive. In multinational federations it makes sense to deploy both strategies simultaneously: as in multinational federalism there may be a risk of secession (which is a threat to the territorial integrity and political unity of the state), constitutionally entrenched integrationist instruments can be used to offset this danger. In the Canadian context the

³⁵ Choudhry, Sujit. 2007. Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory. *International Journal of Constitutional Law* 5 (4): 573-575
<http://icon.oxfordjournals.org/content/5/4/573.extract?sid=febc7714-3ccf-4a44-9f0c-1c1a7d176f83> (accessed February 5, 2011)

requirement for Quebecers to participate in federal institutions is an illustrative example of the combined strategy.

(3) There are several ways to achieve the combination of integrationist and accommodationist strategies. One device is to set limits on the scope of accommodation; for example, by forcing certain decisions to be made in common institutions in which a national subunit does not have a veto. This is illustrated by the broad but limited scope accorded to provincial jurisdiction and, on the other hand, by the constitutional entrenchment of provincial participation in common national institutions. Another method is to balance an accommodationist strategy in one area of constitutional design against an integrationist strategy in another; for example, the balancing of a multinational federalism against the nation-building aspects of the Canadian Charter of Rights and Freedoms.

(4) Constitutional strategies that appear to be accommodationist may in reality be integrationist. To put it in other words, it is important to differentiate accommodation as institutional separateness (for example, multinational federalism) from accommodation designed to facilitate participation in common institutions (federal language policy, for instance).

So, the specificity of the Canadian model is that it is a conspicuous example of how constitutional design can accommodate these competing nation-building agendas within a single state. In other words, the Canadian exemplar responds by challenging the equation of nation and state that underlies not only majority nation building but also the defensive response of minority nations, for which the logical response is to resist incorporation into the majority nation and demand states of their own.

1.3 Controversies around Enfranchisement

Electoral participation is reckoned as a broader strategy for advancing indigenous self-determination, moving self-government from the realm of theory to reality. However, an insight into the past atrocities committed by the settler-state will help to get into the shoes of indigenous peoples and understand why such an apparently empowering tool of electoral participation in state institutions breaks into the wall of suspicion and hostility exhibited by indigenous communities.

1.3.1 State efforts to include indigenous peoples into the electoral system

Although Canada is an example of a decent democratic state with a range of policies designed to accommodate the needs and aspirations of immigrants, national minorities and indigenous peoples, its commitment to respect and protect the individual and collective rights of indigenous peoples is not full and in good faith. Murphy, Knight and other scholars provide quite a number of cases of non-implemented proposals that were designed to address the representational imbalance of Aboriginal peoples. The first proposal, he refers to, is a system of Aboriginal Electoral Districts (AEDs), considered by the 1991 Canadian Royal Commission for Electoral Reform and Party Financing that would potentially have ensured eight seats out of 295 in the House of Commons for indigenous representatives. Despite support that AEDs have also received over the years from Aboriginal organizations such as the Métis National Council and the Native Council of Canada, the proposal has not been realized. Then Enhanced Aboriginal representation in both the House of Commons and a reformed Senate was proposed as part of the 1992 Charlottetown package of constitutional reforms, but these measures fell by the wayside once the Charlottetown Accord was defeated in a nationwide referendum. Another idea was to re-draw selected federal and provincial electoral boundaries to conform to historic treaty areas,

so that specific treaty First Nations could choose their own representatives, but the idea, too, had little impact among policy makers.³⁶

A different type of proposal found its way into the 1996 Final Report of the Canadian Royal Commission on Aboriginal Peoples (RCAP).³⁷ Major recommendations of the report included, first and foremost, the creation of a parallel Aboriginal House of Representatives that would sit alongside the existing Parliament, comprising some seventy-five to 100 representatives, one for every distinct Aboriginal national across the country,³⁸ and the recognition of Métis self-government, provision of a land base, and recognition of Métis rights to hunt and fish on the Crown land. Among other things, the commission proposed that the First Nations House should have capacity to initiate legislation on issues crucial to the interests of Aboriginal peoples. The commission further recommended that Aboriginal representatives be included on key legislative committees and accorded the capacity to review relevant draft legislation from the Senate and House of Commons in early stages of its development.³⁹ There were also initiatives to address social, education, health and housing needs, and the establishment of an Aboriginal peoples' university, and the recognition of Aboriginal nations' authority over child welfare. In January 1998 the respond from the government to the RCAP report followed, to some extent, in the aftermath of the protest, held by the Assembly of First Nations in April 1997 as an expression of their anger over government inaction and Prime Minister's refusal to meet with First Nations leaders to discuss the report. The framework for future governmental actions included four objectives: renewing the partnership; strengthening aboriginal governance,

³⁶ Murphy, 194

³⁷ Royal Commission Reports on Aboriginal Peoples. <http://www.ainc-inac.gc.ca/ap/rrc-eng.asp> (accessed Dec. 2010).

³⁸ Murphy, 195:

“the proposed First Nations House was to be modeled roughly along the lines of the Nordic Sami Parliaments with the crucial difference that it was to have real policy clout, as opposed to advisory or consultative powers.”

³⁹ Ibid, 196

developing new fiscal relationship and supporting strong communities, people and economics. There has not been much progress in these benevolent intentions insomuch that the Canadian government's approach has been subject of the critical observations by national and international human rights bodies. For instance, in December 1998 the UN Committee on Economic, Social and Cultural Rights expressed concerns about the non-implementation of the RCAP in the view of Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their land. The assembly-line of proposals targeting the electoral imbalance of indigenous representatives in state institutions that were neither implemented nor seriously debated by Canadian politicians is strikingly long. The destiny of these proposals is still open.

1.3.2 The history of state manipulation of indigenous status: indigenous representation and citizenship in Canada

Up to the latter half of the nineteenth century, in order to control indigenous population, colonial settler state, Canada, began the engineering of indigenous citizenship by a means of state-mandated definitions of indigeneity⁴⁰ and the franchise. Murphy identifies the objectives that these policies were pursuing and clarifies the content of each policy. By manipulating the citizenship status of Aboriginal peoples, the government intended to meet the following ends: from permanent segregation of portions of indigenous population, recognized as “morally reprehensible,”⁴¹ or deemed and doomed uncivilized, and the assimilation of those reckoned as

⁴⁰ Alfred, T., & Cornthassel, J “Being Indigenous: Resurgences against Contemporary Colonialism.” *Government and Opposition* 9 (2005): 597–614: “Indigeneity,” or “indigenosity,” is “an identity constructed, shaped and lived in the politicized context of contemporary colonialism. The communities, clans, nations and tribes we call *Indigenous peoples* are just that: Indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies and states that have spread out from Europe and other centers of empire. It is this oppositional, place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonization by foreign peoples that fundamentally distinguishes Indigenous peoples from other peoples of the world.”

⁴¹ Stavenhagen, 29:

“Too often the larger society has taken the stance that indigenous social institutions are contrary to the national interest or, worse, are morally reprehensible. This position was taken for a long time by the dominant institutions in colonial empires. [Nowadays] [t]he question is frequently debated whether adherence to indigenous communal

capable to improve by enfranchisement to the subtraction of their indigenous and treaty rights, or the alleviation of state obligations to indigenous peoples by defining them out of existence, at least in legal terms.⁴²

In 1830s there was a noticeable shift in policies from protecting and acculturating “separate and self-governing Aboriginal communities to a policy of direct interference in tribal self-government, a coordinated attempt to break up and alienate any remaining Aboriginal land holdings and to assimilate reserve populations as equal citizens of the burgeoning Canadian polity.”⁴³ In 1850 this new policy was marked with the adoption of the Lower Canada Lands Act that was to define who was an ‘Indian’ and hence entitled to the legal benefits and protections afforded by this status. In addition, the government used various means to alienate ‘Indian’ status (willingly or unwillingly) by legally defining Indians out of existence, and consequently, relieving themselves from political and financial obligations for these populations.⁴⁴ As in the Australian case, ‘blood quantum,’ or the use of blood standards, was a key factor in the policy of alienage: in governmental calculation a few generations of intermarriage would alleviate their Indian problem. As the result, blood quantum, a first dimension of assimilation policy, became a standard feature of the Indian Act,⁴⁵ the government’s main instrument of Indian policy, and remains a feature of that policy instrument to this day.⁴⁶

institutions may lead under certain circumstances to the violation of individual human rights (for example, the rights of women and girls).”

⁴² Murphy, 187:

The author focuses on three states, Australia, Canada and New Zealand. Each of the three settler states has its distinct pattern of the engineering of indigenous citizenship.

⁴³ Ibid., 193

⁴⁴ quoted in Murphy, 194

⁴⁵ Report of the Human Rights Committee, GAOR, Thirty-sixth Session, Supplement No. 40 (A/36/40), pp. 166-175. case referred to as Communication No. R.6/24: Lovelace versus Canada:

In respect to the Indian Act, “special privileges were granted to the Indian communities as indigenous peoples, in particular their right to occupy reserve lands. In addition, since in the farming societies of the 19th century, reserve lands were felt to be threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 bear the imprint of traditional, patrilineal relationships: an Indian woman marrying a non-Indian man loses her status and indigenous rights.”

A second aspect of assimilation policy was the process of enfranchisement. Prior to Confederation in 1867, there was an assumption shared by Canadian officials that Aboriginal people were too uncivilized for the franchise. Knight notes that Canadian government denied the indigenous suffrage on political-economic grounds as well: Aboriginal people did not pay taxes, and as a result, they were deprived from having a voice in how taxes were collected and spent.⁴⁷ When enfranchisement began in the 1850s, Indians lost their status and treaty rights, including the right to live on reserve, to participate in reserve political life, or to hold land collectively as a member of a tribal community. Due to the unwillingness of most Aboriginal people to pay such a high price (loss of their identity and culture) for a voice in government, they remained effectively disenfranchised until 1960, when their participation in federal elections was granted without restriction.⁴⁸ To be more specific, in 1950 Inuit gained the right to vote in federal elections, and the First Nations obtained this right not until 1960.⁴⁹ Importantly, Knight makes a time slice from 1960s (the expansion of the franchise) and 2000 to provides demonstrative statistical data on low representation of indigenous people at the federal level. For instance, during 1867 – 1993 only twelve self-identifying Aboriginal people have been elected to the House of Commons. In 2000 five self-identifying Aboriginal members were elected to the House of Commons. Knight points out that as of 1990 Aboriginal people were underrepresented at the provincial level as

http://www.minelres.lv/un/cases/24_1977.htm (accessed December 2010).

⁴⁶ E.J. Dickson-Gilmore, "Iate-Onkwehonwe: Blood Quantum, Membership and the Politics of Exclusion in Kahnawake" (1999) 3 *Citizenship Studies* 27 at 35-6, quoted in Murphy, 194

⁴⁷ Knight, 1067

⁴⁸ Murphy, 194

⁴⁹ Sarah Bonesteel. *Canada's relationship with Inuit: a history of policy and program development* / prepared for Indian and Northern Affairs Canada; managed and edited by Erik Anderson; prepared by Public History Inc. ; principal author, Sarah Bonesteel. -- Ottawa : Indian and Northern Affairs Canada, 2008, 7:

A 1951 Amendment to the Indian Act specifically excluded Inuit from sharing the status of First Nations. Inuit affairs continued to be administered federally. In 1966, the Department of Indian Affairs and Northern Development was established. Although the administration of both indigenous communities was within one department, First Nations and Inuit had different status. The Indian Act continues to outline the federal responsibility for First Nations in Canada, there is no corresponding legislation or policy for Inuit; Murphy: The first Inuk was elected to the Council of the Northwest Territories in 1966

well, except for the Yukon and the Northwest Territories where indigenous peoples made up a quarter in the legislature in the former province and a majority of the legislature in the latter one respectively.⁵⁰

Murphy and Knight emphasize that at present, there remains little influence from sitting Aboriginal members on the issues of Aboriginal governance policy in the House of Commons; it has been suggested that a specific number of seats should be designated for Aboriginal members, which has been attempted in countries like New Zealand. Increasing the number of reserved seats will also provide more opportunities for the government to establish special committees on Aboriginal governance issues that are managed by Aboriginals.⁵¹ According to Knight, increased indigenous representation in Parliament will help to bridge the gap existing between Aboriginal people and the Canadian political order.⁵²

Electoral representation seems to be a powerful tool in terms of advancing indigenous right to self-determination as well as bringing Aboriginal communities and broader political community together. Moreover, ‘electoral participation ... serves as a measure of health for the political community, or at least for its electoral component.’⁵³ In other words, in the case of Aboriginal peoples, Canada has not yet met the promise of representative democracy. At the same time, political institutions lack legitimacy in the eyes of indigenous peoples. The history of forceful assimilation and imposed electoral inclusion provoked hostility and suspicion towards legal institutions aimed to undermine indigenous autonomy.⁵⁴ Kiera Ladner adds that “[b]y and large, Aboriginal people continue to see the Canadian political system as an instrument of their

⁵⁰ Knight, 1067

⁵¹ Murphy, 194

⁵² Knight, 1067

⁵³ Cited in Knight, 1067-1068: Roger Gibbins

⁵⁴ Murphy, 196

domination and oppression.”⁵⁵ Moreover, participation in the Canadian electoral system can be perceived by indigenous peoples “like participating in the institutions of a foreign nation, an idea that is anathema to individuals who consider themselves citizens of Aboriginal nations but not citizens of Canada.”⁵⁶

This sense of alienation frequently combines with a parallel sense that increased legislative representation would do little to advance Aboriginal interests. For instance, Murphy reflects on the general sense of skepticism about Aboriginal representation within Canadian institutions present in the RCAP, where the officials underline that a relatively small number of indigenous members of parliament will have a limited impact on the issues under their concern. Moreover, the constraints of majoritarianism and such factors as party discipline and executive domination of the policy process will limit the impact of indigenous representation.⁵⁷

1.3.3 The Final Review of Pros and Cons

Despite a number of controversies around indigenous franchise, there are still powerful reasons for reconsidering representation as a pathway to indigenous empowerment, and for viewing this form of a political voice not as a subversive empowerment to indigenous self-determination but as a useful component of a broader strategy of indigenous political development.

The first reason, stressed by Murphy, is that indigenous peoples will continue to be subject to the laws and decisions of non-indigenous governments at present and in the foreseeable future, and electoral participation as a strategy of indigenous empowerment creates a

⁵⁵ Kiera Ladner, “The Alienation of Nation: Understanding Aboriginal Electoral Participation” (2003) 5 *Electoral Insight* 16 at 23, quoted in Murphy, 196.

⁵⁶ *Ibid*, 196

⁵⁷ *Ibid*, 204

powerful incentive for indigenous representatives to play a role in shaping those decisions,⁵⁸ and their future individual and collective lives. The franchise and representation of indigenous peoples in central bodies is a non-confrontational democratic way to protect the core values of their identity and culture, articulate the concerns of their own communities and to take part in the decision-making that affects them. This strategic importance of electoral participation as a means to secure political objectives has been realized and jointly articulated by the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) in the lead-up to the 2004 Canadian federal election. This debate is particularly crucial as governments in Canada begin to discuss the merits of proportional forms of representation whose implementation, as illustrated by the experience of New Zealand Maori, can significantly increase the impact of indigenous representatives on the national stage.

The second reason for the representation and relational self-determination is that it assists in addressing the issues of a substantial number of indigenous peoples, who reside exclusively outside of a territorially concentrated indigenous community or circulate back and forth between their 'homelands' and non-indigenous communities. Their life experiences are characterized by relations of deep and complex interdependence with non-indigenous communities, and they prompt to reconsider the strategic value of electoral representation.⁵⁹ For instance, according to 2001 Canadian Census data, approximately half of Canadian Aboriginal Peoples, including Inuit, live in urban communities. Out of a total population of 45, 000, approximately 5,000 Inuit live outside the four Inuit land claim settlement regions.⁶⁰

⁵⁸ Ibid., 196

⁵⁹ quoted in Murphy, 198

⁶⁰ Bonesteel, 120:

"The largest Inuit community in southern Canada resides in the Ottawa-Gatineau region, with a population between 600 and 900. Several hundred Inuit live in each of five other Canadian cities – Yellowknife, Edmonton, Montreal, Toronto, and Vancouver."

The third reason is that territorially concentrated Aboriginal communities experience resource scarcity and lack of governing capacity. As the result, these factors increase the level of dependence on non-indigenous governments. On this basis, it is essential to foresee forms of governance and empowerment that speak to both the autonomy and the interdependence dimensions of contemporary indigenous realities⁶¹ and that are relevant to the living experience of a broad spectrum of land-based, urban, and geographically dispersed indigenous populations. Furthermore, speaking about the constraints of democratic majoritarianism, party discipline,⁶² and executive dominance, they are all present in the mass representative government in general, not only in indigenous representation. Thus specific interests will be always undermined in the give-and-take of majoritarian politics. However, there are cases when one member of the parliament made a difference. For instance, in Canada the Aboriginal Caucus of the federal Liberal party played an essential role in developing the government policy of recognition of the inherent right of Aboriginal peoples to self-government in 1995, and it continues to be engaged in developing the party's policies relating to Aboriginal peoples.⁶³ Murphy also refers to Elijah Harper who helped to filibuster the Meech Lake Accord in the Manitoba Legislature (the purpose of which was to bring Quebec formally into the constitutional fold by recognizing its status as a distinct society) and defeat in such a way signaling about the disappointments felt by indigenous

⁶¹ The concept of sustainable self-determination is proposed by Jeff Corntassel in order to politically mobilize and regenerate indigenous nations. This holistic approach encourages paying more attention to responsibilities and vital relationship indigenous peoples have with their families and natural world.

<http://www.corntassel.net/Sustainable.pdf> (accessed December, 2010).

⁶² On this topic, Anna Hunter accentuates:

“Aboriginal and non-Aboriginal people both have reservations about the institutional and personal incentives for participating in the prescribed democratic process in its current form. The current system does not appear to reward independence of spirit, policy innovation or service to the constituency. Party discipline and a powerful executive have led to the widespread perception that high-level politics should be left to the elites. As a result, Canadians in general are feeling disengaged from formal political processes, and there is a noticeably strong movement towards less formal channels of political action as more appropriate for effecting meaningful change.”

http://www.elections.ca/res/eim/article_search/article.asp?id=25&lang=e&frmPageSize= (accessed December 2010)

⁶³ cited in Murphy, 204

peoples: their interest in constitutionalizing the inherent right to self-government was sidelined during the negotiations leading to the Accord. The federal government took note and in the negotiations leading to the 1992 Charlottetown Accord, the leaders of four national Aboriginal organizations were included as full partners.⁶⁴

Thus representation as a form of political voice at the federal level is viewed as a mechanism to advance indigenous self-determination. There are three main reasons to support this view. First, in a shared country the present and future of indigenous and non-indigenous communities are interlocked. Taking into consideration that indigenous peoples are subject to laws and institutions, established by non-indigenous government, it is of strategic importance to take a meaningful participation in the decisions that will have impact on their life, identity and welfare. Second, electoral representation will help to accommodate needs and interests of urban indigenous peoples, the number of which is growing. Third, representation is about empowering indigenous peoples as due to resource scarcity and lack of knowledge about political, social and legal institutions, indigenous peoples tend to be in the state-dependent position, and the state tends to acquire the paternalistic approach towards them. Building relationships in state institutions based on the trust and partnership is the key principle of the relational model of self-determination that will be explored in more detail in the following chapter.

⁶⁴ Ibid, 208

2. The Relational Model of Self-Determination

This chapter discusses the normative grounds of indigenous political representation. It provides a brief overview of the historical roots of the right to self-determination and a list of types of self-governing agreements in Canada. Then I focus on the delineation of two conceptions of the right to self-determination, autonomist (past) and relational (contemporary). The relational model of the right to self-determination recognizes the right to self-government and representation in central institutions. Within the discussion of institutional and electoral reforms, specific options to improve Aboriginal representation in Canada's federal structure are elaborated.

2.1 Self-Determination: its functions, aspects, and approaches

Decolonization brought to the agenda of international community and human rights law the issue of self-determination of people who were subject to oppression by subjugation, domination and exploitation by others.⁶⁵ International human rights instruments since 1960s have not been limited to the application of the right of self-determination exclusively to colonial situations.⁶⁶ The Declaration on Principles of International Law clarified the content of this right when it stated: "that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations."⁶⁷ Two International Human Rights Covenants (International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)) in the common Article 1 claim that "all people have the right of self-determination.

⁶⁵ McCorquodale, Robert. 1994. Self-Determination: A Human Rights Approach. *International and Comparative Law Quarterly*, 43: 883

⁶⁶ Ibid.

⁶⁷ Ibid.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁶⁸ The African Charter on Human and Peoples’ Rights also clarifies that the right of self-determination is “the right to free [colonized or oppressed peoples] from the bonds of domination,”⁶⁹ and thus the rights of self-determination is part of the empowering process of human rights.⁷⁰ As a result, a state’s internal protection of the right of self-determination is not solely a matter of a state’s domestic jurisdiction but also of international concern.⁷¹

There is a difference in meaning and content given to Aboriginal self-determination in international law and in a state’s jurisdiction. The term “self-determination” is most widely used in the international legal context: it is viewed as “a right that reflects the importance given to communities, collectives and families in many societies and the general inherent communal quality of humans, [and] the purpose of the protection of this right is to enable these communities as communities to prosper and transmit their culture as well as to participate fully in the political, economic and social process, thus allowing the distinct character of a community ‘to have this character reflected in the institutions of government under which it lives’.”⁷² In the domestic jurisdiction of Canada “self-government” is used as an expression of the right of self-determination. Subsection 35(1) of the Constitution of Canada states that “the existing [Aboriginal] and treaty rights of the Aboriginal peoples of Canada are hereby recognized and

⁶⁸ International Covenant on Civil and Political Rights (ICCPR), <http://www2.ohchr.org/english/law/ccpr.htm> (accessed December 2010) and

International Covenant on Economic, Social and Cultural Rights (ICESCR), <http://www2.ohchr.org/english/law/cescr.htm> (accessed December 2010)

⁶⁹ quoted in McCorquodale, Art.20 (2). The African Charter (ACHPR)

⁷⁰ McCorquodale, 859

⁷¹ Ibid., 865

⁷² I. Brownie, “The Rights of People in Modern International Law”, in J. Crawford (Ed.), *The Rights of Peoples* (1988) at 5 quoted in McCorquodale, 859

affirmed.”⁷³ Nevertheless, it “neither defines what these rights include nor the boundaries of these rights.”⁷⁴ The absence of firm agreement in what self-determination precisely entails is a common feature in international law and in Canada.⁷⁵

According to James Anaya, self-determination includes five characteristics: freedom from discrimination, respect for cultural integrity, social welfare and development, land and natural resources, and self-government. The last two characteristics are disputable as they stress the importance of autonomy in governance based on the interplay between laws, land use, and resources, which can conflict with judicial authority at the federal, provincial, or territorial levels. Depending on the type of autonomy that is adopted, self-government might include decision-making, law-making capabilities, and varying degrees of autonomy, including in relation to a land base or territory. Thus, in these ways, self-government can ensure that Aboriginal peoples live in accordance with their own norms and values, and therefore it is an essential embodiment of the right of self-determination.⁷⁶

According to Hannum, McCorquodale, Ghai, the right of self-determination is divided into two aspects (“internal” and “external” self-determination). External self-determination was applied to colonial situations most frequently as it concerns directly the territory of a State – its division, enlargement or change – and the State’s consequent international (“external”) relations with other states. There are three main methods for exercising the “external” right of self-determination marked in General Assembly Resolution 1541(XV): “emergence as a sovereign independent state; ... free association with an independent State; or ... integration with an

⁷³ Constitution Act, 1982 quoted in Jennifer E. Dalton, “Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government,” *Canadian Journal of Law and Society*, Volume 21, Number 1, 2006. 11

⁷⁴ *Ibid*, 11

⁷⁵ *Ibid*, 12

⁷⁶ James Anaya, *Indigenous peoples in international law*. New York: Oxford University Press, 1996. 267

independent State.”⁷⁷ McCorquodale emphasizes that in the Resolution independence or secession from an independent State is not seen as “the only, or even necessary or appropriate, means of exercising the right” of self-determination.⁷⁸ The “internal” aspect of the right of self-determination affects a State’s “internal” relations, and it applies to the right of people within a State to choose their political status, the extent of their political participation and the form of their government. The exercise of this right can take different forms from autonomy over most policies and laws in a region or part of a State, such as the canton system in Switzerland, to a people having exclusive control over only certain aspects of policy, such as education, social and/or cultural matters. Although self-representation enables to invalidate paternalism and articulate minority grievances, Varady emphasizes that a new mechanism of protection still requires more deliberation: in the conventional system of decision-making by majority vote, minority voices could hardly gain an excessive importance.⁷⁹ However, the type of exercise of the right of self-determination will usually depend on the constitutional order of a given state and may pose a challenge to a centralized structure of most states.⁸⁰ In search of general legal norms and guidelines to resolve the manner or extent of the exercise of the right of self-determination relevant to any situation, international lawyers developed two approaches that focus on the peoples (the “peoples” approach) to whom the right applies and on the territory (the “territorial” approach) affected by the right.

⁷⁷ quoted in McCorquodale, 863

⁷⁸ Ibid, 864:

“Nevertheless, the right does require that all people within a territory must be consulted before any change in sovereignty over that territory can occur, particularly if it is a colonial territory.”

⁷⁹ Varady, 9-54

⁸⁰ McCorquodale, 864

2.1.1 The “peoples” approach

The “peoples” approach to the right of self-determination, or “personal autonomy”⁸¹ in Varady’s wording, has sparked debates over the notion of “peoples.” Stavenhagen notes that in their statements to international forums indigenous representatives have demanded the recognition of their right to self-determination as peoples while some states have claimed that such a right should not extend to the indigenous.⁸² The issues has been what are the objective conditions which have to be fulfilled before a group is defined as being a “people,” and thus entitled to the right of self-determination. In any of the multiple international legal instruments there does not appear an unequivocal definition of this term. Still some of these conditions that were defined included: “common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life; and being a certain number.”⁸³ In the ILO Indigenous and Tribal People in Independent Convention, 1989 the element of self-identification by a group as a “people” was recognized as a “fundamental criterion” of the definition of “peoples.”⁸⁴ However, Stavenhagen points to the distinction of this term in certain fields: “In political science and legal literature the term is usually linked to all the citizens of an existing state, whereas in more sociological texts the notion of a “people” refers to certain commonalities, shared identities and identifications.”⁸⁵

2.1.2 The “territorial” approach

The “territorial approach” to the right of self-determination focuses on the degree of control over a territory. It envisions two situations: colonial and non-colonial. In the former

⁸¹ Varady, 49:

“Personal autonomy [is concerned with] the distinct identity of a minority group, such as education, culture, or media...”

⁸² Rudolfo Stavenhagen, 32.

http://hdr.undp.org/en/reports/global/hdr2004/papers/hdr2004_rodolfo_stavenhagen.pdf, (accessed December 2010)

⁸³ McCorquodale, 866

⁸⁴ Cited in Robert McCorquodale, 867

⁸⁵ Stavenhagen, 32

situation self-determination is seen “as a transfer (peacefully or by force) of control over the territory from the colonial power to the independent state.”⁸⁶ In the latter situation, when the disputed territory is not a colony, the approach relies on constitutional and legislative provisions of a state, for instance, its degree of federal structure. In McCorquodale’s view, the territorial approach ignores internal self-determination and concentrates exclusively on one exercise of external self-determination, and this one-sided direction is viewed as problematic as it could threaten unity and integrity of existing states. In this respect Stavenhagen’s example of Inuit in Canada refutes this argument. This case proves that the recognition of indigenous territorial rights in the legislature does not threaten the national unity: “After a decades-long struggle for legal redress concerning ancient land rights and Aboriginal title, the Inuit people of northern Canada, who had linked land claims to territorial autonomy, negotiated a political agreement with the federal government, whereby they achieved the creation, in 1999, of the self-governing territory of Nunavut. Rather than weaken national unity, this arrangement has strengthened the federal structure of Canada and met the claims and aspirations of the Inuit people.”⁸⁷ Hannum emphasizes that although the demands for “self-determination” often focus on statehood as the definitive goal, “there also is increasing evidence of a willingness to formulate new arrangements of autonomy, minority rights, delegated powers, etc., that seek to arrive at realistic modes of power-sharing rather than to insist on formal delineations of sovereignty.”⁸⁸ In other words, territorial self-determination incorporates secession but it is not always a necessary step until other constructive alternatives are considered.

⁸⁶ McCorquodale, 869

⁸⁷ Stavenhagen, 15-16

⁸⁸ quoted in Hurst Hannum, “Sovereignty and Its Relevance to Native Americans in the Twenty-First Century,” 487-495, 491

2.1.3 Types of Self-Government Agreements in Canada

Canada has a long history of treaty making with Aboriginal groups. Initially they were used to maintain peace and friendship with resident Aboriginal groups; and as the new country was formed, their purpose became to secure lands for settlement.⁸⁹ After the post-Confederation, a large number of land secession treaties were completed. Currently the treaties form an important part of the legal framework for all Aboriginal issues and governance. Importantly, as Aboriginal law is a relatively new area of jurisprudence, Jay Kaufman and Florence Roberge note that many issues are not clear, especially those involving the existence and content of the Aboriginal right to self-government. Moreover, the section 35 of the Constitution does not specify the nature or extent of Aboriginal and treaty rights. At this point it is worth referring to the federal policy, the Inherent Right Policy, adopted in 1995; its aim has been to approach the implementation of self-government with “practical and workable” agreements to avoid lengthy and costly litigation. Under this policy, Canada recognizes the inherent right of self-government as an existing Aboriginal right under the section 35 of the Constitution Act, 1982. The policy is also based on the principle that “Canadian Aboriginal peoples have the right to govern themselves in relation to matters integral to their communities, cultures, identities, traditions, languages, institutions and with respect to their special relationship to their land and resources.”⁹⁰ The powers of paramount importance to Canada, such as sovereignty, national defence, external relations, criminal law and the national interest are not subject to negotiation. Interestingly, the policy recognizes a wide range of First Nations jurisdictions, and in accord with it, self-government agreements can be constitutionally protected. Mary Hurley notes that the “policy outlined differing approaches to self-government for First Nations, Inuit and Métis,

⁸⁹ Kaufman, J and Roberge, F. 2003. Aboriginal Governance in the Canadian Federal State 2015. <http://www.kta.on.ca/pdf/abgov2015.pdf> (accessed May 2011).

⁹⁰ Kaufman, J and Roberge, F. 8

stipulating that provincial/territorial governments must be parties to agreements in which subject matters fall within their jurisdiction.”⁹¹ As the result, she infers, the self-government negotiation context covers a range of comprehensive and sectoral initiatives, as well as “stand-alone processes.” Hurley adds that these self-government discussions may and do take place within the broader claim process in the regions where there were no historical land cession or modern treaties (for instance, most of British Columbia, the Atlantic provinces, and the large areas of Quebec).⁹²

Comprehensive self-government

Comprehensive agreements cover the subjects and jurisdictions on matters central to self-government and matters not integral and internal.⁹³ A comprehensive agreement must include provincial participation and concurrence to ensure that jurisdictions are recognized and agreements are constitutionally protected. A number of these types of agreement have been negotiated in British Columbia, Saskatchewan and Manitoba.

Self-Government and Comprehensive Claims Agreement

Kaufman, Roberge and also Hurley refer to the 1998 Nisga’s agreement as an example of this type of the agreement that is given protection under the section 35 of the Constitution Act, 1982. Until recently, claims negotiations may or may not have included self-government provisions. Comprehensive claims are based on an assertion of continuing Aboriginal rights and title that have not been dealt with by a treaty or other legal matters.

⁹¹ Hurley, Mary. 2009. Aboriginal Self-Government. Social Affairs Division: 14
<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0923-e.htm> (accessed May 2011)

⁹² Ibid.

⁹³ Kaufman, J and Roberge, F: Matters central to self-government: elections, structures, membership, marriage, child welfare, language, culture, local taxation, education, health, monies, hunting, fishing, law administration, policing, housing, property, public works, local transportation, land management, agriculture, business licensing and regulation; matters not integral and internal: divorce, labour/training, administration of laws of other jurisdictions, penitentiaries and parole, environment protection and assessment, fisheries co-management, gaming, emergency preparedness, migratory birds co-management

Local Self-Government Agreements

This type of self-government is restricted to jurisdictions that are local in nature, such as responsibilities that would pertain to municipalities. They are generally negotiated as bilateral agreements between the federal government and the First Nation(s), in which the province is not party to the process. The federal government will not negotiate jurisdictions that it believes fall constitutionally within the provincial domain on such issues as health, education, social welfare, etc. The exercise of powers under these agreements is restricted to First Nations lands.

Sectoral Self-Government Agreements

Hurley notes that sectoral negotiations relate to limited self-governing jurisdiction over specific subject matters such as education, land management or family services. Kaufman and Roberge give a recent example of the Mi'kmaq Education Authority, an agreement that includes 9 First Nations within Nova Scotia. The powers under this agreement are delegated to the First Nations. Province-wide negotiations are taking place in Saskatchewan on a framework agreement that will recognize a number of sectoral jurisdictions that may be taken up by First Nations in that province.

Public government

Public government is self-government within a larger public government arrangement(s). The only current example of the public government model is Nunavut. In this model, the government is Aboriginal controlled as opposed to Aboriginal exclusive. Aboriginal specific jurisdiction, authority and culture matters are incorporated into governing mechanism by constitutionally protecting Aboriginal, treaty and economic rights.

A “stand-alone” self-government framework agreement

According to Hurley, a “stand-alone” self-government agreement is the one that does not involve land component, and it does not have the status of a treaty. As the result, it could be superseded by a trilateral treaty with governance provisions.

Self-government agreements are often shaped by traditional governance concepts and practices. Although precise forms and practices vary, Kaufman and Roberge mark the common denomination for generally all of them, namely traditional governance structures are founded on a nation basis (“sociologically and culturally defined group with an identifiable land base”). They identify two generic examples of traditional Aboriginal governance structures: clans/kinship systems and confederations. **Clans/kinship systems** represent extended families and define the social order, the governance structure, and the system of justice. Kaufman and Roberge concisely determine that “the clan is the system of relationships defined by birth, and the determinant of membership in the group.” In many cases, leaders were both identified and dismissed by women of the tribe. The primary decision body was a council of Elders. Other government functions included traditional practices of leadership selection, education, health, spiritual knowledge and administration of justice. The structure of a **Confederacy** is explained on the example of Nishnawabe Aski Nation that consists of Cree, Ojibwa and Oji-Cree First Nation Communities in Northern Ontario. In the confederacy structure each Aboriginal group is equal and autonomous yet they maintain a joint political structure that pursues common interests such as program and service delivery and economic goals. Kaufman and Roberge note that in the self-government context the confederacy approach would involve alliances and pooling of jurisdiction to carry out common functions.

The sketched historic development of the concept of the right of self-determination depicts two deviations in terms of its understanding. In the international legal context it is defined broadly as the right of people to freely determine their political status and pursue their economical, social and cultural development. In the domestic jurisdiction it is narrowed down and classified into certain degrees of autonomy, either decision-making, law-making capacity or varying degree of autonomy over certain policies, on the basis of state sovereignty and supremacy a certain degree of autonomy⁹⁴ is delegated to a political unit within a country. Research shows that this domestic approach strips indigenous nations of the opportunity to exercise the right of self-determination in a full mode and at a national scale. The further discussion proceeds with the identification of electoral participation in state institutions as a strategic element in advancing indigenous self-determination. In order to meet this goal, the change in the conceptual thinking and human rights discourse is long-felt. In this respect the following section proceeds with the consideration of two conceptions of self-determination: autonomist self-determination and representation-relational (dual) self-determination.

2.2 Two Conceptions of the Right to Self-Determination: autonomist and relational

A brief historical account of the term of “self-determination,” defined as the right to be free from oppression by subjugation, domination and exploitation by others. Then, the notion of self-determination was more precisely formulated as the right of all people to freely define their own political status and to pursue their social, economic and cultural development. This

⁹⁴ Ibid, 80:

In general, the domestic treatment of indigenous peoples falls into two categories. In the first category, the state grants a special legal status that ensures the protection of indigenous nations and their freedom from certain civil obligations, but still there are certain limits on the enjoyment of certain rights. The second category recognizes also the indigenous peoples’ status equal to other nationals of a country – they have the same rights and obligations as other state citizens. This approach takes into account their special needs “as it is done with other ‘disadvantaged’ groups.” Canada belongs to the former category. In the state jurisdiction Indians are considered as self-governing at their reservations or reserves for certain purposes but their activities are subject to the federal jurisdiction.

definition was reflected in two International Human Rights Covenants, ICCPR and ICESCR. It was noted that there is a discrepancy in terms of content and meaning of the term self-determination in the international law and at the domestic level. In the Canadian jurisdiction self-government, a certain degree of autonomy is considered as an expression of the right of self-determination. This section focuses on the internal aspect of self-determination of indigenous peoples in Canada. Electoral participation and representation of indigenous nations inside and outside state institutions was reckoned as one of the ways of advancing indigenous self-determination. The history of past injustices committed towards indigenous peoples also through the policies of indigeneity and franchise sheds light on skeptic, suspicious and hostile attitudes of Aboriginals today towards legal institutions and any forms of political participation in them.

Still many scholars highlight the importance of renewing rather than rejecting relationships with non-indigenous peoples and governments. One of the compelling reasons to favorably consider electoral representation in state institutions was that in the foreseeable future indigenous peoples will continue to be subject to the laws and decisions of non-indigenous governments and electoral participation is a powerful incentive for indigenous representatives to play a role in shaping those decisions. This section of the essay concentrates on Murphy's two conceptions of self-determination, autonomist and relational-representation mode of governance. The latter model of self-determination incorporates the idea of electoral participation and representation in state bodies and it aspires for renewed relationships between interdependent indigenous and non-indigenous communities. Kymlicka's two theories of multiculturalism – traditionalist and liberal create the background for the discussion, and the liberal mode of multiculturalism promotes the primacy of relational model of self-determination.

2.2.1 Relational model of the right of self-determination and liberal multiculturalism

“Canada will have failed to live up to the promise of democracy until Canada’s Aboriginal peoples obtain more effective representation in Parliament.”⁹⁵

One from a range of opinions about the roots of multiculturalism states that it has diverged from liberalism. The reasoning is as follows: multiculturalism is about ‘culture,’ and culture is fundamentally about ancestral ‘traditions.’ Thus ‘accommodation of cultural diversity’ is a matter of preserving ‘traditional ways of life.’ According to Kymlicka, from this point this basic idea is interpreted from various ways, and he elaborates on two of them, traditionalist multiculturalism and liberal multiculturalism, which are strongly in contradiction with each other.⁹⁶

The traditionalist, or, according to Amartya Sen, ‘communitarian’ or ‘conservative’ approach to multiculturalism, states that to some degree cultural change is inevitable but there are certain practices that are ‘authentic’ or ‘integral’ to a culture, and which therefore must be protected from change. It is said that these ‘authentic’ practices are essentially important to the identity of the group, and hence to the identity of its individual members.⁹⁷ This link between culture and identity is perceived to be particularly strong if the cultural practice is ‘traditional,’ i.e. deeply-rooted in a people’s history, and not just the result of recent adaptations or outside influences.⁹⁸ In this view, cultural rights and policies of cultural inclusion are considered as primarily or exclusively protecting such ‘authentic’ cultural practices from pressures to change. Thus multicultural claims are interpreted through a set of ideas relating to cultural authenticity

⁹⁵ Knight, Trevor. 2001. Electoral Justice for Aboriginal People in Canada. McGill Law Journal. <http://lawjournal.mcgill.ca/documents/46.4.Knight.pdf> (accessed May 2011).

⁹⁶ Kymlicka, 98

⁹⁷ Ibid, 101

⁹⁸ Susan Okin. “Feminism and Multiculturalism: Some Tensions.” *Ethics* 108. 4 (Jul., 1998): 667

Okin calls into notice that there are so many of the world’s cultures that are highly patriarchal, and the infringement of women’s rights is justified by the intrinsic nature of these cultures per se.

and group identity. Culture is interpreted or reduced to a set of discrete practices (preferably ‘traditional’ and ‘authentic’ practices). These practices are considered to be crucial to the group’s identity and hence to the identity of individual members, and so must be accommodated and protected by multiculturalism policies.⁹⁹

The liberal approach to multiculturalism has a different rationale and goals. It is “inevitably, intentionally, and unapologetically transformational of people’s cultural traditions. It demands both dominant and historically subordinated groups to engage in new practices, to enter new relationships, and to embrace new concepts and discourses, all of which profoundly transform people’s identities and practices.”¹⁰⁰ Furthermore, pertaining to the historically dominant majority nation in a country, it is “required to renounce fantasies of racial superiority, to relinquish claims to exclusive ownership of the state, and to abandon attempts to fashion public institutions solely in its own national (typically white/Christian) image.”¹⁰¹ Stavenhagen adds, “the idea of multiculturalism does not imply the artificial preservation of indigenous (or tribal) cultures in some sort of museum, but only the right of every human community to live by the standards and visions of its own culture. The preservation of indigenous cultures (including tangible and intangible elements, arts and artifacts, traditions, knowledge systems, intellectual property rights, ecosystem management, spirituality and so on) is an essential component of a comprehensive indigenous human rights package, but in fact the preservation of indigenous cultures is not a natural process at all.”¹⁰²

⁹⁹ Kymlicka, 98-99:

“the conservative interpretation of multiculturalism is more accurately described, not as according people cultural rights, but as imposing cultural duties – that is, the duty to maintain one’s culture [willingly or not, and that is] and abridgement [...] of individual freedom.”

¹⁰⁰ Ibid

¹⁰¹ Ibid, 100

¹⁰² Stavenhagen, 24-25

According to Kymlicka, liberal multiculturalism is equally transformative of the identities and practices of both majority and minority groups. The relational model of self-determination based on the principles of co-equality and mutual consent rather than paternalism and domination seems to be at its heart. This concept of self-determination prompts to recognize “the centrality of a sphere of autonomous self-governing authority beyond the reach of state laws and institutions but also the need for sites of governance capable of effectively managing the relationships among self-governing peoples living in conditions of complex interdependence.”¹⁰³ The relational mode of self-determination fulfills two objectives: first, it encompasses indigenous aspirations to control over their individual and collective futures and second, to establish negotiational relationships with the non-indigenous societies with whom they share a state.

Murphy infers that the autonomous self-government is constrained by realities of interdependence while relational model of self-determination pulses on deep and complex relationships between indigenous and non-indigenous communities. The representation-relational model encourages the view that indigenous peoples must seek influence in a variety of different political forums to manage this complex web of relationships with non-indigenous communities and governments. He underlines that electoral representation is not necessarily in tension with the goals of self-government but, alongside self-government, can be part of a more comprehensive strategy of empowering indigenous people both inside and outside state institutions, and in as wide a variety of political forums as it is necessary to effectively promote indigenous priorities and ensure the security of indigenous futures.

Kymlicka deliberates that the value of liberal multiculturalism is in its process of ‘citizenization,’ when uncivil relations based on dichotomy – “conqueror and conquered; colonizer and colonized; settler and indigenous; [...] civilized and backward; master and

¹⁰³ Murphy, 199-200

slave”¹⁰⁴ – transform into the relationship of liberal-democratic citizenship in both vertical (the members of minorities and the state) and horizontal levels (the members of different groups). In this respect I argue that the relational model of self-determination contributes to the fulfillment of the multicultural task: it “responds to the practical need to make effective decisions under conditions of complex interdependence, but also reflects an important ethical imperative. In ethical terms, it tells us that because the decision and activities of different self-determining political communities have an impact on one another, there is a need for shared forums of democratic decision making designed to ensure that these interdependences can be governed by consent rather than by imposition or domination.”¹⁰⁵

It is necessary to bear in mind that the inclusion of indigenous representatives in central legislatures is a question of policy impact as well as a symbolic issue. For many indigenous peoples electoral option symbolizes their subordination to the state and their acceptance of assimilation policy. As a result, the dilemma for them could be symbolic risks versus potential policy pay-offs.¹⁰⁶ So, the task of liberal approach to multiculturalism is highly relevant to as it “demands both dominant and historically subordinated groups to engage in new practices, to enter new relationships, and to embrace new concepts and discourses [to] transform their identities.”¹⁰⁷ The representation model of self-determination additionally sends two messages: for indigenous peoples to take a meaningful participation in governmental institutions that shape decisions affecting the shared future of all citizens of the country and for non-indigenous people about the Aboriginal law as part of the Canadian judicial system that benefits both communities.

¹⁰⁴ Kymlicka, 96

¹⁰⁵ Murphy, 200

¹⁰⁶ Cited in Murphy, 211

¹⁰⁷ Kymlicka, 98-99

Finally, it is noteworthy that this ‘dual’ form of representation at the local and central legislature – the accommodation of pluralism at large – can build a sense of belonging to the federal state from individuals who belong to indigenous peoples without ‘abandoning’ their own identity.¹⁰⁸ A renewed conception of self-determination could enable Canada to approach her long-staged goal, the development of the Canadian identity for the sake of peace and stability in the country. Murthy also stresses, the importance of the relational model of self-determination both for indigenous and non-indigenous communities is that this practice allows each citizen to have a stake in the decisions taken by national institutions, regardless of whether these have a direct impact on their interests.¹⁰⁹

2.3 Failed Proposals for Electoral Representation of Indigenous Peoples

The Royal Commission on Aboriginal Peoples recommended three proposals for Canada aimed to improve political representation of Aboriginal peoples in the federal structure: the creation of exclusively Aboriginal electoral districts, the creation of an advisory third Indigenous House at the federal level, and the creation of a new province that would be composed of existing reservation lands.

First of all, in 1991 two federal bodies – the Committee for Aboriginal Electoral Reform and the Royal Commission on Electoral Reform and Party Financing began to move to the idea of Aboriginal political input to the federal structure. After consultations, the Committee for Aboriginal Electoral Reform issued a report to the Royal Commission that included several recommendations on Aboriginal electoral districts; among these recommendations, the key ones stressed the importance of such districts to provide for Aboriginal representation on the House of

¹⁰⁸ Caron, Jean-Francois and Laforest, Guy. 2009. Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper’s Open Federalism. *Nationalism and Ethnic Politics* 15: 27-55

¹⁰⁹ Murphy, 203

Commons and simultaneous recognition of Aboriginal and treaty rights and other rights of Aboriginal peoples, including the inherent right of Aboriginal self-government. The largest obstacle with this model is that the Constitution does not allow for the inter-provincial electoral districts, as it assigns seats to the provinces themselves. The Royal Commission for Aboriginal representation suggested another option so as to avoid the necessity of a constitutional amendment: Aboriginal electoral districts were proposed to be created within provincial boundaries.¹¹⁰

Second, in 1996 the Royal Commission on Aboriginal Peoples published its report, in which it partly discussed Aboriginal political representation. Noting the low representation of Aboriginal people, its proposed solution was to establish a third Chamber of Parliament that would represent Aboriginal people. The functions of the proposed Aboriginal Parliament included the review of reports from treaty commissions, several of the Royal Commission's propositions, and Aboriginal self-government and land claims agreements. The Royal Commission also advised that Aboriginal parliamentarians be elected by their nations or peoples and these elections to be conducted at the time of federal government elections.¹¹¹ According to the Royal Commission on Aboriginal Peoples, the Aboriginal Parliament, or "House of First Peoples" should act initially as an advisory body: it would provide advice to local and national authorities on issues that affect Aboriginal interests, directly or indirectly, and could receive references from the House of Commons or Senate for investigations.¹¹² There are two major difficulties connected with the concept of an Aboriginal House: first, it is an advisory body with

¹¹⁰ Niemczak & Jutras, 3-4: However, another problem, for instance, with Aboriginal population in the Atlantic Provinces is that they are small and scattered, and no Atlantic province could constitute a larger enough number of Aboriginal people to legitimate its own Aboriginal electoral district, if population is the key factor to determine the appropriate number of Aboriginal electoral districts for a province.

¹¹¹ Ibid, 17-18

¹¹² Cited in Niemczak & Jutras, 5-6

soft power that can be ignored by governments; and second, in order to grant “real power” to the assembly of Indigenous peoples, this would require a significant constitutional amendment.

The third proposal to increase Aboriginal representation was to create a new province, called “First Peoples,” composed of all Indian reserves south of the 60th parallel. It is believed that in these areas Aboriginal population tend to have more effective representation as their Members of the Parliament are mainly Aboriginals. The major obstacle to this plan is the need for constitutional amendments that would require the approval of the two-thirds of the provinces, making up at least 50% of the Canadian population and extra expenses (on education, intra-provincial transportation and health care) that would be associated with this endeavor.¹¹³

The common feature of the proposals turned down is that their implementation would have required constitutional amendments that would call for a referendum and approval of either special or institutional reforming from the majority of non-Indigenous communities. In retrospect one could see a similar situation which provoked a negative reaction from the majority of the Canadian population. In this respect I am pointing at the Quebec versus the Rest of Canada: Pierre Trudeau’s Liberal governments promoted official bilingualism and the Charter of Rights and Freedoms in order to build a bilingual and multicultural Canadian nation. The result was vice versa, Quebec came to be viewed as elitist and an example of special treatment. As the result, the 1980 Meech Lake Accord that was proposed to codify some aspects of dualism and then the 1995 referendum failed to deliver majority support.¹¹⁴

This chapter has addressed perspectives for balance between local self-determination and effective participation and representation of Aboriginal peoples at the federal level. The

¹¹³ Ibid, 7-8

¹¹⁴ Erk, Jan. 2008. *Explaining Federalism. State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland*, London: Rutledge, 47-48

relational model of self-determination based on the principles of liberal multiculturalism was recognized as an approach benefiting both indigenous and non-indigenous communities. It pursues two goals: first, indigenous aspirations to control over their individual and collective futures and second, to establish negotiational relationships with the non-indigenous societies with whom they share a state and their individual and collective futures. While bringing emphasis on enfranchisement and federal representation of indigenous people in state legislature as an element of a broader strategy to empower indigenous nations and advance indigenous self-determination, at the same time it casts it in the language of liberal democratic citizenship. Moreover, the relational model of self-determination accentuates ethical and practical values of federal representation of indigenous peoples, to name but two of them. By incorporating Aboriginal world views into the fabric of social, political and cultural institutions of the shared country, institutions make redress for the past wrongs that may foster some change in attitudes of indigenous peoples towards these institutions in the long-run. In addition, legislative representation may also help demonstrate to the wider public that indigenous peoples have the capacity and the right to speak on their own behalf, rather than being spoken for, and that they are entitled to the same dignity and respect as all other members of the Canadian society.

3. Government in Opposition Rules: a Separate Indigenous Parliament

One of the main factors affecting the political representation of Aboriginal peoples in Canada is bound up with the shortcomings of the current electoral system. Due to the fact that a change in the Canadian electoral system is unlikely to be in the foreseeable future, there is a need to explore other feasible options. In the light of the discussion over the relational model of the right to self-determination, a separate indigenous parliament appears to be an institutional alternative. My argument will have three facets, and will incorporate references to the Sami Parliament in the Nordic countries (the Appendix). First, I will argue that a separate indigenous parliament would advance the implementation of the right to relational self-determination, namely indigenous participation in the decisions of state institutions that matter to their individual and collective identities and welfare. Second, following the imperative of representative democracy, this model of political representation would guarantee indigenous political input at the federal level: their voices would be heard and their interests in education, employment, health care etc. would be taken into consideration. The third argument is that this model exemplifies government in opposition rules, a theory by David Fontana on constraints to the classical separation of powers in all forms of constitutional democracies.

This chapter proceeds as follows. At first I will identify the gist of the theory on government in opposition rules, its advantages and concerns surrounding it. Then I will use this approach to argue for a separate indigenous parliament as a check on the classical separation of powers, in addition to it as a strategic way to advance the right of indigenous peoples to self-determination. Second, I will consider the applicability of a separate indigenous parliament to the Canadian context as an institutional model that guarantees indigenous representation in the federal structure and also serves the promise of representative democracy.

3.1 Government in Opposition Rules: a summary of the theory

The underrepresentation of Aboriginal peoples in Canada's political institutions is attributed mainly to the shortcomings of the current electoral system based on the single plurality vote. This system ensures "the participation of candidates that have the characteristic of the majority riding."¹¹⁵ Thus, there are few indigenous peoples who run and who get elected, except for the two territorial ridings (Yukon and Northwest Territories) where indigenous peoples are the predominant population. The argument by Knight and also Robert Gibbins¹¹⁶ is that the change of the electoral system (from single plurality (SPM) to proportional (MMP)) will increase the representation of indigenous peoples in Parliament who are numerical and dispersed minority. Knight emphasizes that as parliamentary representatives, they will be able to voice the perspectives of their community and to reflect their needs in policy process. Like ombuds, they will also assist their constituents when they have problems with the government apparatus. Moreover, he adds that other institutions are involved in policy-making while legislature is the body where resources are allocated and government policies get scrutinized. Thus proportional political representation will help indigenous peoples to get access to the benefits of the democratic system. Otherwise, Knight concludes, inequality of indigenous participation in democratic politics leads to inequality in political influence that is already observed and needs to be remedied.

The key problem is that an electoral system is difficult to change. Knight explains that the beneficiaries of the electoral system prefer to keep the status quo and thus unlikely to push for a new system.¹¹⁷ Hence to improve Aboriginal representation through PR is unlikely on the

¹¹⁵ Knight, 1069

¹¹⁶ R. Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts" in Knight

¹¹⁷ Knight, 1071

horizon. Under such circumstances, other options need to be considered so as to improve the representation of indigenous peoples under the current electoral system.

A separate indigenous parliament would be an alternative model aimed to increase indigenous political representation at the federal level. Moreover, it may represent government in opposition rules, a constraint or a check to the classical separation of powers, by being “not a type of democratic system of its own, but rather an aspect of a democratic system.”¹¹⁸ Fontana, a scholar on Constitutional Law at the George Washington University, notes that this model may be an addition to or a replacement of a proportional electoral system. Elaborating on the terminology of his theory, Fontana argues that there are two sides in all forms of democracy: winning parties, “winning coalition,” and losing parties, “losing coalition.” In a democratic country the former legally have authority over “purse and sword” as well the right to appoint or empower candidates from the winning coalition to subinstitutions and committees while losing parties remain disempowered, though polling a sufficient number of the vote. He pinpoints that the legitimacy of democracy and democratic institutions under the rule of winning parties is under question. Although democratic systems recognize and protect losing political parties, they do not give them substantial powers afforded to govern and to make law,¹¹⁹ despite the fact that they have polled a major portion of the vote. Thus, he proposes government in opposition rules as a means of dividing power among political groups in order to “form part of a deliberate, new, and alternative form of separation of powers: winning coalitions are not necessarily given all winners’ powers, and losing coalitions are not granted solely losers’ powers.”¹²⁰ Fontana specifies that winners’ powers are the power to govern: “[having] the capacity to use the sovereign power of the state to legislate and coerce binding, obligatory endeavors” while losers’

¹¹⁸ Fontana, 563

¹¹⁹ Ibid

¹²⁰ Ibid

powers are powers to prevent the overexercise and overreaching of winners' powers (the power to dissent, to note the problems with what the government is doing, etc.).¹²¹

The normative grounds for the adoption of government in opposition rules are multifaceted. To name but two, they ensure a more robust version of representative democracy by encouraging a broader range of perspectives to be aired. Hence they give more legitimacy for the democratic institutions. Moreover, government in opposition rules "sensitize majorities to the concerns of minorities" by developing the "responsible winner" rationale. The principle of reciprocity is aimed to prompt "the winning coalition to act responsibly so that the losing coalition uses their winners' powers more responsibly as well."¹²² The advantages of this theory disperse, to certain extent, the existing concerns about instability and obstruction in governance caused by parties that got represented through these rules rather than receiving sufficient number of the vote. Fontana reiterates that by giving access to represent their interests both to the winning and losing coalitions, government in opposition change the incentives for gridlock and for extremism. The reasoning is that those represented in the central legislature and possessing government in opposition powers can be blamed for the gridlock in government and have also much at stake and much to lose from the fall of the government. He notes that each form of democracy should develop its own variation of government in opposition rules and the degree of their exercise should be adjusted depending on the country and the situation.

Depending on the constitutional system (parliamentary, semi-presidential, or presidential), there will be variations in the government in opposition rules. However, the application of government in opposition rules to all forms of democracy is imperative. He adds that such specific questions as how many and what kind of government in opposition rules to

¹²¹ Ibid: winners' powers is really "the power to control the legitimate use of violence by the government;" the losers' powers are "the power to block and forestall."

¹²² Ibid

have should be addressed and resolved by constitutional designers in all democracies. Government in opposition rules can be in legislature, in the executive branch and in the judiciary. Legislative government in opposition is when losing coalitions exercise the winners' powers that go along with controlling the operation of the entire legislative body. Fontana notes that in Canada the chief opposition party is granted control of the House of Commons for twenty days a year. For the same number of days the opposition receives control of the legislature in Great Britain and New Zealand. During these days, called "Opposition Days" or "Supply Days," the losing political coalition can overrule motions or items put forward by the winning coalition. Fontana underlines that executive government in opposition is highly consequential. In parliamentary and presidential systems cabinet ministers exercise substantial authority. Particularly in parliamentary systems, it is the minister in charge of the relevant department who has authority in the policy area in question and is in the position to present a policy proposal at cabinet.¹²³ Fontana observes that cabinets of ministers are usually of small size and have a high workload. Due to also time constraints, it is up to the cabinet minister to give a precise content and wording of a bill falling into his jurisdiction.¹²⁴ Thus, if a cabinet minister is from a losing coalition, then he/she can do more than propose a law to the chief executive. The scope of powers is larger, and the losing coalition can make law on their own and most of the time. Government in opposition rules can also exist for courts and the judicial branch. They could include both the appointment of individuals to the courts and the operation of these courts. Under certain circumstances, some rules permit losing political coalitions to appoint judges to the bench, other rules permit judges, appointed by the losing coalition, to have power to decide cases

¹²³ Fontana, 575

¹²⁴ Ibid, 577

as majorities, or they could have special powers to compel and command the resources of the judicial branch.¹²⁵

These types and forms of government can also vary in terms of legal or other coercion involved in the exercise of winners' powers by losing coalition. In addition, there will be a question over the span of these rules and the formula to determine how many government in opposition rules there should be. Fontana notes that generally there are two ways to answer this question: first, winners' powers shall be divided proportionately, and second, winners' powers are divided through some other mechanism. For instance, he refers to certain legislative committees in Canada which are traditionally chaired by the opposition party (to mention but in the Public Accounts Committee), although the number of the appointed individuals not necessarily correspond with the number of seats held by the party in the legislature.¹²⁶

Bringing Fontana's government in opposition rules into the discussion over the right of indigenous peoples to self-determination, it is noteworthy that Canada is a parliamentary system that creates a single winner who largely controls all the levers of government. In addition, Canada's current electoral system leads to the underrepresentation of indigenous peoples in state institutions. Hence government in opposition rules, designed for the Canadian context, can guarantee indigenous political representation at the federal level and create a more robust version of legitimacy for democratic institutions. In the following section I will explore the applicability of such an institutional mechanism as a Separate Indigenous Parliament to the Canadian settings through the lens of government in opposition rules. The living lesson of the Nordic countries will be instructive in this respect (Appendix).

¹²⁵ Ibid, 579

¹²⁶ Ibid, 570

3.2 A Separate Indigenous Parliament as a Non-Classical Institutional Mechanism for the System of Checks and Balances

In ethnically diverse societies, political scientists assume that the combination of certain components to put in use should prevent potential conflicts and reconcile competing interests; these components are as follows: proportional electoral system, minority rights, parliamentary government, political-territorial autonomies (regionalism, federalism), etc. According to Lijphart, in societies where there are significant differences, the parliamentary-PR systems offer best records, particularly in respect to representation, protection of minority interests, voter participation, and control of employment. However, the warrant is that moderate PR and moderate multipartism, like in Sweden, represent more attractive models rather than the extreme PR and multiparty systems of Italy and the Netherlands.¹²⁷ As mentioned in Chapter 1, a federal structure – the devolution of powers between federal and provincial institutions – is an accomodationalist approach in plural societies. It is equally important that the beneficiaries are aware of opportunities provided by such arrangements and that they acquire the capacity to voice their opinions and bring their perspective into the policy process.

Due to the historic legacies of extermination, assimilation and disenfranchise, for a long time indigenous peoples have remained unaware of the mechanisms of the electoral and political system, institutionalized by the settler's state. Despite the recognition of Aboriginal inherent right and the constitutional entrenchment of Aboriginal treaty rights, they remain disempowered at the federal level where laws shaping policies on education, on land and resources as well as economic development are passed. Thus, using Fontana's terminology, it is possible to speak about indigenous communities as a "losing coalition," who persistently remain underrepresented due to the single plurality system, and thus have no say and impact on any important decisions in

¹²⁷ Lijphart, Arend. 1991. Constitutional Choices for New Democracies. *Journal of Democracy* 2(1): 81

the central legislature. Within this discussion, a separate indigenous parliament is a model of the legislative government in opposition rules that represents a deliberate and new form of separation of powers, proposed for Canada.

The Royal Commission on Aboriginal Peoples proposed three models of indigenous political representation for Canada: Aboriginal districts inside each province, an Aboriginal province composed of reserves and an Aboriginal Assembly. The implementation of the two former models seems to be not feasible on the grounds of demographics and dispersion of indigenous peoples as well as a need for support of two-thirds of the population to introduce a constitutional amendment. The third option is the Assembly of Indigenous Peoples does not belong to the arsenal of classical democratic instruments that guarantees the political input of indigenous peoples at the federal level. In accordance with the government in opposition rules, it helps to strengthen the accountability of classical separation of powers. Fontana notes that it is a new way of understanding of the major systems of separation of powers, in which “government in opposition rules can better constrain power and stabilize the core elements of constitutional democracy, better prepare all parties to govern effectively, more fairly involve all interests in the process of governing.”¹²⁸ As the Royal Commission on Aboriginal Peoples in its 1996 report noted: The reforms that may take place in the Senate and the House of Commons “may not be compatible with the foundations for a renewed relationship built upon the inherent right of Aboriginal self-government and nation-to-nation to government relations. Three orders of government imply the existence of representative institutions that provide for some degree of majority control, not minority or supplementary status.”¹²⁹ A separate indigenous parliament is a

¹²⁸ Fontana, 548

¹²⁹ Cited in Niemczak and Jutras, 5

mechanism that could counteract the majoritarian principle of democracy, and guaranteed the representation of a variety of indigenous communities in the central legislature.

What is the type of power that shall be assigned to a separate indigenous parliament? First of all, its position should be to sit alongside the existing Parliament and to be empowered to review draft legislation from the Senate and the House of Commons in early stage of its decisions, and take initiatives to address cultural, educational, language bills and policies and treaty agreements that matter to their identity and economic development. Fontana notes that an institutional mechanism that embodies government in opposition rules can exercise different degrees of power. The indigenous parliament can exercise soft power, namely to have an advisory role in the legislative and decision-making process on matters to the concern of indigenous communities. Another degree of power is a veto power. In this case the indigenous parliament will be able to put certain constraints or even block the adoption of legislation that does not benefit the interests of their communities. The third degree of power is located in the middle of the spectrum, it could be identified as partnership based on consensus negotiations. In order to identify the pros and cons of different degrees of power, I will examine the 1996 Report of the Royal Commission on Aboriginal Peoples, which argued in favor of the separate indigenous parliament. Within this discussion I will shortly compare it to the experience of the Nordic countries with Sami Parliaments.

According to the Royal Commission on Aboriginal Peoples, initially the Aboriginal Parliament, or “House of First Peoples,” should act as an advisory body and provide recommendations on anything that affects their interests, directly or indirectly, and could receive references from the House of Commons or Senate for investigations. However, the example of Sami Parliaments that perform an advisory role in Norway, Finland, and Sweden is not so

promising in terms given that governments are not bound to follow recommendations and in practice it seems to be the case. For instance, in Finland the Sami Parliament (the Sameting) does not have any authority to make decisions binding on the national Parliament, the local authorities or their administrations. However, the authorities are obliged to negotiate with the Sami Parliament important decisions affecting indigenous interests. Still, Schmidt points out that when economic interests interfere, the Sameting is unable to prevent the national government to pursue their plans on the development of a traditionally indigenous land.¹³⁰ Another important concern is of the position of the Sami Parliament vis-à-vis other governmental branches. Although in theory a Sami Parliament is a body elected by indigenous peoples to represent and argue for the matters of importance to their communities, in reality it seems to be subordinate to the national Parliament, in some cases to the officials in Ministries. In addition, the Sami Parliament in Finland, for instance, does not have its own parliament building and no assembly room. Many consider the possession of a separate parliament building is of symbolic value as it gives a reputable status for the Indigenous Parliament.¹³¹

In Canada, the Royal Commission on Aboriginal Peoples also argued that the real power would be required for the Aboriginal Parliament to have a real impact: “the power to initiate legislation and to require a majority vote on matters critical to the lives of Aboriginal peoples.”¹³² Apparently it is only through the constitutional amendment that an Aboriginal Parliament with hard-core powers can be established. Thus the Royal Commission on Aboriginal Peoples recommended that this institution be created by the Parliament, in consultation with Aboriginal groups, as an advisory body. The Commission added that the members of the Aboriginal Parliament (MAPs) should be elected by their nations and peoples: each Aboriginal

¹³⁰ Schmidt

¹³¹ Sapmi. http://www.eng.samer.se/servlet/GetDoc?meta_id=1103 (accessed February 2011)

¹³² Cited in Schmidt, 6

group should have at least one MAP but for larger groups, such as the Cree and Ojibwa First Nations, there could be more than one MAP. It is proposed that the election to the Aboriginal Parliament take place simultaneously with the federal elections in order to add legitimacy to the process.

3.3 Evaluation of Approaches to Indigenous Representation at the Federal Structure

Aboriginal people present a unique case for guaranteed representation simply because others have joined this political order voluntarily through immigration. Knight refers to Patrick Macklem who argues that “Aboriginal people are prior occupants of the land, they exercised sovereignty over the territory before the exertion of European sovereignty, and they are in treaty relationships with the federal government – all of which distinguish them from minority cultures.”¹³³ Thus the guaranteed representation of indigenous peoples at the federal level signifies the recognition of their distinctive identity by the Canadian state and ensures their participation in decision and law-making process at the federal level.

In his study of the Canadian federalism, Cameron already foresees that politics and federalism in the next century will be markedly different from what Canadian have known in the recent past. He notes that negotiations over land claims and treaty rights, together with court decisions pertaining to these matters, have begun to affect the way Canadian perceive their constitutional and political system and the aspirations of aboriginal peoples of self-government. In conclusion his forecast is in the emergence of a third order of government in Canadian

¹³³ Knight, 1091; John B. Henriksen, Key Principles in Implementing ILO Convention No. 169, 2008, 11: Henriksen speculates over minority rights vis-à-vis indigenous peoples’ rights, and individual and collective rights: “the rights of individuals to preserve and develop their separate group identity within the process of integration, whereas indigenous peoples’ rights tend to consolidate and strengthen the separateness of those peoples from other groups in society.” http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf (accessed in April 2011):

federalism.¹³⁴ A separate indigenous parliament may be a model of a third order of government, or, in other words, the legislative government in opposition rules that grant power to those who have been disenfranchised and remain quite disempowered in federal institutions. Importantly, the experience of the Nordic countries has illuminated certain shortcomings of this representation model in terms of having less power to make legislature and participate in the decision-making process on equals. Moreover, there are concerns whether an Aboriginal Parliament is a self-ruling body or it turns out to be a federal administrative entity. This is food for thought to constitutional designers to work out the degree of power to be initially and then progressively¹³⁵ exercised by a separate indigenous parliament, potentially representing legislative government in opposition rules.

¹³⁴ Cameron, 116

¹³⁵ As mentioned before, in order to create a federal institution with real power, it is necessary to gain approval of the majority (2/3) of population in Canada. Currently that seems to be problematic: first, on the grounds of demographics of indigenous population (3,8 percent), and second, taking into account the Quebecois attempts for secession.

Conclusion

The present research has shown that there are ways to improve Aboriginal representation at the federal level in Canada. The change of the electoral system from the single plurality to proportional is one of the ways, proposed by many scholars, as being in accord with the promise of representative democracy. But for this powerful tool to be enacted and to bring the change, it should receive the support of the two-thirds of the Canadian population in the national referendum. This is unlikely to happen in the foreseeable future. Especially taking into consideration Quebec's attempts to secession from the nation-state, the majority of the population may be not inclined to vote in favor of another numerical minority to get special representation rights via this arrangement. The author of the thesis proposes another model of indigenous representation, which seems to be more feasible. It is a separate indigenous parliament that would be an advisory body, established by and in relation to the Canadian parliament, and elected by the indigenous population of the country, simultaneously during general elections. This model embodies Murphy's relational model of the right to self-determination of indigenous peoples that incorporates the idea of indigenous electoral participation and representation in the central legislature, and it aspires for renewed relationships between interdependent indigenous and non-indigenous communities. Importantly, it is also a constituent of both accommodationalist and integrationalist approaches, deployed to reconcile diverse interests in the multicultural Canadian society. On the one hand, it recognizes the distinctiveness of aboriginal communities and enables their political representation and input to the decision-making through their own representatives at the federal level. On the other hand, by empowering them and advancing their participation in the common Canadian institutions, this model intertwines the lives of indigenous and non-indigenous communities, and hence fosters the nation-building process. In addition, it accentuates ethical and practical values of federal

representation of indigenous peoples. First, in the future indigenous peoples will continue to be subject to the laws and decisions of non-indigenous governments and electoral participation is a powerful incentive for indigenous representatives to play a role in shaping those decisions. Second, legislative representation may also help demonstrate to the wider public that indigenous peoples have the capacity and the right to speak on their own behalf, rather than being spoken for. Although indigenous peoples continue to express a sense of alienation to state institutions that were used to exterminate, assimilate, and disenfranchise them, there are apparent advantages in having a say in central legislature where resources get allocated and policies get scrutinized.

Futhermore, in a polyethnic society, like Canada, there is the co-existence of traditional governance structures and self-governing arrangements based on Western liberal democratic practices and principles at the local level. The relational model of self-determination enables the co-existence of indigenous and non-indigenous practices and principles through the establishment of a separate indigenous parliament at the federal level. This institutional arrangement represents a constraint and a check to the classical separation of powers, as Fontana would put it, it shapes legislative government in opposition rules. Despite weighty advantages, this representation model still has certain shortcomings that have come to light in the evaluation of the Sami Parliaments in the Nordic countries. As a rule, the assigned advisory role to this institution was castigated. It is concluded that without real power a separate indigenous parliament cannot have a real impact on government operations. Moreover, in certain policies it is subordinate to the government; particularly it is conditioned by financial dependence. Importantly, it is possible to speak about autonomy if there is political and fiscal independence. It turns out that a separate indigenous parliament in the Nordic countries does not stand in opposition to the classical division of powers. It does not enable a new version of checks and

balances but actually becomes a constituent of a classical governmental structure, provoking questions over its legitimacy, from the perspective of indigenous peoples. Further research would be required in order to work out, first of all, the scope of power granted to a separate indigenous parliament immediately and progressively, and then the mechanisms that ensure its symbolic as well as real independence from state institutions in the long-run. The study of the ambit of provincial powers regarding the electoral system will be essential to define the boundaries of constituencies as well the method of election for indigenous communities. Without this research the recommendations will have the risk of being less effective.

Appendix

Overview of Aboriginal Empowerment and Representation in New Zealand and Maine and the Nordic Countries

The underrepresentation of indigenous peoples in state institutions is approached differently in New Zealand, Maine and the Nordic countries: New Zealand has opted for Aboriginal electoral districts, the US state of Maine guarantees seats for representatives of its two largest First Nations in the state legislature through the proportional mixed electoral system, and the Nordic countries have pursued the option of separate Houses for their indigenous peoples. The analysis of indigenous representation in three jurisdictions will provide insight of the shortcomings of each model of representation. The living lesson of the Nordic countries can be particularly instructive to the Canadian case as I argue that a Separate Indigenous Parliament shall guarantee the implementation of the right to self-government from the theory into practice, at the federal level.

Designated Seats for Indigenous Peoples in New Zealand and Maine

Canada was the first country in the world to adopt multiculturalism as an official policy – and currently there are three different policies accommodating immigrants, national minorities and Indigenous peoples.¹³⁶ Nevertheless, the situation is far from offering bona fide results. The voices of Indigenous communities are not heard at the federal level as there is no institutional mechanism that would ensure their political input at federal bodies (Jennifer Schmidt, Michael A. Murphy, Peter Niemczak and Celia Jutras.) To improve Aboriginal representation at the federal level, the Royal Commission on Aboriginal Electoral Representation recommended three options for Canada that were represented in detail in Chapter 2: the creation of exclusively

¹³⁶ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*. Oxford: Oxford University Press, 2007

Aboriginal electoral districts, the creation of an advisory third Indigenous House at the federal level, and the creation of a new province that would be composed of existing reservation lands. Neither of these models has been implemented so far.

Before renewing the discussion over the suggested representation models within the Canadian context, it is worth paying attention to the mechanisms that guarantee indigenous representation in New Zealand, Maine and the Nordic countries. In both New Zealand and Maine there are designated Aboriginal seats in legislative bodies. In New Zealand the Maori are the indigenous peoples that comprise roughly 10 percent of the country's population. According to Schmidt, as the Maori remained a physical threat to the pakeha, or white settlers, New Zealand's government granted the Maori initially four guaranteed seats in 1867 (initially temporarily and then in 1893 permanently) in order to pacify them.¹³⁷ After a binding referendum on electoral reform in 1993, the government revised the electoral system with the Electoral Act: the change was from a first-past-the-post system to a mixed-member proportional system¹³⁸ and the number of Maori seats increased to proportionally represent the number of electors on the Maori rolls. Interestingly, Maori voters have the opportunity to choose which electoral roll they wish to be listed on, either the Maori electoral roll or the general one. The choice can be altered in each census, conducted every five years: by self-identifying as Maori on the grounds of the descent, an individual signs up for the Maori voting list. When the electoral rolls are updated, the Representation Commission determines the appropriate number of Maori and general seats, and redraws electorate boundaries accordingly. The debate over this form of indigenous representation goes over the issue of its effectiveness. Schmidt, referring to a number of scholars,

¹³⁷ Schmidt, 9

¹³⁸ Ibid, 10: Like voters on the general electoral roll, voters on the Maori have two voters under the mixed-member proportional system: the first vote is cast for a representative for the voter's riding, the second vote goes to the party that an individual would like to see in the House of Representatives.

such as Fiona Barker et al., Susan Banducci, Todd Donovan and Jeffrey Karp, speaks about the inability of the Maori Members of the Parliament to advance the interests of their group, notwithstanding that New Zealand's mixed-member proportional system is fair in terms of representing the number of Maori Members of Parliament proportionately to the number of Maori in the general population.¹³⁹ In the state of Maine, USA, two tribes, the Penobscot and the Passamaquoddy, have guaranteed representation for Aboriginal population since 1823 (the arrangement was formalized for the former tribe in 1866 and for the latter in 1927). Each tribe has a single representative, referred to as Tribal Government Representatives, in the State Legislature. Schmidt adds that there is not much critical literature on Maine's system of guaranteed representation. However, he remarks that there are no provisions in Maine's law that allow any change in the number of Tribal Government Representatives. Due to the limited power of the Tribal Government Representatives, the members of both tribes are also entitled to vote in general elections for regular representatives.

The similarity between two cases is in the form of political representation, the guaranteed aboriginal seats in legislative bodies. However, the difference is in rights and privileges granted to indigenous representatives. In the case of New Zealand, the "guaranteed seat" in Parliament does not signify any privileges or restrictions attached to the Maori ridings. Schmidt notes that a Maori representative has the same rights and privileges as a regular one while in the case of Maine the picture differs, to certain extent: in comparison with regular Representatives, first, Tribal Government Representatives cannot vote on legislation; second, they are restricted, to certain degree, to introduce legislation to the House of Representatives (though they are entitled to jointly sponsor any bill); and third, they do not have an official status as "Members" of the

¹³⁹ Cited in Schmidt, 10-11

State Legislature.¹⁴⁰ The question over the effectiveness of this form of representation is relevant to both cases. Many scholars share an opinion that either of the first two options is the most realistic, given Canada's unique characteristics, such as, the heterogeneity of the Aboriginal population and the concentration of indigenous peoples in certain provinces.

Pondering over the premises for Aboriginal empowerment, I cannot but refer to Henriksen's speculations over minority rights vs indigenous peoples' rights, and individual and collective rights: "the rights of individuals to preserve and develop their separate group identity within the process of integration, whereas indigenous peoples' rights tend to consolidate and strengthen the separateness of those peoples from other groups in society."¹⁴¹ Indigenous rights entail certain complications¹⁴² in comparison with minority rights. Why states still opt for the former in this case? I see at least two credible explanations for recognition and ascription of special Aboriginal rights: first, the protection of the interests who are in minority, who came to be in the disadvantaged position due to the persistent historical injustices, and second, in the power-sharing dimension, the provision of symbolic power to numerical minorities so as to pacify and subtly, without much friction or tension, impose a desirable societal structure.

The Experience of the Fennoscandian Jurisdiction: Separate Indigenous Parliaments

A better example of Aboriginal political representation one can see in the Nordic countries (Finland, Norway and Sweden) that opted for Separate Indigenous Parliaments. Although they share a common institutional mechanism to advance the right of indigenous peoples to self-determination, there are differences in the scale of soft power exercised by the

¹⁴⁰ Schmidt, 11-12: according to the Attorney General of Maine noted "they are 'non-members who occupy the special status of being Tribal Government Representatives.'"

¹⁴¹ John B. Henriksen, Key Principles in Implementing ILO Convention No. 169, 2008, 11. http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf (accessed April 2011)

¹⁴² Henriksen, 10-11: To name but several of indigenous peoples' rights that pose a challenge to the core functions of the nation state: collective rights to lands, and natural resources, their right to maintain and strengthen their political, legal, economic, social and cultural institutions.

Indigenous Assembly in each country. The assessment of the strengths and weaknesses of each indigenous body at the federal level will help grasp lessons in the field of Indigenous Parliament establishment for the consideration to the Canadian context.

In Chapter 2, I enumerated and presented in more detail three options or models of Aboriginal representation advised to Canada the implementation of which came to deadlock. In this respect the living experience of the indigenous representation model in Nordic countries could be informative to renew the dialogue over the failed proposals. Before going in more detail about the creation of Indigenous Parliaments in each country, I will give a short overview of the Aboriginal peoples inhabiting this territory.

The Sami, or Lapps, are indigenous populations that are traditionally reindeer breeders and herders.¹⁴³ They tend to live in the Nordic countries and on the Kola Peninsula in Russia. It is estimated that about 40,000 Sami live in Norway, 20,000 in Sweden, 7,500 in Finland, and 2,000 in Russia. For the most part, language and self-identification are the ethnic criteria used in all countries with Sami inhabitants. The Sami have depended on hunting, fishing, farming, and reindeer herding, and have been semi-nomadic. Today only 2 percent of Sami work in the reindeer industry. Parts of the Sami population gain their livelihood from agriculture, fishing and wilderness industries, while many are employed in the general labor market.¹⁴⁴

Sweden

After the Swedish Government passed legislation creating a separate Swedish Sami Parliament in December 1992, Sweden's separate Sami Parliament, or Sameting, was created.

¹⁴³ Eva Josefsen. *The Saami and the National Parliaments – Channels for Political Influence*. Resource Center for the Rights of Indigenous Peoples, May, 2003. Translator: Helge Haver, Translatørservice AS; Niemczak, Peter & Jutras, Céilia (2008). *Aboriginal Political Representation: A Review of Several Jurisdictions*; Schmidt, Jennifer (2003). "Aboriginal Representation in Government: A Comparative Examination" Paper prepared for the Law Commission of Canada.

¹⁴⁴ Cultural Survival. <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/finland/s-mi-facts> (accessed in February 2011): "The Sami language is part of the Finno-Ugric branch of the Uralic language. There are several dialects of Sami, and people who speak them may not understand each other."

The first elections to the Aboriginal Parliament were held on 16 May 1993. The Sameting consists of 31 members elected for four years by popular vote of Sami voters across the country. Voting eligibility is determined on the criterion of self-identification as a Sami, or having a parent who is or was on the Sami voter's list.

The Sameting is an advisory body with power to issue recommendations to national and local institutions. Niemczak and Jutras note that in comparison with its Norwegian counterpart, it also has other powers: these powers vary from the appointment of Sami school boards to participation in national physical planning. To be more specific, they point out the following functions: first, it is authorized to allocate funds for public purposes; financial assistance comes from State and the "Sami Fund," in the latter case money is derived from sources that include the sale of hunting or fishing rights. Second, the Sameting directs the Sami language projects and appoints the board of the Sami school system.¹⁴⁵ The authors try to show that despite the soft power granted to the separate indigenous assembly, the scope of their functions is significant, in terms of financial resources at their disposal as well as their leverages to impact educational projects. However, Josefsen dilutes this optimistic picture by showering that it is the Ministry of Agriculture, Food and Fisheries that is responsible for Sami affairs: within the Ministry, the Sami and Educational Division that works with Sami and reindeer husbandry issues is also responsible for higher education and research in the field of agricultural sciences, the protection of genetic resources, genetic engineering, hunting and game management, land use policy and land use in the agricultural sector. Responsibility for issues regarding the language and culture of the Sami lies with the Ministry of Culture, while the Ministry of Education and Science is responsible for Sami schools.¹⁴⁶ So, it seems that the Sami parliament is not so separate, institutionally, from the

¹⁴⁵ Niemczak and Jutras, 4

¹⁴⁶ Josefsen, 28

state apparatus. This is a relevant point to the discussion over indigenous empowerment and special mechanisms to guarantee their political representation: whether the Sami parliament is a self-ruling body that is elected by the indigenous communities or a part of the state administration acting on the directives from above.

There are certain problems pertaining to the indigenous parliament, such as the Swedish state's traditional division between Sami who herd reindeer and those who do not, the Sami parliament's role both as a Swedish government authority and as an elected Sami body, the relationship between the Sami parliament and its Board, and a shortage of Sami leaders.¹⁴⁷ Among all three models, the Swedish institutional representation structure is not yet properly developed, which is partly explained by the slow movement of the Swedish Government to the idea of crafting an Aboriginal Parliament.

Finland

The Finnish constitution contains two provisions that deal with Sami rights: first the Sami's rights as indigenous people are recognized as well as their right to use the Sami language when communicating with the authorities; and second, the Sami people have linguistic and cultural autonomy within the Sami homeland to the extent that this is laid down in other legislation.¹⁴⁸

In 1971, with the encouragement from the Finnish State Commission on Sami Affairs, the Government of Finland began to move to the idea of creating a separate Sami Parliament. After the Commission issued a report with a recommendation to create a separate body to represent the interests of the Sami minority, and a Cabinet Decree (A 824/73) implementing the Commission's recommendation was signed by the President of Finland in 1973, a Sami

¹⁴⁷ Cited in Josefsen, 29

¹⁴⁸ Ibid.

Parliament, known as the Delegation for Sami Affairs, was established.¹⁴⁹ In 1995 it was renamed the Sameting, when the Finnish Parliament revised the structure and function of the Sami Parliament.¹⁵⁰

As in the Swedish case, the system for determining Sami electoral eligibility is based on self-identification as a Sami. As it was outlined in the 1973 Cabinet decree, those individuals and their spouses who are eligible can self-identify as Sami voters on the census, which has been collecting data on Aboriginal origin since 1962.

The Sami Parliament¹⁵¹ does not have any authority to make decisions binding on the national Parliament, the local authorities or their administrations. Nevertheless, in contrast to both Sweden and Norway, the authorities are obliged to negotiate with the Sami Parliament on all broad and important decisions that may either directly or indirectly influence the Sami's status as an indigenous people. The Sami in Finland thus have stronger statutory rights than those in either Sweden or Norway. A disadvantage is that these formal rights prove not to have been translated into practical political action to any particular extent. No comprehensive formal structures or meeting places of any significance have been established between the Sami Parliament and the Finnish government to ensure that the intentions of the legislation on Sami influence are fulfilled.

¹⁴⁹ It is noteworthy that Finland has different traditions than Sweden when it comes to minority politics. There has always been a strong Swedish minority in Finland that acquired extensive cultural autonomy, and to certain extent territorial autonomy. http://www.eng.samer.se/servlet/GetDoc?meta_id=1111 (accessed February, 2011)

¹⁵⁰ Niemczak and Jutras, 3: The decree established also four constituencies in northern Finland, and it set the number of members sitting in the Sami Parliament at 21, each of whom serves a four-year term. Three representatives and one vice-representative must come from each of the four municipalities within the officially designated Sami Homeland: 12 of these members are elected from the four Sami constituencies in Northern Finland, while the remaining 9 members are elected according to popular Sami vote and are drawn from all regions of Finland, both inside and outside the four Sami constituencies. In 1996, Sámi Parliament was restructured to correspond to the Swedish and Norwegian Sámi Parliaments, with administrative duties in relation to Sámi culture and the Sámi language

¹⁵¹ However, the Sámi Parliament does not have its own parliament building and no assembly room. So, the Plenary Assembly meets at various locations around Sapmi. Many consider that the possession of a separate parliamentary building would be an important symbol and status issue for the Sámi Parliament. http://www.eng.samer.se/servlet/GetDoc?meta_id=1103 (accessed February, 2011).

Understandably, there is a need to examine the grounds for the criticism of this system of Sami political representation. Citing an indigenous scholar on the issues of self-determination and indigenous peoples (Pekka Aikio), Niemczak reports that the Parliament “has no direct powers of decision-making... It is [the Sami Parliament’s] experience that the authorities of Finland are not positive towards our [indigenous peoples’] demands. Some have been listened to, but by far the majority have been ignored.”¹⁵² In line with this criticism, Schmidt illuminates that the Sameting has been unable to prevent the Finnish government from allowing commercial interests to access and develop land that is claimed by the Sami for traditional use: “the Sami Parliament has neither power to determine matters that are of importance to the Sami, nor adequate resources to influence such decisions when they are being made.”¹⁵³ Moreover, the Sami Parliament is subordinate not only to the national Parliament but also to officials within the Ministry of the Interior. In the Finnish case as well as in the Swedish one, the same question persists: whether the Sami parliament is a self-ruling body, a mechanism for the guaranteed self-governing rights of indigenous people or a state administrative authority glossing the non-existing functions of the Aboriginal entity.

Norway

The majority of Sami live in Norway; their population is at least 40,000. The Norwegian Sami Rights Commission, established in 1980 by the Norwegian Government to learn about political, economic and cultural needs of the Sami,¹⁵⁴ issued a report in 1984 with one of the key recommendations to create a separate Sami Parliament. After legislation, the Sami Act, was

¹⁵² Cited in Niemczak and Jutras, 3

¹⁵³ Cited in Schmidt

¹⁵⁴ A hundred years there was a “Norwegianisation” policy conducted in a stringent way. Afterwards Norwegian Sami politics have changed. One more factor that fostered a change in public opinion about the Sami situation during the 1980s was Sami demonstrations against the construction of the Alta/Kautokeino dam. Following up this tension, the Government set up a Commission to inquire about the situation with indigenous peoples.

http://www.eng.samer.se/servlet/GetDoc?meta_id=1111 (accessed February, 2011); Josefsen

enacted in 1987, the Samediggi, Norway's separate Parliament was created. First elections were conducted in 1989; elections for the Samediggi are held concurrently with elections for the Norwegian Parliament.¹⁵⁵ As in both cases of Sweden and Finland, voting eligibility to the Samediggi is determined by self-identification: "a person must self-identify as a Sami and either have Sami as his or her home language or have a parent or grandparent who does."¹⁵⁶ The Norwegian authorities ratified International Labor Organization Convention No. 169 in 1990.

The Sami Parliament has no clear constitutional position: it is not under the control of the Government, but neither is it an independent body. According to the Norwegian Constitutional tradition, the state authorities are to create conditions to ensure that the Sami people can preserve and develop their language, culture and social life. Norway's Sami Parliament, like its Finnish counterpart, does not have any real political power and that hampers the ability of this institution to advance Sami interests. It only performs the functions of an advisory body,¹⁵⁷ a power to make recommendations to both public authorities and private institutions on matters affecting the Sami. However, there was a case proving that these recommendations can be easily ignored but the government: a bill, Finnmark Act, proposed by the Norwegian Government, "disregarded all recommendations made by the Samediggi with respect to conflict between Sami and Non-Sami in Norway's Finnmark Country, and instead proposed an alternative solution that would affectively remove any special protection that Sami in the area currently enjoy."¹⁵⁸ As a result,

¹⁵⁵ Sami Parliamentary elections. <http://www.samediggi.no/artikkel.aspx?AId=884&MId1=270> (accessed February 2011): Sami voters elect 3 members for each of the 13 Sami constituencies. Prior to the election in 2009, a new election scheme was introduced from the Samediggi: the number of constituencies was reduced from 13 to 7, and the number of parliament was cut from 43 to 39

¹⁵⁶ Niemczak and Jutras, 4

¹⁵⁷ It is noteworthy that the Sami in Norway have special constitutional protection through Article 110a of the Constitution, which states that is the duty of the national authorities to create the conditions to enable the Sami ethnic group to safeguard and develop their language, their culture and their society. The Sami's Parliament influence and authority have gradually increased through legislation and political decisions.

¹⁵⁸ Cited in Schmidt, 15

there is lack of confidence in the Samediggi among Norwegian Sami as the institution fails to protect their interests.

Interestingly, among three countries of Fennoscandia, only Norway¹⁵⁹ ratified the ILO Convention No 169 in 1990 and it was the first State that officially recognized Sami as an indigenous people, Finland and Sweden are still not parties to the Convention. Although Finland and Sweden are not parties to the Convention, the provisions of the Convention have strongly influenced political and legal developments in these countries, including as far recognition of the Sami as in “indigenous people” is concerned.

Recapping the administrative structures of three Aboriginal representation models, it is necessary to mention that unlike the Sami parliaments in Finland and Norway, the Swedish Sami Parliament had to build an administration up from nothing. As Josefsen notes the worst possible starting point was in Sweden. The Sami parliament in Finland had its roots in the Sami Delegation. The Norwegian Sami Parliament took over the administration from the Norwegian Sami Council, which was a state-appointed advisory body for the Norwegian authorities.¹⁶⁰ Thus, it takes time to build up an administration and establish sound administrative routines and systems, and this time component influences how structured the political debate and proceedings can be in the preliminary phases of a separate Indigenous parliament.

¹⁵⁹ Henriksen, 16: Sami voters elect 3 members for each of the 13 Sami constituencies. Prior to the election in 2009, a new election scheme was introduced from the Samediggi: the number of constituencies was reduced from 13 to 7, and the number of parliament was cut from 43 to 39

¹⁶⁰ Josefsen, 29

Glossary of Terminology¹⁶¹

Aboriginal peoples: The descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people: Indians, Métis and Inuit. Aboriginal peoples are bound as a group by historical continuity, culture, language and values as opposed to by race.

Aboriginal rights: Aboriginal rights derive from the fact that Aboriginal peoples maintained organized societies in Canada since “time immemorial” and were the first inhabitants of what is now called Canada. These rights are constitutionally protected under section 35 of the Constitution Act, 1982. Aboriginal rights encompass cultural practices and language, as well as “site specific” activities such as hunting and fishing.

Aboriginal self- government: Governments designed, established and administered by Aboriginal peoples within the framework of the Canadian Constitution. Aboriginal self-government is generally recognized through negotiated self-government agreements or treaties.

First Nation: A word with no legal definition used to refer to a group of Indians occupying a specific land base (for the most part, reserve land). It refers to both status and non-status Indian people in Canada. In some instances, First Nation also refers to the name of a community and is used in place of “band.”

¹⁶¹ Jay Kaufman and Florence Roberge. *Aboriginal Governance in the Canadian Federal State* 2015. Working Paper 2003(3), 50-51

Indian: An “Indian”¹⁶², as defined by the Indian Act, is a person who is or is entitled to be registered as an Indian. The regulations of entitlement can be found in the Indian Act. The Department of Indian Affairs & Northern Development maintains a registry of those who are registered.

Inherent Right: The Inherent Right of Aboriginal Self-government is a claimed Aboriginal right. Federal government’s policy recognizes the inherent right as a general right based in section 35(1) of the Constitution Act, 1982. The Courts have yet to adjudicate on the existence or nature of the inherent right.

This right is in addition to the right to self-determination, treaty rights and any other Aboriginal rights. Not all Aboriginal governments may choose to take advantage of this right.

Inuit: An Aboriginal people in northern Canada who reside “above the tree line” in the Northwest Territories, Northern Quebec and Labrador. The word means “people” in Inuit.

Métis: An Aboriginal people with a combination of cultural and genetic heritages that pre-dates European settlement, as opposed to European contact.

Treaties: An Indian treaty is an agreement between the Crown and a group of Indian people that created promises, obligations and benefits of the parties to be respected. In many historic treaties,

¹⁶² Richard Simeon and Martin Papillon note that the term “Indian” applies to the majority of indigenous peoples in Canada but not all (i.e., not to Inuit or to Metis). While it is this term has meaning in law, it is not longer the preferred collective term of the indigenous peoples themselves, who use “Aboriginal,” “indigenous,” “First Nations,” or indeed the names of their specific nations, such as Mohawk, Mi’kmaq, Nisga’a, and so on.

in exchange for land surrender, Indians would receive cash settlements, as well as education and health services and agricultural equipment.

Indian treaties differ from international treaties. Indian treaties are protected under section 35 of the Constitution.

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