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RESILIENT COLONIALISM: THE POLITICS OF INDIGENOUS RIGHTS IN CANADA[1]

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1. INTRODUCTION

Like almost all the countries of the Americas, Canada is home to a population of indigenous peoples who, by definition, were here before Europeans crossed the ocean to found new societies, a "new world." But along with only the United States, Canada is also a "First World" country, a member of the Group of Seven richest, most industrialized countries in the world. People who know this country only as a wealthy northern democracy may be surprised to learn, on the one hand, that there are indigenous peoples in Canada and, on the other hand, that many of them live in great poverty. Although the country is indeed wealthy and the majority of its population lives comfortably as part of the "middle class," Canada has not eliminated poverty – which has, in fact, grown in the last two decades; and it has not ended what can only be called the *internal colonialism* under which its indigenous peoples have been living for the last four centuries.

This chapter starts from the recognition that, to the limited extent that it is likely to improve, the situation of indigenous peoples in Canada will change as a result of a process that is, first and foremost, *political*. As a result, the chapter focuses on the present and future, while also outlining the historical genesis of the present situation; and on the political dynamics and developments, while keeping in mind the socio-demographic and economic dimensions. The first section offers an overview of the current social, economic and demographic situation, in the context of the political status of indigenous peoples. The second part looks at how this state of things came to be. Third, we review the ways and the extent to which it may be changing.

[1] An earlier version of this chapter was published in Spanish in *Canadá: política y gobierno en el siglo XXI*, edited by Athanasios Hristoulas, Claude Denis and Duncan Wood. México (Mx.), Miguel Ángel Porrúa Grupo Editorial, 2005. This version differs only in minor updates, and particularly in the inclusion of 2006 census data.

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2. THE "FOURTH WORLD": A DEMOGRAPHIC, SOCIO-ECONOMIC AND POLITICAL OVERVIEW

A number of names are used to speak of indigenous peoples in Canada. Some of these names are broadly synonymous, some are not, and some others are used in ambiguous ways. Aboriginal, native, indigenous: these terms all apply very broadly to people who are originally from the lands of the Americas, who are not immigrant, colonists or colonizers. In the eyes of contemporary western science, this basic definition is not entirely helpful, as human beings are not thought to be native to the Americas: "indigenous" peoples have migrated to this hemisphere thousands of years ago, eventually peopling all the lands from Alaska and the arctic islands to Tierra del Fuego. But they have indeed been here for a very long time, and they are in any case the first inhabitants of the Americas.[2] Hence the name "First Nations" that has become popular in Canada since the early nineteen-eighties. But, as we will see below, the term "First Nations" is more specific than the other three above.

The Canadian constitution recognizes three categories of persons under the general category "Aboriginal people" (Section 35, Constitution Act 1982): Indians, Inuit, and Métis. The Inuit category is the easiest one to understand: the Inuit are the people of the Arctic, the circumpolar north; in other parts of the world, from Alaska to northern Russia and Siberia, people of the far north are usually called Eskimo. For the Inuit of Canada, contact with "the white man" is so recent as to belong to living memory. They live in small, remote communities, amounting to an overall population of only 50 485 in 2006 (Statistics Canada, 2008).

There is a federal law, to which we will return, called the *Indian Act*, that defines officially who is a "status Indian" in Canada. Status Indians are generally members of bands (the equivalent of what are called "tribes" in the United States); they are entitled to live on reserves ("reservations" in the U.S.) and to elect the band councils and chiefs who have some authority to run the affairs of the band – under the general authority of Indian and Northern Affairs Canada (INAC), a Department of the federal government. Many status Indians, however, live "off-reserve", often in the most disadvantaged areas

[2] On the general history of Canada's indigenous peoples, see Dickason (2002).

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of big cities. There are 612 bands across Canada, 80% of which are in isolated areas rich in natural resources but where economic development is severely lacking.

Indian bands often call themselves First Nations; and the Assembly of First Nations (AFN) is the federation of these bands. It is the largest of several pan-Canadian indigenous organizations. In addition to the bands governed under the *Indian Act*, the AFN recognizes 12 other "First Nations communities," for a total of 624.

The Canadian census provides detailed numbers for indigenous peoples as for the non-aboriginal population (see Table 1 for the most recent data, from the 2006 census). But counting the indigenous population is a somewhat tricky thing. All status Indians are listed in an official register of the federal Department of Indian and Northern Affairs Canada (INAC), which is charged with administering the *Indian Act*. Along with the officially registered Inuit population, this is the most easily counted group. In 2001, for instance, the Indian Register counted 690,101 status Indians, 42.5% of whom lived off-reserve. But, according to the 2001 Census of the Canadian population, there were 608 850 people who self-identified as Indians (a number that has since gone up by nearly 90 000). The discrepancy stems from the widely acknowledged fact that the census under-reports the indigenous population, for a variety of reasons to which we will return later. We may note immediately, however, that certain Indian bands refuse to participate in the census, in the context of their dissatisfaction with their political status. Also, many indigenous people who live in cities experience extremely difficult living conditions and, like other disadvantaged populations, are more likely than average to be missed by the census takers.

Table 1
Size and growth of population with an aboriginal identity, Canada, 1996 and 2006

Aboriginal identity	2006	Percent variation between 1996 and

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		2006
Total population of Canada	31 241 03	9
Population with aboriginal identity	1 172 790	45
First Nations	698 025	29
Metis	389 785	91
Inuit	50 485	26
Multiple & other aboriginal answers	34 500	34
Non aboriginal population	30 068 240	8

Source: Statistics Canada, 2008: 11.

The "Métis" category is the most complicated to define and count. As a general notion, a Métis would be defined as a person of mixed ancestry, mixed "blood." In the Canadian context, the Métis population includes communities in the Prairie provinces (Manitoba, Saskatchewan and Alberta) that developed since the 18th century at fur trade counters from the unions of "white" fur traders and indigenous women. It is this Métis "nation" that is at the origin of the province of Manitoba, and that was the protagonist of two rebellions in the second half of the 19th century. But other groups may also be counted as Métis, from "non-status Indians" (people who lost the status or who may have never obtained it while being entitled to it) to other mixed-ancestry communities in provinces from Newfoundland to British Columbia. In the 2006 Census, 389 795 people identified as Métis – a remarkable 91% increase in ten years. Another 34 500 gave multiple indigenous-identity answers, for a total of 1 172 790 people reporting an indigenous identity. This amounts to an increase of 45% over only ten years earlier: the indigenous population is young and growing fast, and individuals are also more likely to declare an aboriginal identity – especially Metis – than they were until recently.

Most of the politics of indigenous rights in Canada have focused on First Nations and their established reserve lands: discussions regarding the future of indigenous self-government are almost exclusively about these First Nations. Left out of political

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discussions, then, are more than half of the country's indigenous population, who live in cities or otherwise outside of recognized First Nations territory. This marginalization is surely one of the most remarkable – and objectionable – facts of the situation of indigenous peoples in Canada.

3. ON THE ORIGINS OF THE "FOURTH WORLD"

Canada's indigenous peoples are sometimes said to live in the "Fourth World." This means that these are people living in Third World conditions of poverty, marginality and deprivation, within the borders of a First World, advanced capitalist country. It is estimated, for example, that as many 80% to 90% of the working-age population of First Nations communities find it impossible to obtain significant employment (Royal Commission on Aboriginal Peoples, 1996).

European history in the Americas started in the 16th century with military and demographic vulnerability and a deeply held sense of civilisational superiority over "the Indians." Faced with the arrival of these newcomers, whom they could easily have exterminated – or, at least in the northern regions of the continent, just allowed to die – in the early decades, indigenous peoples decided to welcome them, help them, and enter into alliances with them.[3] A number of these alliances took the form of treaties, many of which are still in force today.

In the upper half of North America – what was becoming Canada – it is not before the beginning of the 19th century that indigenous peoples could be discounted as a military force. Indeed, up to the middle of the 19th century in Canada, many areas could not be said to be under Euro-Canadian control. By then, the (ex-)Europeans had achieved demographic superiority, and indigenous peoples were increasingly marginalized socially, economically, ant territorially. Canada's vast land was about to become largely empty of "Indians." The sense of superiority – moral, religious, technological, etc. – that Europeans brought with them on their ships was well on the way to being established materially on Indian land.

[3] For an indigenous perspective on this history, see Sioui (1992).

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By the last quarter of the 19th century, it was done. And a fully colonial relationship could be formalized, between the newly formed Canadian state and indigenous peoples. The British North America Act (BNA Act), which established Canada as a federal state in 1867 and is still the country's basic constitutional framework, gave the federal government full responsibility for Indian policy. In 1876, Ottawa – the federal government – consolidated a series of pre-existing laws into a comprehensive one, the *Indian Act*. Through the *Indian Act*, indigenous peoples (to the exclusion of the Métis people, who are not covered by the *Act*) became wards of the Canadian state – a legal relationship similar to that between children and their parents. Indians registered with the federal government were to live on reserves, pieces of land most often tucked conveniently away from areas slated for "white" settlement, representing a fraction of formerly Indian land and usually insufficient to sustain economic development. Individuals who for some reason were not registered – perhaps they had been away hunting on the day that government agents came to the village to make the list – found themselves in a social no-man's-land, unrecognized officially but victims of the racism of the settlers.

This system is still in place today, with remarkably little change. Only one significant reform of the *Indian Act* has occurred, in the 1950s, making it less repressive: people would have more freedom to carry out traditional practices such as the Potlatch and the Sun Dance, would no longer need a special pass to leave the territory of the reserve, etc.. Status Indians only obtained the right to vote in federal elections in 1960. Before then, in order to vote, status Indians would have to give up their official status, thereby making them inadmissible to live on reserve, to participate in the life of their community, and depriving their children of the same access to their community. Legal discrimination against status women was ended only in 1985, with a variety of unanticipated negative consequences still outstanding. Other than these few changes, the *Indian Act* still governs the lives of indigenous peoples in Canada, including (by dint of keeping them outside the system) those who are without status.

For most of the 20th century, indigenous peoples were basically invisible, with no political weight whatsoever. They had been widely expected to disappear, out of an evolutionist belief that they were backward and bound to be absorbed by civilization. The *Indian Act* was and is structured to facilitate this disappearance, this assimilation. But this expectation has not been realized. What happened? The first component of an

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answer is that the expectation was simply wrong-headed, arising from a set of assumptions that owed more to the cultural arrogance of European civilization and the overwhelming power of European-inheritor states than to well founded scientific analysis. A more modest outlook would recognize that different societies have developed in different ways over time, that European history is not the benchmark for the rest of the world, that indigenous societies have been well equipped to maintain themselves over many centuries and that they can continue to do so for the foreseeable future – if they are not exterminated by more powerful European inheritors. It turns out, also, that indigenous societies have been well equipped to resist the pressure of the settler states, so that they survived – throughout the Americas – decades and even centuries of attempts to eliminate them.

Survival and resurgence were not, however, predetermined outcomes; and great damage has been done to the lives and cultures of indigenous peoples. Disease has been a particular danger, given indigenous populations' lack of defense against illnesses brought from Europe by people who had had hundreds (if not thousands) of years to develop an immunity against them (Sioui, 1992). Because of disease, indigenous populations in Canada have gone from more than two million at the time of arrival of the Europeans to a few hundred thousands at the beginning of the 20th century, raising the possibility that indigenous peoples would indeed disappear – killed off by the diseases of "civilization." But for the last hundred years, Canada's indigenous population has rebounded, and is now significantly younger than the country's overall population, and growing fast.

Disease has its own logic and time, and indigenous peoples were eventually able, after great suffering, to overcome that threat. Government policy obeys a different logic, and presents a different kind of threat. With the basic goal of government being the assimilation of indigenous people into the Euro-dominant mainstream – or "whitestream" (Denis, 1997) – of Canadian society, the two general instruments of policy were socio-economic marginalization and cultural oppression.

In socio-economic terms, the confinement of Indians on reserves that do not provide a sufficient land base to allow economic development, has produced a profound economic dependence of Indian bands on the Canadian government, and deep and lasting poverty for a great majority of indigenous people. To this day, many reserves do

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not have access to clean water and to a significant supply of electrical power, and housing shortages are common; in the Canadian winter, such a lack of basic resources produces severe hardships. Cultural oppression has taken many forms, including the interdiction of engaging in indigenous cultural practices, from religion to language. Up until the 1960s, Canada's main Churches (Catholic, Anglican and United), under contract with the federal government, ran so-called residential schools for Indian children. These schools were often away from the children's communities, which they were able to visit only in summer months, if at all; children were force-fed English (and sometimes French), Christianity and European manners, while they were forbidden from speaking their own languages, boys could not keep their hair long and braided, etc.. It has become widely known only recently that, in addition to this generalized and systematic cultural abuse, various forms of physical and sexual abuse were frequent at these schools, resulting in generations of Indian children growing up traumatized – many of them becoming dependent on drugs and alcohol, and often repeating a cycle of abuse on their spouse and children.

As a consequence of the Canadian government's policy of assimilation, which was abandoned officially in the 1970s but remains in effect in many practical ways, life in indigenous communities – whether on reserves or in impoverished areas of Canada's cities – is difficult, harsh and unhealthy. A large majority of indigenous people cannot speak their ancestors' languages. Rates of abuse, alcohol and drug dependence, and suicide are much higher than in Canada's general population. The life expectancy of indigenous people is shorter and overall health levels are lower; average education and income levels are much lower.

4. GAINING GROUND, FROM THE *CALDER* DECISION TO THE CHARLOTTETOWN ACCORD

As terrible as their situation has been, indigenous peoples have never given up demanding that their rights be recognized by the Canadian state. And they have maintained, as best they could in difficult circumstances, their traditions and cultural practices. It is not until the early 1970s that the situation started showing signs of potential improvement. The first sign was provided by the Supreme Court of Canada, in

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the 1973 *Calder* decision (named after Frank Calder, then chief of the Nisga'a people of northwest British Columbia).[4]

Since the late 19th century, the Nisga'a had been trying to negotiate a treaty with the Canadian and British Columbia governments, that would recognize their political and cultural autonomy and their authority to control economic development on their territory. But the provincial government had never been interested in signing such agreements with any of the more than one hundred First Nations communities in British Columbia; and the federal government saw no use in negotiating with First Nations as long as the province was not participating. Tired of waiting for the governments, the Nisga'a eventually took their claim to court in order to force governments to negotiate; they argued that, as an aboriginal people, they had legal collective rights. The Nisga'a (or Calder) case eventually reached the Supreme Court of Canada, which confirmed that the Nisga'a held certain aboriginal rights, but did not define them. This ground-breaking decision forced the Canadian government, under Prime Minister Pierre Elliott Trudeau, to abandon officially its assimilationist policy and gradually recognize that aboriginal rights do exist.

Through the 1970s, indigenous pressure on governments mounted, as indigenous organizations gained in prominence and legitimacy in the eyes of Canadians. First among these is the Assembly of First Nations (AFN), a federation of more than 600 bands that had been active (but marginal) for decades under the name of the National Indian Brotherhood but repositioned itself for the new context. Other key organizations include the Inuit Tapirisat (IT); the Aboriginal Council of Canada (ACC, previously known as the Native Council of Canada (NCC)); the Métis National Council (MNC), created in 1983 from a split in the NCC; as well as the Native Women's Association of Canada (NWAC), created in 1974 and which came to prominence in the late 1980s. Indigenous pressure culminated in 1981-1982 with the inclusion of Aboriginal rights in the newly patriated Canadian constitution (as its Section 35). But the constitution, like the *Calder* decision, did not define what these rights are: this was left to further negotiations and court cases. Three constitutional conferences were held between 1983 and 1987, to try to come to an agreement among all governments and the main indigenous organizations as to what these rights might be. But these efforts failed.

[4] On the development of conceptions of "aboriginal rights" in Canada, see Asch (1988).

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Soon after the failure of the last conference, the provinces and the federal government came to an agreement on Quebec's status within Canada, following that province's dissatisfaction with the Constitution Act 1982 (which it had refused to ratify). Indigenous organizations reacted to this, the Meech Lake Accord, with anger and dismay as their own efforts had just been unsuccessful, and opposed it on the grounds that their concerns should not be left aside. While signed by the First Ministers, the Meech Lake Accord needed to be ratified by the federal parliament and all provincial legislatures, no later than 1990. Over three years, opposition to the Accord spread among the Canadian population, and the concerns of indigenous leaders became one of the key reasons cited for people to fight it. For many Canadians, this new-found support for indigenous claims was undoubtedly genuine, but others merely co-opted indigenous opposition to achieve their own end of thwarting an accommodation of Quebec's nationalist claims. As the deadline of June 1990 approached, two legislatures had withheld ratification of the Accord. In Manitoba, an indigenous member of the Legislature named Elijah Harper succeeded in blocking a last-minute effort to approve the accord. Harper's stand became a key symbol of popular opposition to the Meech Lake Accord and of the Canadian people's solidarity with indigenous peoples. The deadline arrived, and the Accord died.

By a fateful coincidence, a major crisis between a First Nation community and its non-indigenous neighbours erupted in Quebec within days of the Meech Lake Accord's final failure. When the small municipality of Oka, near Montreal, decided to expand a golf course in an area that the nearby Mohawk community of Kanesatake claimed was its sacred land, holding a cemetery, the Mohawk erected a roadblock to keep work from beginning on the golf course. After weeks of increasingly tense stand-off, the municipality asked the provincial police force to intervene, and to dismantle the roadblock. When the *Sûreté du Québec* (SQ) tried to do so, Mohawk "Warriors" and police officers exchanged gun shots, a police officer was killed, and the SQ retreated. The stand-off resumed, and other Mohawk communities became involved, as people on the Kanawake reserve blockaded one of the major bridges linking the island of Montreal to its south shore, across the St.Lawrence River. This created significant disruptions in the ordinary life of Montreal, increasing exponentially the tension between Montrealers (and Quebecers generally) and First Nations people. As in the Meech Lake debate, Canadians outside Quebec were quick to express solidarity with indigenous people, against Quebec. Meanwhile, at Oka / Kanesatake, the Canadian

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Armed Forces were summoned by the Quebec government, and negotiations eventually succeeded in ending the confrontation peacefully.

The combination of the Oka crisis and the rejection of the Meech Lake Accord produced lasting damage in the relationship between Quebecers and indigenous peoples – although in the early 2000s breakthrough agreements would be made between the Quebec government and the Cree and Innu peoples. But while Quebecers and First Nations peoples were growing further apart, other Canadians had become more aware of the situation and claims of indigenous peoples, and more sympathetic to them. As a result, when a new round of constitutional negotiations opened in 1991, the agenda of indigenous organizations was quickly included among the issues to be dealt with. These negotiations eventually produced the Charlottetown Accord, which included the breakthrough recognition of the indigenous peoples' "inherent right to self-government."[5] This concept is based on the notions that (a) indigenous peoples occupied the Americas first, and were self-governing peoples at the time of European arrival; and that (b) in Canada, indigenous peoples never surrendered their sovereignty and were never conquered, which means that they are still sovereign and self-governing. As radical a departure as recognition of this right was for Canada's governments, it still represented an unacceptable mid-way point for a number of indigenous communities, who had signed treaties with the British Crown in the 19th century and who insist that these are *international* agreements, not to be "domesticated" by inclusion *in* the constitution. The Charlottetown Accord was put to a referendum vote in the fall of 1992, and a majority of the Canadian electorate voted against it; indigenous voters also rejected it, in part by voting against it and in part by boycotting the referendum so as not to recognize the Accord's "domestication" of treaty rights.

5. GAINING GROUND SINCE THE 1990S: THE COURTS, NUNAVUT, THE NISGA'A TREATY AND POLITICAL AGREEMENTS

Attempts to deal with indigenous issues through constitutional change ended with the failure of the Charlottetown Accord. In the decade and a half since that failure, the AFN

[5] Indigenous rights were only one of several components of the Charlottetown Accord. There is a full discussion of the Accord (and of the Meech Lake Accord) elsewhere in this volume.

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and other indigenous organizations lost a significant part of their hard-won clout, as governments appeared to conclude that these organizations could not "deliver" the support of their members. Some confrontations, similar to that at Oka / Kanesatake, took place in Ontario (where an indigenous man was shot by police in circumstances that have remained unclear), British Columbia and New Brunswick, and the Canadian population was much less inclined to sympathize with indigenous activists now that the conflicts were not in Quebec.

In its dealings with indigenous peoples, since Charlottetown, the Canadian government has been much less willing to deal with pan-Canadian organizations, preferring instead negotiations with individual First Nations – where, it goes without saying, the balance of forces is much more favourable to the government. Since 2001, the Canadian government has also sought, for the first time in more than thirty years, to carry out a significant reform of the *Indian Act* through the proposed First Nations Governance Act. This reform, promoted over the strenuous objections of the Assembly of First Nations and other indigenous organizations, would tighten democratic and accountability controls over Indian bands. But, after more than a year of debate and controversy, the government failed to adopt the First Nations Governance Act.

Despite the difficulties, the last decade of the 20th century and the beginning of the 21st produced significant gains for indigenous peoples, that can be grouped in four main categories: decisions by the Supreme Court of Canada that affirmed treaty rights and "aboriginal rights," the signing of the Nisga'a Treaty, province-by-province settlements of a number of claims and conflicts, and the creation of the new territory of Nunavut where the majority of the population is Inuit. Alongside these developments, and in the aftermath of the Oka crisis, the Canadian government created the Royal Commission on Aboriginal Peoples (RCAP), a major inquiry that was to chart the way forward for the relationship between Canada and "its" aboriginal peoples. In 1996, the Royal Commission published its Report, accompanied by a large amount of research, advocating the end of colonialism and the redefinition of the relationship as a "nation to nation" partnership.

The most fundamental demand by indigenous peoples is that they be allowed to govern themselves in conditions that can sustain their socio-economic development: once that is granted, everything else follows. The general framework for such self-

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government remains to be established, but is often thought of as a third order of government within Canadian federalism. The extent of autonomy sought varies from one community to another, as are the rationales offered to justify it: treaties that can date back to New France or be as recent as the end of the nineteenth century, the inherent right to self-government, and/or the assertion of undiminished sovereignty. It is in this context that the Nisga'a Agreement, signed in 1997, and the creation of Nunavut are obviously important, and why they ought to be more significant than court decisions which do not deal with self-government issues.[6] But, as we will see below, they also carry their own limitations.

In their self-government agreement, the Nisga'a First Nation obtained a wide range of jurisdictions that are transferred from the federal and provincial governments (see Denis, 2000). But rather than establishing a fully autonomous third order of government, subject only to constitutional provisions, the Agreement exists as a function of federal and provincial legislation, leaving the Nisga'a more or less in the position of a regional municipal government. Nisga'a autonomy is further circumscribed by its being subject to the Canadian Charter of Rights and Freedoms, which was a necessary condition for the federal government's participating in the Agreement. Also, economic development and the Nisga'a justice system are subject to significant provincial and federal constraints. Finally, Nisga'a government is being established on less than 10% of the land than had been claimed, leaving many families without clear access to their traditional territory.

One may wonder why the Nisga'a negotiators – and later, the Nisga'a voters who ratified the Agreement in a referendum – agreed to a deal that is so short of their goals. As negotiations had moved forward, it had quickly become clear that the federal and provincial governments would be unyielding on a variety of issues (as noted above) and, most importantly, that the B.C. climate for an agreement was likely to worsen rather than improve. As a provincial election approached and it appeared likely that the relatively friendly government would be defeated by a party that was opposed to an accommodation with First Nations, the Nisga'a negotiators and voters came to the conclusion that it was now or never, and that an imperfect agreement was better than

[6] On Nunavut and the Nisga'a Treaty, as well as a wide range of other issues in contemporary indigenous politics in Canada, see Bird, Land and Macadam (2002).

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no agreement at all. In that, as in their concern about a different government being elected, they were correct.[7]

Nunavut, Canada's eastern Arctic region, was established as the country's third northern territory in 1999, following a decade of negotiation among the indigenous peoples of the Northwest Territories (N.W.T.) and the federal government. The western part of the N.W.T has been set aside as the Dene people's territory, Denendeh, to be created in a parallel process to that of Nunavut; but agreement has been difficult to reach, and this has delayed the establishment of Denendeh. The creation of Nunavut required a constitutional amendment, which was facilitated by the fact that only the federal government needed to approve the change, as only one existing territory was affected directly. Nunavut is geographically isolated, with a population of only a few thousands. It is also one of Canada's only regions where a clear majority of the population is (and will remain) indigenous, which made it possible to establish it as an "ordinary" territorial jurisdiction (ie without an explicitly indigenous government) and be confident that it would *function* as an indigenous, Inuit jurisdiction. As a result of all these peculiarities, Nunavut – which, in itself, is a major advance for Canada's indigenous peoples – cannot serve as much of an example for other indigenous peoples seeking for ways to establish their own governments.

The Nisga'a Agreement, for its part, was conceived as the model for the negotiation of other treaties – more than one hundred of which are being sought by indigenous peoples in British Columbia alone. But the Nisga'a negotiations were highly dependent upon B.C.'s political climate and the unprecedented good will of the provincial government – and for all that, both the federal and B.C. governments imposed conditions on the Nisga'a negotiators that make the Agreement a far-from-perfect political framework. But the climate in British Columbia has worsened for indigenous peoples since the late 1990s, with the election of a new government that has denounced the Nisga'a process at every occasion. In 2002, the new B.C. government even conducted, and won, a referendum on the treaty process, seeking to reduce severely the ambit of future and on-going negotiations with other First Nations. Consequently, the (imperfect) model that the Nisga'a Treaty ought to be had now been disavowed by one of the necessary partners. Since then, the same (re-elected) B.C.

[7] Their concern about the election was, however, premature: it took another four years for the government to lose an election. But lose it did, and the B.C. treaty process ground to a halt for several years.

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government has developed a more open perspective toward indigenous peoples, and progress has been made in redefining the relationship.

With the two landmark self-government events of the 1990s self-limiting, and with the constitutional route blocked since the failure of the Charlottetown Accord, indigenous peoples have found the law courts to be almost the only other way for to make gains. The 1990s and early 2000s have seen several history-making decisions by the Supreme Court of Canada, at once advancing and limiting the legal-political agenda of indigenous peoples. All these decisions have as their starting point Section 35(1) of the Constitution Act 1982, which binds the federal and provincial governments, and states that "(t)he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[8]

Since the 1990 *R. v. Sparrow* decision, the Supreme Court of Canada has developed a jurisprudence on aboriginal title and rights, and treaty rights, in such key judgements as *R. v. Van der Peet* (1996), *Delgamuukw v. British Columbia* (1997), and *R. v. Marshall* (1999). And *R. v. Powley*, in 2003, recognized for the first time the aboriginal rights of Metis people. As might be expected, each of these decisions is quite complex; and, in the British tradition of common law, it is meant both to be built on legal precedent and to provide further precedent for later cases. Beyond the complexities, some key features of the emerging jurisprudence are quite clear – both in the way that they advance the cause of indigenous rights and in the way that they limit it. On the one hand, for instance, the Supreme Court has overturned decades and centuries of colonialist practice by recognizing that various indigenous peoples have a right to land, and to fish and hunt, whether for their own consumption or for sale on land otherwise owned by the federal or provincial government and without having to obey ordinary hunting and fishing laws. As a result, the possibilities for economic development in many indigenous communities have improved significantly. On the other hand, the Court has interpreted the constitutional clause regarding "aboriginal rights" as excluding self-government issues; it affirms instead a kind of cultural, or ethnic right that may apply to the specific cultural practices of a specific people on a specific territory, grounded in a cultural stability that is unimaginable for contemporary societies in general.

[8] And S.35(2) defines « aboriginal peoples » as « Indian, Inuit and Métis peoples . »

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Courts make decisions on indigenous rights on the basis of a complaint brought to them, in which one of the parties to the complaint claims to be a member of an aboriginal people as defined in S.35(2) of the Constitution Act 1982, and to have a treaty or aboriginal right (S.35(1)) to do something otherwise forbidden by the other party (as a rule, a government). For instance, in the *Sioui* (1990) case, three brothers, members of the Huron-Wendat people, went hunting in a provincial park where hunting was prohibited by the Quebec government. The Quebec government prosecuted the Sioui brothers, who argued – presenting historical evidence – before the court that they had a treaty right dating back two hundred years to hunt as they needed for ceremonial (ie religious) purposes. The Supreme Court eventually confirmed that members of the Sioui brothers's community do have that treaty right to hunt. But this right does not apply to other communities, it is not a right to self-govern, it is not a right to fish, and it is not a right to hunt for com

In the important 1999 *Marshall* decision, the Supreme Court ruled that the Mik'maw and Maliseet peoples, on the Atlantic coast, have an 18th-century treaty right to fish commercially, in order to earn a "moderate living:" their right is more wide-ranging than that of the Huron-Wendat, but they may not enrich themselves. And, again, they may not self-govern. In allowing commercial fishing, the *Marshall* decision threw the whole fisheries sector of the Atlantic provinces into turmoil: non-indigenous fishers saw the arrival of a whole new group of fishers as a grave threat to their economic survival, as fish stocks were (and are) severely depleted, while indigenous fishers refused to bear the burden of several generations of non-indigenous over-fishing. Demonstrations and riots ensued, and the Canadian government (which has constitutional jurisdiction on fisheries) found itself trying to set limits on the rights that the Court had just recognized.

A key feature of the Court's treatment of "aboriginal rights" as a kind of ethnic right is its insistence on the historical continuity of indigenous practices: in order to be potentially recognized as a right, a practice (say, fishing, hunting or trading) must be shown by the indigenous party in a trial to have been a "distinctive" component of that party's culture at the time of "European assertion of sovereignty" and to have retained that character ever since (Denis, 2002). In other words, by focusing the right on a specific practice, the Court basically forbids significant social change among indigenous peoples: if your practices change, the Supreme Court has ruled, you lose your rights. Such a view remains grounded, without saying so, in the evolutionist ideas that conceived the field

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of anthropology as that of unchanging, "primitive societies," in contrast to the fields of history and sociology that deal with progress-making historical societies.

In the last decade, governments have also sought, or agreed, to negotiate and sign a number of political agreements with indigenous peoples. The most wide-ranging, but short-lived, was the 2005 "Kelowna Accord," a grand agreement between the federal government, all provincial governments, and all major indigenous organizations, to provide major improvements in the socio-economic life of First Nations, Metis and Inuit peoples. In line with the dominant trends in the Canada-Indigenous peoples relationship, "Kelowna" held some promise of improving the socio-economic lives of indigenous peoples, but changed nothing to the colonial structure of the relationship. This was an initiative of Paul Martin's minority Liberal government that lost power within months of achieving the accord. The succeeding minority Conservative government, led by Stephen Harper, has shelved the Kelowna Accord. The Harper government, in fact, is animated by much the same philosophy regarding indigenous peoples as the one informing all Canadian governments prior to the 1973 *Calder* decision: it would like to see indigenous individuals integrate fully into the whitestream of Canadian life, leading to the disappearance of indigenous peoples as collective entities. Harper himself is much influenced on this count by the ideas of his adviser and former professor at the University of Calgary, Tom Flanagan, whose assimilationist work[9] is at the very margin of the Canadian literature on the subject.

Meanwhile, a number of provincial governments have developed agreements of varying importance with indigenous peoples. Some of these are local in nature, while others are province-wide. In the late 1990s, for instance, the Quebec government and the Cree people of northern Quebec signed the "Paix des Braves," a pact updating and reinforcing the James Bay Convention of the 1970s, which had been Canada's first "modern" treaty. In the mid-2000s, the B.C. government let go of its hostility to seeking agreements with indigenous peoples, launched several local/regional initiatives, and became a staunch proponent of the Kelowna Accord. Also, in 2006-7, the Ontario government settled a local but nationally notorious conflict with indigenous communities over control of provincial park at Ipperwash. And it signed, in early 2008,

[9] Notably the much remarked and decried *First Nations? Second Thoughts* (McGill-Queens University Press, 2000).

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a long-term province-wide financial agreement with the Ontario's indigenous organizations.

6. CONCLUSION

It would have been possible for the courts to interpret "aboriginal rights" as "the abstract political rights of aboriginal peoples / societies." This would have led to a quick judicial recognition of aboriginal rights to self-government, making it much more difficult for governments to resist negotiating with indigenous peoples. But, as much as the courts have been willing to move the indigenous agenda forward by recognizing ethnic rights, they have remained unable to shed colonial preconceptions and unwilling to establish a new form and level of government within the Canadian constitutional order: colonialism dies hard. Government policy, at both the federal and provincial levels, has gone in the same direction, in its own way.

One of the most respected – and mainstream – analysts of Canadian politics, Alan Cairns (2002), has written recently that, at most, there will be a partial end to colonialism in Canada. In demonstrating this, Cairns does not lament or attack Canadians' unwillingness to forswear colonialism: he merely acknowledges the fact, and encourages indigenous peoples to adjust to it. There is no indication, at the beginning of the 21st century, that Canada's governments, political parties or population at large are any more interested than the Supreme Court in ending colonialism; and so there is little reason to disagree with Cairns's expectation. Canada, it seems, is headed for a kind of crypto-colonialism. But if we stop to think about it, this is a remarkable fact: Canadians and their governments are content to maintain a colonialist system, so as not to disturb their habits and way of live, decades after colonialism has been delegitimized across the world. How is that possible?

There are no obvious answers to this question. But the fact that indigenous people account for less than 4% of the Canadian population, and that more than half of them live in relatively (or very) isolated communities means that most Canadians hardly ever have any contact with them. This has made it possible, over several decades, for Canadians to almost forget that indigenous peoples existed, except as exotic reminders of the country's origins – and, in any case, they were supposed to

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disappear, to be absorbed into civilization. By the 1980s, when the situation started becoming politically uncomfortable, Canadians had developed such a highly benign sense of themselves – the peace-keepers, the moderates, the nice North-Americans, the friends of the Third World – that they could not begin to think of themselves as perpetrators of a massive, colonial injustice. It goes without saying that the fact that their material interests remain dependent on maintaining the system in place only reinforces this tendency.

We already knew, from the past five decades of neo-colonial African (and other) experience, that colonialism is highly resilient. Canada, among several "new world" countries, is now in the process of developing new, self-denying and liberal ways of being colonial. Such new developments may well improve the lives of many indigenous people and communities, without at the same time coming to terms with the fundamental basis of their claims. This is clearly better than nothing, but not quite something to be proud of for one of the world's wealthiest countries.

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