

## Canada’s Democratic deficit and Idle No More

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In January 2013 the *Arctic Review on Law and Politics*, edited at the University of Tromsø in Norway, commissioned a report on Idle No More. As a peer-reviewed international journal whose focus is on circumpolar jurisprudence and social science, it seeks to provide a forum for informed discussion of the social and legal issues related to the Arctic region. This paper, focusing on Canadian constitutional problems, is an extension of the work initiated by the *Arctic Review*. The original submissions to that journal will be available in the Spring and Fall 2013 issues. See <http://site.uit.no/arcticreview>. The opinions expressed are those of the author.

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## Democratic deficit and Idle No More

“By the way, I can talk, but I don't understand what I'm saying”

Funky Robot

Is Canada really a “free and democratic society”, a champion of equal rights, a model for the world? Have we even thought about what democracy is? This is the question that Idle No More is asking. It is trying to peel the blinders from our eyes, demanding self-awareness and a new paradigm, one that takes account of our sorry past that created opportunity for immigrants by depriving Indigenous peoples of their political and territorial rights. As Idle No More supporters, native and non-native alike, point out, we have a serious democratic deficit. Our institutions are running on auto-pilot. Like the talking robot, we function in form but not substance. How else to explain a democracy that does not understand the duty to consult? A political party that uses majority status to stifle parliamentary debate? A plan for “long term prosperity” that turns a blind eye to the environment? Or the undermining of our Constitutional declaration of equality by leaving Non-Governmental Organizations to struggle through the courts in an attempt to make sure that children on reserves receive the same funding for education and social services as children in the rest of the country? Children!! What has become of us?

Idle No More is about making democracy real. This is why the movement that sprang up on the Canadian prairies in November 2012 has swept across the country and around the world to Egypt, New Zealand, London, South Africa, Hungary and other far-flung places. There is a new energy on the political horizon. Fueled by cell phones, the internet and Twitter, people everywhere are keeping in touch as never before – keeping in touch and discovering common ground. With a median age of 27 compared to 40 for the general population, young Aboriginal people in Canada are fully engaged with this dynamic. Despite abysmally low general education levels, there are now about 30,000 Aboriginal students in university or college. Two-thirds are women.<sup>1</sup> They have overcome the social chaos created by the genocidal residential schools. They

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<sup>1</sup> Friesen, Joe, “What's behind the explosion of native activism? Young people”, *The Globe and Mail*, 18 Jan. 2013, <http://www.theglobeandmail.com>

are reclaiming their languages and cultures and earning advanced degrees while raising children on sub-poverty incomes. Educated, resilient and tough, bolstered by the failed efforts of generations of their elders, they have become film makers, authors, actors, lawyers, teachers, comedians and political analysts. They have the creativity needed to survive, they are not likely to disappear and they are fearless. Idle No More describes itself as a protest against “attacks on Democracy, Indigenous Sovereignty, Human Rights and Environmental Protections”.<sup>2</sup> Indigenous leaders and all of the opposition parties agree it is time to re-set the Crown-First Nations relationship.<sup>3</sup> But where do we go from here? And what does Idle No More bring us? This paper gives a detailed account of the origins of this movement followed by a review of its philosophy and some of the historical factors that explain the almost universal support it has received from a wide range of Indigenous organizations, unions and other Canadian advocacy groups.

## **PART I: The Origins & Growth of Idle No More**

The initial protest began when Nina Wilson, Sheelah McLean, Sylvia McAdam and Jessica Gordon began e-mailing each other, trying to figure out the impact of Bill C-45 on the “aboriginal and treaty rights” ostensibly protected by s. 35 of Canada’s *Constitution Act, 1982*.<sup>4</sup> None of these women fit the usual profile of political analysts. Although Sylvia McAdam has a Canadian law degree and is a professor at First Nations University, she resides on Whitefish Lake Reserve #118 in Treaty 6 territory and her focus has been on Cree laws and ceremonies. Nina Wilson from Kahkewistahaw, Treaty 4 territory, is a masters student, Jessica Gordon from Pasqua, also in Treaty 4 territory, is a community activist and Sheelah McLean is a third generation immigrant of Scottish and Scandinavian descent who teaches anti-colonialism and anti-racism.<sup>5</sup> They are the kind of people whose opinions are commonly ignored by politicians.

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<sup>2</sup>Houle, Shannon M., “Idle No More World Day of Action - January 28”, 2013 12 Jan. 2013 <http://idlenomore.ca/> (accessed 1 Feb. 2013)

<sup>3</sup> See eg. Carolyn Bennett, Liberal Party, “Crown First Nations relationship is at a “tipping point” – current crisis could be a tinder box only the PM can fix” 10Jan,2013,<http://carolynbennett.liberal.ca>; Jean Crowder, New Democratic Party, “Jean spoke about her motion regarding the governments relationship with first nations - January 31, 2013” 1 Feb. 2013 <http://jeancrowder.ndp.ca> (accessed 5 Feb, 2013)

<sup>4</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11

<sup>5</sup>“About us”, The official Idle No More Website, <http://idlenomore.ca> (accessed 6 Feb. 2013); See also Sylvia McAdam Teachings, INCA Channel’s Videos, <http://vimeo.com/> (accessed 13 Jan., 2013); CTV News.ca staff, “Idle No More cofounder supportys Spence, not blockades”, 13 Jan.2013 <http://www.ctvnews.ca> (accessed 7 Feb. 2013)

## 1.1 Bill C-45

Obscurely labeled “A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures”, the official short title of bill C-45 is *Jobs and Growth Act, 2012*.<sup>6</sup> At 443 pages long, it contains 556 sections. The “other measures” referred to revise a broad range of acts and regulations concerned with such unrelated matters as navigable waters, grain inspection, public sector pension plans, hazardous materials, electronic travel authorization and pay raises for judges. This unmanageably large concatenation of amendments had been introduced to Parliament by the Conservative Party majority on October 18<sup>th</sup>, 2012. The first act referred to was Bill C-38, a similarly unwieldy “omnibus budget bill” with un-related add-ons that had been passed on June 29, 2012 under the name *Jobs, Growth and Long-term Prosperity Act*. On October 30<sup>th</sup>, 2012 Bill C-45 had passed its second reading in Parliament and was referred for a mere month of review to the Standing Committee on Finance.<sup>7</sup>

What the four women found when they attempted to decode this monstrosity alarmed them. The Assembly of First Nations (AFN), a lobbying organization formed of band council chiefs elected under Canada’s *Indian Act*, had just brokered a Crown-First Nations Gathering on January 24<sup>th</sup> 2012. The ceremonial significance of this event was probably lost on most Canadians who have little knowledge of the history of inter-cultural relations, but it was a deliberate attempt to revive the *Covenant Chain* diplomacy that had prevailed during the era of fur-trading partnerships that created the foundation for Canada’s eventual emergence as a unified state.<sup>8</sup> Despite difficulty persuading Prime Minister Stephen Harper to stay for the full event, he had eventually promised that the *Indian Act* would not be abolished, saying there would be no changes affecting Aboriginal people without prior consultation. Yet here, only a few months later, was this bloated set of revisions that pulled the rug out from under many constitutionally protected “aboriginal and treaty rights”: The *Fisheries Act* imposed a new definition of “Aboriginal Fisheries” and reduced the protection offered, limiting it to “serious harm” as defined by whatever federal policy and regulations might happen to be. The *Canadian*

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<sup>6</sup>Parliament of Canada, <http://parl.gc.ca/LegisInfo/>

<sup>7</sup> Parliament of Canada, “Hansard Index”, <http://www.parl.gc.ca>; Flaherty, Jim (Minister of Finance, sponsor) *Open Parliament*, 14 Dec. 2012. Press, Jordan, “Senate passes Harper government’s omnibus budget bill”, Postmedia news in *National Post*, <http://www.nationalpost.com>, Dec 14, 2012 (Accessed 9 Jan. 2013) For more on the diplomatic philosophy of the *Covenant Chain* see WILLIAMS, Robert A.Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (New York: Routledge, 1999).

<sup>8</sup> Royal Commission on Aboriginal Peoples (RCAP), *Looking Forward, Looking Back*, Ottawa, 1996.

*Environmental Assessment Act* was replaced with legislation that removed the requirement for environmental review of “minor projects”, reduced opportunities for Aboriginal involvement, cut short timelines for ecological assessment and accepted internet posting as “notice” of projects under the National Energy Board or the Canadian Nuclear Safety Commission. The *National Energy Board Act* limited the ability to challenge projects approved by the federal cabinet. An amendment to the *Indian Act* allowed the leasing of reserve lands and reduced the level of community support needed to change land designations. The *Navigable Waters Protection Act* drastically reduced federal environmental oversight. Among Canada’s estimated 32,000 major lakes and 2.25 million rivers, there was now protection for only 97 lakes, and portions of 62 rivers. Left vulnerable were waterways and Indigenous territories in the path of the highly contentious Northern Gateway Pipeline proposed to bring tar-sands oil from Alberta to the Pacific coast.<sup>9</sup>

In short, the legislation was a direct violation of the United Nations *Declaration on the Rights of Indigenous Peoples* whose Article 19 says: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”<sup>10</sup>

## 1.2 Taking Action

As they discussed the situation the four decided to set up a planning session through a teach-in at Station 20 West, a recently opened community centre serving the poverty-stricken core neighbourhoods of Saskatoon where many Indigenous people live. To advertise the event they started a Facebook page. Jessica Gordon decided to name it “Idle No More” as a reminder to themselves “to get off the couch and start working”. As it turned out, many others were alarmed by Bill C-45. On November 30<sup>th</sup>, Tanya Kappo in Edmonton used the #idlenomore hashtag

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<sup>9</sup> Assembly of First Nations, “Federal Omnibus Legislation: Bill C-38: Jobs, Growth and Long-term Prosperity Act & Bill C-45: Jobs and Growth Act, 2012” <http://www.afn.ca>; “Joint Statement Supporting Chief Spence and “Idle No More”” 2 Jan. 2013 signed by a long list of supporters. See eg. Canadian Union of Postal Workers, “CUPE signs joint statement supporting Chief Spence and Idle No More” 2013 <http://cupe.ca/> (accessed 7 Feb. 2013)

<sup>10</sup> United Nations Declaration on the Rights of Indigenous Peoples, <http://www.un.org>.

which spread like wildfire on Facebook and Twitter.<sup>11</sup> The original Saskatoon meeting was replicated in Regina, Prince Albert, North Battleford and Winnipeg. Then the movement spread nation-wide. But nothing could stop the Conservative majority. On December 4<sup>th</sup>, at the time of the third reading in Parliament the opposition parties proposed 1,600 amendments which were all rejected. The AFN was holding a plenary meeting in Gatineau, across the river from Ottawa. Several prominent chiefs tried to enter the House of Commons to speak and, as if to underscore the futility of Harper's January promise, they were stopped at the door.<sup>12</sup> On December 5<sup>th</sup> the bill was passed to the Senate, but with Conservative control of both houses, there was nothing to hinder its progress and it received the royal assent required for formal legal status on December 14<sup>th</sup>, 2012.

Aboriginal peoples constitute only about 4% of the Canadian population.<sup>13</sup> Although their ancestors once had access to or control over 100% of the land and resources, they have no designated representation in Parliament and their treaty rights were routinely ignored during the colonial development of the Canadian state. With no formal political clout, they have been forced to find creative ways to assert their rights. An early version of the Idle No More website featured videos of two outspoken Indigenous academics, Sharon Venne and Pamela Palmater, who had come second to Shawn Atleo in the last vote for National Chief of the AFN.<sup>14</sup> According to Palmater, Idle No More wanted Canada to amend the omnibus bills, withdraw legislation threatening Indigenous lands and waterways, restore funding that had been cut from communities and advocacy organizations and set up Nation to Nation processes to manage long term implementation of treaties and resource sharing.<sup>15</sup>

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<sup>11</sup> Olivier, Cassidy and Stephanie Ip, "Idle No More has grown into national protest on First Nations rights", *The Province*, Vancouver, B.C., Canada 4 Jan. 2013, <http://www.theprovince.com>; Jeremy Warren, "Idle No More born on the Web", *The Star Phoenix*, Saskatoon, 19 Dec. 2012, <http://www.thestarphoenix.com> (accessed 7 Jan. 2012)

<sup>12</sup> Anishinabek Nation Grand Council Chief Patrick Madahbee flanked by Serpent River First Nation Chief Isadore Day, Onion Lake Cree Nation Chief Wallace Fox and Assembly of Manitoba Chiefs Grand Derek Nepinak Barrera, Jorge, Kenneth Jackson, "Chiefs take fight to House of Commons doorstep", APTN National News, 4 Dec. 2012 <http://aptn.ca/pages/news/> (accessed 6 Jan, 2013)

<sup>13</sup> The 2006 census counted 50,485 Inuit, 389,785 Métis and 698,025 First Nations people for a total of 1,172,790. The Aboriginal population is growing at a much faster rate than the Canadian population in general. Statistics Canada, "Aboriginal Population Profile" [www12.statcan.ca](http://www12.statcan.ca) (Accessed 5 Feb. 2013)

<sup>14</sup> Each has published her doctoral thesis. Sharon Helen Venne, *Our Elders Understand Our Rights" Evolving International Law Regarding Indigenous Rights* (Penticton, B.C. Canada: Thetus Books, 1999); Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon, Saskatchewan, Canada: Purich Publishing, 2011) Palmater is the Director of the Centre of Indigenous Governance at Ryerson University.

<sup>15</sup> Palmater, Pamela, "Idle No More: What do we want and where are we headed?" *rabble.ca*, 4 Jan., 2013 <http://rabble.ca>

These issues were widely agreed upon by Indigenous people of most political persuasions. December 10<sup>th</sup> was declared a National Day of Action. Rallies, demonstrations, blockades of roads and bridges and flash-mob round dances in shopping malls proliferated across the country. Although Idle No More now had the support of the AFN, there was no formal leadership or central organization for any of this. People took their own initiatives based on a large variety of past conflicts with the Canadian state. As Idle No More popped up in various cities around the world, comparisons were made with the Occupy movement of 2011.<sup>16</sup>

### 1.3 Seeking Solutions

On December 11<sup>th</sup>, 2013, Chief Theresa Spence from Attawapiskat in northern Ontario started a hunger strike in support of the movement. De Beers has established a diamond mine on her traditional territory that will reportedly pay the province of Ontario 6 billion dollars over its 17 year life time. Attawapiskat receives little over two million dollars a year, housing remains deplorably inadequate and the improved infrastructure the people expected as part of the deal has not materialized. Chief Spence had dominated the news the winter of 2012 after declaring a state of emergency and calling on the Red Cross for help.<sup>17</sup> Now she was vowing to fast until Prime Minister Stephen Harper and the Governor General met to discuss outstanding issues with Indigenous leaders.<sup>18</sup>

This was a tall order. Some chiefs have been trying unsuccessfully for years to meet the Prime Minister.<sup>19</sup> However, Chief Spence galvanized even more support. As Harper attempted to shuffle responsibility off to his ministers, celebrities broadcast, human rights organizations wrote letters and the Christmas shopping season was marked by more demonstrations, blockades and flash mobs.<sup>20</sup> Eventually he capitulated.

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<sup>16</sup> Gollom, Mark, "Is Idle No More the new Occupy Wall Street?" CBC News, 8 Jan. 2013 <http://www.cbc.ca>

<sup>17</sup> Barrera, Jorge, "Equality for Aboriginal Peoples: Attawapiskat", *APTN News*, 20/03/2013: CBC News, "9 questions about Idle No More" Jan 5, 2013 <http://www.cbc.ca/>; "About Attawapiskat" *Huffington Post* <http://www.huffingtonpost.ca> (accessed 5 Feb. 2013)

<sup>18</sup> Barrera, Jorge, "Attawapiskat chief begins first day of hunger strike with sacred fire, sweet grass, tobacco" *APTN National News*, 11 Dec. 2012 [www.aptn.ca](http://www.aptn.ca) (accessed 5 Feb. 2013)

<sup>19</sup> Bonaparte, Darren, "Chief Theresa Spence should end hunger strike" *indianz.com*, 7 Jan., 2013 <http://www.indianz.com> (accessed 9 Jan. 2013).

<sup>20</sup> MacDougall, Greg, "See eg. "Idle No More: On the meaning of Chief Theresa Spence's hunger strike" 22 Dec. 2012 <http://rabble.ca/> (accessed 9 Jan. 2013); Lawyers Rights Watch Canada, "Canada | Arrange meeting requested by Chief Spence, Lawyers Rights Watch Canada tells PM" 29 Dec. 2012, <http://www.lrwc.org/> (accessed 9 Jan. 2012)

A meeting was scheduled for January 11<sup>th</sup>, 2013, styled as a follow-up to the January 24<sup>th</sup>, 2012 Crown-First Nations Gathering. Despite indications that Prime Minister Harper had not planned to stay beyond the colourful opening photo-ops, that event had brought him, the Governor General, and 12 Cabinet members together with 170 Chiefs. The result as perceived by Indigenous people was an assurance of “on-going dialogue”.<sup>21</sup> However, Harper’s focus then, as with the later omnibus “budget bills”, was on industrial economics. The gathering was officially subtitled “Strengthening Our Relationship – Unlocking Our Economic Potential” and the agenda was heavily focused on fiscal reform and “economic success”.<sup>22</sup> The political and historical importance of this meeting for First Nations people may well have escaped this son of an Imperial Oil accountant with a master’s degree in economics from a university that is heavily subsidized by major oil companies.<sup>23</sup> How else can one explain the conspicuous absence of consultation from the omnibus bill procedure implemented in such apparent contradiction to his promises at that first Gathering?

Indigenous response to the announcement of a second meeting between the Crown and the AFN was understandably skeptical – particularly after an audit of Attawapiskat was conveniently leaked to the press provoking discussions concerning Chief Spence’s fiscal integrity and whether her liquid diet of fish broth and moose blood was really a fast.<sup>24</sup> Speculation about the Harper administrations’ strategic information management was cut short by two pieces of news from the Federal Court. First there was release of the judgment in *Daniels* finding that Metis and non-status “Indians” have same rights as “status Indians”. Thus the federal government was now responsible for providing services instead of the provinces.<sup>25</sup> Next the Mikisew Cree and Frog Lake First Nations announced that they had applied for judicial review of Bills C-38 and C-45 claiming that changes to the *Fisheries Act* and *Navigational Waters Act* violated their aboriginal and treaty right to meaningful consultation.<sup>26</sup>

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<sup>21</sup> Assembly of First Nations, News & Media, “Crown-First Nations Gathering” <http://www.afn.ca/> Prime Minister of Canada, “Crown-First Nations Gathering Outcome Statement”, 24 Jan. 2012 <http://pm.gc.ca> (accessed 9 Jan.2013).

<sup>22</sup> Aboriginal Affairs and Northern Development Canada, “Agenda: Crown - First Nations Gathering - "Strengthening Our Relationship – Unlocking Our Economic Potential"” <http://www.aadnc-aandc.gc.ca>

<sup>23</sup> “Stephen Harper”, “University of Calgary”, Wikipedia, (accessed 9 Jan. 2013).

<sup>24</sup> CBC News, “Attawapiskat chief slams audit leak as 'distraction'” 7 Jan, 2013, <http://www.cbc.ca/news/> (accessed 9 Jan.2013)

<sup>25</sup> *Daniels v. Canada*, 2013 FC 6 (CanLII) <http://www.canlii.org/>

<sup>26</sup> *Chief Steve Courtoreille et al. v. The Governor General in Council et al.* Federal Court Trial Division T-43-13,



The Mikisew Cree are successors to the 1899 signers of Treaty 8. Their traditional territory situated primarily in northeastern Alberta oil-sands country includes Lake Athabasca and Fort McMurray. They had successfully challenged construction of a road through Wood Buffalo National Park receiving strong Supreme Court affirmation for the “duty to consult” in the context of treaty rights.<sup>27</sup> Phrasing this new initiative in terms of interests shared with all Canadians, their web-site has Chief Courtoreille quoting the late New Democratic Party (NDP) Leader Jack Layton saying “Hope is better than fear. Optimism is better than despair. So let us be loving, hopeful and optimistic. And we’ll change the world.”<sup>28</sup> Whether this new court challenge results in any real change remains to be seen, but this timely announcement dragged public attention squarely back to the issues that had started Idle No More.

#### **1.4 The Second Crown First Nations Gathering**

The days leading up to the second Crown-First Nations meeting were tense. Participants and format changed hour by hour. Could Chief Spence be persuaded to end her fast? Would the Prime Minister attend or would he just send the Minister of Aboriginal Affairs and Northern Development? Governor General David Johnson announced that he would not participate. Chief Spence refused to end her fast. Other prominent chiefs supported her, insisting the Governor General’s presence was necessary for Nation to Nation dialogue. The Governor General announced a “ceremonial” dinner after the meeting. Chief Spence seemed to waver back and forth. “We have nothing to lose,” declared Manitoba Grand Chief Derek Nepinak with reference to harsh reserve living conditions, adding “The Idle No More movement has the people...that can bring the Canadian economy to its knees”.<sup>29</sup>

Facing prospects that the proposed meeting would fall apart, the AFN held an impassioned press conference on January 10<sup>th</sup>, 2013. According to National Chief Shawn Atleo, Idle No More represented a tipping point. In comments framed by an obvious knowledge of international law, he said they were tired of being told they do not exist as peoples. He identified the need for a fundamental transformation in relations with the government of Canada.

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*Chief Clifford Stanley and others v. The Governor General in Council and others* Fed. Ct. T.D, T-44-13 Both are represented by Robert Janes of Victoria British Columbia.

<sup>27</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 <http://www.canlii.org>

<sup>28</sup> Courtoreille, Steve, “Message From the Chief” <https://mikisewcree.ca> (accessed 18 Jan, 2013)

<sup>29</sup> Ljunggren, David, “Native Canadians could block development, chief warns” *Reuters*, 10 Jan. 2013 <http://ca.news.yahoo.com> (accessed 7 Feb. 2013)

Saskatchewan Regional Chief Perry Bellegarde said they wanted peaceful co-existence, not exploitation that made them poor on their own land. They wanted respect for the United Nations Declaration on the Rights of Indigenous Peoples with its standard of “free, prior informed consent”. Atleo came close to tears when he referred to the documented failure to investigate the murders and disappearances of over 600 Aboriginal women, saying it is estimated that real numbers may be closer to 2,000. British Columbia Regional Chief Jody Wilson-Reybold referred to the hard work required to bring about real change and pleaded for the importance of this gathering. The unilateral C-45 process was not appropriate, reiterated Atleo. Idle No More was standing up for rivers and waters and, he protested, “We have a legal construct in this country that denies that we are peoples with rights”.<sup>30</sup> In this context, Idle No More issued a press release reaffirming its educational goals and announcing an international day of action for January 28<sup>th</sup>, 2012.<sup>31</sup>

In the end, the Gathering did happen, not in a First Nations’ venue, but rather in the Prime Minister’s office with the sound of drummers and 3,000 Idle No More protesters in the background. And the Prime Minister did stay for the full three and a half hours instead of skipping all but the first and last half hours as he had originally planned. Aboriginal Affairs Minister John Duncan, Health Minister Leona Aglukkaq and Treasury Board Secretary Tony Clement were present, but Natural Resources Minister Joe Oliver was not. Nor was any representative of Idle No More, which has resolutely insisted that its role is educational. Chiefs representing the Yukon, Manitoba and Ontario boycotted the meeting in solidarity with Chief Spence. She vowed to continue her fast, though at the last minute she was persuaded to attend the Governor General’s reception where she was offered a “special welcome” and concern for her health and that of Raymond Robinson and Jean Sock who had joined her fast.<sup>32</sup>

Curiously, the Prime Minister did not issue a press release about this much watched event though he did issue one concerning a “round table discussion” with “leading business women” and another regarding his attendance at a Diamond Jubilee medal ceremony to “honour Her Majesty Queen Elizabeth II’s sixty years of service to the people of Canada”. What the

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<sup>30</sup> AFN Press conference Jan 10, 2013 Ottawa - CBC News #idlenomore <http://www.youtube.com>

<sup>31</sup> Houle, Shannon M. “Idle No More World Day of Action- January 28, 2013” *Idle No More* 12 Jan 2013, Press Release 10 Jan. 2013 [www.idlenomore.ca](http://www.idlenomore.ca) (accessed 12 Feb. 2013)

<sup>32</sup> Mackrael, Kim, Gloria Galloway “Governor General offers Chief ‘special welcome’ at ceremonial meeting” *The Globe and Mail* 11, Jan. 2013, updated 21 Jan. 2013 [www.theglobeandmail.com/](http://www.theglobeandmail.com/) (accessed 7 Feb. 2013)

Diamond Jubilee press release did not mention was that three prominent Canadians had rejected the medal in solidarity with Chief Spence and Idle No More.<sup>33</sup> Nor was much publicity given to the later return of his medal by Chief David Montour after he learned that another recipient would be Garry McHale, an inflammatory opponent to the Six Nations campaign to protect their land rights.<sup>34</sup>

Harper's previous press release on January 8<sup>th</sup>, 2013 had unselfconsciously declared support for "responsible natural resources development in Africa".<sup>35</sup> So Canadians could only wonder why he did not express the same concern for protecting their own resources. That and why were we left to rely on Shawn Atleo's report on the discussion at this historic meeting? According to Atleo, Harper had pledged to take "a more hands on role in managing the relationship between the government and Canada's native people". There would, we were told, be other "high-level discussions" to increase momentum on treaty negotiations, resource revenue sharing, and land claims.<sup>36</sup> The whole situation made it obvious enough that there had been no repudiation of the colonial paternalism so evident in the *Indian Act*. As soon as the meeting was over, Atleo stepped down as National Chief for a couple of weeks to recover his health.<sup>37</sup>

## 1.5 Aftermath

During the run up to the January 11<sup>th</sup> meeting Chief Spence had almost become the face of Idle No More. In a rare interview on January 13<sup>th</sup>, 2013, Sylvia McAdam specified that while she supported Chief Spence, neither Spence nor the AFN - nor any other political organization - could speak for the activists. Idle No More was a peaceful educational movement, she said, and it wanted to work "within legal boundaries". It did not condone blockades of roads and rail

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<sup>33</sup> CBC News, "3 prominent Canadians reject Diamond Jubilee medals: Maude Barlow, Naomi Klein, Sarah Slean refuse medals in solidarity with Spence, Idle No More" The Canadian Press, 13 Jan. 2013. <http://www.cbc.ca> (Accessed 9 Feb. 2013)

<sup>34</sup> Staff, "Six Nations chief won't wear same medal as activist McHale", Metroland News Service, Hamilton, <http://metronews.ca/> (accessed 9 Feb. 2013). For analysis of this issue see Laura DeVries, *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law* (Vancouver, B.C. Canada: UBC Press, 2011).

<sup>35</sup> Harper, Stephen, Prime Minister of Canada, "PM to participate in an economic consultation with top Canadian business leaders", "PM participates in Diamond Jubilee Medal ceremony in Toronto", "PM announces support for responsible natural resource development in Africa" <http://www.pm.gc.ca> (accessed 7 Feb. 2013)

<sup>36</sup> Galloway, Gloria, Kim Mackrael, Adrian Morrow, "PM meets Chiefs, vows improved relations", *Globe and Mail*, 12 Jan 2013, A4.

<sup>37</sup> Mac Charles, Tonda, "Norovirus sidelines AFN National Chief Shawn Atleo", *The Star*, Canada, 10 Feb. 2013, <http://www.thestar.com> (accessed 9 Feb. 2013)

lines.<sup>38</sup> Nevertheless, several chiefs had announced that January 16<sup>th</sup> would be a national day of action and, whether the founders approved or not, Idle No More signs appeared at blockades of major roads and rail lines in many provinces, lasting sometimes for several hours. Many protesters felt this was the only way they could bring attention to the deplorable conditions in their communities.<sup>39</sup>

Other Idle No More events continued as before, pushed by a diversity of regional initiatives, some of which did not even align themselves with the movement. In December, Jonathan Francoeur, a small businessman in British Columbia, had written letters to Queen Elizabeth II and Prime Minister Harper in support of Chief Spence. Now he received a reply from the Queen herself dated January 7<sup>th</sup>, 2013. “This is not a matter in which The Queen would intervene,” it said. “As a constitutional Sovereign, Her Majesty acts through her personal representative, the Governor General, on the advice of her Canadian Ministers and, therefore, it is to them that your appeal should be directed”. But her Canadian Prime Minister had not responded to Jonathan Francoeur’s letter.<sup>40</sup>

On January 24<sup>th</sup>, Chief Theresa Spence announced the end to her hunger strike. Representatives from the opposition NDP and Liberal parties and from the AFN had all signed declarations committing to support a 13-point list of objectives including Indigenous consent to federal legislation affecting inherent or treaty rights.<sup>41</sup> A few weeks later, people from her reserve were blockading the ice-road to the diamond mine in an attempt to get DeBeers to at least fulfill its initial commitments.<sup>42</sup> Meanwhile Manitoba Grand Chief David Harper, declared that the AFN had no right to represent Indigenous people regarding treaty rights. There were reports that some Chiefs would break with the AFN, though they eventually kept the organization intact saying the “sovereign Nation-Crown Relationship” had been “severely impaired by the Government of Canada.”<sup>43</sup>

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<sup>38</sup> CTV News.ca staff, “Idle No More cofounder supports Spence, not blockades”, 13 Jan.2013 <http://www.ctvnews.ca> (accessed 7 Feb. 2013)

<sup>39</sup>“Idle No More protesters stall railway lines, highways:5-hour blockade of railways between Toronto, Ottawa and Montreal” CBC News, 16 Jan. 2013 updated 17 Jan., <http://www.cbc.ca> (accessed 9 Feb. 2013)

<sup>40</sup> CBC News “Queen declines to intervene in Chief Spence's protest” *The Canadian Press*, 17 Jan. 2013 <http://www.cbc.ca/> (accessed 18 Jan., 2013)

<sup>41</sup> CBC News, “Chief Theresa Spence to end hunger strike today” 24 Jan. 2013 <http://www.cbc.ca>

<sup>42</sup> Barrera. Jorge “Diamond mine hit by second Attawapiskat blockade” *APTN National News*, 11 Feb. 2013 [Http://aptn.ca](http://aptn.ca) (accessed 13 Feb. 2013)

<sup>43</sup> Carlson, Kathryn Blaze, “Manitoba chiefs won’t break with AFN but continue to question assembly’s mandate”, *National Post*, 23 Jan. 2013 <http://news.nationalpost.com/> (accessed 7 Feb. 2013)

A diversity of other concerns connected to the issue of Indigenous status in relation to Canada had already surfaced before the advent of Idle No More. In Canada, education and health care are funded by the provinces except for those classified as “Indians” whose funding comes from the federal government. Cindy Blackstock, a Gitksan former social worker, had founded the First Nations Child and Family Caring Society of Canada to improve education and social services for children on reserves. When the Canadian Human Rights Commission refused to hear a formal complaint about under-funded welfare services, she appealed to Federal Court. With an audience of primary school students proving that even kindergarten children can understand basic human rights, the judge sent the case back for re-hearing, leaving the public to wonder why court action should be necessary in the first place.<sup>44</sup>

Meanwhile, Indigenous nations in British Columbia have been leading objections to the Northern Gateway Pipeline proposed to bring Alberta oil through the mountains to the scenic west coast where super-tankers would carry it to refineries in China. With peoples’ minds still on the 2010 B.P. oil-spill in the Caribbean and the coast of Alaska still suffering from the 1989 Exxon Valdez oil spill, environmentalists soon joined the cause. Eventually even Christie Clarke, British Columbia’s business oriented Liberal Premier, was saying that the project gave all of the profits to Alberta and all the risks to B.C.<sup>45</sup>

Idle No More had erupted in a context where almost every court in the country was dealing with one Aboriginal issue or another. Court proceedings had also been initiated in relation to a British Columbia coal mine’s plan to import temporary workers from China and there were rumblings about the rejection of qualified Canadian applicants to favour foreigners willing to work for sub-standard wages.<sup>46</sup> Now, in January 2013, the Hupacasath First Nation applied for an injunction to prevent Canada from ratifying a treaty with China under the *Canada-China Foreign Investment and Promotion Act* (FIPA). FIPA has been widely criticized for

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<sup>44</sup> *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (CanLII), <http://canlii.ca>; *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*, 2010 CHRT 7; First Nations Child and Caring Society of Canada, <http://www.fncaringsociety.com>; See also video: “Cindy Blackstock: Remember the Children: What a landmark human rights case tells us about discrimination and justice in Canada” Lawyers Rights Watch Canada, 25 May 2012, <http://www.lrwc.org>

<sup>45</sup> See eg. Gary Mason, “B.C. Premier Christy Clark warns of national crisis over pipeline”; “Rally draws thousands to B.C. Legislature to oppose Northern Gateway” *The Globe and Mail*, 22 Oct. 2012 <http://www.theglobeandmail.com> (accessed 9 Feb. 2013)

<sup>46</sup> O’Neil, Peter, “B.C. coal mine’s temporary workers from China will be here for years, maybe decades”, *Vancouver Sun*, 7/01/, 2013; <http://www.vancouversun.com>; “B.C. mining firm sends 16 Chinese workers home, delays hiring more”, *Canadian Press*, 9/01/2013, <http://www.ctvnews.ca/ca>

relinquishing control over natural resources to a foreign state. With the failure to consult Indigenous nations in issue, Indigenous rights came, once again, into alliance with other Canadian interests.<sup>47</sup>

On January 28<sup>th</sup>, 2013 Romeo Saganash, a Cree New Democratic Party Member of Parliament from northern Quebec, tabled a private member's bill, C-469, *An Act to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples*, which requires annual reporting on progress in this regard from the Minister of Aboriginal Affairs.<sup>48</sup> The next day the *Ottawa Citizen* published a letter signed by a long list of prominent legal experts charging the Canadian government with engaging in a fifteen year campaign to diminish the "aboriginal and treaty rights" protected by the *Constitution Act, 1982*.<sup>49</sup> The week ended with a decision from the Ontario Superior Court requiring the release of residential schools documents under the Indian Residential Schools Settlement Agreement which required the Truth and Reconciliation Commission to create a complete historical record.<sup>50</sup> Why, one might ask, did it take a court order to get the government to comply with the mandate of a commission that it had established itself?

The effect of Idle No More's popularity can plainly be seen in NDP Aboriginal Affairs critic Jean Crowder's motion that the 2013 budget should focus on improving outcomes for Indigenous peoples and that treaty implementation should be effected with full and meaningful consultation "as required by domestic and international law". This received a rare unanimous vote.<sup>51</sup> But the government continued to rely on confrontational procedures and the next day it

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<sup>47</sup> *Hupacasath First Nation v. Minister of Foreign Affairs Canada and AGC*, Federal Court Trial Division T-153-13; Bains, Camille, "China-Canada FIPA: BC First Nation Wants Deal Ratification Stopped" *The Canadian Press*, 21 Jan, 2013 (accessed 7 Feb. 2013)

<sup>48</sup> CBC News, "Saganash tables private members' bill on UN Declaration on the Rights of Indigenous People" 26 Jan 2013, <http://www.cbc.ca>; For full text see: Jessica Gordon, "BILL C-469 Private Members Bill - Romeo Saganash" Idle No More, 1 Feb. 2013, <http://idlenomore.ca> (accessed 9 Feb. 2013)

<sup>49</sup> Backhouse, Constance, Wilton Littlechild, "Legislation must not erode aboriginal rights" *Ottawa Citizen* 29 Jan. 2013, <http://www.ottawacitizen.com>

<sup>50</sup> *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 (CanLII), <http://www.canlii.org/>; "Assembly of First Nations Welcomes Ontario Superior Court Decision to Disclose Documents to Truth and Reconciliation Commission" 30 Jan.2013 <http://www.afn.ca> (accessed 9 Feb. 2013)

<sup>51</sup> "That the House, recognizing the broad-based demand for action, call on the government to make the improvement of economic outcomes of First Nations, Inuit and Métis a central focus of Budget 2013, and to commit to action on treaty implementation and full and meaningful consultation on legislation that affects the rights of Aboriginal Canadians, as required by domestic and international law." Vote No.611,41<sup>st</sup> Parliament,1<sup>st</sup> Session, Sitting No 204, 5 Feb.2013, <http://www.parl.gc.ca>; "Assembly of First Nations Welcome All-Party Support for Treaty Implementation and Respect for Aboriginal Title and Rights" AFN, 7 Feb. 2013, <http://www.afn.ca> (accessed 9 Feb. 2013)

announced its appeal of the *Daniels* decision that had given Métis and non-status Indians federal rights.<sup>52</sup>

The week ended with scandal. Aboriginal Senator Patrick Brazeau regaled his fellow Conservatives with some very unstatesman like remarks about Chief Spence. Then he promptly got himself arrested for domestic violence.<sup>53</sup> As Ottawa pundits reiterated reasons why Aboriginal organizations had opposed Brazeau's appointment to the Senate in the first place, three Aboriginal Liberal Senators walked out of a meeting on the proposed *First Nations Accountability Act* saying the Conservatives continue to ignore the need for responsive consultation.<sup>54</sup> As for Idle No More, it had announced its partnership with Have a Heart Day naming February 14<sup>th</sup> a day of world wide support for Indigenous children and for ending violence against women and girls.<sup>55</sup>

The next week was marked by the release on February 13<sup>th</sup> of a Human Rights Watch report on the "Highway of Tears".<sup>56</sup> This sent Royal Canadian Mounted Police (RCMP) media relations experts back-pedaling in high gear. Despite years of publicity about missing and murdered Aboriginal women, there is still wide-spread fear of reporting incidents to the police for fear of retaliation and even abuse by police themselves. Indeed, the RCMP is currently facing several law suits as hundreds of current and former police women claim an atmosphere of intimidation and abuse in the work-place.<sup>57</sup> According to CBC Radio News, the McPhail commission of inquiry into the situation found that there is a general problem of bullying and abuse of authority within the force itself.<sup>58</sup> The week ended yet again with scandal. This time John Duncan, the Minister of Aboriginal Affairs, was forced to resign because of an "ethical

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<sup>52</sup>*Her Majesty the Queen and others v. Harry Daniels and others Federal Court of Appeal A-49-13*; "Ottawa to appeal court ruling that Metis, other natives are 'Indian'", CTV News, 6 Feb. 2013, <http://www.ctvnews.ca> (accessed 9 Feb. 2013)

<sup>53</sup> Harper, Tim, "Senator Patrick Brazeau crashes after years of boorish behaviour" *The Star*, Canada, 7 Feb. 2013 <http://www.thestar.com> (Accessed 9 Feb. 2013)

<sup>54</sup>Lunn, Susan, "Liberal senators walk out on Aboriginal Affairs minister" CBC News, 6 Feb. 2013, updated 7 Feb. <http://www.cbc.ca> (accessed 9 Feb. 2013).

<sup>55</sup> Gordon, Jessica, "On February 14<sup>th</sup>, Worldwide, We Are Idle No More". 5 Feb. 2013. <http://idlenomore.ca> (accessed 9 Feb. 2013)

<sup>56</sup> "Canada: Abusive Policing, Neglect Along 'Highway of Tears'", 13 Feb. 2013; *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, Human Right Watch, Feb. 2013. <http://www.hrw.org> (accessed 13 Feb. 2013)

<sup>57</sup> "Hundreds of women join RCMP harassment lawsuit", *The Canadian Press*, 30 July, 2012 (accessed 13 Feb 2013).

<sup>58</sup> CBC Radio News, Vancouver, 14 Feb. 2013, 8:30 am; Complaints Commission for Public Complaints against the RCMP, "Commission Releases Report on Investigation into RCMP Workplace Harassment", 14 Feb. 2013, <http://www.cpc-cpp.gc.ca> (accessed 14 Feb. 2013).

lapse”. He had written a letter to the Tax Court on behalf of a constituent. Some people thought Idle No More had played a role, but no mention was made of the even greater ethical lapses involved in the failure to respect the spirit and intent of treaties, the gross underfunding of education and welfare for children on reserves and the failure to investigate the disappearances and murders of Aboriginal women.<sup>59</sup>

With that, Canadian political life slipped slowly back into its usual pattern. The attention of the major news networks shifted to other stories. There were the usual crimes, fires and accidents. We got in-depth reports on Lululemon’s recall of inadvertently see-through yoga pants.<sup>60</sup> Then there was the European debt crisis. The world looks so different from the perspective of APTN, the Aboriginal People’s Television Network that has been exiled to remote channels that most people in Vancouver cannot find.<sup>61</sup> Idle No More cropped up in two or three stories almost every day and one can only wonder why the major networks did not pay more attention to the travails of the people of Lake St. Martin’s and Little Saskatchewan reserves who are still homeless two years after their houses were intentionally flooded to save the city of Winnipeg.<sup>62</sup>

On March 21<sup>st</sup>, the 2013 budget was released. Billed as an austerity budget, it ignored Jean Crowder’s call to focus on improving outcomes for Indigenous people that had received unanimous support just 6 weeks earlier. As AFN National Chief Shawn Atleo, observed “Budget 2013 makes reference to First Nations in almost every section, which suggests that the unprecedented attention and engagement of our peoples is beginning to be heard, but the investment just isn’t there.”<sup>63</sup> An unspecified amount was attributed to renovating the Parliament buildings, but not one penny was to be spent to correct the scandalous disparity of funding for the education and welfare of children on reserves.<sup>64</sup> Meanwhile, an Idle No More procession that

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<sup>59</sup> “Aboriginal Affairs Minister John Duncan resigns from cabinet”, CBC News, 15 Feb. 2013, <http://www.cbc.ca> (accessed 15 Feb. 2013)

<sup>60</sup> Wolochatiuk, Tim dir.; Jason Sherman ed, *We Were Children*, APTN 19/03/ 2013; Oswald, Brad, “We Were Children docudrama lays bare residential school horrors”, “Winnipeg Free Press” 03/19/2013.

<sup>61</sup> It is channel 155 on Telus and has been displaced by the Shopping and Horse Racing channels on Shaw.

<sup>62</sup> Compton, Francine, *aptn Investigates: Flood Fallout PART 1*, 05. FEB, 2013 <http://aptn.ca>

<sup>63</sup> “Assembly of First Nations Stands with all First Nations Peoples in Firm Call for Respect and Fairness” *CNW Canada News Wire* 21 March, 2013..<http://www.newswire.ca/> (21/03/2013)

<sup>64</sup> Stinson, Scott, “Everything you need to know about the 2013 budget, from cheaper clothes for baby to better weather forecasts”, *National Post*, 21/03/2013 <http://news.nationalpost.com>; APTN News panel, 21/03/2012; “Highlights from the 2013 federal budget: Deficit grows in the short-term but on track to balanced budget, says Flaherty”, CBC News, 21/03/2013 <http://www.cbc.ca>; Nerenberg, Karl, “Budget 2013: Welcome to workfare for First Nations in Canada”, *rabble.ca*, 22/03/2013, <http://rabble.ca>



had begun on January 16<sup>th</sup>, 2013 in tiny Whapmagoostui on Hudson Bay was due to arrive on Parliament Hill. After walking 1,500 kilometres through temperature that reached minus 50 C, the six Cree youths who began the trek had been joined by hundreds of others and gained a Facebook following of more than 30,000.<sup>65</sup> Just as the procession reached Ottawa, Harper skipped town to welcome the arrival in Toronto of two pandas he had borrowed from China.<sup>66</sup>

Such events demand reflection on some of the fundamental questions surrounding the status of Indigenous peoples in relation to Canada. What does “the rule of law” mean? Is Canada really a “free and democratic society”? What rights should Indigenous peoples have? Can a just and fair future be built on a colonial foundation? Do environmental issues unite us all? One thing is certain. The Idle No More movement is determined to change some of Canada’s most basic assumptions and practices.

## **Part II: History & Philosophy**

The determination manifested by Idle No More and the proliferation of pending court challenges is deeply rooted in parts of Canadian history that have yet to be fully explored. UNDRIP requires consultation with Indigenous peoples to be “in good faith” and “through their own representative institutions”, but we do not even know what those institutions are. Indeed, we have even lost sight of major changes in more recent Canadian institutional history as well. This invites us to probe more deeply into the misunderstandings underlying current inter-cultural relations.

### **2.1 The Philosophy of Idle No More**

Idle No More is not a movement that places Indigenous rights in opposition to settler society. According to Sylvia McAdam, her ancestors taught that we live in the age of Wesakechak, a

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<sup>65</sup> “Aboriginal Youth on Epic 1,500 Kilometre Walk to Parliament Hill, Expected to Arrive in Days” George Stroubouloupoulos Tonight, *CBC News*, 20 March, 2013 <http://www.cbc.ca>; The Quest of Wisjinichu-Nishiyuu, Quest for Unity, <http://nishiyuujourney.ca>

<sup>66</sup> “May Welcomes Indigenous Youth to Parliament Hill: Criticizes Panda’s Priority”. Green Party press release, 25 March, 2013, <http://elizabethmaymp.ca> ; Mertz, Emily, “Harper’s panda meeting sparks criticism” *Global News*, 25 March, 2013, <http://globalnews.ca>

benevolent trickster.<sup>67</sup> When a baby is born Wesakechak takes a piece of the Creator's flame and places it in the baby. This determines the person's characteristics, whether male or female, Cree or Polish, etc. but we are all part of the same original energy.<sup>68</sup> This view is consistent with the doctrine of the Medicine Wheel. As explained to Wanda John-Kehewin by her father, it has four directions because it contains the whole world: the mental, physical, spiritual and emotional; earth, air, fire and water; every plant and tree, every four-legged and two-legged animal and the stages of life that bring us through dependent infancy, youthful vigour and adult responsibility back to elderly dependence again. It also includes all races of people regardless of colour or belief.<sup>69</sup> In other words, Cree philosophy is fully consistent with the principle of equality that is fundamental to international law as it has been defined at the United Nations whose purposes, set out in Art 1(2) of its Charter are "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".<sup>70</sup>

Peace is a fundamental value for Idle No More. As explained by McAdam, the high Indigenous suicide rate is a sign that people are not at peace in their own families. In order to create peace, it is important to be united in one's own people. Moreover, the Cree concept of *wakewtewin* is much more comprehensive than the English language concept of kinship. As also described by the Medicine Wheel, it means we are related to everything, not just our human relatives. And so relations to the land are seen more in terms of stewardship than ownership.<sup>71</sup> We must thus find ways to make peace with what we in English would call "the environment".

In keeping with this world view, the injustices that accompanied colonization were characterized by a speaker at a Vancouver Idle No More teach-in as a 500 year Sun Dance – an ordeal sent by the Creator to make the people strong, a prayer for life and world renewal.<sup>72</sup> The genocidal character of the residential schools system that removed children from their families in a deliberate attempt to eradicate Indigenous cultures has gained increasing recognition.<sup>73</sup> Prime

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<sup>67</sup> "Native Languages of the Americas: Wesakechak Stories and other Cree Legends" <http://www.native-languages.org/cree-legends.htm> (accessed 7 Feb.2013)

<sup>68</sup> Schertow, John Ahni, "Cree Cultural Teachings by Sylvia McAdam" in *Intercontinental Cry*, 7 Jan. 2012 <http://intercontinentalcry.org/> (accessed 5 Jan. 2013).

<sup>69</sup> John-Kehewin, Wanda, "The Medicine Wheel" in *In the Dog House*, Vancouver: Talon Books, 2013, p 65-68.

<sup>70</sup> *Charter of the United Nations*, 1945 <http://treaties.un.org>

<sup>71</sup> Schertow, *supra* n.68.

<sup>72</sup> See eg. "Sun Dance", Native Americans On-line, <http://www.native-americans-online.com> (accessed 7 Feb. 2012)

<sup>73</sup> See eg. Dean Neu, Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People*. Halifax: Fernwood Publishing, 2003

Minister Harper himself issued an apology for the residential schools in 2003, stating on behalf of Canadians, “we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.”<sup>74</sup> The on-going over-representation of Indigenous people among child apprehensions and in prisons and the incessant failure of all levels of government to consult on matters affecting Indigenous rights support the charge that pressure to assimilate remains entrenched. Yet the eye-for-an-eye quest for retribution characteristic of the Old Testament in the Christian *Bible* and the Canadian *Criminal Code* is remarkably absent. The focus of Idle No More is on improving present and future relations. More than one supporter has referred in private to their elders’ prediction that Native Americans were meant to initiate a new world order, so the movement’s concerns are not limited to Indigenous rights.

The social values of Idle No More are resolutely egalitarian. None of the initiators have used its phenomenal popularity to become prominent in the media. None asked to participate in the much publicized meeting between the Prime Minister and the AFN. McAdam’s insistence that no person or organization could speak for the movement demonstrates that support for any particular person’s initiative does not bestow representative capacity. “From day one we wanted this to be something that was led by everyday people, a horizontal movement,” explained Tanya Kappo in Edmonton, while Quebec’s Melissa Mollen Dupuis pointed out that Idle No More has resisted attempts by the leaders of Aboriginal organizations to co-opt the movement because of its growing popularity.<sup>75</sup> As stated by Devon Meekis on the official Idle No More website: “There have been talks of getting leaders to lead, however, we are the leaders!!! Remember that!!!!”<sup>76</sup>

This places Idle No More at odds with Euro-American traditions that give Canadian society a vertical structure.<sup>77</sup> Prime Minister Harper sees himself as the personification of the Canadian state. Coupled with his assumption that social order is inherently hierarchical, it seems that he believes improved relations with Indigenous people will require him to take a more

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<sup>74</sup> Aboriginal Affairs and Northern Development Canada, “Statement of Apology – to former students of Indian Residential Schools” 11 June, 2008, <http://www.aadnc-aandc.gc.ca>

<sup>75</sup> Curtis, Christopher, “Idle No More founders distance themselves from chiefs”, Postmedia News, 1 Jan. 2013. <http://www.calgaryherald.com> (accessed 9 Jan 2013)

<sup>76</sup> Meekis, Devon, “Face and Leaders of Idle No More is the Grassroots People” 3 January, 2013 <http://idlenomore.ca/> (accessed 6 Jan. 2013). See also Kinew, Wab, “Declaration of Dedication” Wab Kinew Blog, <http://wabkinew.ca> (accessed 12 Feb. 2012)

<sup>77</sup> See eg. John Porter *The Vertical Mosaic: An Analysis of Social Class and Power in Canada*, Toronto: University of Toronto Press, 1965.

“hands-on” approach and engage in “high level” talks. But his hands have already been overly engaged as seen in the top-down Bill C-45 process. Idle No More has specified that “the vision of this grassroots movement does not coincide with the visions of the Leadership... While we appreciate the individual support we have received from chiefs and councilors, we have been given a clear mandate ... to work outside of the systems of government and that is what we will continue to do.”<sup>78</sup>

This concept of Idle No More’s role may be derived in part from half-forgotten Indigenous institutions that were ignored or repressed during the colonization process. Sylvia McAdam has mentioned the *Okicitaw Iskwewak* as part of her campaign to revitalize knowledge of Cree law. It seems to have been a nine-woman lodge that held authority over treaty making and was driven underground by the *Indian Act*. There is no equivalent institution in Anglo-Canadian culture and translations of *Okicitaw Iskwewak* as “warrior women” or “clan mothers” do not give a satisfactory account of their role.<sup>79</sup> However, the importance of the somewhat similar *Gantowisas* (women acting in their official capacities) in Haudenosaunee or Iroquoian cultures has been remarked upon in the *Jesuit Relations* (1656-1657) and other early reports.<sup>80</sup> Indigenous consultation protocols can be far more comprehensive than parliamentary procedure.<sup>81</sup> Once one becomes aware of this background, it is easy to understand Indigenous outrage at Canada’s failure to engage in even the most superficial pretense at Indigenous inclusion in decision-making procedures.

There is, accordingly, a fundamental difference between Harper’s top-down concept of how things should work and that of Idle No More, whose members recognize, respect and value the existence of multiple points of view. “The Chiefs have called for action and anyone who chooses can join with them, however this is not part of the Idle No More movement” they insisted in the days leading up to the January 16<sup>th</sup> blockades organized by some of the more

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<sup>78</sup> Curtis, Christopher, “Idle No More founders distance themselves from chiefs”, Postmedia News, 1 Jan. 2013. <http://www.calgaryherald.com> (accessed 9 Jan 2013)

<sup>79</sup> McAdam, Sylvia, “Nehiyaw weyeswewna (Cree Laws) - Revitalizing Okicitaw Iskwewak as Part of the Treaty Understanding”, *You Tube*, “Idle No More Alberta – Sylvia McAdam” 3 Dec 2012 <http://www.youtube.com/watch?v=pKJ4mW5urgU> (accessed 5 Apr. 2013)

<sup>80</sup> Johansen, Bruce E., Barbara A. Mann eds., *Encyclopedia of the Haudenosaunee (Iroquois Confederacy)*, Westport Connecticut, Greenwood press, 2000 at p.105, Mann, Barbara Alice, *Iroquoian Women: the Gantowisas*, New York: Lang, 2000.

<sup>81</sup> See eg. A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* [originally New York State Museum Bulletin: 184 (Albany:University of the State of New York, 1916)] (Ohsweken, Ontario: Iroqrafts, 1991). Annemarie Anrod Shimony, *Conservatism Among the Iroquois at the Six Nations Reserve* (Syracuse, N.Y: Syracuse University Press, 1994).

militant chiefs.<sup>82</sup> This inter-cultural mismatch concerning the meaning and importance of “leadership” and “chiefs” lies at the root of what many see as a deliberate snub of Indigenous peoples by the Conservative administration. The most charitable spin one can put on the situation is that they have yet to fully understand just what, exactly, is required to fulfill Indigenous demands for consultation.<sup>83</sup>

There is also a significant difference between Idle No More and many previous Indigenous rights movements. Their inclusion of Canadians as allies re-establishes the ethos of the fur-trading era. Idle No More’s concept of leadership by the people corresponds to that seen in the iconic Oka crisis of 1990 where a Quebec police officer asked “Are you the leader?” and Johnny Cree responded, “No. I’m just a spokesperson. There is no leader. The people lead.”<sup>84</sup> However, unlike the road and rail blockades that characterized Indigenous protests in the wake of Oka, Idle No More opposes confrontational tactics. It accepts members of the settler society as part of creation and its values are shared by environmental and human rights organizations as well as unions. Thus significant support can now be found within Canadian society. Alliances have been formed on various issues such as opposition to the Enbridge pipeline, resource exploitation by foreign companies without benefitting the local population and boycotts of Atlantic salmon raised in Pacific feedlots where local fish have no resistance to their diseases.<sup>85</sup>

Adapting to past experience, Idle No More has also seen the futility of stand-offs that culminate in public violence. On December 17th, 2012 the Confederacy of Treaty No. 6 First Nations issued a press release saying that they did not recognize the legality of any laws passed by the government of Canada” because they had been implemented without consultation.<sup>86</sup> But

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<sup>82</sup> Curtis, *ibid.*

<sup>83</sup> For a more comprehensive discussion of possible reasons for this cognitive impairment see Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada*, Vancouver: UBC Press, 2011, notably pp 112-124.

<sup>84</sup> Maclaine, Craig, Michael Baxendale, “This Land is Our Land: The Mohawk at Oka”, Montreal: Optimum Publishing International Inc., 1990 p. 17. RE Oka see also Geoffrey York, Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka*, Toronto: Little Brown (Canada), 1991.

<sup>85</sup> cmclean, “Idle No More march takes unexpected turn in Duncan” CTV News, 8 Feb. 2013, <http://www.ctvvancouverisland>; “Salmon Feedlot Boycott at Walmart Eagle Landing Shopping Centre in Chilliwack” ECO/Huff Strategy, Jan 30th, 2013 <http://www.huffstrategy.com> (accessed 9 Feb. 2013)

<sup>86</sup> Norrell, Brenda, “Treaty Six First Nation says 'No' to Canada's laws violating Indigenous rights” *Censored News*, 17 Dec. 2012, <http://bsnorrell.blogspot.ca> (accessed 9 Feb. 2013).

there has been remarkably little sabre rattling of this kind. McAdam insists that she opposes the *Indian Act*, but she does not support abolition or change without comprehensive consultation.<sup>87</sup> Even Chief Nepinak, who had spoken of bringing the Canadian economy to its knees, conceded that “We can’t win in any kind of environment where we’re using force.”<sup>88</sup> So, blockades thus far have not lasted long and when police are called or court injunctions obtained, the protesters typically disperse before anyone is arrested. The methodology is not unlike that used by the Maori in 19<sup>th</sup> century New Zealand who confounded British soldiers by avoiding any meeting on the battlefield.<sup>89</sup> They are not playing by the colonizers’ rules.

## 2.2 “Attacks on Democracy”

### How Bill C-45 violates traditional Canadian legislative process

Bill C-45 was the spark that set off the Idle No More movement. “It’s a complete dog’s breakfast,” complained Liberal MP Ralph Goodale, “calculated to be so humongous...that it cannot be intelligently examined...by a conscientious Parliament. Worse still, routine matters and positive measures are interwoven willy-nilly with destructive and contentious issues so that at the end of the day there can be no clear vote on anything”.<sup>90</sup> Official Canadian explanations say that the passage of a bill into law requires *Committee Consideration*: “After a detailed analysis of the bill, often involving the hearing of witnesses, and a clause-by-clause study, the committee reports the bill back to the House of Commons.”<sup>91</sup> The omnibus bill procedure made this impossible but, despite the sense that the Conservative majority had subverted the very purpose of Parliament; Canadians in general seemed resigned to wait until the next election to rectify the situation.

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<sup>87</sup> McAdam, Sylvia, “Nehiyaw weyeswewna (Cree Laws) - Revitalizing Okicitaw Iskwewak as Part of the Treaty Understanding”, *You Tube*, “Idle No More Alberta – Sylvia McAdam” 3 Dec 2012  
<http://www.youtube.com/watch?v=pKJ4mW5urgU> (accessed 5 Apr. 2013)

<sup>88</sup> “Blockades mark Idle No More in Manitoba: CN Rail obtains court injunction as blockade takes over tracks”, CBC News, 16 Jan. 2013, <http://www.cbc.ca> (accessed 9 Feb. 2013)

<sup>89</sup> James Belich, *The Victorian Interpretation of Racial Conflict*, Toronto: McGill-Queen’s University Press, 1986.

<sup>90</sup> Ralph Goodale Wascana, SK 25 Oct. 2012. Canada, House of Commons Hansard #169 of the 41st Parliament, 1st Session, <http://www.parl.gc.ca>

<sup>91</sup> Government of Canada, Legisinfo, Frequently Asked Questions, “5. How Does a Bill Become Law?”  
<http://parl.gc.ca/LegisInfo> (accessed 7 Jan. 2013)

Although the opposition parties did not know how to mount a legal challenge, Indigenous lawyers did. Several Supreme Court of Canada decisions had supported the “duty to consult”.<sup>92</sup> UNDRIP, so reluctantly ratified by Canada, established the standard of “free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Art. 19). Bill C-45 was doing an end-run around all of these hard won standards. As Pamela Palmater, one of the early Idle No More spokespersons observed, “Just as the early days of contact when the settlers needed our help to survive the harsh winter months, and seek out a new life here, Canadians once again need our help.”<sup>93</sup> It did not take long for the Mikisew Cree and Frog Lake First Nations to file for judicial review.

However Bills C-38 and C-45 are not the only pieces of legislation passed by Harper’s Conservatives that upset Indigenous peoples.<sup>94</sup> The *First Nations Elections Act*, the *Safe Drinking Water for First Nations Act*, the *First Nations Accountability Act*, the *Family Homes on Reserve and Matrimonial Interests or Right Act*, the *Interpretation Act*, the list goes on. All affect Indigenous interests. Consultation, if at all, has only been with the government’s choice of Indigenous representatives. All ignore Indigenous jurisdictions and the need to consult the bands affected.<sup>95</sup> As for the private members bill, C-428, *The Act to Amend the Indian Act and to Provide for its Replacement*, many see this as an attempt to sidestep Harper’s promise not to unilaterally amend the *Indian Act* and several Indigenous representatives have pointed out that Conservative MP Rob Clarke’s Indigenous ancestry does not absolve him from the duty to consult.<sup>96</sup>

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<sup>92</sup> Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004]; Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004]; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005]; R. v. Kapp, 2008 SCC 41, [2008]; Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010]; Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010]; Ontario (Attorney General) v. Fraser, 2011 SCC 20, [2011], <http://www.canlii.org/>. See Thomas Isaac and Anthony Knox. “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49. <http://www.mccarthy.ca>

<sup>93</sup> Palmater, *supra* n.15.

<sup>94</sup> Rabson, Mia, “A guide to the Idle No More movement, treaties and legislation” *Winnipeg Free Press*, 26 Jan, 2013 <http://www.winnipegfreepress.com>

<sup>95</sup> Shanks, J. Douglas, Jordan R.D. Lester, “Bill S-6 and the First Nations Elections Act: The Modernization/Paternalization of Voting under the Indian Act” 15.3 *Ontario Bar Association, Aboriginal Law Section*, July 2012, <http://www.oba.org>; “Water and Wastewater”, *Assembly of First Nations*, <http://www.afn.ca>; Gordon, Jessica, “History of Idle No More Grassroots Movement – Idle No More” 10 Jan. 2013 *Idle No More – “About us”* <http://idlenomore.ca> (accessed 12 Feb.2013)

<sup>96</sup> Barnes-Connell, Valerie G. “LLRIB calls on MP Rob Clarke to stop his private bill to repeal the Indian Act”, *The La Ronge Northerner*, 11 Feb. 2013 (accessed 12 Feb. 2013)

A serious question lies buried beneath the general feeling of public discontent represented by these protests: Does procedural compliance make something “law” even when this has been accomplished by doing an end-run around democratic principles? As observed by Regena Crowchild, a treaty consultant with the Tsuu T’ina nation, “They want to amend the *Indian Act* without consulting us. All this legislation is just moving towards making us ordinary Canadians with no treaty rights.”<sup>97</sup> As McAdam sees it, Harper’s government “wants to legislate us into extinction”.<sup>98</sup>

It may seem ironic that Canadians must now rely on this colonized minority to defend democratic principles, but the same hazy approach to history that has made it possible to ignore Indigenous sovereignty has impacted understanding of half-remembered British traditions. British history incorporates two contradictory concepts of law. One is based on the use of force as seen in the 1066 establishment of Norman law by William the Conqueror, the adventures of warrior princes and the enterprises of the colonial age. The other champions popular rights through principles like equality before the law, due process and the monarch’s obligation to protect the laws of the land, even to the extent of allowing a conquered colony like Quebec to keep its own laws.<sup>99</sup>

The law of conquest and aggrandisement was rejected in principle at the League of Nations and through the decolonization movement of the twentieth century. As stalwart promoters of the League of Nations, the United Nations and other human rights initiatives, Canadians tend to feel smugly secure in their democratic credentials.<sup>100</sup> However, the Harper administration’s expansive use of archaic prerogative powers has been supported by the Supreme Court of Canada. In *Friends of the Earth v Canada*, the Federal Court found that the Minister was permitted to formulate a climate change plan that did not accord with Canada’s Kyoto commitments. Leave to appeal was denied and a reformulated challenge was dismissed.<sup>101</sup> In the *Khadr* case the S.C.C. even ignored the *Convention against Torture* and the *Convention on the*

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<sup>97</sup> Wherry, Aaron, “Where #Idle No More began” *Macleans.ca*, <http://www2.macleans.ca> (accessed 9 Feb.2013)

<sup>98</sup> McAdam, Sylvia, “Nehiyaw weyeswewa (Cree Laws) - Revitalizing Okicitaw Iskewewak as Part of the Treaty Understanding”, *You Tube*, “Idle No More Alberta – Sylvia McAdam” 3 Dec 2012 <http://www.youtube.com/watch?v=pKJ4mW5urgU> (accessed 5 Apr. 2013)

<sup>99</sup> For discussion see Woo, *Ghost Dancing with Colonialism*, *supra*. n.83.

<sup>100</sup> See eg. McLachlin, Beverley “Remarks of the Right Honourable Beverley McLachlin, P.C. Globalization, Identity and Citizenship October 26, 2004”, <http://www.scc-csc.gc.ca> (accessed 12 Feb. 2013)

<sup>101</sup> *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 (CanLII); *Turp v. Canada (Attorney General)*, 2012 FC 893 (CanLII) <http://www.canlii.org>



*Rights of the Child* to overturn a lower court order requiring the government to ask for the repatriation of a Canadian youth illegally detained in Guantanamo.<sup>102</sup>

In Britain, by contrast, the 21st century began with a comprehensive analysis of the country's "democratic deficit". This culminated in a reorientation away from hierarchical structures including a reduction in the use of prerogative powers, increased transparency, and reforms to improve consultative processes with the citizenry including establishment of legislative assemblies for Scotland, Wales and Northern Ireland.<sup>103</sup> Thus, in spite of the fact that Canada's constitution was founded on British tradition, it is now moving in the opposite direction. Instead of instituting reforms to decolonize Indigenous peoples and bring the country into closer alignment with the affirmation of democratic principles asserted in the preamble to the *Constitution Act, 1982*, it is reviving the prerogative powers that characterized the worst aspects of feudal society. And, with the exception of Idle No More, there seems to be relatively little power to prevent this erosion or even consciousness of the serious nature of what is going on. As observed by the Voices-Voix coalition, the avalanche of detailed technical assaults on established democratic processes is difficult for most members of the public to understand.<sup>104</sup>

Of course, Canada is not the only state confronted with competition between mining interests and ecological forms of land use.<sup>105</sup> Nor are we the only society faced with the task of up-dating our laws to protect Indigenous rights. As with Indigenous peoples here, the Sámi were already living on the lands of Norway, Sweden and Finland when present State boundaries were established. Old proprietary doctrines used cultivation as the standard for land rights based on immemorial usage (alders

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<sup>102</sup> *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII); *Canada (Prime Minister) v. Khadr*, 2009 FCA 246 (CanLII), [2010] <http://www.canlii.org>; *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, ("UNCAT"); *Convention on the Rights of the Child*, Canada, 28 May 1990, 1577 U.N.T.S. 3, Can. T.S. 1992. See Grace Li Xiu Woo, "How the Supreme Court of Canada undermined the Convention on the Rights of the Child in the Case of Omar Khadr" in Janice Williamson ed. *Omar Khadr, Oh Canada*, Montreal: McGill-Queens University Press, 2012.

<sup>103</sup> House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report of Session 2003–04, HC 422, London, The Stationery Office Limited, 16 March 2004; *The Governance of Britain* presented to Parliament, July 2007 by the Secretary of State and Lord Chancellor, <http://www.official-documents.gov.uk/>; Ministry of Justice, UK, *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, U.K. October 2009) <http://www.peeraage.org> (accessed 12 Dec. 2012)

<sup>104</sup> See eg. "Petition to support the Declaration of the Voices-Voix Coalition" Voices-Voix- Defending advocacy and dissent in Canada. <http://voices-voix.ca> (accessed 12 Feb. 2013)

<sup>105</sup> See eg. Ravna, Øyvind, "Legal and political challenges in governance of Northern natural resources" *Arctic Review on Law and Politics*, vol. 3, 2/2011 p. 135–137. ISSN 1891-6252; Elvestad Christel, Frode Nilssen and Ludmila Ivanova, "The New Paradigm for Nature Protection: A Model for Russia's High North?" *Arctic Review on Law and Politics*, vol. 3, 2/2011 p. 199–221. ISSN 1891-6252

tids bruk) in Norway, and immemorial prescription (urminnes hävd) in Sweden and Finland. Thus, during most of the 1900's, it was simply assumed that the wide-ranging use by semi-nomadic Sámi reindeer herders did not result in ownership of land and resources. However, in 2001, the Norwegian Supreme Court found that the rightful owners of the land were the local population of Sámi majority in northern Svartskogen, not the State. Similarly, in 2007, the Swedish court of appeal in the *Nordmaling* case upheld reindeer herding rights on private lands. In Finland, the doctrine that reindeer herding rights originate in immemorial prescription is now considered to mean that it is not dependent on statutory recognition for its existence.<sup>106</sup> The Reindeer Herding Rights Commission for Western Finnmark is doing interesting work to define and protect the work of herders. While Canada has barely recognized a duty to consult, they are drawing on elders stories and traditional knowledge in an attempt to balance state and indigenous values. This is no easy task for reindeer have minds of their own. Their movements shift with seasonal and ecological variations and they have no concern for human regulatory assumptions. It may accordingly be impossible to fix some rights in terms of geographic boundaries.<sup>107</sup> Considerations like these make it obvious that Canada will need, not only to re-invigorate the consultative capacity of Parliament, but also to develop new institutions that can accommodate comprehensive long-term collaboration if it is to uphold democratic standards for Indigenous peoples.

## 2.3 Indigenous Sovereignty

### Why Chief Spence and others insist on meeting the Governor General

To many Canadians, as with the Queen herself, Chief Spence's insistence that resolution of Indigenous complaints requires the participation of the Governor General seems somewhat misguided. The Governor General, like the Queen, is considered to play a purely ceremonial role. Yet Spence was supported on this issue by many prominent Indigenous leaders. This is because the treaties their ancestors signed were made with Queen Victoria - "Her Most Gracious Majesty the Queen of Great Britain and Ireland" or, in the case of Attawapiskat and other signers of *James Bay Treaty No. 9*, King Edward VII, "His Most Gracious Majesty".<sup>108</sup> Although treaty signing was conducted by commissioners from the "Dominion of Canada", a "Dominion" was

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<sup>106</sup> Allard, Christina, "The Nordic countries' law on Sámi territorial rights", *Arctic Review on Law and Politics*, vol. 3, 2/2011 p. 159–183. ISSN 1891-6252

<sup>107</sup> Sara, Mikkel Nils, "Land Usage and Siida Autonomy", *Arctic Review on Law and Politics*, vol. 3, 2/2011 p. 138–158. ISSN 1891-6252

<sup>108</sup> For texts of the treaties see: Aboriginal Affairs and Northern Development Canada, <http://www.aadnc-aandc.gc.ca>

defined as a colony and considered part of what the historian J.R. Seeley referred to as “Greater Britain”.<sup>109</sup> And so the party offering the treaty was the monarch of Great Britain.

This is confirmed by Indigenous oral tradition. Attawapiskat, located near the shores of James Bay, is so far north that it managed to avoid the diseases and social chaos that tended to accompany colonization until the beginning of the 20<sup>th</sup> century. However, as miners and geological surveyors began to penetrate the region, there was talk of building a northern railroad and treaty commissioners were sent to secure control.<sup>110</sup> In 1975, the International Court of Justice affirmed in the *Western Sahara* case, that even when a territory’s occupants were stateless nomads, incorporation in a state had to “be the result of the freely expressed wishes of the territory’s people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage”.<sup>111</sup>

This standard was not met when treaties with Indigenous peoples were negotiated. According to one band that signed Treaty 9, the treaty commissioners appeared on August 3<sup>rd</sup> 1905 and Duncan Campbell Scott proclaimed, “I am here under the British Government”. The next day, he announced that Britain would take care of their land for them. They would be given \$8 per person per year and a yearly visit from a doctor. No legislation would interfere with their hunting, trapping and fishing and, if they were ever in need, help would be provided. “This will be all for now; I will give you one hour to think it over. If you do not accept this treaty, the government will do whatever it wants with you.”<sup>112</sup> Could this possibly be conceived as informed consent?

The English text plainly states, “the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights titles and privileges whatsoever, to the lands included within the following limits...” Yet, the Indigenous signers had to rely on interpreters and their languages did not conceptualize the world in English legal terms. They did not think they were giving up self-government or what we call “sovereignty”. Indeed, less than a decade later, the League of

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<sup>109</sup> Lord Hailsham of St. Marylebone, *Halsbury’s Laws of England*, 4<sup>th</sup> ed. ,vol.10, London: Butterworth’s, 1996 para 856; J. R. Seeley, *The Expansion of England*, University of Chicago Press, 1971 reprint of 1883.

<sup>110</sup> Morrison, James, “Treaty Research Report - Treaty No. 9 (1905-1906)” Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986. Aboriginal Affairs and Northern Development Canada, <http://www.aadnc-aandc.gc.ca> (accessed 9 Jan 2013)

<sup>111</sup> *Western Sahara Advisory Opinion*, 16 Oct. 1975. <http://www.icj-cij.org>

<sup>112</sup> Morrison, *supra* note 110.

Nations' Permanent Court of International Justice ruled that calling an agreement a "treaty" presupposed that sovereignty remained intact.<sup>113</sup> And, in 1897, the Judicial Committee of the Privy Council held that the treaties with "Indians" were contracts.<sup>114</sup> They did not include clauses permitting assignment. Marriage contracts do not permit anyone to substitute their son or anyone else in the role of husband. Why should these treaties permit Britain to unilaterally abdicate its responsibilities in favour of Canada? Especially without the knowledge or consent of the other party?

Recently someone discovered the diary of George McMartin, the Treaty Commissioner for Ontario, gathering dust in an archive. His account confirms oral Indigenous versions of what they were told.<sup>115</sup> So there is some basis for the Manitoba Chiefs' claim that the British Crown has a direct responsibility for Canada's First Nations. From their perspective, Ellen Gabriel was right when she charged that the Queen was "shirking her responsibilities" in her letter to Jonathan Francoeur.<sup>116</sup>

## 2.4 The Emergence of Canada from the British Empire

In 1959, when Queen Elizabeth visited Ottawa, I was a Girl Guide. As we entered the agricultural exhibition grounds where she was to appear, we were numbered off and some girls had red or white papers pinned to the backs of their blue uniforms. Then we trooped before the Queen and everyone crouched down with their backs up to form the Union Jack, that iconic blending of the flags of England, Scotland and Wales. There was something vaguely off about the exercise. I had not yet learned of the refusal of British envoy Lord Macartney to kow tow to China's Emperor Qian Long in 1793, but that is precisely what we were doing. We were kow towing.<sup>117</sup>

Canada stopped using the red ensign that incorporated the Union Jack when it instituted its own flag in 1965. By the time I went to law school in the late 1980's not a word was said about Canada's place in Britain's imperial constitution. The last time I attended July 1st Canada

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<sup>113</sup> Case of the S.S. "Wimbledon", 1923, PCIJ. <http://www.worldcourts.com> (accessed 12 Feb. 2013)

<sup>114</sup> *Robinson Treaty Annuities case* (1897) A.C. 199 (UK) at 204 per Lord Watson.

<sup>115</sup> Long, John S. *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, Montreal: McGill-Queen's University Press, 2010; "George MacMartin's Big Canoe Trip", *Ideas with Paul Kennedy*, CBC Radio, 19 Dec. 2011, <http://www.cbc.ca> (accessed 9 Jan, 2013)

<sup>116</sup> "Manitoba chiefs pledge unity as Spence continues fast", *CBC News*, 18 Jan.2013, <http://www.cbc.ca> (accessed 9 Feb. 2013).

<sup>117</sup> *Encyclopedia Britannica*, "kow tow" <http://www.britannica.com> (accessed 13 Feb. 2013)

Day fireworks in Ottawa the streets were full of young people waving the maple leaf flag with the patriotic fervor of Americans. What happened? And how could things change so surreptitiously? Canada has never had an independence movement. In my youth we were proud, or relieved at least, to be heirs to the British Empire that we took to be the largest and most civilized of governmental orders.<sup>118</sup> I had trouble understanding at first why the Six Nations (near Brantford, Ontario) kept insisting that they were “allies not subjects of Britain”. That is when I began to investigate Canadian constitutional history and the implications of its assumption of statehood.

### 2.4.1 The Coronation Oath

One of the reasons for the easy expansion of the British Empire was its legal format. Unlike modern states that are territorially defined, the British constitution was conceived in terms of personal relationships established through the Oath of Allegiance and the Coronation Oath - reciprocal promises derived from feudal custom. Each subject owed loyalty and obedience to the monarch through the Oath of Allegiance. In return, the monarch owed protection to his or her subjects through the Coronation Oath.<sup>119</sup> According to the rationale of this constitutional set-up, the state was not confined to the British Isles for the English carried their law with them wherever they went – somewhat like the reindeer of Finnmark, one might say. The oath actually sworn by Queen Elizabeth II promised “to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon, and of [her] Possessions and other Territories to any of them belonging or pertaining, according to their respective laws and customs”.<sup>120</sup>

This principle of British administration is one of the reasons why Canada is not a unitary state. Britain’s constitutional arrangement is capable of recognizing many forms of internal sovereignty. In the case of Canada, the entity that was eventually recognized as an independent state began in 1867 with the confederation of the eastern British North American colonies that had remained loyal to Britain following the 1776 American Revolution. Called the “Dominion of

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<sup>118</sup> In 1883, John Robert Seeley, a British minister, published *The Expansion of England*, an immensely popular account of the British Empire that remained in print until the mid 29<sup>th</sup> century. He was not a lawyer and his book does not explain the legal structures underlying his theory.

<sup>119</sup> Lord Hailsham of St. Marylebone, *Halsbury’s Laws of England*, 4<sup>th</sup> ed. ,vol.8(2), London: Butterworth’s, 1996 para 26; Maer, Lucinda and Oonagh Gay, “The Coronation Oath” (Britain: House of Commons Library, Parliament and constitution Centre, 2008) <http://www.parliament.uk/> (accessed 18 Jan. 2013)

<sup>120</sup> Appendix B: Text of the oath taken by Elizabeth II in 1953 in Maer and Gay, *ibid*.

Canada”, it allowed most of the laws and customs of the original colonies to remain intact. Thus Nova Scotia and Prince Edward Island, like the conquered French of Quebec, became separate “provinces”, retaining legislative authority over “Matters of a merely private or local nature” such as education and hospitals. The newly created federal level of government dealt with matters of common concern including the military, the postal service, weights and measures, naturalization and aliens and, by s. 91(24), “Indians, and Lands reserved for the Indians”.<sup>121</sup> The purpose of Confederation was to “promote the Interests of the British Empire”.<sup>122</sup>

The first issue this constitutional format raises regarding the status of Indigenous peoples concerns whether they ever actually became British subjects. After all, if they were subjects, then surely the Crown should have protected “their respective laws and customs” to create Indigenous provinces. As a practical matter, English law applied only to Englishmen during the first centuries after contact when visits were intermittent and brief. Although inter-cultural trade developed over time, the first colonial settlements were small and isolated. Indigenous peoples continued to live according to their own rules that were only marginally understood by the colonists. It was only in the late 18<sup>th</sup> century, after the end of the Anglo-French wars and American independence that the repopulation of North America began in earnest.<sup>123</sup>

Subject status may be gained by conquest, as happened to the people of Quebec, or by swearing allegiance. But most of Canada’s First Nations were not conquered and accounts of “Indians” swearing oaths of allegiance are conspicuously missing from the historical record. Such ceremonies were certainly not part of the reported treaty signing process.<sup>124</sup> The British initially recognized that the people they called “Indians” were not subjects of their monarch. Thus in 1719, Royal Instructions to the Governor of Nova Scotia expressed the hope that the “Indians...may be induced by degrees not only to be good neighbours to our subjects but likewise to become good subjects to us”.<sup>125</sup> Similarly, the *Royal Proclamation, 1763* refers to the

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<sup>121</sup>*The British North America Act, 1867*, (BNA Act) U.K. 30 & 31 Vict. C.3, renamed the *Constitution Act, 1867* in 1982. Federal and provincial “heads of power” are listed in ss. 91 and 92.

<sup>122</sup> *Ibid.* Preamble and s. 132.

<sup>123</sup> Trigger, Bruce G., “The Historian’s Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present” (1986) 67.3 *Can. Hist. Rev.* 315; Dussault, René, Georges Erasmus co-chairs, Royal Commission on Aboriginal Peoples (RCAP), *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, Ottawa: Minister of Supply and Services.

<sup>124</sup> Canada, *Indian Treaties and Surrenders, from 1680 to 1890*, Ottawa: Queen’s Printer, 1891 reprint Fifth House Publishers, 1992.

<sup>125</sup> Dussault, *supra* n. 123 at 14.

occupants of conquered colonies as “subjects” but does not apply this term to “Indians”.<sup>126</sup> However, as population balances shifted, the colonists began to ignore Indigenous peoples and Sir William Johnson, the first Superintendent of Indian Affairs (1755-1774) found it necessary to remind British administrators repeatedly that the “Indians” were allies, not subjects.<sup>127</sup>

By the 19<sup>th</sup> century, Anglo-Canadian administrators simply assumed that “Indians” were British subjects. Huge areas of the globe were painted pink to represent British dominion even though some regions had never so much as been visited by an Englishman, let alone being properly mapped. On the great central plains where the buffalo roamed, a hybrid society known as “Métis” had developed, formed through the co-operative efforts of European and Indigenous fur traders. In 1869 Louis Riel’s *Declaration of the People of Rupert’s Land and the North-West* argued that the Métis were British subjects but not under the authority of Canada.<sup>128</sup>

It is important to remember that before confederation the name “Canada” was only applied to what is now Quebec and part of Ontario. Communications were poor. Letters from London might be received only once or twice a year in the north and far west. In the east, the original nations that lived in closer proximity with the burgeoning settler population were becoming invisible.<sup>129</sup> Regular ceremonies to “polish the Covenant Chain” that had ensured consultation in an earlier age, had ended in 1858.<sup>130</sup> Thus, John A. MacDonald, Canada’s first Prime Minister, named William MacDougall Lieutenant-Governor of the North-West Territories.

Confronted with the Métis assertion of independence, MacDougall, one of the Fathers of Canadian Confederation, first forged Queen Victoria’s signature on a proclamation he cooked up, then sent for troops. Eventually Riel was hung for treason, though he may have been the only Indigenous leader ever to claim British subject status.<sup>131</sup> In the 1920’s, when the Haudenosaunee Six Nations attempted to prove that they were *not* British subjects, they were denied access to

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<sup>126</sup> *Royal Proclamation, 1763* (U.K.) R.S.C. 1970 Appendix II, No.1. See The Avalon Project, Yale Law School, <http://avalon.law.yale.edu>

<sup>127</sup> See eg. Walters, Mark, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall” (2001), 24 *Dalhousie Law Journal* 75-138.

<sup>128</sup> “Declaration of the People of Rupert’s Land and the North-West”, 9.3 *Manitoba Pageant*, April 1964, The Manitoba Historical Society, <http://www.mhs.mb.ca> (accessed 13 Feb. 2013)

<sup>129</sup> Trigger, Bruce G., “The Historian’s Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present” (1986) 67.3 *Can. Hist. Rev.* 315; *Natives and Newcomers: Canada’s “Heroic Age” Reconsidered* (Montreal: McGill-Queen’s University Press, 1985).

<sup>130</sup> Walters, Mark D., “The “Golden Thread” of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill L. J.* 711.

<sup>131</sup> “William MacDougall” Library and Archives Canada, <http://www.collectionscanada.gc.ca> (accessed 13 Feb. 2013); Joseph Kinsey Howard, *Strange Empire: The Story of Louis Riel*, Toronto, Swan Publishing, 1952.

any court or tribunal. A young Winston Churchill even sent them a letter similar to the one recently received by Jonathan Francoeur from Queen Elizabeth.<sup>132</sup> And so, in spite of the historical evidence – or lack of it – Indigenous peoples were denied any opportunity to prove their independence or ownership of land according to British legal parameters. Indeed, in 1927 the *Indian Act* was revised to prohibit them from hiring lawyers.<sup>133</sup>

If we return to take a look at the Indigenous “laws and customs” that should have been protected if “Indians” ever were British subjects, we find that the initial distinction between “Indians” and “subjects” corresponds both to oral tradition and early settler accounts. Indigenous peoples typically did not understand the concept of subjection and their political organizations were usually federal rather than hierarchical. According to the *Two Row Wampum*, considered by the Haudenosaunee/Iroquois to be one of the earliest inter-cultural accords, relations between Europeans and natives were compared to two ships travelling separate paths on a river. This was possible because both polities were relationally rather than territorially defined.<sup>134</sup> Like the European international law principle of non-interference in the internal affairs of other states, each was to function independently. This may explain why there were no Indigenous Fathers of Confederation. Close relations had developed between some of the eastern nations and settler society so it is unlikely that the Haudenosaunee, for example, were unaware of the changes being made to grant the colonists greater autonomy within the British Empire. But the Haudenosaunee preferred their own canoe to the settler’s boat – just as the Kanienkehaka/Mohawks refuse to this day to vote in Canadian elections.<sup>135</sup>

In any event, Canada quite plainly did not understand or respect Indigenous laws and customs. After it attained quasi independent “Dominion” status it interpreted s.91(24) of the *British North America Act* as the grant of authority to make laws *for* “Indians”, not to negotiate

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<sup>132</sup> Woo, Grace Li Xiu, “Canada’s Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations”, LGD 2003(1), <http://www2.warwick.ac.uk>

<sup>133</sup> *Indian Act, 1927*, R.S.C. c. 98 (17 Geo. V) s.141.

<sup>134</sup> Much has been written about Haudenosaunee/Iroquois social order. See eg. Henry Lewis Morgan, *League of the Ho-de-no-sau-nee, Iroquois*, Rochester, N.Y., Sage and Brother, 1851; A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* [originally New York State Museum Bulletin: 184 (Albany:University of the State of New York, 1916)] (Ohsweken, Ontario: Iroqrafts, 1991). Annemarie Anrod Shimony, *Conservatism Among the Iroquois at the Six Nations Reserve* (Syracuse, N.Y: Syracuse University Press, 1994).

<sup>135</sup> There is a great deal of literature around these ideas. See eg. Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* London: Oxford University Press, 1997; Woo, *supra* n. 83.



with them.<sup>136</sup> In 1876, it instituted an *Indian Act* that defined a ‘person’ as “an individual other than an Indian”.<sup>137</sup> In 1884, the potlatch and Tamanawas dances were banned.<sup>138</sup> As admitted by Prime Minister Harper in his residential schools apology, Canadian policy deliberately attempted to suppress Indigenous cultures. Although the *Indian Act* was revised in 1951 to remove the exclusion of lawyers, dances and personhood, the paternalistic subjection of almost every decision to the Superintendent of Indian Affairs remains intact to this day.<sup>139</sup>

England’s parliament retired “British subject” status as a legal entity as of January 1st, 1983.<sup>140</sup> Canadian citizenship had been legally instituted in 1947 and co-existed with subject status for several decades.<sup>141</sup> The Supreme Court of Canada later affirmed the *Western Sahara* standard in reverse when it decided that French-speaking Quebec could not secede without a vote in favour on a clear question by a majority of its people.<sup>142</sup> However, this standard had not been applied to the devolution of the British Empire. With public opinion focused on the *Constitution Act*, 1982 and “patriation” of constitutional amending authority, little attention was paid to the loss of British subject status. To this day, some Canadians still think they are British subjects. After all, even though the Queen’s Christmas address now refers to her “people” rather than her “subjects”, immigrants must still swear an oath of allegiance in order to become Canadian citizens.<sup>143</sup> This is because the Statute of Westminster only gave the Dominions parity with Britain within the Empire.<sup>144</sup> It did not take Canada out of the monarchy. With so little understanding of the historical rights and duties incorporated in the British constitutional settlement at the source of their constitution, it is not surprising that most Canadians cannot comprehend why many members of the original nations do not think of themselves as “Canadians”. Even the Supreme Court of Canada has declared that “Indians are citizens”.<sup>145</sup> Yet, when did they give their informed consent? Even feudal ceremony required that.

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<sup>136</sup> *The British North America Act, 1867*, U.K. 30 & 31 Vict. C.3, renamed the *Constitution Act, 1867* in 1982.

<sup>137</sup> *Indian Act, 1876*, c-18 (39 Vict.) s.12.

<sup>138</sup> *Indian Advancement Act, 1884*, c.28 (47 Vict.)

<sup>139</sup> *Indian Act, 1951*, S.C. c. 29; *Indian Act*, RSC 1985, c I-5.

<sup>140</sup> *British Nationality Act, 1981*, C-61 (U.K.)

<sup>141</sup> *Canadian Citizenship Act*, S.C. 1946 C-15. (Can.)

<sup>142</sup> *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) <http://www.canlii.org>

<sup>143</sup> *Citizenship Act*, RSC 1985, C-29 (Can.)

<sup>144</sup> *Statute of Westminster 1931*, 1931 c.4 (22 & 23 Geo.5) <http://www.legislation.gov.uk>

<sup>145</sup> *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), <http://www.canlii.org>

## 2.4.2 The Doctrine of Discovery

The second legal issue raised by the Coronation Oath with respect to Indigenous peoples is whether their traditional territories belong legally to Canada. According to the *Western Sahara* reasoning, perhaps not. After all, as the Supreme Court of Canada has recognized, “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>146</sup> The treaties that were signed do not state that sovereignty is being surrendered and in this context sovereignty is frequently confused by questions concerning rights to own and use land. Many Indigenous nations, particularly in British Columbia, never signed any treaties to begin with. So the question that the courts have never answered is: How did Canada gain what we in English call “sovereignty” over the First Nations?

This is where that other British model of law comes into play - the one based on the might-makes-right ability to conquer epitomized by William of Normandy’s 1066 invasion of Britain. The Coronation Oath is consistent with modern human rights law. It asserts protection for social order as organized by the subject’s customs and assures that even the monarch is restrained by the rule of law. If Indigenous peoples really were British subjects and if the laws of England had been applied as nobly to them as they were to the settler colonies then their sovereignty, their laws, and their territorial rights should have been protected. There should, at the very least, have been Indigenous provinces and independent protectorates somewhat like Prince Edward Island and Alberta or Monaco and Andora. However, British claims to sovereignty may be traced back to the doctrine of Christian discovery. In 1095, at the beginning of the Crusades, Pope Urban II issued the Papal Bull *Terra Nullius*, claiming that European princes had a right to claim land belonging to non-Christians.<sup>147</sup> This model of reasoning took hold in Europe and by 1496, when John Cabot, citizen of Venice, sought the backing of England’s King Henry VII for a trans-Atlantic venture, he was granted a charter authorizing him to lay claim to “whatsoever isles, countreys, regions or prouinces of the heathen and infidels

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<sup>146</sup> *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [30], <http://www.canlii.org>

<sup>147</sup> Morales, Robert, “Debunking the Doctrine of Discovery: Colonial Excuse for the Seizure of Land and Oppression of Peoples”, oral presentation, 24 Jan. 2013, *Lawyers Rights Watch Canada: The Gap Between Law and Practice*, 24 Jan. 2013, <http://www.lrwc.org>; “Doctrine of discovery and Terra Nullius”, Synod 2001, Anglican Church of Canada, Evangelical Lutheran Church of Canada, <http://archive.anglican.ca> (accessed 15 Feb. 2013)

whatsoever they be, and in what part of the world soever they be, which before this time haue bene vnknownen to all Christians”.<sup>148</sup>

Christian missionary efforts played an important role in the colonization process from the very beginning for both the English and the French.<sup>149</sup> Yet Indigenous conversion to Christianity did not result in respect for equal legal rights. Indeed, the age of European colonialism was marked by the conquest of Christians as well. Walter Raleigh and his half brother Humphrey Gilbert, those heroes of the Elizabethan age, began their careers by conquering the Irish.<sup>150</sup> Francis Drake was knighted for being the second person to circumnavigate the globe – and, not incidentally, for adding to the Queen’s wealth by looting Spanish ships laden with stolen Inca gold. The leading European colonial powers spent the next couple of centuries capturing and recapturing each other’s colonies. Things settled in North America after the British, with the help of their Iroquois allies, conquered Quebec in 1759. Canada became British as part settlement for the global Anglo-French Seven Years War (1756-1763). However the New England colonies, greedy for more land, chafed at their exclusion from the Ohio valley by treaties negotiated with “Indians” by Sir William Johnson. Soon they declared their independence from Britain.

Although the Haudenosaunee/Iroquois confederacy initially tried to remain neutral in the civil war that is now remembered as the American War of Independence, its constituent nations were eventually forced to choose sides.<sup>151</sup> They suffered huge economic dislocation because of this internal British conflict. When refugees at Niagara heard the terms of settlement negotiated without their participation by the 1783 *Treaty of Paris*, they were outraged saying. “..if it was really true that the English had betrayed them by pretending to give up their Country to the Americans Without their Consent, or Consulting them, it was an act of Cruelty and injustice that

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<sup>148</sup> “The Letters Patents of King Henry the Seventh Granted unto Iohn Cabot and his Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknownen Lands; March 5, 1498” *The Avalon Project*, Yale University Law School, <http://avalon.law.yale.edu> (accessed 15 Feb. 2013) A similar charter authorized the 1496 voyage: Evidence submitted to the Privy Council in *St. Catherine’s Milling and Lumber Co. v. the Queen on Information of the Attorney General of Ontario* H.L. Vol. XVI 46 J.C. (1889) U.B.C.Law Library KG42 P748 1888 No.69.

<sup>149</sup> See eg. “The Jesuit Relations and Allied Documents 1610 to 1791”, <http://puffin.creighton.edu>

<sup>150</sup> Williams, Robert A., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York: Oxford University Press, 1990; Theodore W. Allen, *The Invention of the White Race v.1 Racial Oppression and Social Control*, London: Verso, 1994.

<sup>151</sup> The Mohawk, Oneida, Onondagua, Cayuga and Seneca became known as the Six Nations after the Tuscarora joined.

Christians *only* were capable of doing,...”<sup>152</sup> And so, the issue of consultation and consent that sparked the Idle No More movement has long been a bone of contention.

One of the consequences of the American Revolution that is frequently overlooked is that this colonial rejection of British subject status required a new paradigm for conceptualizing state identity. Instead of focusing on personal relations as had been the practice of both the English monarchy and the Haudenosaunee Confederacy, statehood came to be defined in terms of territorial boundaries. This had huge consequences for Indigenous peoples. The 1883 remonstrance at Niagara included the assertion that their ancestors had only granted permission to the French king to build trading houses or small forts on the water ways connecting Canada and the “Western Indians”. They had not granted “One Inch of Land”. They had given permission to Sir William Johnson to hold these forts for their ally, the King of England, but this did not give England the right to grant anything to the Americans.<sup>153</sup> However, once the settler population became dominant, the Indigenous treaty protocols that Johnson had respected and any terminology that recognized independent Indigenous nationhood were deliberately ignored.<sup>154</sup>

A similar sleight of hand was used to convey “Rupert’s Land” to Canada in 1869. In 1670, England’s King Charles II had granted his cousin Prince Rupert and a “Company of Adventurers” a trading monopoly defined by the waters draining into Hudson’s Bay.<sup>155</sup> It can hardly be considered that the “Hudson’s Bay Company” took *possession* of the land through the activities of its handful of traders huddled on the northern shores of this frequently ice-bound water. It was decades before any Englishman ventured inland. The company’s prosperity depended on Indigenous trading networks stretching half-way across the continent. By the end of the 18<sup>th</sup> century, when the Montreal-based North-West Company began to compete for furs using a southern route, it argued in accord with the Cabot charter that the HBC charter excluded the lands of “any Christian prince”.<sup>156</sup> On March 20<sup>th</sup> 1869, “Rupert’s land” was sold to Canada.<sup>157</sup> Once again, there was no consultation with its Indigenous occupants many of whom were, by

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<sup>152</sup> Allan Maclean to Sir Frederick Haldimand, May 18, 1783 at 37 in Charles M. Johnson, *The Valley of the Six Nations: A Collection of Documents on the Indian Lands of the Grand River*, University of Toronto Press, 1964.

<sup>153</sup> *Ibid*, 36-37.

<sup>154</sup> “James Duane Expresses his Views on the Indian Question”, No 5468-9 in Hugh Hastings ed. *Public Papers of George Clinton, First Governor of New York, 1777-1795-1801-1804*, Albany, N.Y., State Legislative Printer, 1904.

<sup>155</sup> “The Royal Charter for incorporating The Hudson's Bay Company, A.D. 1670”, <http://www.solon.org>

<sup>156</sup> Newman, Peter C., *Company of Adventurers*, Penguin Books Canada, 1985, 330.

<sup>157</sup> Rupert’s Land Act, 1868 (U.k.) 31 & 32 Vict. C.105.

now, Christian. Their outrage, as expressed in Riel's 1869 declaration, was predictable, but their resistance was called a "rebellion" by Canada.

Not long afterwards, a dispute broke out between the province of Ontario and the Dominion government over who had a right to issue timber licences on Anishinabek territory. Once again, the Indigenous people concerned were not consulted. When the situation was considered by the Judicial Committee of the Privy Council in England, the documentation used to trace the foundation of British sovereignty began, again, with the 1496 Cabot charter.<sup>158</sup> Lord Watson described "the tenure of the Indians" as "a personal and usufructuary right dependant on the good will of the sovereign".<sup>159</sup> Canadian courts have not made the kinds of adjustments that are being made in Scandinavian countries and, as of 2013, this is still considered to be "the starting point of Canadian jurisprudence on aboriginal title".<sup>160</sup> Canadian judicial reasoning has declared that Aboriginal rights are "*sui generis*", going through great contortions in an attempt to reconcile actual treatment of Indigenous peoples with the Anglo-Canadian legal principles applied to everyone else. Instead of acknowledging the facts of colonialism, modern courts continue to maintain that Aboriginal rights, including title or land rights "must be understood by reference to both common law and aboriginal perspectives."<sup>161</sup> True enough – but part of the common law tradition requires the rejection of precedents that have been superseded by the enactment of constitutional principles. So why haven't our courts budged from the assertion that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [Aboriginal] lands vested in the Crown"<sup>162</sup> In other words, they continue to ignore the historical record, the opinions of Indigenous peoples and the protection offered by s. 35 of the *Constitution Act, 1982* itself.

It is now almost twenty years since the Royal Commission on Aboriginal Peoples recommend that the Canadian government should acknowledge that the "concepts ... of terra nullius and the doctrine of discovery are factually, legally, and morally wrong."<sup>163</sup> International opinion has progressed. Instead of envying the prosperity of colonizers, many states are seeking to correct the injustices of the colonial era and working on sustainable development. By contrast,

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<sup>158</sup> Evidence submitted to the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen on Information of the Attorney General of Ontario*, H.L. vol.XVI 46 J.C. (1889), UBC Law Library KG42 P748 No.69.

<sup>159</sup> *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, (U.K.)

<sup>160</sup> *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC) at 112, <http://www.canlii.org>

<sup>161</sup> *Ibid.*

<sup>162</sup> *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, <http://www.canlii.org>

<sup>163</sup> RCAP. *Renewal. a Twenty Year Commitment*. Canada: Ministry of Supply & Services Canada, Vol. 5, 1996, p. 1

Canadian judicial reasoning and public policy remain founded on the doctrine of Christian discovery in plain violation of the democratic principles, right to equality, freedom of religion and protection for “aboriginal and treaty rights” now incorporated in both Canada’s *Constitution Act, 1982* and international human rights treaties that Canada has ratified.<sup>164</sup> With those instruments in place, there should have been no need to argue about whether or not the United Nations *Declaration on the Rights of Indigenous Peoples* is legally binding or merely aspirational.<sup>165</sup> The latter document is, after all, only a detailed assertion that Indigenous peoples have the same rights as everyone else. No wonder Indigenous peoples dealing with Canada are starting to seek justice elsewhere. Thus the Hul’qumi’num Treaty Group has appealed to the Inter-American Human Rights Commission of the Organization of American States to gain support for its right to ancestral territory on Vancouver Island.<sup>166</sup> In short, the issues that unite supporters of Idle No More are questions of basic human rights.

## **2.5 Why an accord with the AFN does not satisfy the Duty to Consult**

Although Canada has not yet come to terms with the need to repudiate colonial reasoning, its courts have recently acknowledged that there *is* a duty to consult and accommodate in good faith. This has been based on an obscurely sourced “principle of the honour of the Crown” rather than on the explicit obligations set out in the Coronation Oath that is part of the British constitutional settlement at the source of Canadian law.<sup>167</sup> Yet, even Harper’s Conservative administration has announced its “commitment to continue working in partnership with Aboriginal peoples in creating a better Canada”.<sup>168</sup> The problem is not so much with law or stated policy as it is with implementation. As the omnibus bill procedure demonstrates, Canada has developed a general failure to understand the essential role of consultation in democratic

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<sup>164</sup> See eg. *Charter of the United Nations*, [1945] R.T. Can. 7; *International Covenant on Civil and Political Rights*, [1976] R.T. Can. 47.

<sup>165</sup> “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, Aboriginal Affairs and Northern Development Canada, 12 Nov. 2010. <http://www.aadnc-aandc.gc.ca>

<sup>166</sup> They do not have access to the British Columbia land claims process because the bulk of their ancestral territory was appropriated without their knowledge or consent in the late 19<sup>th</sup> century for a railway to facilitate a private coal mine. Jurisprudence of the Inter-American Human Rights Court is supportive of their position. See Inter-American Commission on Human Rights <http://www.oas.org> Also, the University of Arizona, Indigenous Peoples Law and Policy program, <http://www.law.arizona.edu>; Lawyers Rights Watch Canada, <http://www.lrwc.org>

<sup>167</sup> *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73 (CanLII) <http://www.canlii.org> ; Thomas Isaac, Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49.

<sup>168</sup> “Canada’s Statement of Support” *supra* n. 146.

legality. This, despite the fact that the word “parliament” itself is derived from the French word “parler”, to talk.<sup>169</sup>

As the 2012 Crown First Nations Gathering demonstrates, the AFN is engaged in an on-going struggle to initiate dialogue by bringing Harper to the conference table. Harper obviously did not understand the ceremonial aspects that sought to revive Covenant Chain diplomacy, but the fact that the AFN has had some measure of success suggests that he would rather deal with them than anyone else. The problem with this is that Idle No More, and other Indigenous organizations insist that the AFN does not represent them. The AFN is not, in fact, a product of Indigenous peoples’ “own institutions” as required by UNDRIP. It is composed of band-council “Indian chiefs”, elected under the *Indian Act* that was implemented by the colonial government at a time when those defined as “Indians” did not have a right to vote in Canadian elections.<sup>170</sup> In short, it depends on another piece of legislation instituted without consultation, consent or even prior knowledge. Its power and authority derive from the fact that the Canadian government continues to ignore traditional Indigenous representative institutions. It is a compromise organization born of desperation and necessity, not free choice.

The question of who qualifies as a “status Indian” with the right to participate in band council government is a further stumbling block to the legitimacy of the AFN as a representative body. Status too is determined by the *Indian Act* whose definition of an “Indian” is essentially based on blood-quantum rather than self-determined political identity.<sup>171</sup> As pointed out by Sharon McIvor, one of the consequences of this is that brothers and sisters with the same grandparents may have differing “legal” status affecting even who has the right to live in their ancestral community.<sup>172</sup> Pam Palmater’s investigation of the same issue suggests that the Department of Indian Affairs has engaged in a deliberate policy of administrative or legislated genocide designed to reduce and eventually eliminate the number of people who qualify as “Indians”.<sup>173</sup> This explains why, for some Indigenous people, Canadian law is comparable to the

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<sup>169</sup> “parliament”, The Free Dictionary by Farlex, <http://www.thefreedictionary.com>

<sup>170</sup> Prohibitions against voting in federal elections were not eliminated until 1960. *The Dominion Elections Act*, SC 1948 c. 46 s 14(2)1 revised SC 1960 c.39.

<sup>171</sup> Furi, Megan, Jill Wherrett, “Indian Status and Band Membership Issues”, Library of Parliament, 1996 revised 2003. <http://www.parl.gc.ca> (accessed 13 Feb. 2013)

<sup>172</sup> *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 1732 (CanLII), <http://canlii.ca>

<sup>173</sup> Palmater, Pamela, *Beyond Blood: Rethinking Indigenous Identity*, Saskatoon: Purich Publishing, 2011.

law of the Vichy regime in occupied France during WWII. A few Mohawk communities have even refused to participate in the AFN, insisting that it does not represent them.<sup>174</sup>

The question that Prime Minister Harper appears to have difficulty understanding concerns what constitutes legitimate democratic representation. This requires representatives chosen by the people themselves, not by their opponents. Also, as the fiasco resulting from the appointment of Senator Patrick Brazeau indicates, it is not enough to treat someone as a representative simply because they have been elected to some organization. It is important to consider who that organization represents. Before his Senate appointment, Brazeau was the head of the Congress of Aboriginal Peoples, an organization that complements the AFN by advocating for off-reserve “Indians”.<sup>175</sup> Neither organization represents an original nation or a universal Indigenous electorate. There are similarly several members of parliament, and even of the Conservative Party, who have Indigenous ancestry. However, like any immigrant, Indigenous individuals are free to choose to join Canada. If they become M.P.’s, they represent all the people in their territorially defined ridings. They do not represent Indigenous sovereignty or political interests just as M.P.’s of Scottish or Pakistani descent do not represent their ancestral states. They are certainly not qualified to re-negotiate treaties on behalf of their ancestral nations.

Canada is confronted with a real problem when it comes to the task of respecting proper representation for Indigenous peoples. Any transition away from the patently irregular *Indian Act* must be achieved without any disruption of essential services. Yet, after so many years of denying the existence of any level of Indigenous sovereignty, it is no longer easy to identify how the various original nations are - or should be - structured, who their proper representatives are or even who belongs to them. These issues must, of course, be decided by the First Nations themselves. However, thus far only the Métis have been accorded recognition of limited independent authority to determine their membership through a combination of self-identification and community recognition.<sup>176</sup> Even then, the Supreme Court continues to insist

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<sup>174</sup> “Mohawk Council of Akwesasne presentation to the Standing Committee on Aboriginal Affairs and Northern Development on the The Specific Claims Tribunal Act (Bill C30) and the Political Agreement”, Mohawk Council of Akwesasne. <http://www.akwesasne.ca>

<sup>175</sup> Basen, Ira, “Patrick Brazeau: Harper's strategic aboriginal appointment” *CBC News*, 13 Feb. 2013, <http://www.cbc.ca> (Accessed 15 Feb. 2013).

<sup>176</sup> Furi, Megan, Jill Wherrett, “Indian Status and Band Membership Issues”, Library of Parliament, 1996 revised 2003. <http://www.parl.gc.ca> (accessed 13 Feb. 2013); *R. v. Powley*, 2003 SCC 43 (CanLII), [2003] 2 SCR 207, <http://canlii.ca>



that ancestry is a determinant of the right to exercise Métis rights despite the fact that Canadian and provincial identities are open people with any imaginable genetic inheritance.

### **Conclusions: What Can We do?**

The debate initiated by Idle No More concerning the legality of Bill C-45 and the omnibus bill procedure has only just begun. It will take years for the legal challenges initiated by the Mikisew and Frog Lake Cree, the Hupacasath, the First Nations Child and Family Caring Society of Canada and others to work their ways through the courts. In the mean time, it appears unlikely that the Conservative administration will follow the leads of Britain and Scandinavia to initiate the re-examination of democratic due process that Canada so desperately needs. Canada's economy is founded on vast reserves of land and natural resources. These were once the exclusive domain of Indigenous nations. Their families and social institutions were deliberately shattered by 19<sup>th</sup> and 20<sup>th</sup> century policies designed to force assimilation into an economy designed by and for in-migrants. Most now struggle to survive at third world standards while aggressive corporate expansion into remote regions continues to saddle them and everyone else with massive pollution and destruction of the natural habitat. But demographic balances are changing. Almost half of Aboriginal people are under 25. Saskatchewan estimates that soon 20% of its school children will be Aboriginal. A new generation is on the horizon and the descendants of the first waves of invasion have no place else to go. If Idle No More has done anything at all, it has broken down some of the social fragmentation caused by the colonial process. Most of us now understand that we all need to work together, no matter what our origins.

Prime Minister Stephen Harper is notoriously difficult to deal with. He is obsessed with 19<sup>th</sup> century economic models but the need for clean water, clean air and clean soil is universal. Idle No More has given us a new paradigm, one we can use to revitalize democracy in the shared quest for a sustainable economy – one that will serve not just the next decade or so, but for many generations to come. With the spotlight re-focusing on the need for institutions and procedures that will ensure the comprehensive on-going consultation required for sound and fair management of the earth's resources, it is time for us all to “get off the couch” and be idle no more.