The Third Solitude?

Is Canada's Liberal Democratic Constitutional Order Inherently Hostile to the Collective Self-Determination of Aboriginal Peoples?

By Derek Kornelsen

A Thesis Submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfillment of the requirements of the degree of

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ABSTRACT

Much of the scholarly work on Aboriginal collective self-determination reveals a profound disconnect between state-centred and Aboriginal perspectives. This thesis investigates the extent to which the Canadian liberal democratic constitutional order is a barrier to the collective self-determination of Aboriginal peoples. The state-centred approach fails to meet Aboriginal demands due to the primary assumption of absolute Canadian sovereignty and the corollary definition of Aboriginal peoples as a minority group of citizens with special needs rooted in cultural differences. On the one hand, state-centred theory and policy focus on the conferral of special rights. On the other, Aboriginal scholarship maintains that special status is sovereignty-based, protected by treaties, and entrenched in the Canadian Constitution. However, common ground exists between Aboriginal and state-centred views – both perspectives place a high value on popular sovereignty to legitimate the constitutional order. In this light, constitutional supremacy in Canada is, in fact, a unique opportunity for a conciliatory dialogue.

CHAPTER 1 – INTRODUCTION

This thesis examines the discourse on the collective self-determination of Aboriginal peoples in Canada. It is motivated by the profound disconnect between what Aboriginal peoples are striving for in Canada, as evidenced by various publications from Aboriginal organizations and scholars, and the varying responses emanating from the Canadian state-centred perspective in the form of government policy and theoretical scholarship. On my interpretation, Aboriginal perspectives in general aim at achieving recognition of their status as sovereign and pre-existing nations on the territory claimed by Canada while state-centred perspectives engage Aboriginal peoples as a unique national minority group of Canadian citizens who may be deserving of self-government rights, but nonetheless fall within the jurisdiction of the sovereign Canadian state. As such, Aboriginal peoples and the Canadian state are speaking, as it were, from two foundationally disparate perspectives and, despite the rhetoric surrounding dialogue, partnership, and mutual respect, what actually exists is a relationship defined by intersecting monologues, independent agendas, and a mutual disrespect. This results in an inability to understand the substance of disagreement and a failure to acknowledge the points of convergence that do exist between the two perspectives.

That the Canadian state and Aboriginal peoples are failing to understand each other is clear from Canada's dismal record of attempts at addressing the needs of Aboriginal peoples. From the 1867 *Indian Act* through to the 1969 *White Paper*, the 1982 *Constitution Act*, and the *Charlottetown Accord*, the Canadian state has continued to advance solutions aimed at addressing Aboriginal demands while Aboriginal peoples

continue to criticize the state for its colonial mentality and its continued oppression of Aboriginal peoples and their governments. The disconnect is not without consequence:

> "There is an anger, a rage, building in [A]boriginal communities that will not tolerate much longer the historic paternalism, the bureaucratic evasion and the widespread lack of respect for their concerns. Failure to deal promptly with the needs and aspirations of [A]boriginal peoples will breed strife that could polarize opinion and make solutions more difficult to achieve" (Royal Commission on Aboriginal Peoples [RCAP], 1996a: 215)

This strife and polarization already existed and, indeed, motivated the establishment of the Royal Commission on Aboriginal Peoples as an attempt to address the legacy of Canada's mistreatment of Aboriginal peoples and to turn the page on an imperial mindset that demeans and disregards Aboriginal nations and cultures; to move beyond the oppression and marginalization that has led to a brutal quality of life for a disproportionately large number of Aboriginal individuals and nations; to rebuild a partnership between the Canadian state and Aboriginal peoples that recognizes Aboriginal nationhood, and to affirm that "the right to collective self-determination is vested in all Aboriginal peoples of Canada"(INAC, 1996). Yet, despite the progressive recommendations for Aboriginal self-government and self-determination outlined by the Commission, strife and polarization persists. Protests by Aboriginal peoples over land or self-government rights continue and Aboriginal leaders continue to voice concern that their youth are becoming increasingly impatient with leaders who cooperate or 'sell-out' to federal agendas resulting in a general concern that the persistent discontent of

Aboriginal peoples in Canada is reaching a boiling point where frustration may lead to more violence and attempts at dialogue may be abandoned.[1]

The chapters that follow argue that there is reason for optimism and that collective self-determination for Aboriginal peoples is not fundamentally incompatible with the Canadian context understood as a liberal democratic constitutional order. When taken together, rather than standing as a barrier, liberalism, democracy, and constitutionalism actually work together to bolster Aboriginal demands for collective self-determination and claims to sovereignty. This is a controversial argument because it suggests that both parties – the Canadian state and Aboriginal peoples – are committed to flawed assumptions which undermine the potential for reconciliation. That is, the possibility of reconciliation depends on a specific interpretation of the interactions between liberalism, democracy, and constitutionalism in Canada's political order and upon a specific understanding of Aboriginal self-determination. Given these understandings, if reconciliation is to be possible, state-centred views must abandon the notion of absolute state sovereignty over the territory defined by Canadian boundaries and Aboriginal views must allow for an alternative view of liberalism – one that departs from the legacy of colonialism and oppression and that celebrates inclusion and democratic dialogue.

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[1] Examples of protests in recent history include standoffs at Oka (78 days - 1990), Ipperwash (1995), Burnt Church (1999 – 2001), and Caledonia (2006 - present). Disputes like these all hold the potential for violence and many have, resulting in shootings and physical altercations between protestors, police officers, and non-Aboriginal citizens. See "Timeline: Aboriginal Standoffs in Canada" (ctv.ca, 2006) for some examples. See also "When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law" (Orkin, 2003) for a discussion on Aboriginal resistance to assumed federal jurisdiction.

Citing liberalism as part of a potential solution to Aboriginal issues is not altogether uncommon, but this approach has also been widely rejected by Aboriginal and post- or anti-colonial scholarship. Liberalism is often viewed as the root source of the suffering and injustices that Aboriginal peoples have been forced to endure. Indeed, John Locke and J. S. Mill, two of liberalism's founding fathers, provided theories that justified colonization and territorial appropriation in the New World (Parekh, 1995; Pocock, 2000; Tully, 1995). It is no wonder, then, that liberalism is seen as "a manifestation of European colonialism" (Turner, 2006: 12); as "perpetuating internal colonisation" (Ivison, Patton and Sanders, 2000) through a "racist economy and a colonial state" (Coulthard, 2008: 194); as supporting "racial superiority and the false assumption of Euroamerican cultural superiority" (Alfred, 2005); or as representing colonial "ethno-centrism and domination" (Turpel, 1989: 151).[2]

Indeed, the colonization of what is now North America has led to generations of violent oppression of Aboriginal peoples and to the destruction of Aboriginal cultures, political institutions, and societies. The obvious continued disadvantaged state of many Aboriginal nations should serve as a poignant reminder of the damage that colonization has done. While it may be true that liberalism or liberal theories in general often seek to remedy some of the mistakes of the past by providing theoretical foundations for a truly just society, the fact that liberalism also provided the historical foundations for colonial expansion, appropriation, and oppression cannot be ignored. To the extent that a continued assertion of state sovereignty over Aboriginal peoples reflects the persistence

[2] These are only a few examples. Literature from Aboriginal scholars is replete with scathing criticisms of liberalism in particular as Western philosophies in general (see also Alfred, 1999; Johnson, 2007; Little Bear, 2004; Venne, 1997 for more examples).

of the 'colonial mentality', Aboriginal peoples still face the extant manifestations of the liberalism that defended colonization as a central feature of the Western philosophies that define their overarching context.

This thesis is structured around three general questions:

1. What is the political context for collective self-determination in Canada?
2. What does self-determination mean?
3. Given the answers to 1 and 2, is collective self-determination for Aboriginal peoples attainable within the Canadian context?

Chapter 2 addresses the first question by laying out the basic features of what I will call the Canadian context. The Canadian context refers to the general political context within which the struggle for collective self-determination takes place. As such, liberalism, democracy, and constitutionalism all play a role. Chapter 2 begins with a discussion of liberalism and its relation to liberal democracy. This is an important discussion because it lays the groundwork for part of the argument for political reconciliation that is presented at the end of Chapter 4. That is, the way in which liberalism has been expressed in Canadian politics has evolved over time to meet the demands of popular sovereignty. While a familiar liberalism emphasis on undifferentiated civic equality has been influential in the past, contemporary practice has been more in line with the type of liberalism defended by Will Kymlicka – a type of liberalism that views cultural rights as essential to individual well-being (Kymlicka, 1989, 1995). Furthermore, some contemporary forms of liberalism are advanced as part of a theory of liberal democracy

and, therefore, as placing a heavy emphasis upon democratic engagement and popular sovereignty (Holmes, 1995; Vernon, 2001). Understanding liberalism in this way provides common ground between Aboriginal and liberal democratic views – the central role that the consent of the governed plays in political legitimation.

The remainder of the chapter gives and account of the history of Canada's constitutional development and demonstrates how liberal democracy both empowers and constrains constitutional legitimation by encouraging the people and *the peoples* to become engaged in constitutional negotiations as a means to popular sovereignty while imposing a strict constraint entailing a level of undifferentiated civic equality within the jurisdiction of a single state. I argue that this single constraint is the root of the tension in Canada's constitutional struggles insofar as diverse nations have tried to arrive at an acceptable form of constitutional entrenchment of their relationships to one another. Thus, the two pivotal features of Aboriginal and state-centred perspectives are highlighted as barriers to the realization of collective self-determination for Aboriginal peoples – the state's underlying assumption of sovereignty over the territory defined by Canadian boundaries and the perception that liberal democracy is inherently inimical to the recognition of Aboriginal sovereignty.

Chapter 3 contrasts Aboriginal conceptions of collective self-determination with liberal views generally and Kymlicka's defence of cultural rights specifically. Aboriginal peoples intepret collective self-determination as a pre-existing and continuous right and as an expression of their sovereignty as nations that pre-dates the establishment of the Canadian state. Liberal perspectives view collective self-determination as a state responsibility rooted in the liberal state's interest for the well-being of its citizens. The

disparate foundational starting points of the Aboriginal and liberal perspectives result in a confusing mix of theory and practice that compromises potential for meaningful dialogue. Kymlicka, for example, recognizes Aboriginal nationhood and defends self-government but resorts to the language of cultural difference and cultural rights while maintaining Aboriginal peoples and their governments within an overarching federal jurisdiction. He thus employs inconsistent methods by presenting Aboriginal peoples as qualitatively equivalent to sovereign states in order to defend a more robust level of political autonomy (self-government rights) while rooting his argument in the more benign language of culture, thereby denying the central role of Aboriginal sovereignty. Aboriginal perspectives are as confusing since they both promote and disparage engagement of the federal government by accepting conferred rights or federal jurisdictions while calling for political autonomy.

Both Aboriginal and liberal strategies become intelligible, however, when their underlying assumptions are taken into account. Aboriginal peoples display a sustained drive to have their sovereignty recognized but are placed in the disempowered position of existing under federal jurisdiction. The acceptance of conferred rights, then, should be understood as an incremental step toward the ultimate goal of emancipation from federal authority. The central goal of collective self-determination remains, but the methods by which to achieve it are disputed. Similarly, Kymlicka's emphasis on the centrality of cultural difference makes sense given his underlying commitment to absolute state sovereignty. At this juncture, the main points of contention are on the table – collective self-determination is seen by Aboriginal peoples as being rooted in their sovereignty as pre-existing nations and their apparently contradictory actions are expressed as coherent.

The Canadian state, however, appears committed to its status as a sovereign unified state and even the most generous form of liberalism that supports the conferral of rights to self-government cannot reconcile it with Aboriginal demands.

Chapter 4 argues that reconciliation is possible, but that it requires the state to abandon its claim of absolute sovereignty and Aboriginal peoples to engage the constitutional framework from a position of cooperation, not hostility and general critique of the system and its philosophies as a whole. In short, what is required is mutual respect and negotiation on a nation-to-nation basis. Treaty federalism, which views historic and modern treaties between Aboriginal nations themselves and between Aboriginal nations and the Canadian state as constitutional documents, provides a framework for the reconciliation of the two apparently divergent perspectives and, in fact, shares the fundamental commitment to the establishment of constitutional legitimacy through the consent of the governed that characterizes liberal democracy and the Canadian context in general. This convergence of Aboriginal and liberal democratic perspectives, along with the shift toward constitutional supremacy introduced in Chapter 2, leads to the conclusion that, at present, constitutional interpretation through judicial review offers an environment that is ultimately conducive to reconciliation through dialogue because it provides a meeting place for Aboriginal and state-centred perspectives of Aboriginal rights and, in so doing, provides a way to assess both the legitimacy and the nature of Aboriginal and Canadian claims to sovereignty.

CHAPTER 2 – WHAT DOES 'THE CANADIAN LIBERAL DEMOCRATIC CONSTITUTIONAL ORDER' MEAN?

Introduction to Chapter 2

This chapter offers an account of Canada's liberal democratic constitutional framework as a context for the collective self-determination of Aboriginal peoples. It investigates the relative influences that liberalism, democracy, and constitutionalism have on the Canadian constitutional framework. In general, the Canadian context is presented as characterized by the underlying political ethos of a country continuing on its "constitutional odyssey" (to borrow Peter Russell's phrase) as it struggles to legitimate its patriated Constitution through some form of popular consent. Indeed, "[t]he idea that a constitution, to be legitimate, must be derived from the people – a dreadful heresy to our founding fathers – has become constitutional orthodoxy for most Canadians ... [and] ... may be the only constitutional ideal on which there is popular consensus" (Russell, 2004: 5).[3] Liberalism, democracy and constitutionalism can interact in many ways that are both conducive to and in opposition to securing popular consent. It is thus argued that, although it has not always been the case, the contemporary context is one in which the

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[3] Popular sovereignty was explicitly rejected as an appropriate means to the legitimation of the terms of Confederation as this excerpt from a letter, written in 1858 and signed by three Fathers of Confederation – George-Etienne Cartier, Alexander Galt, and John Ross – explains: "It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus remedying any defect" (Quoted in Russell, 2004: 3).

features of liberalism, democracy, and constitutionalism work together toward the establishment of legitimacy through popular sovereignty.

Because liberalism has received much attention as a barrier to the collective self-determination of Aboriginal peoples, the first section discusses liberalism in general and introduces Kymlicka's defence of self-government rights as the most progressive liberal attempt to garner the popular consent of Aboriginal peoples in Canada. The next section examines liberal democracy and distinguishes between two general conceptions: one that views liberalism as the dominant and defining feature and one that sees liberal democracy as a single concept arising from the convergence of some liberal and democratic ideals. The remaining sections discuss the evolution of constitutionalism in Canada and illustrate that much of Canada's history has been being characterized by the liberal dominated conception of liberal democracy. However, the contemporary shift toward incremental constitutional interpretation and change along with the coincident judicialization of constitutionalism in Canada has witnessed the emergence of popular sovereignty as a salient and important feature connecting formerly unrepresented people and peoples to the Canadian Constitution and bringing the Canadian context more in line with the synthesized view of liberal democracy as a result. However, Canada's constitutional travails have consistently pointed to one persistent point of contention that has yet to be resolved. That is, when Canada is understood as a constitutional union of peoples and, therefore, dependent upon the consent of peoples as well as individuals, popular sovereignty has strained against the competing assumption of state sovereignty. This assumption has continued to present a barrier in the drive to secure popular consent to the Canadian constitutional framework.

Liberalism

There are numerous ways to understand liberalism and it would be a mistake to conceive of it as a singular, unified, and internally consistent political doctrine. Generally, the Lockean claim that all individuals are "by nature free, equal and independent" (Locke, 1952: 54) underlies various liberal positions which take freedom and equality together as a typical starting point. But disputes surrounding the specific nature of, or relative emphasis on, freedom or equality divide liberal theorists, resulting in theories that, while labelled as 'liberal' due to the similarities in their foundational claims, settle on radically divergent constructions of state and society. One may, for example, equate liberalism with libertarianism, emphasizing maximum liberty and free market economics constrained only by formal equality under laws that are enforced by the minimalist neutral state (Hayek, 1960; Nozick, 1974). On this view, liberalism can be seen as an excessively individualistic doctrine that encourages disregard for the welfare of fellow citizens (Holmes, 1995). Alternatively, some contemporary theorists have argued that the state should play a positive role in wealth and benefit redistribution in order to create equality of opportunity, welfare, or resources (Cohen, 1989; Dworkin, 2000; Rawls, 1971). As such, liberalism can be seen as excessively conservative or tending toward socialism depending upon how one interprets or applies various foundational values. The persistence of debates within and across perspectives renders

problematic any argument that includes an unqualified account of liberalism in its structure.

One useful way of understanding the myriad of liberal theories is to distinguish between 'perfectionism' and 'neutrality'. The essential difference between these two perspectives is that perfectionism argues for state promotion of 'the good life' while those that argue in favour of neutrality maintain that the state ought to remain neutral on varying conceptions of what the good life may be.[4] Both views are traditionally liberal because, like those of Mill and Locke, they place a fundamental value on the moral equality of individuals and the associated right to lead a self-chosen life – to be self-determining individuals. However, Mill's theory is argued to be perfectionist because the value placed on one's ability to employ "all his faculties" and to autonomously "choose his plan for himself" (Mill, 1998: 65) leads to the positive claim that the state should "enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones" (Raz, 1986: 133). Locke's defence of a self-chosen life, on the other hand, suggests only that what we choose should "in no manner proceed from corporal Sufferings" (Locke, 1952: 27). The shift in emphasis appears slight, but the ramifications are significant. While the Millian/perfectionist argument leads to metaphysical questions of what the good life may be, the Lockean/neutralist argument focuses the discourse on

[4] Both theories are rooted in equality: "The first theory of equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another. ... The second theory argues, on the contrary, that the content of equal treatment cannot be independent of some theory about the good for man or the good of life, because treating a person as an equal means treating him the way the good or truly wise person would wish to be treated." (Dworkin, 1978: 127).

the question of "why some people's values should override those of others" (Lecce, 2009: 13).

The perfectionist/neutralist distinction helps to locate Kymlicka's arguments within the perfectionist strand of liberal theory. Kymlicka situates himself alongside other prominent theorists in the contemporary liberal tradition "from J. S. Mill through to Rawls and Dworkin" by claiming to defend a similar political morality. That is, that our essential interest is not only in leading a good life, but that we be able to "lead our life from the inside, in accordance with our beliefs about what gives value to life … [and] … that we be free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide" (Kymlicka, 1989: 10-13). The positive perfectionist claim is evident in that Kymlicka moves beyond simply arguing for freedom from coercion and gives an indication of the nature of valuable choices – that is, valuable choices originate from within one's culture. For Kymlicka, "it is of sovereign importance ... that the cultural structure is being recognized *as a context of choice* ... [and as] ... a good in its capacity of providing meaningful options for us" (Kymlicka, 1989: 166).

However, Kymlicka criticizes Rawls and Dworkin on the grounds that, while they recognize the importance of cultures, their theories are flawed due to their "assumption of cultural homogeneity" within the political community for which their theories are intended (Kymlicka, 1989: 178). Given the central role that culture as the 'context of choice' plays in an individual's ability to form and revise personal conceptions of the good life, and the fact of cultural diversity, Kymlicka goes on to offer a liberal equality-based defence for group rights for cultural minorities including self-government rights for

national minorities including Aboriginal peoples. The central aim of these rights is to compensate for the fact that the viability of minority cultures "may be undermined by economic and political decisions made by the majority" (Kymlicka, 1995: 109). Rights that ensure "territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights", for example, protect cultural viability and hence the ability of the individuals within to rationally examine and revise their conceptions of the good. In this way, "group-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage" (Kymlicka, 1995: 113).

Kymlicka's theory is discussed in more detail in Chapters 3 and 4 below. However, this brief introduction demonstrates how his theory is relevant to the broader question of the compatibility between Aboriginal collective self-determination and the Canadian liberal democratic constitutional order. Kymlicka seeks to show that an explicit recognition of Aboriginal peoples as nations within Canada is defensible from a liberal perspective and argues that liberals should, therefore, defend self-government and other rights aimed at the collective self-determination of national minorities including Aboriginal peoples. As such, his theory offers a possible synthesis of liberal theory and Aboriginal claims to collective self-determination.

Liberal Democracy

Canada is a liberal democracy. As such, liberalism should not be seen as providing a sufficient characterization of the Canadian political context. If Canada's political story is essentially one of a drive for popular sovereignty, then democracy must be understood as a key defining feature. At the most fundamental level, democracy refers to 'rule by the people' or self-rule (Held, 1996). But how this fundamental idea might manifest itself in various political orders that are rightly labelled democratic can vary broadly, from the direct democracy of the ancient Athenian *polis* to centralized representative systems that characterize many modern states today. In a *liberal* democracy, liberalism provides the "standing rules" that Locke referred to (Locke, 1952: 78) or the principles of justice that regulate democratic institutions (Holmes, 1995; Lecce, 2008; Rawls, 1971). A liberal democracy, therefore, is liberal because it takes into account the democratic need for popular sovereignty as a means to the legitimation of the political order while it "entails limits to what majorities can do, and also entails personal rights" (Vernon, 2001: 11).

What does this say about the relationship between liberalism and democracy? Does liberalism inhibit or empower the drive for popular sovereignty? For some, liberalism and democracy are divergent concepts entailing an inherent tension within liberal democracy. As Isaiah Berlin has argued, one might find a democratically elected tyrant whose policies show little regard for the citizens' freedom to pursue their own conceptions of the good life. Alternatively, equal freedom might be well protected by the proverbial benevolent dictator whose authority is absolute and who is not held accountable to the citizenry. Liberalism and democracy can be said to address two related but divergent questions. Liberalism is concerned with the equal liberty for the

individual to decide "What am I free to do or be?", while democracy asks "By whom am I ruled?" (Berlin, 1984: 22). So while liberalism may be said to defend the carving out of a private sphere of liberty within which one can form, revise, and pursue one's vision of the good life, democracy seeks to ensure that the constraints that are placed upon this sphere are sanctioned by the people, either through direct participation in the creation of laws and the shaping of society or by proxy through elected representatives. These distinct orientations are said to reveal the inherent tension in the liberal democratic model – the tension between individual liberty and democratic self-rule (Berlin, 1984; Mill, 1998).

Given this tension, liberalism has been argued to be the dominant partner in a liberal democratic dichotomy (Macpherson, 1977; Parekh, 1992). Liberal commitments to free market capitalism (Macpherson, 1977) and to "individualist, elitist and bourgeois" definitions of rights (Parekh, 1992: 168) are said to undermine democracy. Indeed, the only type of democracy possible in a political system dominated by liberalism is one that departs from direct democratic participation and is committed to a lesser form of representative government as a "highly effective way of insulating the government against the full impact of the universal franchise" that a commitment to equality demands. This perspective casts liberalism in decidedly Millian terms in which the perfectionist idea of the good life is defined by an elite, "enlightened minority" (Parekh 1992: 167) and in which democracy comes in as an important legitimator but must be kept at bay lest it undermine the position and ideologies of the ruling class. As such, the liberal democratic partnership is seen to be one in which liberalism is inimical to democratic self-rule because liberalism is committed to prior ends as defined by the

maintenance of the *status quo*. Liberalism, then, "fears unrestrained popular sovereignty [and] goes to the other extreme and disempowers the people" (Parekh, 1992: 168).

This method is rejected by contemporary theorists who see liberalism and democracy not only as compatible but as mutually reinforcing. On one such view, fundamental liberal values such as toleration, separation of state powers, protections from state coercion, and freedom of speech and assembly are essential to a properly functioning democracy (Holmes, 1995). This moves beyond seeing democracy as useful to liberalism as an expression of simple formal equality by arguing that liberalism actually promotes democratic participation and is essentially discursive in that it "creates an institutional framework that, if it functions properly, makes decision making more thoughtful" and holds those in power accountable to the public and open to criticism and fresh arguments (Holmes, 1995: 6).

Another view goes further, arguing that "liberal democracy is a single conception" – a theory on its own "which serves to justify political systems that rest on a certain combination of practices, namely accountability and the restraint of government." (Vernon, 2001: 7,169). As such, liberal democracy must leave behind some traditionally liberal commitments as they become politicized areas subject to democratic constraints. The libertarian emphasis on free market capitalism, for example, becomes contingent rather than foundational since "[i]f a particular kind of economic arrangement is given protection at a basic level, then the system's claim to democracy is negligible, for democratic majorities lose the capacity to determine some of the most crucial aspects of their own society's institutional character" (Vernon, 2001: 10). Thus, liberal democracy defines an area where the liberal emphasis on the equal right for individuals to form and

revise their conception of the good life converges with the democratic sense of "equality of citizens as participants in democratic discourse" (Vernon, 2001: 74).

All of the perspectives on liberal democracy share, at varying levels, a concern for the legitimation of the overarching political framework through the expression of popular sovereignty. Those that see liberalism and democracy as competing values identify democracy as important to liberal democracy insofar as it provides public sanctioning of the liberal order. Where liberalism is especially prominent, democracy becomes increasingly emaciated providing the thinnest possible method of participation in the form of casting ballots for representative government. When liberalism and democracy are seen as mutually reinforcing, however, democratic participation becomes more valuable. Given the central role that democracy and popular sovereignty play in the establishment of political legitimacy, liberal democratic constitutions should be structured to provide greater levels of public debate which translates into greater levels of legitimacy. Indeed, "[p]opular sovereignty is unavailing without legally entrenched rules to organize and protect public debate" (Holmes, 1995: 171). In fact, on the most unified understanding, liberal democracy becomes a theory of legitimation which seeks to establish political processes that encourage engagement from citizens and demand accountability from those in power (Vernon, 2001).

Constitutionalism

Liberal democracy and popular sovereignty come together in the associated idea of constitutionalism. A constitution exists as the legal framework that entrenches the 'standing rules' or principles for a democratic society. In a liberal democratic society specifically, a constitution should be seen as institutionalizing a democratic framework that values and encourages participation thus attending to the consent of the people and to popular sovereignty. However, the idea of constitutionalism introduces an important distinction regarding the specific focus of consent and popular sovereignty. That is, it suggests that there are two distinct levels of legitimacy to be considered – the legitimacy of the laws and policies that any government may enforce or pursue *within* a given liberal democratic framework and the legitimacy of *the framework itself*:

> "A people are said to govern themselves, and thus to be a free people, when the laws by which they are governed rest on their consent or the consent of their representatives. The condition of consent holds for legislation and even more fundamentally for the constitution. If the constitution does not rest on the consent of the people or their representatives, or if there is not a procedure by which it can be so amended, then they are neither self-governing nor self-determining, but are governed and determined by a structure of laws that is imposed on them and they are unfree. This is the principle of popular sovereignty by which modern peoples and governments are said to be free and legitimate" (Tully, 2000: 57).

The liberal democratic views presented so far attend mainly to the former concern regarding the need to attend to self-rule by ensuring that 'the people' (the citizens) have an adequate level of influence over political processes and legislations that may affect their lives. But a constitution also defines who 'the people' are that are within its jurisdiction and this point is not up for debate in a liberal democratic context. That is, "[t]he background conditions of liberal democracy include an already constituted political community"(Vernon, 2001: 175). As such, "[l]iberal democracy presupposes the

existence of the state. The ... territorial borders have been firmly established and the question of who is a member of the community has been clearly answered" (Holmes, 1995: 100). The prior assumption of statehood, therefore, takes the legitimacy of the liberal democratic political order and its jurisdiction over an established political community as given as long as the institutional framework allows for what may be termed domestic popular sovereignty.

The distinction between the overarching jurisdiction of a constitutional framework and the functioning of the framework itself is important to an understanding of the Canadian struggle for popular sovereignty introduced at the outset of this chapter. Although issues of domestic popular sovereignty, or the participation of citizens within the constitutional framework, have also been part of Canada's political landscape, much of Canada's "constitutional odyssey" (Russell, 2004) has been characterized by a tension arising from the constitutional framework itself, or the terms of the initial arrangement between the nations that co-exist in the territory defined by Canadian borders. So while the focus on how the state should treat 'the people' has resulted in a sustained push for the imposition of a uniform legal and political framework defined by civic equality, there has also been a simultaneous resistance to the assumption of state sovereignty as evidenced by the continued efforts of the Québécois and Aboriginal peoples to be recognized as distinct peoples or political communities in their own right and to challenge state-centred interpretations of the initial terms of union and the assumed jurisdiction of the Canadian state.

At the time of Confederation, Canada's founding fathers failed to agree on the proper way to interpret the Constitution (the 1867 *BNA Act*) designed to bring together a

society that, at the time, was considered to be made up of two distinct nationalities – the English and the French. Debates and pressures centred on whether the document should guide Canada toward a uniform 'nation-state' with a highly centralized federal government or if the racial and political duality of its founding nations should prevail (Cairns, 1971; LaSelva, 1996; Russell, 2004). Conspicuous by their absence, however, were any references in the *BNA Act* to previous agreements, such as the *Quebec Act* (1774), which afforded an exceptional level of legal and religious autonomy for the province of Quebec. Similarly, the next major constitutional development in Canadian history, the 1982 *Constitution Act*, remained silent on any special role that Quebec might have in the federation as a founding partner, implicitly suggesting, as in 1867, that no such role existed (Gibbins, 2004). These conspicuous absences served to reinforce an emphasis on a pan-Canadian identity that placed French-Canadians on par with the rest of Canada as equal individual citizens enjoying equal individual rights, thus entrenching the concept of a single political community within the jurisdiction of a single state.

With respect to Aboriginal peoples in particular, the push toward uniformity has been especially prominent. The initial constitutional relationships are said to have revealed a level of mutual respect and acknowledged the "nation-to-nation underpinnings" of the interactions between Aboriginal peoples and the Crown as expressed in the *Royal Proclamation* of 1763 (Gibbins, 2004; RCAP, 1996b; Tully, 1995). However, there is little disagreement between Aboriginal and non-Aboriginal scholars that, from Confederation until 1982, constitutional developments involving Aboriginal peoples were aimed at their assimilation into the broader, non-Aboriginal society (Cairns, 2000; Ladner, 2003; Tobias, 1991). The *Indian Act* – and associated

amendments from 1876 to 1951 – is perhaps the strongest example of such legislation. It involved, paradoxically, a level of recognition through separation on reserves, but only as a means to assimilation. "The reserve system was thought of as a protected training school in which Indians ... could be readied for membership in the larger society." The eventual goal was the removal of all legal distinctions between Aboriginal peoples and non-Aboriginal Canadian citizens (Cairns, 2000: 48). In addition, the *Indian Act* detailed the dismantling of Aboriginal governmental structures and the imposition of new political systems fashioned after the Canadian model, while ensuring that the new leadership was accountable to and subject to the authority of the Canadian federal government (Ladner, 2003; Monture-Angus, 1999). The final overt push for uniformity came in the form of the 1969 *White Paper* which sought to dismantle the *Indian Act* and establish, once and for all, the full equality between Aboriginal peoples and the rest of Canada's non-Aboriginal population (DIAND, 1969).

That this conception of Canada as a single people sharing equal citizenship has been rejected by Aboriginal peoples and the Québécois is clearly demonstrated through the constitutional negotiations from the 1982 *Constitution Act* through the Meech Lake (1990) and Charlottetown (1992) Accords. The patriation of the Constitution, along with the drafting of the *Charter,* in 1982 was, in part, motivated by Prime Minister Pierre Trudeau's vision of the reconciliation of individual Canadians with Canadian society as a whole by fostering "a Canadian identity based on rights and ... the sovereignty of the people." (LaSelva, 1996: 82; Axworthy and Trudeau, 1992; Bickerton, Brooks and Gagnon, 2006). This vision fits well with the liberal democratic model presented above in that the patriation process included public participation at an unprecedented level.

Various minority groups succeeded in having their perspectives included. Feminist groups, for example, succeeded in achieving the inclusion of Section 28 guaranteeing formal sexual equality and Aboriginal groups succeeded in gaining recognition of their Aboriginal and treaty rights through Sections 25 and 35. In this light, patriation achieved Trudeau's goal of creating a pan-Canadian identity that celebrated inclusiveness and the broad equality of right-bearing citizens (Russell, 2004).

It may be tempting to interpret the passing of the 1982 *Constitution Act* and the inclusion of the *Charter* as a momentous victory for Trudeau's vision of a unified Canadian state and as the establishment of popular sovereignty expressed through a broad consensus regarding the foundational features of Canada's constitutional framework. However, this was not the case in reality, as is evidenced by the dissatisfaction and absence of consent from the two Canadian groups who have continued to present the greatest challenge for the promotion of the uniformity ideal in Canada – the Québécois and the Aboriginal peoples. Patriation of the Constitution went ahead amidst sustained protest from Quebec. In the end, Trudeau's government and all the provinces except Quebec provided the popular support necessary for the *Act* to pass. Quebec's National Assembly officially rejected the Constitution as it was, but to no avail.

Similarly, of the four Aboriginal organizations that received a hearing during negotiations, three were opposed to the package in its entirety (Russell, 2004). In addition, the irony of the limited inclusion of Aboriginal perspectives lies in the fact that their main contributions (Sections 25 and 35) were focused on solidifying their status as separate and sovereign peoples *not* under the jurisdiction of the Canadian constitution (see Chapter 3). Rather than bringing Aboriginal peoples into Canadian society through a

constitutional process, the result was a deep mistrust of the process, a sustained lack of legitimacy and the perceived "constitutional alienation" of Aboriginal peoples in Canada (Cairns, 2004: 353, 354). Aboriginal scholars and organizations have since continued to voice sustained rejection of the 1982 *Constitution Act* as an inappropriate imposition of Western uniformity over the political culture of Canada as a whole (Alfred, 1999; Assembly of First Nations, 1982, 1992; Turpel, 1989, 1990).

Subsequent attempts to bring a measure of popular legitimacy to the Canadian Constitution also failed. The Meech Lake Accord, which was aimed at providing Quebec with the special status and rights that were lacking in the 1982 *Constitution Act*, was broadly criticized for the failure to include the public in general, and Aboriginal leaders in particular, in the consultative process (Gibbins, 2004; Russell, 2004). The Accord required ratification from all ten provincial legislatures and Parliament to come into effect. Responding to Aboriginal outrage due to their exclusion from the Meech Lake negotiations, Elijah Harper successfully filibustered the Manitoba assembly preventing ratification by the imposed deadline. Newfoundland eventually followed suit, but the Meech Lake Accord was essentially dead due to Harper's influence in the Manitoba legislature (Cohen, 1990; Russell, 2004). The need for inclusion also influenced the Charlottetown Accord negotiations to the extent that, in addition to Quebec and Aboriginal groups, "feminists, environmentalists, and whatever other group or interest was able to shoulder its way to the increasingly crowded constitutional table" was included (Gibbins, 2004:138). Despite this inclusion, Aboriginal groups along with voters in Quebec and most other provinces voted against the Accord.

Organic Constitutionalism

The preceding examples demonstrate that the failure to adequately accommodate a plurality of peoples, each with a unique stake in the Canadian constitutional order, has presented a seemingly insurmountable stumbling block for securing popular consent as a means to the legitimation of the Canadian constitutional framework. Moreover, the nature of this stumbling block appears to stem from the flawed assumption that there exists such a thing as a unified Canadian polity bounded by the Canadian territory. However, major contractual negotiations which attempt to engage the Canadian society at large are not the only available avenue for constitutional change in Canada. The idea of an organic Constitution is one that has gained some level of salience in recent years as a means to accommodate competing visions of the Canadian constitutional framework and, in so doing, secure a level of popular support previously unattainable.

Organic constitutionalism departs from the notion of a single political community coming together and democratically agreeing to a single constitutional framework. Rather, it acknowledges that "diverse peoples here and now seek to reach constitutional agreements from time to time by means of negotiations" (Tully, 1994: 95). The paradigm shift does not negate the idea that individual citizens within a political community should democratically engage their constitution. What it does, is broaden the scope to accept the view that a constitution – especially one for a multinational country like Canada – should be a meeting place for *peoples*, each with their own pre-existing constitutional orders. Organic constitutionalism, then, provides a way for a constant renegotiation of the

ongoing relationships between peoples sharing a given territory. This shift in perspective requires, first, an acknowledgement of a level of constitutional negotiation that is separate from the idea of *domestic* popular sovereignty introduced above and that is undertaken between peoples negotiating the terms of their relationships and, second, an abandonment of the impulse to impose uniformity upon this context by assuming that constitutionalism must refer to the great "project of democratically contracting together to adopt a Constitution" for a single society, thus moving towards embracing constitutional change "in the evolutionary, piecemeal way ... [that is] .. proper for an organic constitution" (Russell, 2004: vii).

The organic method of constitutional change uses different avenues than the direct amendment route of the failed "mega-constitutional" trials, including individual pieces of federal and provincial legislation, judicial interpretation of the formal constitution and its underlying principles, and commonly accepted political practices that have become unofficially entrenched and "hardened into constitutional conventions" (Russell, 2006: 24). In fact, several rejected provisions of the Meech Lake and Charlottetown Accords – including Quebec's veto over constitutional amendments, language equality rights in New Brunswick, and the transfer of power to the provinces in economic and natural resource areas – have become part of Canada's constitutional framework through these methods. Aboriginal peoples, specifically, have had some success in gaining control over their governments and territories through modern treaties with federal and provincial governments, which was originally part of the Charlottetown mandate.

Organic constitutionalism provides an appropriate and enduring way to conceive of constitutional change in Canada. At the time of Confederation, Sir John A. MacDonald voiced his support for an interpretation of the new *BNA Act* that was continuous and progressive in order to adapt to new conditions and keep the Constitution up to date as well as reflecting upon the need for "the flexible interpretation that changing circumstances require" (Cairns, 1971: 308). Later, when ruling in favour of women's rights to sit in the Senate, Lord Sankey's statement that the Constitution should be read as "a living tree capable of growth and expansion" entrenched the organic conception, also known as the 'living tree doctrine', into Canadian constitutional law (*Edwards v. Canada*, 1930: 136). More recently, since the 1982 *Constitution Act*, and the inclusion of the *Charter*, much has been written about this aspect of Canada's constitutional framework, with a specific focus on the role of the courts in settling constitutional questions or ambiguities (Morton and Knopff, 2000; Russell, 1994; Sigurdson, 1993; Smith, 2002).

While debates persist as to whether this is beneficial for Canadians or how much authority the courts should have, the piecemeal modification of Canada's constitutional framework has certainly become a central feature of the Canadian context. This emphasis on the judicial review of constitutional provisions has signaled a sea-change in the functioning of democracy in Canada. While a representative Parliament had previously been the forum in which minority groups were to find their respective voices, the courts, as interpreters of the Constitution and the *Charter*, have been a more effective institution for the defence and expression of minority perspectives. As a result, "constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries". As such, the tradition of parliamentary

supremacy has slowly been replaced by "introducing principles of constitutional supremacy into ... political systems" (Hirschl, 2004: 1).

Organic Constitutionalism and Liberal Democracy

When assessing the fit between organic constitutionalism and liberal democracy, the first inclination may naturally be to see the move away from representative institutions as a departure from the liberal ideal. But the emphasis on organic constitutionalism and constitutional supremacy is in fact compatible with and beneficial to a liberal democratic regime where the co-existence of peoples is a central constitutional concern. To reiterate, representative institutions provide only the weakest form of democratic legitimation for a liberal democratic government or for the overarching constitutional framework. With respect to the Canadian case, the democratic value of representation is further weakened because, while Parliament may be said to fairly represent certain regional interests, these interests are mainly divided between English- and French-Canadians by region, resulting in the exclusion of other groups. Aboriginal peoples, for example, have little to no representation in the formal parliamentary structure. However, Aboriginal concerns are given explicit attention in the current *Constitution Act*, as well as in previous iterations. As a result, certain Aboriginal rights are placed "beyond the reach of majoritarian politics" (Hirschl, 2004: 199). In this way, the shift from parliamentary venues to the judiciary, for example, is a move toward broader democratic engagement of those groups who have a stake in the constitutional

framework but have little or no voice in the formal Parliamentary structure, thus strengthening the legitimacy of the constitutional framework.

Furthermore, and somewhat paradoxically for an appointed body that is subject to very little direct democratic input, the judiciary has achieved a level of perceived legitimacy surpassing that of Parliament. How this has come about is not absolutely clear. It may be due to the courts exercising a level of self-imposed restraint and their desire to refrain from being antagonistic to public opinion or to Parliament coupled with the high level of responsiveness to the prevailing public sentiment (Russell, 1994, Smith, 2002). Alternatively, the inclusion of the 'notwithstanding clause' in the *Charter* (s.33) which allows federal and provincial governments to opt out of judicial decisions may be seen as one way that democracy can still hold sway over the power of the courts. Perhaps more fundamental, however, is that the sense of legitimacy is exaggerated due to the fact that it is perceived relative to a representative system which has notoriously lacked democratic legitimacy in Canada. Indeed, "[in] Canada, ... it is the elected politicians, not the judges who are experiencing a legitimacy crisis" (Russell, 1994). Thus, if liberal democracy places a high value on democratic participation as a process of legitimation (Vernon, 2001), then the move toward organic constitutionalism is exactly what liberal democracy requires because it allows for the legitimation of the constitutional framework itself by, not only providing a venue within which domestic popular sovereignty can be augmented, but by also allowing the peoples to re-assess the terms of their respective relationships as groups.

Conclusion to Chapter 2

Whether Canada's liberal democratic constitutional order is a barrier to or is conducive of the collective self-determination of Aboriginal peoples depends largely on the particular conception of liberalism one adheres to. If one considers liberalism to be a dominant ideology that constrains democracy, one would expect to find a Canadian political context defined simply by individual rights and broad formal equality of citizenship legitimated via token representative government. To some extent, Canada's history has approximated this vision of uniformity as evidenced through initiatives such at the 1969 *White Paper* and the *Charter* which were both motivated by a drive to entrench the equality of all Canadians as undifferentiated Canadian citizens. However, the opposition by the Québécois and Aboriginal peoples to the constitutional entrenchment of undifferentiated citizenship in Canada demonstrates that a method which tends toward political uniformity is a poor fit for the peoples that find themselves within the territory defined by the Canadian state and has motivated a shift in approach.

The move from the uniformity paradigm to 'mega-constitutional' politics and on to organic constitutionalism also demonstrates a coincident shift from the dominant/uniformity view of liberalism to an interpretation that is more in line with the idea of liberal democracy as a single concept representing the convergence of liberalism and democracy. From this perspective liberalism, democracy, and constitutionalism become mutually reinforcing ideas that share a central emphasis on democratic engagement as a means to the establishment of popular sovereignty and the legitimation of the constitutional framework.

However, one significant conceptual barrier persists – that is, the assumption of statehood that provides the background for any theory of liberal democracy. Constitutional struggles in Canada have not only been about how citizens might be treated equally, but have also been focused explicitly on the initial terms of Canadian union and how they impinge upon the relationships between the peoples that co-exist within the Canadian boundaries. A commitment to popular sovereignty means that the relationships between Aboriginal peoples, the Québécois, and the rest of Canada must also be agreed upon at the constitutional level. And this is where liberal democracy appears to falter. There is clearly encouragement for democratic engagement and constitutional dialogue, but the dialogue is constrained by Canadian statehood which conflicts with any perspectives that challenge the overarching jurisdiction of the constitutional framework.

The next chapter examines Kymlicka's liberal theory for Aboriginal self-government as a more robust attempt at establishing popular consent by recognizing the distinction between peoples and by supporting differentiation through self-government rights. Like the liberal democratic perspective discussed above, Kymlicka's theory also attends to the importance of democratic legitimation, but he does so by encouraging a shift away from the weak forms of representation that characterize the liberal-dominated view of liberal democracy. While Kymlicka does not discuss legitimation explicitly, his liberal defence of self-government as a way to provide Aboriginal peoples with greater representation in the institutions that govern their lives attends to the same concern regarding popular sovereignty that has been the focus of this chapter.

CHAPTER 3 – COMPETING VISIONS OF COLLECTIVE SELF-DETERMINATION

Introduction to Chapter 3

This chapter discusses the meaning of collective self-determination by contrasting two broad categories of views – liberal views and Aboriginal views. These two perspectives represent two fundamentally competing conceptions of self-determination for Aboriginal peoples in Canada. Liberal political and legal frameworks have largely set the terms by which collective self-determination has been understood and theorized. That is, the issue is seen as one that addresses how a sovereign state should distribute rights to its citizens in a way that attends to the familiar liberal concerns with individual freedom and equality. Aboriginal perspectives, on the other hand, contrast with liberal views in that they represent the claims of colonized nations or peoples against the overarching state. As such, these perspectives challenge the unilateral assertion of state sovereignty over Aboriginal peoples and the subservient relationship that equal citizenship and the acceptance of conferred rights entails.

This central contrasting dynamic grounds the discussion that follows – that is, liberal democratic views begin from the *status quo*, by assuming state sovereignty within the international state system as an uncontested fact, while Aboriginal perspectives dispute this as a legitimate starting point and present the issue as one of competing sovereignties. If the main concern of a liberal state is to ensure the well-being of the individual citizens within, collective self-determination is understood as the devolution of

federal jurisdiction to smaller locales, allowing for greater levels of political autonomy for national groups within the state (Kymlicka, 1989, 1995; Margalit and Raz, 1990; Raz, 1986; Tamir, 1993). The goal, however, remains the individual well-being of citizens and collective self-determination must therefore be understood in instrumental terms as a means by which the liberal democratic state can enable the well-being of the individuals within national minorities. Aboriginal perspectives that challenge this starting point by disputing the unilateral assertion of Crown (and Canadian) sovereignty over Aboriginal nations do not see collective self-determination as a right rooted in equal citizenship and conferred from the Canadian government to Aboriginal peoples in order to improve their individual well-being. Rather, the right to be self-determining is considered as pre-existing, rooted in Aboriginal sovereignty, and as entailing recognition of the political equality between Aboriginal nations and the Canadian state.

The following presentations of liberal and Aboriginal perspectives on collective self-determination demonstrate that the co-existence of these two disparate foundational assumptions compromises the potential for productive dialogue. Common interests in areas such as equality and minority protections, for example, do exist. However, the fundamental underlying difference in perspectives results in what are better described as intersecting monologues rather than genuine dialogue. The first section discusses the dominant conceptions of collective self-determination as understood internationally and according to liberal theory – it focuses on Kymlicka's liberal defence of group rights aimed at promoting the collective self-determination of national minorities (including Aboriginal peoples) as a liberal response to the demands for collective self-determination that are faced by multinational states. I argue that since Kymlicka is bound by the

primary assumption of state sovereignty, his argument ultimately fails because he attempts to meet demands that are rooted in the sovereignty of Aboriginal peoples with a model that implicitly negates that very notion of sovereignty. As such, Kymlicka misrepresents Aboriginal claims by translating them into a more benign cultural discourse. The result is an inconsistent theory that tends to support political homogenization (liberalization) while emphasizing cultural and political difference as the justification for policies that promote collective self-determination.

The next section presents Aboriginal perspectives on collective self-determination. Given that Aboriginal peoples find themselves within the context of the assumed overarching sovereignty of the Canadian state, the interaction between Aboriginal conceptions of collective self-determination and the assumption of state sovereignty is of central importance. Two main points are emphasized: First, Aboriginal conceptions of collective self-determination are rooted in the assumption of Aboriginal sovereignty. This foundational point, along with the assumption of state sovereignty that is part of the liberal position, often places Aboriginal peoples in the paradoxical position of being required to work within the legal and political framework of the overarching state in order to request that the state grant recognition of their sovereignty along with the associated rights and jurisdictions. In each case, when Aboriginal peoples work within the constraints set by the dominant, state-defined discourse, they can be seen to be undermining their own claim of equal sovereignty by accepting the jurisdiction of the legal and political framework of the settler state over their nations. Second, in order to understand Aboriginal conceptions of collective self-determination, nationhood, and sovereignty, one must also appreciate that the dominant legal and political framework –

including the assumptions of state sovereignty and the international state system – is not structured according to traditional Aboriginal laws, values, and systems of government. In order to exercise their sovereignty and to be self-determining, then, Aboriginal peoples seek to engage what they see as a foreign, dominant, and oppressive discourse as well as to recreate their own discourses, identities, around legal and political frameworks that are based on their own distinctive values, laws, and systems of government.

Dominant Conceptions of Collective Self-Determination

International Discourse on the Right to Collective Self-Determination

At the level of international discourse, the right to self-determination of peoples has repeatedly been affirmed over time in various United Nations (UN) instruments including the UN Charter (UN, 1945), the International Covenant on Civil and Political Rights (UN, 1976), the International Covenant on Economic, Social and Cultural Rights (UN, 1976), the Millennium Declaration (UN, 2000), and, most recently, the UN Declaration on the Rights of Indigenous Peoples (UN, 2007). Broadly speaking, self-determination refers to the rights of 'peoples' and has both 'internal' and 'external' aspects:

> "In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. ... In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the

> prohibition to subject peoples to alien subjugation, domination and exploitation (UN, 1996).

Historically, self-determination has been realized in ways that correspond roughly to the internal and external aspects outlined above, but the question of whether internal or external considerations should take priority has not been answered with consistency. Following World War I, for example, Woodrow Wilson articulated the principle of self-determination with an eye toward the establishment of new states following the collapse of the German, Russian, Austro-Hungarian, and Turkish empires. New territories were carved out along ethno-national lines with language and culture being the main considerations. In the post-World War II era, however, the focus has been on decolonization. At that time, pre-existing political units were able to redefine themselves as independent states, granting political power to the majority population within predefined territorial jurisdictions. In this case, once independence was achieved, the ethnic makeup of a given state was no longer a valid justification for independence (Emerson, 1971). Following the Cold War, the coincident democratization of existing states and secessionist creation of new states created through the subdivision of pre-existing territorial boundaries, all under the banner of self-determination, further confused any attempts at precise definition of the right to self-determination (Buchanan, 1998). More recently, Indigenous peoples across the globe have been exercising their claim to the right. Successes in this regard have usually come in the form of greater levels of autonomy and self-government vis-à-vis but within overarching colonial states.

The confusion at the root of the continuing debate over the meaning of self-determination is evident from the above examples. One might delineate two general

categories corresponding to internal and external aspects. For example, self-determination may be achieved internally through enhanced representation, a redrawing of territorial lines giving the peoples within the required jurisdiction and majoritarian control of their 'economic, social and cultural development'. However, when considering the external aspects allowing peoples to 'determine freely their political status and their place in the international community', it is not immediately clear what form self-determination should take. At one end of the spectrum, this may imply secession. Alternative arrangements may be sought, however, which may range from some form of consociational power-sharing, to federalism, to an overarching scheme of civil rights. At issue is the appropriate level of autonomy for the groups in question. The actual exercise of the right to self-determination may fall anywhere along a continuum that extends from minor jurisdictional autonomy in specific policy areas granted by the state and defined by electoral boundaries, to outright secession and the formation of an independent, internationally recognized state.

Any particular manifestation of the right self-determination, however, is not a function of the justification of the right itself. That is, once peoples or nations are considered the appropriate bearers of the right to be self-determining, this may imply any manifestation along the entire spectrum of possible political arrangements, including secession (Buchanan, 2004; Miller, 1998; Tamir, 1993). Whether independent statehood is the appropriate expression of the right depends on other external constraints. The right to self-determination, as part of a broader scheme of rights, is essentially defeasible and must therefore not be interpreted as

> "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and

> independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples" (UN, 1996).

In addition, secession must not be unilateral, but may be conceded given "the free agreements of all parties concerned" (UN, 1996).

Canada and Basic Liberal Values

In Canada, the Trudeau government's 1969 *White Paper* offers the first significant example of a particularly liberal attempt at reconciling Aboriginal demands with the Canadian state. It would be a mistake to present this as a liberal approach to collective self-determination for Aboriginal peoples specifically since the focus is on a formal equality of citizenship on par with all other Canadians and within the Canadian state. Thus, in this case, the collective self-determination of Aboriginal peoples is encouraged only as Canadian citizens and as part of the Canadian collectivity proper.[5] This basic liberal understanding corresponds directly to the internal aspects of collective self-determination introduced above which stipulate that "governments are to represent the whole population without distinction as to race, colour, descent or nation or ethnic origin"(UN, 1996). By turning the page on the discrimination and political and economic marginalization of Aboriginal peoples, the *White Paper* sought to establish "*[t]rue* equality" by offering "the right to full and equal participation in the cultural, social, economic, and political life of Canada" (DIAND, 1969).

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[5] As such, it is also argued that the 1969 *White Paper* was overtly aimed at the cultural/political assimilation of Aboriginal peoples. See (Ladner and Orsini, 2005; Tobias, 1991).

Of course, the *White Paper* was soundly rejected by Aboriginal peoples in general and ushered in a new era of Aboriginal pressure to have their distinctiveness as peoples recognized by the Canadian state. However, the *White Paper* remains an important touchstone with respect to the current discussion because it demonstrates how a liberal emphasis on equal citizenship misses the point of Aboriginal demands for self-determination. Aboriginal claims that are rooted in their political identity as sovereign nations simply cannot be addressed by enfranchisement and inclusion in the broader state which functions under the assumption of absolute sovereignty. Under this assumption, associated ills such as poverty or lack of education, which the *White Paper* was meant to address, are rectified through the realization of equal citizenship, and any distinct legal or political treatment of Aboriginal peoples would be nothing less than discriminatory. This may seem a simple observation, but it continues to be a point of contention in contemporary discourse. Throughout the development of the discourse surrounding Aboriginal rights, scholars have continued to refute Aboriginal claims to legal and political distinctiveness on the grounds that it violates the fundamental value of equal citizenship (Cairns, 2000; Flanagan, 2000).

The *White Paper* example is also important because it foreshadows how the assumption of state sovereignty leads to liberal conceptions of Aboriginal distinctiveness that are interpreted almost exclusively in cultural rather than legal or political terms. The acceptance of fundamental political or legal distinctions between citizens is at odds with formal equality within a sovereign state. Therefore, any acceptance of the validity of Aboriginal claims of distinctiveness demands that this difference be understood in more benign terms that do not challenge the absolute sovereignty of the state. The *White Paper*

does exactly this by rejecting the separate legal status of Aboriginal peoples and describing Aboriginal peoples as characterized by different "languages", "tales", and "values" and by suggesting that true freedom for Aboriginal peoples means that they be "free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians"(DIAND, 1969).

Kymlicka and the Protection of Cultural Viability

Kymlicka has, in one sense, continued in the tradition of the *White Paper* by defining Aboriginal distinctiveness in terms of cultural difference. However, his theory is also a radical departure from the classic liberal paradigm in that, by understanding culture as the 'context of choice', he argues for levels of political autonomy and self-government rights for national minorities including Aboriginal peoples (see Chapter 2). It is important to note that placing a value on culture is not the essential distinguishing feature of Kymlicka's argument. Indeed, the *White Paper* distinctly emphasized the importance of Aboriginal cultures and the right to these cultures as an important feature of liberty. Kymlicka's argument goes beyond simply placing a greater weight on the importance of cultural freedom because he includes a critique of state neutrality and highlights national minority cultures specifically as a unique type that warrants special treatment.

Kymlicka ties his work to liberal theory by suggesting, first, that the viability of one's national culture should matter from a liberal perspective because it is the culture that provides the individual with the context for making constitutive choices – to form and revise one's conception of the good life (Kymlicka, 1989; 1995). Moreover, he suggests that the state cannot remain neutral on cultural matters. Because various state

decisions with respect to "languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups..., [t]he state unavoidably promotes certain cultural identities, and thereby disadvantages others" (Kymlicka, 1995: 108). It is therefore important to provide levels of political autonomy and cultural protections in order to ensure the cultural viability of national minorities. Special treatment for minority national groups is warranted because it is necessary to ensure that the individuals within enjoy an equal freedom to form and revise their conceptions of the good life in way that is consistent with their specific cultural perspectives.

The type of protections that any group should receive, however, is contingent upon the nature of the particular group. Kymlicka makes a clear distinction between national minority groups (including Aboriginal peoples) and other, ethnically-defined, groups. While both may face disadvantages within a liberal state, self-government rights aimed at promoting the collective self-determination of the group are reserved for national minorities (Kymlicka, 1995). The nature of this distinction is twofold. The first difference between groups pertains to the definition of the idea of culture. Kymlicka defines national minority cultures as "societal cultures". Typical notions of culture which emphasize only shared values, histories, or languages are cited as being too abstract. Societal cultures, on the other hand, offer a more robust understanding because they include common institutions and practices that embody cultural traits. National minority cultures, understood as societal cultures, are seen as "synonymous with a 'nation' or a 'people' – that is, an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history"

(Kymlicka, 1995: 18). As 'institutionally complete' entities, societal cultures are seen as "containing a full range of social, educational, economic, and political institutions, encompassing both public and private life" (Kymlicka, 1995: 78).

The second distinction is essentially an empirical one. That is, ethnic minorities do not display the cultural resilience or desire for recognition that national minorities do when faced with state nation-building policies (Kymlicka, 1995, 2001). Ethnic minorities often integrate quite readily and willingly into the mainstream society. "Their distinctiveness is manifested primarily in their family lives and associations, and ... [t]hey still participate within the public institutions of the dominant culture(s) and speak the dominant language(s)" since they do not have robust societal cultures of their own. The special treatments that ethnic minorities demand are most often aimed at affirmative action programs that facilitate participation and integration into the societal culture of the larger society (Kymlicka, 1995: 14). National minorities, on the other hand, have generally resisted integration into the larger society and are more attached to their societal cultures which are characterized by "practices and institutions [that] define the range of socially meaningful options for their members" (Kymlicka, 1995: 79)

Taken together, these two distinctions identify the relevant national groups based on the existence of a societal culture and their resilience as a group. The particular type of cultural rights that Kymlicka advocates for these groups are rights that correspond with their particular type of culture – a societal culture. Self-government rights aimed at promoting the collective self-determination of the group are therefore justified because they are the type of rights that are needed to maintain a societal culture specifically.

Confounding Sovereignties

A tension in this theory arises due to Kymlicka's use of the idea of culture to define groups (national minorities) that have cultural attributes but that are not essentially *cultural* entities. The definition of national minority cultures as 'societal cultures' reflects this tension in that it is difficult to draw a clear distinction between what should constitute the societal culture of a national minority and that of the overarching state. The societal cultures of both groups are essentially equivalent, as both are historically established and both contain 'the full range of social, educational, economic, and political institutions, encompassing both public and private life'. The difference is that one lies within the jurisdiction of the other. However, the theory provides no explanation for why two entities that appear to be functionally and descriptively equivalent should exhibit such disparity in their relationship to one another.

It is simple enough to acknowledge that since state sovereignty is taken as a background assumption there is no need to explain or justify its existence. However, the assumption of state sovereignty works against Kymlicka's argument by constraining the discourse such that the question of state sovereignty remains unexamined. Thus, while Kymlicka goes so far as to identify national minorities as pre-existing political communities that are descriptively equivalent to states, he must resort to the language of culture in order to present the interests of the citizens within as those that an overarching liberal state can protect. With respect to Aboriginal claims to self-determination, the constraints imposed by the context of state sovereignty result in the misrepresentation of Aboriginal demands and Aboriginal difference as cultural issues rather than political issues rooted in Aboriginal sovereignty.

To be fair, Kymlicka does address the idea of Aboriginal sovereignty but only peripherally and only to put the issue aside. He argues that making a distinction between Aboriginal peoples as internal minorities as opposed to colonized peoples is irrelevant to his argument because Aboriginal "advocates of the self-determination and sovereignty views are not in fact seeking a sovereign state". Kymlicka's focus is on the justice of state provisions regardless of "whether [A]boriginal groups are viewed as peoples or as minorities" (Kymlicka, 1989: 158, nn. 4). However, a central point of this chapter is that Aboriginal demands for rights of any sort are rooted in the desire to have their underlying sovereignty recognized. Any provisions that fail to recognize this essential feature are therefore unjust on those grounds regardless of whether these provisions are directed at independent statehood. When such provisions are accepted they are done so only because they are seen as the only available means to the end of collective self-determination.

Kymlicka's misrepresentation of Aboriginal claims as cultural rather than political concerns is problematic because it leads to faulty conclusions regarding the appropriate ways to accommodate Aboriginal demands. First, although Kymlicka's argument provides an understanding as to why cultural values as expressed through societal cultures can be important to individual well-being *generally*, his reliance on the empirical claim of cultural resilience provides little in the way of explanation for why any one societal culture *in particular* should be protected over any other (Moore, 2001). If all that is required is a secure context, there are many cultures or identities to choose from and many that arguably provide a broad range of choices, recognition and respect. Indeed, a liberal state purports to provide precisely those conditions that are relevant to individual well-being, which implies assimilation rather than protection for cultures or identities.

Of course, it may be argued that switching from one culture or national identity to another comes at too great a cost – that it is unfair and excessively disorienting to expect individuals to readily give up public languages, values, and institutions, and that national groups should therefore remain intact. But, as a general statement, this cannot hold up to scrutiny. Societal cultures are not necessarily discrete and membership in them is not necessarily permanent. Moreover, the cultures that characterize societal cultures are not bounded, internally homogeneous, or distinct entities. There is much overlap and interaction resulting in a general fluidity by which cultures and national identities change and develop over time (Barry, 2001; Tully, 1995). The empirical observation that membership in a societal or national minority culture is more resilient than the same in ethnically defined cultures, does not dispute the fact that, intransigence notwithstanding, individuals *are* able to make the transition. If, national minorities are to be distinguished by their stronger attachment to their cultures, the best that the empirical observation can do is to suggest that, as a matter of fairness, the right to collective self-determination can be justified as a function of the relative difficulty that the alternative – assimilation – presents to the group in question (Moore, 2001). Furthermore, if affirmative action programs are an appropriate response to ethnically defined cultural diversity as a means toward integration into the broader society (see above), there is no clear reason why fairness might simply demand a more robust integrative approach for national minorities rather than ceding self-government rights. In short, there may be a valid difference between ethnic minorities and national minorities, but using the language of culture fails to provide the necessary justification for collective self-determination.

Second, the focus on cultural difference results in an undue emphasis on the critique of state neutrality and the cultural differences that may exist between Aboriginal peoples and the Canadian state. To reiterate, Kymlicka suggests that the well-being of individuals within national minority societal cultures is at risk in a liberal state because the state's nation-building policies will inevitably advantage some cultures while disadvantaging others. Disadvantaged societal cultures are less able to provide their members with adequate contexts of choice. Therefore, special protections for minority societal cultures are warranted in order to ensure the viability of the group and thus the well-being of the individuals within. If this is accurate, then it follows that the level of protection for societal cultures should rise or fall as a function of cultural difference or similarity with the overarching state – the more dissimilar, the greater the warranted level of protections or political autonomy. On the other hand, if no real difference can be said to exist, the implication is that no group rights aimed at promoting collective self-determination should follow.

With respect to Aboriginal collective self-determination specifically, basing the argument for group rights on a critique of state neutrality is problematic because it is essentially divisive. As is discussed in the next section of this chapter, common interests between Aboriginal nations and the Canadian state exist. However, from the perspective of those vying for the collective self-determination of Aboriginal peoples, an acknowledgement of commonalities can be seen as undermining the original claim. On the other hand, the emphasis of cultural differences as incompatibilities would provide a more effective means by which to further a claim for collective self-determination. Furthermore, a liberal multi-national state has an interest in liberalizing the national

minorities within its borders (Kymlicka, 1995). Kymlicka's theory displays an internal tension because it advocates the promotion of collective self-determination as a function of differences in societal cultures while promoting liberalization. That is, the liberal state emphasizes and encourages political and cultural difference on the one hand, while striving for political homogenization on the other. Accommodations then remain constrained by the overarching goal of liberalization and inevitably lack the type of autonomy that is demanded. As is discussed below, the imposition of a liberal framework on self-government models, for example, means that the agreements often fall short because they are seen to be entrenching the superior position of the liberal state relative to Aboriginal nations, and as missing the point of the underlying claim of Aboriginal sovereignty. This model fails in its unifying goal, because concessions by the overarching state appear disingenuous and it encourages Aboriginal peoples to emphasize differences rather than promote or develop commonalities.

In sum, dominant understandings of collective self-determination work within the context of the sovereignty of states within the existing state system. Thus, even though collective self-determination is cited as containing an "external aspect" which "implies that all peoples have the right to determine freely their place in the international community", the important caveat forbidding "any action which would dismember or impair ... the territorial integrity or political unity of sovereign and independent States" serves to maintain the *status quo* and results in a focus on the "internal aspect" which emphasizes "the rights of all peoples to pursue freely their economic, social and cultural development without outside interference" (UN, 1996). Kymlicka's liberal defence of group protections aimed at promoting the collective self-determination of Aboriginal

peoples focuses on the internal aspects of collective self-determination, offering levels of political autonomy in order to promote the well-being of Aboriginals as citizens of the Canadian state. As such his theory misrepresents Aboriginal demands for collective self-determination as being rooted in cultural difference rather than the pre-existing and continuous sovereignty of Aboriginal peoples. To demonstrate the nature and extent of the characteristic misrepresentation, the next section focuses on Aboriginal perspectives of collective self-determination.

Aboriginal Conceptions of Collective Self-Determination

The Multiplicity of Aboriginal Perspectives

One of the major complicating factors that enters into any discussion of a specifically Aboriginal conception of self-determination is that no such monolithic view exists. Views on self-determination will vary across Indigenous tribes, bands, citizens, and scholars and these views will range along a continuum from secession to assimilation. It is useful, therefore, to identify two broad categories of sentiment, or "two Indian movements, ... one ethnic and one political" (Barsh and Henderson, 1980: 244). The main difference between these two perspectives lies in the value placed on one's tribal origins and tribal citizenship. Both perspectives aim for equality, however, on the ethnic view the emphasis is on equal citizenship within the overarching state. While these individuals may identify themselves as Aboriginal by ancestry and culture, their goal is to be able to freely identify with and practice their culture while enjoying the same range of

opportunities as that of the broader society. From the political or tribal perspective, this type of equality undermines tribal origins and is essentially assimilationist in that "[i]t assumes that all groups *want* to choose from among the same alternatives, the alternatives having been previously established by a dominant or oppressor group" (Barsh and Henderson, 1980: 244). They seek, rather, a political equality – the recognition of their right to establish the alternatives for themselves, according to their own values, laws, and systems of government.

The focus in this section is on the latter type – those that share a desire for political self-determination as an expression of their sovereignty as nations pre-existing the formation of the Canadian state – because these perspectives are the most prevalent in the Aboriginal literature and because they present the most profound challenge to dominant, state-centred perspectives like Kymlicka's. But this delineation is further complicated by the fact that, even within the groups seeking greater political autonomy, strategies range from those associated with the ethnic perspective which emphasize civil rights within the existing political structures, and those that lean towards outright secession, eschewing any political forms that originate from what is seen as the illegitimate political authority of the settler state. Thus, while some will advocate claiming equal citizenship and all that the classical liberal democratic state has to offer, others will align with the more contemporary versions which emphasize public recognition of cultures and identities. Still, others will accept some level of local political autonomy, or municipal-style governance within their communities. All of these, however, will be rejected by some as a perpetuation of the colonial relationship. The result is an amalgamation of what appear to be incompatible and inconsistent strategies

originating from a group that is supposed to be unified in its goals. The goal, however, remains as a desire to have the sovereignty of Aboriginal nations recognized. Collective self-determination, then, is not seen solely in instrumental terms, but is seen as an expression of sovereignty. How this shift in perspective interacts with the instrumental liberal perspective already presented is discussed below.

Civil/Individual Rights

It should be made clear at the outset that the debate about civil rights is not about whether a scheme of individual rights or formal equality of citizenship that would put Aboriginal peoples on par with all other Canadians is sufficient in itself for self-determination. As has been discussed, this type of approach was attempted and abandoned as official policy through the proposal and subsequent resounding rejection of the Trudeau government's attempt to rectify the discrimination embodied within the *Indian Act* through the policy recommendations outlined 1969 *White Paper*. Despite the widespread consensus that *Indian Act* was an oppressive piece of colonial legislation, Aboriginals paradoxically chose to "retain the very legislation that colonized them because ... it recognize[d] their special status" (Borrows, 2002: 104). Whatever the discourse surrounding rights may be, nationhood and the importance of a relationship with the federal government that recognizes Aboriginal sovereignty must remain.

The debate, rather, is focused on the question of what place, if any, state-sponsored citizenship rights ought to have in Aboriginal conceptions of collective self-determination. In this case, the rights in question are those outlined in the *Charter*. For some, the application of the *Charter* to Aboriginal peoples is entirely at odds with a

proper understanding of self-determination (Alfred, 1999; Turpel, 1989, 1990). On this view, the application of the *Charter* to Aboriginal peoples represents the imposition and domination of a foreign legal and cultural framework. For example, the preamble to Part I of the 1982 *Constitution Act* states that, as part of the supreme law of Canada, the *Charter* is based upon "principles that recognize the supremacy of God and the rule of law". This prefatory statement makes reference to "a foreign God and the (Anglo-American) rule of law" and fails entirely to acknowledge Aboriginal spirituality, conceptions of the Creator, and "The Great Law of customary laws of the First Peoples of this [North American] territory" (Turpel, 1989:150; 1990). Thus, to accept the conferral of rights from the Canadian state is to accept the imposition of a foreign legal and political framework that is irrelevant to Aboriginal peoples and their values, laws, and systems of government.

In addition to failing to resonate with the distinct worldview of Aboriginal peoples, the application of the *Charter* to Aboriginal peoples represents a failure to recognize the *sui generis* nature of Aboriginal rights. That is, that "[A]boriginal rights must be viewed differently from *Charter* rights because they are rights held only by [Aboriginal] members of Canadian society" (*R. v. Van der Peet* (1996) cited in Henderson, 2000: 77). The *sui generis* understanding of Aboriginal rights is rooted in the idea that the relationship between Aboriginal peoples and the Canadian state is defined by treaties between sovereign entities with their own distinct legal traditions, not by *Charter* rights that may be conferred to citizens by the state (Borrows, 2002; Borrows and Rotman, 1997; Henderson, 2000; 2004). As such, to accept the jurisdiction of the *Charter* "is to concede nationhood in the truest sense ... in order to enter the legal and

political framework of the state" (Alfred: 1999: 140). In short, the recognition of Aboriginal peoples as sovereign entities residing within the territory claimed by the Canadian state is undermined by an acceptance of the jurisdiction and application of the *Charter*. This imposition of a foreign legal framework, then, is entirely at odds with a conception of collective self-determination by which a people seek to live according to their own values, laws, and systems of government.

However, the *Charter* is also argued to be essential to the self-determination of Aboriginal peoples. One of the most salient voices in this respect is that of the Native Women's Association of Canada (NWAC) who have argued that in order "to protect individual groups in the Aboriginal collectivities ... [t]he *Canadian Charter of Rights and Freedoms* must apply to all arrangements negotiated pertaining to self-government and self-determination" (NWAC, 1992: 8). This stance is rooted in the perceived need for some legal recourse to counter the sexism inherent in the *Indian Act*, which has ignored the centrality of women's roles in traditional Aboriginal governance. This discrimination has been most notable with respect to patriarchally defined property rights (AFN, 2008; NWAC 2007), Indian status, and governmental structures (Borrows, 1994; Monture-Angus, 1999). In this regard, the democratic and equality rights enshrined in the *Charter* can ensure that Aboriginal women have the legal right to fight against sexist institutions and legislation that adhere to the older patriarchal models.

As in the opposing position, the goal remains collective self-determination as an expression of the sovereignty of Aboriginal peoples. However, the difference here is that it is not simply the external imposition of foreign and discriminatory values that is seen to be standing in the way. In this case, the imposed patriarchal political structures have

become internalized and recreated through Aboriginal governance as defined by the *Indian Act*. The goal is not simply to control governmental structures that have been imposed upon Aboriginal groups from the outside. Rather, the goal is to be genuinely self-determining by reclaiming traditional laws and systems of government that reflect traditional values that can only be properly expressed if Aboriginal women regain their status in Aboriginal society (NWAC, 1992). The *Charter*, therefore, is seen as the essential tool with which to battle longstanding discrimination and as a central feature of collective self-determination.

Standing between these two conceptions of the *Charter* as foreign and inimical to collective self-determination versus the *Charter* as a central feature of collective self-determination is a perspective suggesting that, "despite potential for the language of rights to oppress, this same discourse can also augment political struggle and contribute to emancipation" (Borrows, 1994: 22). Thus, the debate surrounding civil rights should not be construed simply as a disagreement on whether a foreign instrument should penetrate the sovereignty of Aboriginal peoples. Rather, it should be recognized that there exists an important alignment of contemporary and traditional interests that are shared by both Aboriginal and settler societies and that emphasize the importance of mutual respect and equality. As such, these shared objectives "provide a meeting place for the potential transformation of the rights discourse. By creating a conversation between rights and tradition, the *Charter* presents First Nations with an opportunity to recapture the strength of principles which were often eroded through government interference" (Borrows, 1994: 21). Underlying this view is the idea that the self-determination of Aboriginal peoples is intimately tied to the extent to which Aboriginal peoples can effectively participate in and

influence Canadian law and politics (Borrows, 2002). In addition to the potential common ground that may exist between traditional and contemporary ideologies, Aboriginal participation within an existing rights discourse holds the potential for the transformation of the discourse itself. It is through the participation in debates surrounding the application of the *Charter* to Aboriginal issues that traditional Aboriginal perspectives can make their way into the political discourse and become entrenched in the legal framework (Borrows: 1994). As in the other views, self-determination for Aboriginal peoples remains the central goal. However, here, the ability of a people to live according to their own values, laws, and systems of government is seen to be intimately linked to their participation within the legal and political framework of the broader state.

Taken together, these perspectives on the relationship of civil rights to self-determination reveal that the civil rights approach alone will not suffice for any conception of Aboriginal collective self-determination. To concede this would be to concede sovereignty which remains the central justification for any claim to the self-determination of Aboriginal peoples. In each case, the goal is essentially emancipation from the assumed jurisdiction and authority of a foreign government. The outright rejection of any *Charter* application is rooted in the idea that any acceptance of jurisdiction will undermine the initial claim to a *sui generis* form of Aboriginal rights which grounds a justification for self-determination. Alternatively, for the NWAC, the application of certain *Charter* rights is a means to the dismantling of an imposed patriarchal system of law and governance. The synthesizing perspective goes beyond claiming *Charter* rights as protections, to engaging the discourse in order to transform the overarching legal framework such that traditional Aboriginal values also become

imbedded within the laws and politics of the broader state. In each case, the position taken is inherently strategic, and the consensus is that civil rights alone do not provide a sufficient understanding of collective self-determination. If such rights are valued at all, it is simply as a partial means to the greater goal of collective self-determination as an expression of the underlying sovereignty of Aboriginal peoples.

Cultural Rights

The idea of constitutionally protected group rights for Aboriginal peoples has gained prominence in Canada in recent years as Aboriginal peoples have increasingly sought to defend their Aboriginal and treaty rights in the courts. Successful defences have bolstered claims for Aboriginal autonomy by making reference to the distinctiveness of Aboriginal cultures. On this view, the protection of Aboriginal and treaty rights entails a protection of the right of Aboriginal peoples to engage in activities on their lands according to traditional Aboriginal customs even when these customs are at odds with federal or provincial laws. Exemplary cases have focused on the right to hunt and fish on traditional lands and to sell these resources without federal or provincial licenses.[6]

However, as the Supreme Court's decisions reveal, the relationship between Aboriginal and treaty rights and cultural protections is often misconstrued. That is, rather than seeing a people's demands for the right to live according to their distinct cultures and traditions as a component part of the broader claim to collective self-determination and as rooted in their sovereignty, the right of Aboriginal peoples generally is defined in terms

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[6] See *R. v. Van der Peet* (1996), *R. v. N.T.C. Smokehouse* (1996), and *R. v. Gladstone* (1996) cited in Borrows (2002: 56-76) for examples of court cases which have defined Aboriginal and treaty rights as practices that were "integral to a distinctive [Aboriginal] culture". See also *R. v. Marshall* (1999) as cited in Ladner and Dick (2008).

of their cultural distinctiveness. As such, the right of Aboriginal peoples to take control of their own economies and resources is determined on the basis of whether the specific activities in question were an integral part of the traditional culture of the specific Aboriginal nation in question. On this interpretation, the right to harvest and sell natural resources can only be defended if such a practice is shown to be a "central and significant part of the [Aboriginal] society's distinctive culture" and to have developed prior to any contact with European settlers (*R. v. Van der Peet* cited in Borrows, 2002: 61). This shifts the focus away from the question of the role that respect for cultural difference might play by assuming that specific rights pertaining to a set of objective cultural characteristics or practices can adequately meet the demand for the right to collective self-determination. On the contrary, deriving a defence of self-determination from a right to cultural preservation undermines the initial claim. It assumes a static culture, defined at some point prior to European contact, and denies protection for any practices that may arise in response to modern challenges (Borrows, 2002). As a result, a people will only have the right to live according to their own values, laws, and systems of government insofar as these remain consistent with past traditional practices. Any attempt to modernize results in a ceding of jurisdiction in to the overarching state.[7]

This might imply that the root shortcoming of the culture-based approach is simply that it fails to adjust for the dynamic nature of culture. But that conclusion does

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[7] In *R. v. Smokehouse* (1996) and *R. v. Van der Peet* (1996), for example, the Supreme Court held that Aboriginal rights to sell and exchange fish fell under provincial and federal jurisdiction because these particular practices developed as a result of contact with European settlers and were, therefore, not an integral part of their distinctive cultures (see Borrows, 2002: 57-71). Similarly, in *R. v. Marshal* (1999) the Supreme Court defined a Mikmaw treaty right to trade only for 'sustenance' or 'moderate livelihood', not for 'economic gain' or 'accumulation of wealth' (see Ladner and Dick, 2008).

not appreciate the core difficulty with this approach, which is that it fails to recognize that cultural claims are seen as a component part of a broader right to collective self-determination which, in turn, is based on the claim of Aboriginal sovereignty. The fusing of "the universal with the particular, the *sui generis* theory of Aboriginal rights with its practices, ... treat[s] the exercise or expression of an Aboriginal right as the Aboriginal right" (Henderson, 2006: 198). This method misses the perspective by which Aboriginal peoples are "defined by reference to sovereignty, recognizing but not deifying origins" (Barsh and Henderson, 1980: 244). As such, the right to engage in various cultural practices should be seen as an expression of the *sui generis* Aboriginal right and rooted in the recognition of Aboriginal peoples as sovereign entities. Similarly, cultural practices should be seen as expressions of traditional values and should not be equated with the traditions *per se*. Cultural and traditional practices of Aboriginal peoples must then be understood as fluid and subject to change and to adapt to and reflect contingent contexts, both internal and external. Not only does the conferral of cultural rights demonstrate a profound misunderstanding of the relationship between Aboriginal cultures and the sovereignty of Aboriginal peoples, it explicitly negates Aboriginal sovereignty by placing the definition and expression of Aboriginal cultures within the purview of the Canadian state. Collective self-determination, on the other hand, requires that the ongoing definition and expression of Aboriginal cultures are initiated and undertaken from the inside and in a manner consistent with their own values, laws, and systems of government.

Self-Government Rights

The idea that group rights for self-government are instrumental for the collective self-determination of Aboriginal peoples is vulnerable to the same criticisms as those just presented. That is, while self-government agreements may secure varying levels of autonomy for Aboriginal peoples, these arrangements are problematic because they place the locus of authority and control squarely in the hands of the overarching state, undermining the sovereignty of the Aboriginal nations striving for self-determination. Thus, while self-government rights for Aboriginal groups may approach the ideal of collective self-determination through the approximation of political autonomy, they "lead to a weaker form of Aboriginal sovereignty because the rights of Aboriginal governance are recognized only to the extent that they do not trump the sovereignty of the Canadian state" (Turner, 2006: 66). The result is a form of delegated authority, entailing a legal and political framework that is controlled and defined from the outside by the overarching state.

If collective self-determination is seen as an expression of the sovereignty of Aboriginal peoples, this form of delegated authority is not only suboptimal but is inimical to the struggle for collective self-determination. The initial imposition of the band council form of government under the *Indian Act*, for example, ignored Aboriginal sovereignty and destroyed traditional systems of governance. This situation is argued to persist today in that, although legal autonomy may be granted in certain areas, these are usually insignificant, allowing only municipal-level jurisdiction and remaining subject to federal approval (Ladner, 2003: 49). In addition, the structures of the band councils remain entrenched in what is seen as a hierarchical Canadian legal and political framework that only acknowledges and negotiates with representatives that fit within conventional *Indian*

Act political practice (Monture-Angus, 1999). Thus, not only do *Indian Act* forms of governance alienate Aboriginal peoples from their traditional values, laws, and systems of government, but by denying the sovereignty of Aboriginal peoples and the associated forms of intergovernmental relationships outlined in treaties, *Indian Act* governmental forms also represent an institutionalized form of political inferiority and dependence for Aboriginal peoples (Ladner, 2003).

More recent self-government agreements have resulted in levels of political autonomy that go beyond the traditional *Indian Act* framework. The *Nisga'a Final Agreement*, for example, allows for control over areas like policing, education, taxation, and natural resources in addition to releasing the band members from *Indian Act* provisions (*Nisga'a Final Agreement*, 2000). Another example, the establishment of the Inuit territory of Nunavut, effectively grants provincial powers to a territory with an Aboriginal majority. However, many of the same dynamics are said to persist. Although greater levels of autonomy are granted to Aboriginal peoples in these cases, governance structures and internal jurisdictions remain constrained by federal and provincial frameworks and standards respectively (Maaka and Fleras, 2008; Jhappan, 1995; Timpson, 2005). Therefore, while these developments are unprecedented achievements with respect to political autonomy for Aboriginal peoples, they are also concessions and limitations on future claims against the Canadian state as well as a betrayal of Aboriginal sovereignty in the face of a persistently oppressive colonial state (Borrows, 2002).

The critical position suggests that self-government must be understood as part of the *sui generis* right of Aboriginal peoples and that the common usage and practice of self-government misses this point by seeing self-government as varying packages of

rights and jurisdictions that can be granted to various communities by the Canadian state. For many Aboriginal peoples, this stands in direct contradiction to their sovereignty since "the Canadian government [has] never [been] in a position to create or grant self-government but merely to acknowledge it" (Little Bear, Boldt, and Long, 1984: xiv). As such, the idea of self-government is often held in disdain as it implicitly acknowledges the sovereignty of the Canadian state over Aboriginal peoples (Monture-Angus, 1999). From this perspective, endorsing prevailing state-defined conceptions of self-government places Aboriginal peoples in the paradoxical position of aiming to exercise sovereignty while conceding that it does not exist. In order to understand self-government in a way that is compatible with collective self-determination for Aboriginal peoples, it must be understood as an expression of their sovereignty. As such, self-government should entail an acknowledgment of the right of Aboriginal peoples to define their own legal and political context according to their own traditions and values. As is the case for various other civil and cultural rights presented above, self-government should be seen as an expression of, and should not be equated with, the foundational right to self-determination which is based on the pre-existing and continuous sovereignty of Aboriginal peoples.

Identity and Sovereignty

As the preceding discussion reveals, the conferral of various individual and group rights upon Aboriginal peoples fails to adequately capture the essence of self-determination because it fails to acknowledge the sovereignty of Aboriginal peoples which grounds a right to collective self-determination. However, the assumption of state

sovereignty presents another problem that undermines Aboriginal aspirations – that is, state control over the definition of Aboriginal identity. In Canada, Aboriginal peoples may have garnered recognition of their status as 'nations', however the state-centred approach, nevertheless, entrenches a weaker form, defining Aboriginal nationhood in cultural terms while reserving political recognition for those groups that meet requirements imposed by a liberal framework.

If collective self-determination for Aboriginal peoples is seen as an expression of their sovereignty, their identity formation and recognition must be initiated from within, and defined by, the Aboriginal nations themselves (Coulthard, 2008). The problem with the current context is that the legal and political power disparities that persist between Aboriginal nations and the Canadian state continue to place the power of identity formation within the purview of the Canadian state resulting in a conferral of – rather than an internal definition of – Aboriginal identity, thus undermining the sovereignty-based conception of collective self-determination.

One of the main problems with a state-centred definition of Aboriginal identity is the broad essentialization that inevitably occurs. The recognition of nationhood is by its very nature, a top-down process by which the Canadian state chooses the organizations or groups that are eligible for nationhood status. The prevailing model recognizes only those groups which have the potential to fit within the legal and political framework of the Canadian state. As such, considerations of land base, permanent population, and the potential to function on par with provinces or municipalities are given precedence when deciding upon whether any group should be afforded legal recognition of nationhood status (McDonnell and Depew, 1999). The result is the creation of political entities such

as tribal councils that can garner a sufficient amount of human resources to function according to federal guidelines. In effect, there is the creation of a "pan-Indian" identity that leaves behind many tribal differences in order to create Indian groups that are better suited to engage the Canadian government (Little Bear, Boldt, and Long, 1984: xvi).

Representation through these entities is problematic. Tribal councils represent only a portion of the over 600 First Nations bands in Canada. As such, many groups are left unrepresented and those that do gain representation do so by amalgamating into groups in order to meet the federal requirements for nationhood status (McDonnell and Depew, 1999). The dominant model imposes a homogenization of Aboriginal interests into a set of objective criteria which are focused on the ability to fit within the legal and political framework of the state rather than on representing the unique interests of a diversity of Aboriginal nations (Turner, 2006). Here again, distinct Aboriginal nations are placed in the paradoxical position of being required to sacrifice their ability to live according to their own values, laws, and systems of government in order to meet the federally imposed requirements that make them eligible for nationhood status.

The Canadian state has also placed constraints on collective Aboriginal identities by defining whether Aboriginal individuals can justifiably lay claim to an Aboriginal identity. Even after the introduction of Bill C-31 which is argued to have removed sexist definitions of Aboriginal identities and to have enabled bands to control their membership (Borrows, 2002) the federal government retains much of the authority to decide who is Aboriginal under law. There remains a confusing array of federally defined matrilineal and patrilineal requirements that must be met in order for one to justifiably claim Aboriginal status (Monture-Angus, 1999). Furthermore, the federal legal system

retains the ability to overturn whatever decisions individual bands may make with respect to individual band membership (Alfred, 1999).

Two main problems are immediately apparent from the state control of Aboriginal identity. First, defining Aboriginal identity on the basis of bloodlines alone has little to do with a subjective identity rooted in a history of living together as a group according to their own values, laws, and systems of government. The legacy of the *Indian Act* which has defined Aboriginal identity without regard for the cultural and historical nature of Aboriginal national identities is one that has seen the stripping away of the cultural features of ethnic identities in addition to the deconstruction of the political institutions required to maintain political identities (Barsh and Henderson, 1980). Second, the usual problem exists in that the national identities are defined from the outside according to foreign values, laws and systems of government. Taken together, these two features demonstrate how the paradoxical situation persists for Aboriginal peoples seeking to be truly self-determining. In many cases, national identities appear to exist, but the means by which to develop and project these identities in order to achieve recognition have been undermined or destroyed. And although recognition of nationhood status may remain within the reach of some Aboriginal nations, they are only able to do so by undermining their claim and accepting a foreign jurisdiction over individual membership. The result is an Aboriginal identity that is alienated from the actual characteristics of the group and essentialized in accordance with, and defined from the outside by, the overarching state.

Relationship and Hierarchy

The root of the problem with the state-centred approaches generally is not to be found in the details of the specific provisions or policy recommendations. Indeed, the legal definition of the relationship between Aboriginal peoples (individually and collectively) and the Canadian state, including the entrenchment of a conception of Aboriginal nationhood, appears to be indispensible given the demands of coexistence. Rather, the main problem appears to be the persistence of the hierarchical relationship between Aboriginal peoples and the Canadian state and the failure to establish a nation-to-nation relationship that acknowledges the underlying sovereignty of Aboriginal peoples. The conferral of rights and the recognition of a weak form of nationhood status "serves to foster unfree and non-mutual relations instead of free and mutual ones" (Coulthard, 2008: 189). The flawed form is one that accepts the superior sovereignty of the Canadian state over Aboriginal peoples generally and engages all negotiations from this perspective.

This form of recognition is at odds with a sovereignty-based understanding of self-determination for Aboriginal peoples because it demands that Aboriginal peoples seek, and are hopefully granted, "recognition from the oppressive structures and institutions of the settler state and state society". Thus, even though Aboriginal groups may be afforded certain special rights, including levels of political autonomy, "the subjective life of the colonized will tend to remain the same – they become 'emancipated slaves' "(Coulthard, 2008: 194).[8] As such, they will essentially have become assimilated,

[8] In this citation, Coulthard is making reference to the work of Frantz Fanon that addresses problems of recognition in colonial contexts (Fanon, 1967; 2005 in Coulthard, 2008). While the main focus of Coulthard's paper is on Charles Taylor and the 'Politics of Recognition' (Taylor, 1994 in Coulthard, 2008), his arguments are relevant here because they address the idea of an Aboriginal identity rooted in sovereignty (which Kymlicka's

giving up on the goal of collective self-determination defined by the freedom to live according to their traditional values, laws, and systems of government, and accepting those imposed upon them by the dominant group as their own (Barsh and Henderson, 1980). By seeking recognition from the overarching legal and political structures, Aboriginal peoples tacitly accept the overarching sovereignty of those institutions, which contradicts and negates any prior claim to their own sovereignty.

It seems an impossible situation – the legal and political power disparity between Aboriginal peoples and the Canadian state, whether unjustly established or not, simply exists. As such, it does not appear that there can be any form of relationship other than a hierarchical one in which the powerful state *grants* recognition or rights to Aboriginal peoples. However, an alternative response, given the dynamics inherent in the current relationship between Aboriginal peoples and the Canadian state, is for Aboriginal peoples to initiate their own "journey toward reclaiming [their] individual and collective identities" (Monture-Angus, 1999: 21). The 'reclaiming' of Aboriginal identities suggests an appreciation of the ways in which Aboriginal identity formation has become co-opted and has come to be defined by, or in terms of, the overarching state. It suggests that the wide array of Aboriginal identities must be *self-defined* and "understood as forms of nationalism because they maintain traditional cultural boundaries and create group self-identification as a political community distinct from the state, and consistently committed to the right of self-determination"(Alfred, 1995). To be truly self-determining, then, Aboriginal peoples must become the authors of their own self-determination, "as the creators of the terms and values *of their own recognition*" (Coulthard, 2008: 195).

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argument ignores) and because Taylor's thesis accepts the same foundational assumption (overarching state sovereignty) as Kymlicka does.

Redefining Aboriginal Sovereignty

Turning away from state-defined conceptions of self-determination implies, in some cases, a reinterpretation or redefinition of the terms of the discourse itself. The idea of sovereignty, for example, has been a central feature of the preceding discussion of self-determination – the prior and continuous sovereignty of Aboriginal nations has been presented as the underlying justification of their right to be self-determining. Sovereignty is commonly understood as an element of statehood. As such, it implies mutual recognition of the status of statehood in the international state system along with political and legal independence vis-à-vis other states (Macklem, 2001; Young, 2000). However, Aboriginal peoples were not part of the state system prior to colonization and have never enjoyed the full recognition of state sovereignty over their territories. Furthermore, the idea of state sovereignty is argued to embody elements of coercive force, absolute authority over people and territory, and hierarchical power structures that are at odds with traditional Aboriginal principles (Boldt and Long, 1984; Alfred, 1999). Because Aboriginal nations were never historically part of the international state system, do not typically aspire to independent statehood, and because the common understanding of state sovereignty conflicts with Aboriginal philosophies of governance, it seems as though the utilization of the idea of sovereignty to further Aboriginal goals of self-determination has the potential to be counterproductive in the same way that accepting delegated forms of rights or recognition is – by endorsing and becoming part of the oppressive framework.

This tension is relieved, however, if sovereignty is understood in a way that appreciates the internal and external dimensions of the relationship between Aboriginal peoples and the Canadian state. The external relationships refer to those between Aboriginal nations and the Canadian state while the internal relationships refer to those within the Aboriginal nations themselves. The unilateral assertion of state sovereignty over Aboriginal peoples generally, affects these relationships differentially and sovereignty ought to be understood differently in each case. The claim of sovereignty against the Canadian state is one that stands in direct opposition to the unilateral assertion of Canadian sovereignty over Aboriginal peoples and their lands. It uses the language of sovereignty to reveal the inconsistent logic that has justified Canadian domination. The initial distribution of sovereignty between European powers, based on the doctrine of discovery, ignored the fact that Indigenous nations already inhabited the continent, forming advanced political systems of governance and exercising political authority over their territories. Unless one comes to accept that religion and technological advancement define political sovereignty, there remains no logical defence for the original unilateral assertion of Crown sovereignty based on the discovery of the North American continent (Macklem, 2001). The claim of sovereignty, when directed externally, serves to provide a shield against the assertion of the political and legal authority of the Canadian state over Aboriginal peoples. It simply demarcates how far the sovereignty of the Canadian state can be justifiably projected.

The political and legal authority implied by sovereignty, however, is said to be at odds with traditional Aboriginal philosophies. But this need not undermine the goal of collective self-determination. When directed internally, the idea of sovereignty departs

from the authoritative connotations of state sovereignty and comes to reflect ideals similar to "personal sovereignty and popular sovereignty" (Alfred, 1999:54). Rather than substituting one overarching authority for another, internal sovereignty means emancipation from foreign hierarchical and authoritative power structures. Sovereignty, in this sense, is vested within the people and the land, not within the state. Systems of governance and the representatives that work within them, become responsible to the people, rather than to the Canadian state as is currently the case. Furthermore, sovereignty does not simply represent political and legal authority over a jurisdiction, but represents the freedom to be self-defining and self-sufficient, and to restore political structures based on a respect for and responsibility to people and the land, spirituality, harmony (Alfred, 1995; Monture-Angus, 1999). Understood in this way, sovereignty becomes intimately linked to collective self-determination, as an external shield against foreign authority and as an internal expression of the freedom for Aboriginal peoples to establish and live by their own values, laws, and systems of government.

Aboriginal Sovereignty and Political Independence

It has been argued that collective self-determination for Aboriginal peoples is a divisive doctrine that threatens the unity of the Canadian state (Cairns 2000; Flanagan, 2000). Indeed, the rhetoric of sovereignty and self-sufficiency that is used in the discourse surrounding collective self-determination implies secessionist motivations. However, the claim for recognition as a sovereign nation should not be misinterpreted as a claim for formal independence. In fact, this interpretation misses a central implication of such recognition. That is, as sovereign entities, the relationship between Aboriginal

peoples and the Canadian state should be defined by treaties rather than by legal decisions made by the state that are rooted in the assertion of Canadian sovereignty over Aboriginal peoples. Acknowledging the sovereignty of Aboriginal nations both affirms the legitimacy of past and future treaties as well as ensures a continuance of interdependent relationship outlined therein.

One treaty commonly associated with the notion of Aboriginal independence was negotiated in early colonial America between the *Haudenosaunee* and the Dutch. This treaty is represented by the *Gus Wen Tah* or the Two Row Wampum belt that was presented to the Aboriginal representatives by the Dutch as a representation of the agreement (Turner, 2006). The description of the belt and its meaning has been described as follows:

> There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These tow rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel" (Williams, 1986 quoted in Borrows, 2002: 126).

The symbolism fits neatly with the distinction made above between internal and external sovereignty. Independence is clearly implied, but this is restricted to internal matters. The laws, customs, and ways of both the Aboriginal peoples and the Europeans were held to be their own independent jurisdictions. However, the three rows of white beads symbolizing peace, friendship, and respect bind the two sovereign peoples together in an ongoing and interdependent relationship (Borrows, 2002; Turner, 2006).

The important point is that collective self-determination need not be equated with outright independence. There is a balance to be struck between political and legal independence and the interdependence that the relationship with the Canadian state entails. There are many means to find this balance and sovereign entities have established their respective relationships in varying ways ranging from federal arrangements to treaties between internationally recognized states (Macklem, 2001; Young, 2000). At issue, however, is the establishment of the terms of interdependent arrangements. If Aboriginal peoples are to be truly self-determining, they must by definition be able to negotiate their interdependence with the Canadian state as a sovereign entity and within the context of peace, friendship, and respect which also entails an adherence to the existing shared jurisdictions as defined by previously negotiated treaties.

Conclusion to Chapter 3

In sum, understandings of collective self-determination diverge depending upon which foundational assumptions one adheres to. If state sovereignty is the starting point, collective self-determination is seen instrumentally as a means by which the state seeks to ensure the well-being of the citizens within. On this view, overarching legal and political institutional frameworks are taken as given and any accommodations are reached within this framework. If the assumption of Aboriginal sovereignty is taken as a starting point, collective self-determination becomes an expression of sovereignty – a pre-existing right that ought not to be understood as granted by the state or flowing from the sovereignty of

the state. The coexistence of these two disparate foundational assumptions compromises the potential for understanding and a dialogue aimed at the realization of common goals.

The dominant understanding and practice of collective self-determination operates within the framework defined by state sovereignty. As such, a confusing relationship has developed between Aboriginal peoples and the Canadian state. While some will seek protections in the form of rights from the state as a means to the emancipation from political frameworks that are seen as imposed and oppressive, others see this type of engagement as undermining initial sovereignty claims. Yet the liberal framework entailing state sovereignty persists placing Aboriginal peoples in what seems to be the paradoxical situation of being required to concede sovereignty in order to assert it.

Understood in this way, the main barrier to the collective self-determination of Aboriginal peoples in Canada is the inability to establish a nation-to-nation relationship with the Canadian state – a relationship that acknowledges the pre-existing and continuous sovereignty of Aboriginal peoples. In order to establish this relationship and with it the necessary preconditions that are required to be truly self-determining, Aboriginal peoples are faced with the daunting task of reclaiming their identities as sovereign nations within the existing hierarchical context that serves to relegate Aboriginal identities to a position of subservience vis-à-vis the overarching state. The next chapter discusses the potential that exists for this understanding of collective self-determination to be realized within the context of Canada's liberal democratic constitutional order.

CHAPTER 4 – RECONCILIATION

Introduction to Chapter 4

This chapter addresses the initial question of whether the Canadian liberal democratic constitutional order can be reconciled with the collective self-determination of Aboriginal peoples. Given the representations of Canada's constitutional framework as presented in Chapter 2 and the conceptions of collective self-determination as presented in Chapter 3, I argue that no fundamental theoretical incompatibilities exist between the two. Rather, liberal approaches like Kymlicka's begin from an understanding of Canadian statehood that is contested by Aboriginal peoples on historical and constitutional grounds. Thus, the central barrier to collective self-determination, from the perspective of Aboriginal peoples, is the flawed assumption of absolute Canadian sovereignty which provides the context for the application of state-centred theories of collective self-determination like Kymlicka's. If the background context is adjusted to accommodate Aboriginal conceptions of their underlying sovereignty, all that changes is the jurisdiction of legitimate application of the theory, not the basic tenets of the theory itself.

This chapter begins by introducing the concept of treaty federalism[9] as being rooted in Aboriginal sovereignty and the status that this implies for Aboriginal treaty orders as constitutional orders that define relationships between various Aboriginal nations and between Aboriginal nations and the Canadian state. It then continues with the

[9] The term 'treaty constitutionalism' is also used. However, both terms refer to a constitutional order defined by treaties between sovereigns (see, for example, Tully, 1995 and Ladner, 2009).

concept of treaty federalism as a focal point for the discussion of the compatibility between Aboriginal sovereignty and constitutionalism, liberalism, and democracy in Canada. It argues that the Canadian Constitution is not only compatible with, but provides explicit confirmation of, and protection for, Aboriginal sovereignty. Thus, Canadian constitutionalism accommodates the shift in context toward treaty federalism by entrenching Aboriginal-state relations as ongoing relationships between sovereigns. This chapter then revisits Kymlicka's theory as presented in Chapter 3 and argues that the tensions that the assumption of absolute state sovereignty creates for Kymlicka's theory are ameliorated by accepting the shift in context, leaving the basic values of Kymlicka's theory intact. The remainder of the chapter moves beyond questions of compatibility to assess whether liberal and democratic values and the associated conceptions of political legitimacy can motivate a shift in the dominant state-centred perspective to one that can acknowledge Aboriginal sovereignty and the co-existence of parallel constitutional orders as implied by treaty federalism. Ultimately, I argue that treaty federalism provides a perspective that challenges only the prior assumption of absolute state sovereignty and the associated assumption of jurisdictional authority. As such, it does not present a challenge to the basic liberal, democratic, or constitutional principles of the Canadian context. In fact, treaty federalism provides a way to ease some of the tensions that arise from the overextension of liberal and democratic theories.

Sovereignty in Canada

The Constitutional entrenchment of the right to collective self-determination for national minorities is not a foreign idea for the Canadian context and already exists in Canada through the federal system. As has been discussed in Chapter 2, the original dilemma for Canada's founding fathers was to find a way to merge two founding nations into one country. The Canadian federal system as outlined in the Constitution was designed, in part, to accommodate the Québécois in a country comprised of a majority of English settlers. Recalling that sovereignty need not be equated with statehood (see Chapter 3), this arrangement is understood as "the initial distribution of sovereignty ... by and through a series of acts of mutual recognition by European powers." The relationship between the French and the English that is outlined in the Canadian Constitution is then seen as resulting from a "relation between sovereigns [and] a relation of equality in which each views itself and the other as independent and distinct" (Macklem, 2001: 112-113). This idea has much in common with the Aboriginal claims of sovereignty and suggests that the Canadian constitutional framework already exists as one that is designed to attend to the demands of competing sovereignties. From the outset, then, Aboriginal sovereignty should not be discounted simply because the idea of sovereignty presents an insurmountable obstacle for Canadian constitutionalism.

However, while the underlying idea of the reconciliation of sovereignties as a central feature of the federal structure that resulted from French and English coexistence provides a conceptual point of entry for the idea of Aboriginal sovereignty, it would be a mistake to equate Aboriginal claims to collective self-determination to those of the Québécois. As pre-existing national entities whose sovereignty was assumed to be extinguished by the formation of the Canadian state, the Aboriginal-state relationship is

clearly of a different sort from the initial relationship between the French and the English at Confederation. And while an Aboriginal conception of collective self-determination is similar in that it requires recognition of sovereignty, it is also distinct because it entails recognition of their own pre-existing legal orders defined by treaties between Aboriginal nations themselves and between Aboriginal nations and the Crown or the Canadian state (Henderson, 1994; Ladner, 2003). Thus, rather than having the terms of distribution of sovereignty defined by the Constitution as is the case for English- and French-Canadians, Aboriginal peoples are looking to the Constitution for recognition of the terms of the distribution of sovereignty that were set in the past and continue to be set by way of historic and modern treaties.

Treaty Federalism and the Canadian Constitution

The type of relationship that follows from constitutional recognition of Aboriginal sovereignty as defined by treaties is commonly referred to as 'treaty federalism' (Barsh and Henderson, 1980; Henderson, 1994; 2000; Ladner, 2003, 2009; RCAP, 1996b). It is considered a federal relationship because "the treaties establish the terms by which nations would co-exist as sovereign entities and because they delegate power and jurisdiction from Indian nations to the Crown" (Ladner, 2003: 174). It is also considered a binding relationship because treaties are considered as agreements which are immutable in the absence of mutual renegotiation (Belanger and Newhouse, 2004; Johnson, 2007; Little Bear, 2004; Venne, 1998). However, treaty federalism differs from the classical

form of Canadian federalism in an important aspect pertaining to residual powers – classical federalism allocates residual powers (those not explicitly allocated to the provinces) to the central government while, in the case of treaty federalism, this relationship should be seen as reversed. That is, any jurisdiction not explicitly delegated from Aboriginal nations to the Crown remains the jurisdiction of the Aboriginal nation (Henderson, 1994). The constitutional entrenchment of this type of relationship based on respect for Aboriginal peoples as sovereign entities who negotiate areas of shared or independent jurisdictions with the Crown (or Canadian state) serves to define "a new constitutional context of self-determination for Aboriginal peoples" (Henderson, 1994: 244).

Treaty federalism also finds expression in the Canadian Constitution as a pre-existing and continuously recognized expression of the relationships between Aboriginal nations and the Crown (Henderson, 1994; Ladner, 2003; RCAP, 1996b). Prior to colonization, treaty federalism was the means by which sovereign Aboriginal nations organized themselves throughout the territory that is now North America. The *Haudenosaunee* or Iroquois Confederacy, established approximately 1000 years ago, is one example of a constitutional order based on treaty federalism that brought together the sovereign nations of the Onondaga, Cayuga, Mohawk, Seneca, and Oneida into one confederacy (Ladner, 2003; Wallace, 1994). The practice of treaty federalism extended to the European settlers when they first arrived and began to build relationships with Aboriginal nations. In these cases, treaty federalism answered the question of how to accommodate the arrival of sovereign nations and the coexistence of diverse legal and political frameworks, offering a way to reach a just constitutional association such that

each sovereign party could continue to govern themselves according to their own laws and traditions (Tully, 1995).

The *Royal Proclamation* of 1763 has become an important touchstone representing the initial constitutional entrenchment of the British Crown's recognition of Aboriginal peoples as sovereign nations. (Henderson, 2000; Macklem, 2001; Tobias, 1991; Tully, 1995). At this stage of the relationship, Aboriginal peoples were explicitly described as nations whose sovereignty and territorial integrity were not only recognized by the Crown, but were protected through the constitutional mandate that any transactions involving trade or land settlements were to be conducted on a nation-to-nation basis, as negotiations between the Crown and Aboriginal nations. Furthermore, the Crown went as far as to demand that any settlements within unceded Aboriginal territories (referred to as countries) should be immediately dismantled and removed. This initial constitutional entrenchment of Aboriginal sovereignty was based on the previous century of treaty relationships between the Crown and Aboriginal nations – relationships which continued as such roughly up until Confederation (Tobias, 1991; Tully, 1995).

Confederation and the 1867 *Constitution Act* marked a change in the nature of the relationship between Aboriginal peoples and the Crown. Through the inclusion of Section 91(24) of this *Act*, "Indians, and Lands reserved for the Indians" were brought under "the exclusive Legislative Authority of the Parliament of Canada" (s. 91[24]). Although government policies regarding Aboriginal peoples had already begun to shift by this point, Section 91(24) marked the defining point at which the new relationship which identified Aboriginal peoples as wards of the state was constitutionally entrenched (Tobias, 1991). However, regardless of how the federal government actually acted toward

Aboriginal peoples, the constitutional recognition of Aboriginal sovereignty remained – and continues to remain – intact (Henderson, 2000). This interpretation goes beyond Section 91(24) to include Sections 9, 12, and 129. Section 9 affirms that the ultimate political authority "of and over Canada is hereby declared to continue and be vested in the Queen" (s. 9). Sections 12 and 129 endow the Parliament of Canada with the authority to abolish existing "Powers, Authorities, and Functions" of the provinces (s. 12) or to repeal, abolish or alter "all Laws in force in Canada ... at the Union" (s. 129). However, both Sections 12 and 129 stipulate that the proposed legislative authority does not extend to any powers or laws "such as exist under acts of Parliament of Great Britain" (ss. 12, 129). The "imperial treaty order", which includes "treaties, instructions, and proclamations" that affirm the nation-to-nation relationship between Aboriginal peoples and the Crown, is defined by the latter category – acts of Parliament of Great Britain (Henderson, 2000: 736). Therefore, "no executive action by the federal parliament or government could amend, modify, or infringe Aboriginal or treaty rights without an unequivocal imperial statute" (Henderson, 2000: 737). In sum, according to this interpretation of the 1867 *Constitution Act*, the British Crown did not delegate legal jurisdiction over and within Aboriginal nations to the federal government, since this authority did not exist in the first place. Rather, the new constitutional order was aimed at organizing the relationships between the provinces and the federal state while continuing in the tradition of the respect for and protection of continuing treaty relations with Aboriginal nations. The new role for the federal government was then a delegated one (from the Crown) – "the role of fiduciary or executive toward the pre-existing Aboriginal and treaty rights" (Henderson, 2000: 736).

The 1982 *Constitution Act* provides similar grounds for a relationship defined by treaties. Sections 25 and 35 "are complementary, and together they locate a constitutional home for treaty rights" (Henderson, 2000). Section 25 stipulates that the provisions of the *Charter* "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that that pertain to aboriginal peoples of Canada including ... any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763" (s.25). In Section 35, "existing aboriginal and treaty rights" are "recognized and affirmed" and any changes to the fiduciary relationship as defined by Section 91(24) of the 1867 *Constitution Act* are deemed to require a constitutional amendment which will require the Prime Minister of Canada, the first ministers of the provinces, and "representatives of the aboriginal peoples of Canada to participate in the discussions on that item" (s.35). Thus, given the interpretations of the Royal Proclamation and the 1867 *Constitution Act* presented above, the 1982 *Constitution Act* represents the continued recognition of the sovereignty of Aboriginal nations and the treaty relationship that this entails. Thus, this latest iteration of Canada's constitutional development entrenches the nation-to-nation relationship, to "create a shield around treaty rights", and reflects the continuous constitutional commitment to a relationship based on treaty federalism (Henderson, 2000: 730).

This understanding of constitutionalism in Canada suggests that the relationship between the Canadian state and Aboriginal peoples should be understood as reflecting the sovereignty of Aboriginal peoples and need not be constrained by the assumption of absolute state sovereignty. In fact, that assumption, while influential in practice (see Chapter 2) appears to be at odds with the existing constitutional order. The respect for

treaties that treaty federalism entails recasts the Canadian constitutional order as one for which treaties have provided the foundation. If not for treaties between Aboriginal nations and European settlers, Canada's "defining national characteristics [of] tolerance, pluralism and democracy ... might not have taken hold". (RCAP, 1996a: 194). However, this is not tolerance, pluralism and democracy under a single sovereign. These defining national characteristics pertain to the coexistence of sovereign nations and the coexistence of legal and constitutional orders. Understanding treaty federalism as a pre-existing and "integral part of the Canadian constitution" (RCAP, 1996b: 194) means that the accommodation of Aboriginal sovereignty "does not necessitate the development of a new constitution, nor a restructuring of federalism. It means merely that the Canadian state must honour its constitutional responsibilities" (Ladner, 2003: 189).

So there are reasons for optimism given the legal/constitutional arguments just presented. However, this is only one aspect of the context as outlined in Chapter 2. Whether Aboriginal peoples can be truly self-determining is more than a simple legal question – it is also a political question (Hueglin, 1996). The next section addresses the potential that Canadian liberal democracy holds for the realization of a relationship based on sovereignty as defined above.

Treaty Federalism and Kymlicka's Theory of Aboriginal Rights

Given that Canada is a liberal democracy and that liberalism, along with the associated focus on individual rights, is often considered to stand in opposition to the

collective self-determination of Aboriginal peoples, it is reasonable to ask if the failures of the Canadian state to meet the demands of a constitutional order based on treaty federalism are due to a prevalence of liberal-minded paradigms that constrain government policy. Put otherwise, does liberalism present a barrier to the collective self-determination of Aboriginal peoples when the right to collective self-determination is seen as rooted in the sovereignty of Aboriginal peoples?

So far, this thesis has focused on Kymlicka's liberal defence for collective self-determination because Kymlicka's interpretation of liberal theory appears to show the most promise for the reconciliation of basic liberal values and the collective self-determination of national minorities. However, despite allowing for robust levels of political autonomy, Kymlicka's emphasis on culture rather than sovereignty keeps Aboriginal peoples within the jurisdiction of state sovereignty and allows for the imposition of liberal constraints upon delegated self-government rights. Therefore, even though his theory attends to some of the substance of Aboriginal demands, he misses the essence of the claim to collective self-determination which requires recognition of the pre-existing sovereignty of Aboriginal peoples. If the sovereignty of Aboriginal peoples is recognized, any self-government arrangements must be viewed as treaty negotiations between sovereigns and must find their justification in the equal sovereignty of Aboriginal peoples and the Canadian state, not in the state's recognition of the role that culture plays in individual well-being.

Is Kymlicka's failure to adequately attend to the sovereignty of Aboriginal peoples, in fact, "liberalism's last stand" (Turner, 2006: 57)? As Chapter 3 argues, Kymlicka appears to come close to reconciling liberal values with collective self-

determination of Aboriginal peoples, but fails due to his acceptance of the background assumption of absolute state sovereignty – that is, state sovereignty is taken as given. However, if Canada's constitutional history is about a negotiation between peoples (as Chapter 2 argues) and treaty federalism is explicitly recognized, then the absolute sovereignty of the Canadian state is called into question with respect to the relationship between the federal government and Aboriginal peoples. Thus, the background context that Kymlicka takes as established fact is called into question. It would then be premature to conclude that Kymlicka's theory fails because it is a *liberal* theory. Rather, all that can be concluded is that his foundational premise is mistaken and he has overextended the reach of his theory. This would suggest that liberalism *per se* does not present a barrier to the collective self-determination of Aboriginal peoples. Indeed, any political ideology that uncritically accepts the paradigm of absolute state sovereignty within the existing state system as uncontested fact would also fail.

But this does not necessarily absolve liberalism in general or Kymlicka's theory in particular. If the problem is simply a contested background assumption then it must be shown that the application of liberal theory can take a different tack. One way to do this is to re-evaluate Kymlicka's theory within the alternative context that recognizes the relationship between Aboriginal peoples and the Canadian state as a relationship between sovereigns. In fact, this move relieves the tensions in Kymlicka's theory that are discussed in Chapter 3.

First, the assumption of absolute state sovereignty overlooks the qualitative equivalence between states and national minorities understood as 'societal cultures' (historically established and institutionally complete political entities) and necessitates a

more benign discourse centred on cultural difference which is itself problematic and misrepresents Aboriginal claims (see Chapter 3). However, if an Aboriginal societal culture is taken to include treaty federalism as part of its 'institutionally complete' character, the preoccupation with cultural difference fades to the background and Aboriginal difference becomes more intelligible as being rooted in a unique 'societal culture' which includes institutional structures (treaty orders) that outline the nature of their relationship to the Canadian state. The issue of collective self-determination, then, is not misrepresented as a cultural one but rather is clearly a political one.

Furthermore, the discourse surrounding the nature of Aboriginal rights becomes more coherent. If, as Kymlicka argues, rights should be appropriate to the character of the minority group (see Chapter 3), understanding Aboriginal difference as defined by treaty federalism means that Aboriginal rights are not *cultural* rights, and that the problems surrounding assigning rights to various cultural characteristics are avoided. Rather, the rights are then clearly understood as rooted in Aboriginal sovereignty. Self-government rights, then, relate directly to the viability of Aboriginal societal cultures because those societal cultures are explicitly defined by their self-governing histories.

Second, Kymlicka's theory encourages a focus on cultural difference and a critique of the neutrality of the liberal state. This translates into an undue emphasis on the cultural and political incompatibilities that may exist between Aboriginal peoples and the Canadian state, resulting in a divisive doctrine that encourages the emphasis or exaggeration of differences in order to justify political autonomy (see Chapter 3). However, recognizing the institutional completeness of Aboriginal societal cultures as characterized by treaty federalism overcomes this problem by removing the incentive to

emphasize difference. Cultural incommensurability is only relevant to the extent that the state subjects Aboriginal peoples to a foreign institutional framework. The 'shield' that the constitutional entrenchment of treaty federalism creates around Aboriginal treaty orders limits the jurisdiction of state-centred institutional frameworks, thus moving Aboriginal nations out from under the jurisdiction of state nation-building policies. The critique of state neutrality is then irrelevant to collective self-determination because the treaty order defines how state institutions interact with Aboriginal institutions. In this way, the need for the emphasis on difference is eliminated. Indeed, seeing treaty federalism as part of the institutional framework of Aboriginal peoples entrenches unity because it recognizes the commitment to mutual respect and interdependence as enshrined in the treaties. If Kymlicka's theory is meant to be a unifying doctrine, his assumption of state sovereignty undermines this goal. Ironically, seeing the relationship between Aboriginal peoples and the Canadian state as one defined by equal sovereignties provides grounds for unity that an imposition of overarching common citizenship cannot.

Finally, Kymlicka's focus on cultural difference presents a third problem in that it renders his theory dependent upon the empirical observation that national minority cultures are more resilient than immigrant cultures and that their members are more intransigently attached to their societal cultures. Under the assumption of absolute state sovereignty, there remains little justification for policies that promote collective self-determination for national minorities over those aimed at immigrant minorities that simply facilitate integration into the broader state (see Chapter 3). Shifting the context to one that defines the pre-existing institutional framework of Aboriginal peoples in terms of treaty federalism helps to provide the lacking justification for unique treatment. Rather

than interpreting the attachment that Aboriginal peoples have to their societal cultures as a simple empirical fact rooted in cultural ties that should be accommodated, the nation-to-nation perspective that treaty federalism entails reframes the issue as one that must attend to the legitimacy of the unilateral assertion of political authority over Aboriginal peoples. Kymlicka's method of taking absolute state sovereignty as an uncontested starting point, leaves no room for this issue – it is taken as settled and cannot, therefore, offer any defence of a unique status for Aboriginal peoples. However, adjusting Kymlicka's background assumption in order to account for treaty federalism allows for the idea of pre-existing and continuous sovereignty as the explicit defence for a unique relationship between Aboriginal peoples and the Canadian state.

This justificatory shift, in turn, modifies the type of recognition or rights that Aboriginal nations are entitled to in a way that is consistent with the resolution of the first tension mentioned above. That is, Aboriginal rights can no longer be seen as autonomy-based concessions justified by cultural difference and as jurisdictional devolutions from the federal government to Aboriginal peoples. Rather, treaty federalism provides an institutional framework that identifies shared or ceded jurisdictions based on mutual consent between sovereign entities, leaving unaddressed areas (or residual powers) within the original pre-existing jurisdictions of the relevant sovereign entities. Any political jurisdiction that the Canadian state may have pertaining to Aboriginal peoples, then, is to be understood as defined by treaties and legitimated through the consent inherent in the treaty process.

In sum, although treaty federalism may appear to present a significant challenge to liberalism as expressed through Kymlicka's theory of collective rights for Aboriginal

peoples, this challenge is not directed at the basic liberal tenets that make Kymlicka's theory a *liberal* theory. Rather, treaty federalism challenges the prior assumption of absolute state sovereignty and the overarching jurisdiction that it entails. This requires a reframing of the relevant paradigm so that liberal principles such as the state's concern for individual well-being apply only to non-Aboriginal citizens of the Canadian state, thus easing the tensions in Kymlicka's theory that arise due to the attempt to subsume Aboriginal constitutional orders within the Canadian order.

But this is a major paradigm shift for liberal theory which works within the context of state sovereignty and civic equality. So far, I have argued that acknowledging Aboriginal sovereignty and a parallel constitutional order defined by treaty federalism is not incompatible with liberalism as represented by Kymlicka's theory and, in fact, relieves some of the tensions within his arguments for minority rights for Aboriginal peoples. However, these arguments alone simply suggest compatibility but do not motivate a shift in perspective. Arguing that the collective self-determination of Aboriginal peoples is possible given the Canadian context requires more than a simple refutation of incompatibilities – it also requires some positive justification for the conceptual shift. An important question, then, is whether there is anything internal to liberal theory that can motivate the paradigm shift entailed by treaty federalism. I think there is, and that the motivation originates within the liberal concern for legitimacy through popular consent and is given more weight by the democratic emphasis on popular sovereignty. The next sections build on the discussion of political legitimacy introduced in Chapter 2 by investigating the effect that the inclusion of the treaty federalism perspective might have on common conceptions of political legitimacy.

Liberalism, Treaty Federalism, and Political Legitimacy

Although Kymlicka fails to address the question of political legitimacy directly, his assumption of state sovereignty along with his support for liberalization of illiberal groups suggests that the legitimacy of the overarching political institutions is taken as given. Liberal theories in general see political legitimacy as being secured through the hypothetical or reasonable consent of citizens to governing principles as embodied in a constitutional framework (see Chapter 2). Thus, as a liberal theory, Kymlicka's arguments should be seen as assuming that all citizens – that is, all individuals falling within the jurisdiction of the sovereign state – would hypothetically consent to the governing principles embodied in their constitutional framework.

Consent is also central to treaty federalism, albeit in a more tangible or robust form characterized by direct participation and rule by consensus (Mercredi and Turpel, 1993; Boldt and Long, 1984). So there is a common concern between liberal and Aboriginal perspectives for the consent of the governed. However, accepting Aboriginal treaty orders as constitutional orders that pre-date colonization and that were unilaterally subsumed by the Canadian order highlights an important inconsistency within the state-centred application of the consent doctrine. Indeed, the idea that Aboriginal peoples have actually consented, or would consent given reasoned consideration, to the Canadian constitutional framework – a framework that negates their sovereignty and the associated treaty order and that bears the legacy of their oppression – seems absurd.

Of course, a liberal defence may suggest that the lack of consent is due to specific injustices and thus follow the approach of the 1969 *White Paper* by suggesting that the principles themselves must be changed in order to establish a civic equality and undo many of the injustices. However, the response of Aboriginal peoples to the *White Paper* stands as evidence that there is much more at stake than civic equality and distributive justice within the Canadian state. The treaty federalism perspective holds that Aboriginal peoples are subject to their own constitutional orders as defined by treaties and, therefore, not subject to the Canadian constitutional order, regardless of what principles of justice it may be based on. The fact that treaty federalism finds support for its perspective within the Constitution does not imply consent to the framework – nor does the fact that Aboriginal peoples participated, to some extent, in the drafting of the 1986 *Constitution Act*. Rather, from the perspective of treaty federalism, the inclusion of Sections 25 and 35 should be seen as the result of a concerted effort to ensure that Aboriginal peoples remained within the jurisdictions of their own treaty orders. In short, treaty federalism disputes any notion that Aboriginal peoples would consent to an imposed constitutional framework, thus opposing the liberal defence of the legitimacy of the claim of absolute state sovereignty.

By introducing contextual features that challenge the liberal assumption of political legitimacy through hypothetical consent, treaty federalism provides a perspective that suggests that a consistent liberal theory must, by its own dictates, recognize the legitimate jurisdictions of other pre-existing constitutional frameworks as well as its own. But, again, this does not challenge liberalism as a political theory or the basic arguments of Kymlicka's theory. Rather, by shifting the context, it tends toward a

liberal defence of Aboriginal sovereignty by emphasizing that the recognition of jurisdictions defined by pre-existing constitutional orders is supported by a liberal conception of political legitimacy.

However, the task of securing political legitimacy is not simply a liberal problem, and the ideal of hypothetical consent does not exhaust the means by which a liberal state can secure legitimacy. In a liberal democratic society specifically, democracy plays a prominent role in providing a means to the legitimation of the political order. Indeed, if liberalism depends upon democracy for political legitimation, the suggested paradigm shift to accommodate treaty-based Aboriginal constitutional orders must also be motivated internally by democracy. The more robust conception of political legitimacy encouraged by the democratic emphasis on popular sovereignty and thus entailed by liberal democracy, as introduced in Chapter 2, is discussed below.

Democracy and Political Legitimacy

As argued in Chapter 2, the Canadian context is one in which democracy, understood as popular sovereignty, characterizes the struggle for the legitimation of the Canadian constitutional framework. The question now, given the introduction of treaty federalism, is whether democratic principles help to motivate the paradigm shift. To recap, democracy is rooted in the idea of popular sovereignty such that 'the people' are the ultimate source of political legitimacy. The difference between liberal and democratic conceptions of democratic legitimacy can be understood as differences in the way the

link between political legitimacy and popular sovereignty is established. For liberalism a theory of hypothetical consent allows for the moral equality of citizens by designing a constitutional framework that citizens would consent to because said framework is based on principles that regard each citizen's interests with equal regard (Brighouse, 1998). Democracy is based on a similar equality but moves beyond hypothetical consent by attempting to establish some level of actual participation or equal say in the design of their constitutional framework (Buchanan, 2004; Tully, 1995).

The original imposition of foreign forms of governance and the subsuming of Aboriginal polities into that of the Canadian state following the 1867 *Constitution Act* were illegitimate from the perspective of democratic theory because they violated the fundamental commitment to popular sovereignty by leaving Aboriginal peoples disconnected from the forms of government that had assumed control over their lives. The solution, from the perspective of the state, was enfranchisement and the establishment of that missing connection. If successful, the assertion of state sovereignty over Aboriginal peoples would then be legitimated according to democratic values. However, legitimation has not yet been widely accepted. Indeed, Kymlicka's theory demonstrates how the state-centred paradigm, working under the assumption of state sovereignty, continues to push the boundaries of acceptable liberal practice in an attempt to reconnect Aboriginal peoples to the powers and structures that govern them, both locally and federally, and in order to establish some level of political legitimacy for the Canadian state vis-à-vis Aboriginal peoples.

However, treaty federalism appears to arrive at the somewhat radical conclusion that the Canadian state can never achieve the legitimacy that policies flowing from

theories like Kymlicka's are attempting to establish. The key point, in this regard, is that a unilateral assertion of state sovereignty ignores pre-existing constitutional orders amongst Aboriginal peoples and between Aboriginal peoples and the Crown (or the Canadian state) that were already legitimate according to democratic standards. Traditional Aboriginal democracies are described as "the most perfect forms of democracy" because they are based on direct participation and rule by consensus (Mercredi and Turpel, 1993: 115; Boldt and Long, 1985). Given this, the question should not refer to how the Canadian state can establish the legitimacy of its assumed jurisdiction but should rather ask what legitimated the expansion of Canadian jurisdiction over Aboriginal polities in the first place. Under conditions where pre-existing democratic nations are governed by democratic institutions, the legitimacy of the political order is already established and the imposition of a new order cannot be legitimated (Buchanan, 2004). Thus, democratic theory and the principle of popular sovereignty do not appear to provide grounds for the initial assertion of state sovereignty over Aboriginal peoples and, therefore, cannot legitimate its continuance.

Popular Sovereignty and Canadian Constitutionalism

So far, the arguments in this chapter have focused on the legal interpretation of Canada's constitution and some of the theoretical underpinnings that make Canada a liberal democracy. In Chapter 2, I introduced the idea that the Canadian political context is one that, in recent years, has evidenced a shift toward a greater emphasis on popular

sovereignty and, as such, a shift toward an organic method of constitution-building and legitimation. If this is an accurate depiction of the Canadian context, what are the implications for treaty federalism? As suggested in Chapter 2, the shift toward popular sovereignty and organic constitutionalism has two main effects – the constitutional entrenchment of various policies concerning minority groups and the shift in attitude and legal precedent toward constitutional, rather than parliamentary, supremacy. While the first effect, the entrenchment of minority rights, is the effect most relevant to Kymlicka's state-centred approach to the collective self-determination of Aboriginal peoples, it is the second effect that is most relevant to treaty federalism and the recognition of Aboriginal sovereignty.

The shift toward constitutional supremacy is important for treaty federalism because it provides a legal defence for Aboriginal sovereignty and for the protection of Aboriginal treaty rights. As such, it allows Aboriginal peoples to appeal to the branch of Canadian government that enjoys the highest levels of perceived legitimacy (see Chapter 2). If popular sovereignty provides a sound basis for an argument as to why Aboriginal peoples should not have a foreign constitutional order imposed upon them, it must also do the same for Canadian citizens. That is, regardless of the accuracy of the historical relationship that provides the background for treaty federalism, convincing Canadians in general that the Canadian Constitution is only one of two constitutions that govern a shared territory will be an impressive challenge. A paradigm shift such that treaty federalism is treated as an inherent part of the Canadian order will be a *de facto* imposition of a foreign order on non-Aboriginal Canadians absent some understanding or its origins and some semblance of popular consent. The language of constitutional

supremacy provides a meeting place for Aboriginal and non-Aboriginal perspectives where legal and historical origins can be brought to light and where "different and distinct legal systems ... combine to generate a cooperative and mutually beneficial theory of constitutional[ism]" (Henderson, 2006). While it may be true that the issue of collective self-determination for Aboriginal peoples is a political and not a legal one, legal discourse, at present, appears to provide the essential forum for a dialogue regarding Aboriginal sovereignty that can include both Aboriginal and Canadian perspectives.

Conclusion to Chapter 4

In sum, this chapter argues that the treaty federalism paradigm presents no fundamental challenge to liberalism, democracy, or constitutionalism in Canada. The challenge that it does present, however, is that it demands a re-evaluation of the legitimacy of Canada's unilateral assertion of state sovereignty over Aboriginal nations. The hurdles that appear insurmountable stem from an adherence to the assumption of absolute state sovereignty. If that assumption is abandoned, treaty federalism appears to be compatible with Canada's constitutional framework and the liberal and democratic values manifest therein.

This is, however, a significant paradigm shift and it may be justifiably argued that there is little room for optimism that the Canadian polity would accept such a dramatic shift in conventional wisdom so as to allow for the conceptual accommodation of two parallel constitutional orders within what is commonly understood as a single sovereign

state. The intention is not to trivialize the relevance of this barrier, but to encourage dialogue by suggesting a way in which collective self-determination for Aboriginal peoples might be realized and to address the theoretical underpinnings within the Canadian context that appear to stand in the way.

CHAPTER 5 – CONCLUSION

In this thesis I have addressed the question of whether the Canadian context, understood as a liberal democratic constitutional order, can be reconciled with Aboriginal demands for collective self-determination. The preceding chapters have defended a qualified "yes" as the answer. What is required is a shift in perspective on the part of state-centred views from the traditional emphasis on absolute sovereignty to recognition of the equal sovereignty of Aboriginal peoples and the nation-to-nation relationship defined by treaties between sovereign entities as outlined by treaty federalism. In addition, if treaties provide the foundation for the relationship, and treaties are to be understood as binding agreements entailing equal sovereignty, mutual respect, and mutual responsibilities, then reconciliation also depends upon a shift in Aboriginal attitudes toward the liberal democratic state from one focused on disdain and incompatibilities, to one that emphasizes respect and common ground. These shifts are politically plausible, at a normative and theoretical level, given that liberal democracy places a high value on popular sovereignty as a means to political legitimation and that this concern is shared by Aboriginal perspectives. They are also legally plausible given the historical relationship between Aboriginal nations and the Crown/Canadian state as entrenched in the Canadian constitution. Finally, given that the task of constitutional interpretation and legitimation in Canada is increasingly seen as falling within the purview of the judiciary, legal plausibility suggests that the shift in the state's attitude toward an acceptance of Aboriginal sovereignty as expressed through treaty federalism should be seen as having at least some level of practical plausibility.

One of the main conclusions is that Aboriginal criticisms of Western philosophies in general and liberalism in particular are misdirected because it is not liberalism *per se* that stands as a barrier to an acceptance of Aboriginal perspectives. Rather, it is the flawed background assumption of absolute state sovereignty that renders Aboriginal claims to sovereignty incompatible with Canada's constitutional framework.
This background assumption is, in fact, a feature of the international state system which is based on state sovereignty and the maintenance of the *status quo* such that any rights to collective self-determination should must not " authorize or encourage any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States" (UN, 1996). Thus, liberalism is not the motivating force behind the position of absolute state sovereignty that reflects the international order and *any* political philosophy would be as guilty of encouraging the oppression of national minorities to the extent that states exist within an international state system.

This might seem to be too quick an exoneration of liberalism since liberalism, as a theory in general, provided the conceptual foundations for colonization and for the oppression of Aboriginal peoples (see Chapter 1). To meet this objection, I have argued that liberalism should be seen in a different light – as a theory committed to the establishment of the legitimacy of a state's constitutional order and that recognizes the value of nationhood. However, it should be noted that I have recommended the favourable conception of liberalism as such because it speaks to the potential of liberalism as a critical theory that values freedom, equality, and the consent of the governed and that is wary of unbridled state power. Given the features that I have emphasized, liberalism should be seen as having the capability to critically assess its own

background assumptions. Questioning the legitimacy of the imposition of state sovereignty over pre-existing self-governing nations should then be part of liberalism's repertoire. To the extent that even the most progressive of liberal theories like Kymlicka's fail to address the primary question of why the state has the authority to offer self-governing rights to Aboriginal nations, liberalism has failed to live up to its potential as a critical theory.

It is difficult to decide where to draw the line between historical culpability for colonial oppression and redemption via a contemporary commitment to the equal right of all people to define their own conceptions of the good life "from the inside" and without coercive interference (Kymlicka, 1989: 13). However, 1867 stands as an important constitutional milestone – the point at which the responsibility to negotiate with Aboriginal nations was delegated from the Crown to the Canadian state through the inclusion of Section 91(24) in the 1867 *Constitution Act* (see Chapter 4). If this is rightly understood as the turning point in Canadian constitutional history at which Aboriginal peoples were officially considered to fall under the jurisdiction of the Canadian state, then liberal theory should be concerned with the legitimacy of that unilateral assertion of Canadian sovereignty and the associated imposition of a new and foreign constitutional framework. It should matter from the perspective of liberal theory, not simply as an interesting historical case study, but because the destructive consequences of that blatant violation of liberal principles remain today as poignant reminders of why liberal principles are important in the first place.

The conferral of an equal right to be self-determining – individually or collectively – within the context of the superior sovereignty of the state accepts the

legitimacy of this initial assertion of state sovereignty. Beyond undermining freedom and mutuality by emphasizing the superiority of the state (see Chapter 3), accepting enfranchisement gives an implicit nod to the original Lockean and Millian justifications for colonial exploitation and domination. If liberalism is not concerned with its colonial past and is simply seeking to be 'just in our time', as Prime Minister Trudeau argued in defence of the 1969 *White Paper*, it is affirming the European ethnocentrism and cultural arrogance of which it is accused and failing to recognize the legitimacy of Aboriginal forms of governance and constitutionalism. Even when enfranchisement includes levels of self-government as Kymlicka's theory does, the underlying message is that equal respect for Aboriginal peoples, their governments and ways of life will only be approximated within a context of Western superiority, demanding, therefore, that Aboriginal governance remain within the jurisdiction of and accountable to the Canadian state.

My position of optimism is due partly to the idea that liberalism need not remain tied to its colonial past and that there is enough common ground between the foundational tenets of liberal theory and Aboriginal visions of collective self-determination for the existence of meaningful dialogue. In a sense, my approach which seeks to understand Aboriginal conceptions of collective self-determination and to assess how state-centred perspectives might shift in order to accommodate them may be seen as circumventing the dialogue that I hope to encourage. That is, I have accepted one foundational premise (Aboriginal sovereignty) that supports Aboriginal perspectives while suggesting that another (state sovereignty) is questionable thus supporting an intransigent Aboriginal point of view while placing the burden of proof on the state-

centred views to defend the assertion of state sovereignty. The method may seem one-sided and contrary to genuine dialogue because it seeks to answer the question of *'how'* collective self-determination should be realized rather than *'why'*, thus failing to address the plausibility of both foundational premises equally.

However, the approach taken in the preceding chapters is a reasonable and productive one given what is characteristic of the discourse thus far. First, as I noted at the outset, there appears to be a profound disconnect between what Aboriginal scholars and organizations say they want and between state-centred approaches that seek to accommodate them. Aboriginal perspectives, while sometimes appearing inconsistent or contradictory, are generally rooted in a common underlying conception of Aboriginal sovereignty which entails a commitment to emancipation from the imposed authority of the state. The state-centred approaches, however, have shifted from outright domination (through the 1876 *Indian Act*), to a strategy of equal enfranchisement (1969 *White Paper*), to group rights and differentiated citizenship as defined by self-government agreements and modern treaties. In each case, the state-centred approaches have been constrained by the assumption of absolute state sovereignty and, therefore, have not attended to the claim of pre-exisiting and continuous Aboriginal sovereignty. That is, the pattern thus far has been to grant the state-centred foundational premise as given, placing the burden of proof on Aboriginal scholars or leaders to defend their claim to special treatment in terms that are defined by the state. If mutual respect is to characterize dialogue, it seems reasonable that the discourse should also consider where an acceptance of the alternate foundational premise of Aboriginal sovereignty might lead.

Second, given the treaty federalism paradigm as understood in Chapter 4, the acceptance of Aboriginal sovereignty as a foundational premise leads, ironically, to an affirmation of the sovereignty of the Canadian state. Rather than presenting a challenge to Canadian sovereignty, treaty federalism simply challenges the over-extension of state jurisdiction to include a right to mandate how Aboriginal peoples should govern themselves. Recalling the *Gus-Wen-Tah*, it is clear that treaties between Aboriginal peoples and the state define the relationships between Aboriginal nations and the state, but do not address the relationship between the federal state and the provinces or Canadian citizens. The co-existent vessels symbolized by the parallel rows of beads reveal a commitment on the behalf of Aboriginal peoples to non-interference with the laws, customs, and ways of the Canadian state (see Chapter 3). Rather than negating the alternative premise, in the way that an acceptance of absolute state sovereignty does, an acceptance of Aboriginal sovereignty leads to a conclusion that affirms the state-centred sovereignty and encourages a co-existence based on mutual respect. Thus, taking Aboriginal conceptions of sovereignty as a starting point for dialogue not only offers a fresh approach to what often appears to be an intractable conflict, but leads to a more mutually acceptable result.

Finally, addressing Aboriginal sovereignty from the perspective of 'how' it should be recognized rather than 'why' it should be recognized offers a productive and dialogical route to reconciliation because, in suggesting 'how' it also brings to light the arguments for 'why'. That is, my discussion of how collective self-determination could be effectively recognized is rooted in my understanding of what Aboriginal perspectives take collective self-determination to mean. As the preceding chapters show, collective self-determination

should not be measured simply in terms of levels of political autonomy or collective rights or as a means to the well-being of Aboriginal peoples – individually or collectively. Instead, it is impossible to understand Aboriginal collective self-determination without understanding that it is rooted in their pre-existing sovereignty. The various ways in which self-determination is to be expressed should then be understood as determined by the content of treaties between sovereign nations. Accepting this as a starting point for a discussion on the compatibility with the Canadian constitutional framework leads directly to the defence for Aboriginal sovereignty as one rooted in history, defined by treaties, and recognized by the Canadian Constitution.

It should also be acknowledged that, in addressing how collective self-determination could work, I have focused mainly on how to conceive of the relationship in a way that is consistent with Aboriginal commitments to a nation-to-nation relationship. I have not, therefore focused on the administrative questions surrounding how this might actually pan out in practice. There are numerous ways in which relationships between sovereigns can be imagined. These most typically range from the maintenance or establishment of independent statehood to the formation of a federation or confederation to some sort of municipal arrangement. Treaty federalism does not appear to take any of these arrangements as a singular optimal model. If the sovereignty of Aboriginal nations is taken seriously, then the actual arrangement between any individual nation (or Confederacy of nations such as the *Haudenosaunee*) and the state would ultimately depend upon the particularities of their respective political and economic capacities and aspirations. The point to emphasize is that treaty federalism entails recognition of sovereignty thus demanding that the terms of agreement are not set

by any one party beforehand but are agreed upon in a spirit of peace, friendship, and respect.

My choice to write this thesis in particular was motivated by my frustration with a discourse characterized by intersecting monologues, independent agendas, and a mutual disrespect. Although I have focused mainly on how collective self-determination might be conceived of in the Canadian context, my arguments also demonstrate that the issue of why Aboriginal sovereignty should be recognized in the first place must be addressed for meaningful dialogue to ensue. The approach I've taken can direct the discourse surrounding the justification of Aboriginal rights by moving away from distracting arguments like those rooted in state-sponsored cultural protections, and toward the crux of the matter – the legitimacy of the assertion of state sovereignty or, alternatively, arguments for the extinguishment of Aboriginal sovereignty. The historical questions seem to me to be the most meaningful ones when addressing the justification of a unique relationship between Aboriginal peoples and the state. Furthermore, if meaningful strategies for collective self-determination are to be arrived at, they must ultimately be rooted in the legitimacy of the claim itself. Otherwise the tension between theory and practice will continue to be played out at the policy level and the monological discourse will continue to breed dissatisfaction and bitterness. In short, what I am suggesting is that without a mutual respect for alternative points of view, dialogue cannot exist, and without dialogue, there should be no expectation of reconciliation.

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