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# Decolonization and Canada's 'Idle No More' Movement

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**Abstract:** Canada's 'Idle No More' movement ignited over concern about Prime Minister Stephen Harper's abuse of majority status to enact laws that undermine democratic rights and environmental protection. With a philosophy that corresponds to international human rights principles, the movement galvanized public opinion and forged stronger alliances with the settler population. Ironically, Indigenous peoples are currently better situated than Canadians to challenge the lack of public consultation and violation of democratic principles that have come to light. The Supreme Court of Canada has recently confirmed that there is a duty to consult aboriginal peoples on issues that affect their rights, and several court actions have now been mounted on this basis. The goal of correcting endemic injustices and reinvigorating democracy will require a full re-evaluation of Canada's colonial past and of the institutional format used to dispossess Indigenous peoples. Idle No More's iconic flash-mob round dances suggest there is a new generation ready to take on this challenge.

**Key words:** British colonialism, monarchy, democracy, Indigenous, law, rights, sovereignty

## 1. Introduction

Protest movements in Canada usually start in the summer and peter out just before the harsh winter weather sets in. Idle No More is different. It began in November 2012 and, in a social context littered with broken promises, failed initiatives and

poverty in the midst of plenty, what started as a study group spread like wildfire among young educated aboriginal women searching for ways to succeed where their elders had failed.<sup>1</sup> Styling itself as a protest against “attacks on Democracy, Indigenous Sovereignty, Human Rights and Environmental Protections”,<sup>2</sup> Idle No More unified unprecedented support from Indigenous organizations in all parts of Canada and even overseas. Major media styled the movement as a protest about aboriginal rights and broken treaties, but allies were soon found among environmentalists, unions and socially conscious people of all ages. Indigenous leaders and all of the opposition parties agree it is time to re-set the Crown-First Nations relationship.<sup>3</sup>

Canada’s Conservative Prime Minister Stephen Harper has been forced to pay attention but, with a solid majority in both the House of Commons and the Senate, his administration remains focused on exploiting northern resources following economic models developed during the colonial age. Despite the intensity of initial public interest, Harper supporters seemed convinced that the movement’s energy would soon be spent, but Idle No More created a unity of purpose that was missing before. If Canada is ever to disentangle itself from its colonial past and build a solid foundation for future development, the issues underlying the movement’s popularity will have to be addressed. Some aspects of Canada’s situation are difficult for outsiders, and even for many Canadians to decode. This paper will begin with a description of how Idle No More developed, then outline the philosophical rift that underlies the complex legal and historical relationship of Indigenous peoples with Canada.

## 2. The Origins & Growth of Idle No More

The initial protest began with e-mails between four women who were attempting to decipher the impact of Bill C-45 on the “aboriginal and treaty rights” ostensibly protected by s. 35 of Canada’s *Constitution Act, 1982*.<sup>4</sup> None of the four women

1. Two-thirds of the 30,000 aboriginal students in university or college are women. The median age of aboriginal Canadians is 27 compared to 40 for non-aboriginals. Friesen, Joe, “What’s behind the explosion of native activism? Young people”, *The Globe and Mail*, 18 Jan. 2013, <http://www.theglobeandmail.com>.
2. Houle, Shannon M., “Idle No More World Day of Action – January 28”, 2013 12 Jan. 2013. <http://idlenomore.ca/02/2013>.
3. See e.g. Carolyn Bennett, Liberal Party, “Crown First Nations relationship is at a “tipping point” – current crisis could be a tinder box only the PM can fix” 10 Jan, 2013, <http://carolyn-bennett.liberal.ca>; Jean Crowder, NDP, “Jean spoke about her motion regarding the government’s relationship with first nations”, 1 Feb. 2013 <http://jeancrowder.ndp.ca> (5 /02/ 2013).
4. *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

fit the usual profile of political analysts. Nina Wilson, Jessica Gordon and Sylvia McAdam all come from reserves, those little patches of land set aside for “Indian bands” by the colonial government. Sheelah McLean teaches anti-colonialism and is a third generation immigrant of Scottish and Scandinavian descent. Sylvia McAdam is the only one with a legal education. She too is a teacher, but her specialty is Cree laws and ceremonies.<sup>5</sup>

## 2.1 Bill C-45

Obscurely labeled “A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures”, the official short title of Bill C-45 is *Jobs and Growth Act, 2012*.<sup>6</sup> With 443 pages, it contains 556 sections. The “other measures” referred to revise a broad range of acts and regulations concerning such unrelated matters as navigable waters, grain inspection, public sector pensions and judicial salaries. This unmanageable concatenation was introduced to Parliament by the Conservative majority on October 18<sup>th</sup>, 2012. The first act referred to is Bill C-38, a similarly unwieldy collection of unrelated additions passed on June 29<sup>th</sup>, 2012 as the *Jobs, Growth and Long-term Prosperity Act*. On October 30<sup>th</sup>, 2012, Bill C-45 passed its second reading in Parliament and was referred for review to the Standing Committee on Finance.<sup>7</sup>

What the four women discovered alarmed them. Just a few months earlier, on January 24<sup>th</sup> 2012, the Assembly of First Nations (AFN), a lobbying organization formed of band council chiefs elected under Canada's *Indian Act*, had brokered a Crown-First Nations Gathering designed to revive the *Covenant Chain*, an Indigenous treaty that had provided regular consultations with settler society until 1858.<sup>8</sup> Prime Minister Stephen Harper, the Governor General and 12 Cabinet members had met with 170 of these *Indian Act* chiefs and promised there would be no changes affecting Aboriginal people without prior consultation.<sup>9</sup> Yet Bill C-45

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5. “About us”, The official Idle No More Website, <http://idlenomore.ca> (6/02/ 2013); Sylvia McAdam Teachings, INCA Channel's Videos, <http://vimeo.com/> (13/01/ 2013); CTV News. ca staff, “Idle No More cofounder supports Spence, not blockades”, 13 Jan.2013, <http://www.ctvnews.ca> (7/02/ 2013).
  6. Parliament of Canada, <http://parl.gc.ca/LegisInfo>.
  7. Parliament of Canada, “Hansard Index”, <http://www.parl.gc.ca>; Flaherty, Jim, Minister of Finance, *Open Parliament*, 14 Dec. 2012; Press, Jordan, “Senate passes Harper government's omnibus budget bill”, *National Post*, 14 Dec. 2012 <http://www.nationalpost.com>, (9/01/ 2013).
  8. Walters, Mark D., “The “Golden Thread” of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill L. J.* , 711
  9. Chiefs elected under the *Indian Act* do not qualify as legitimate political representatives according to the laws of some indigenous nations.

ignored a great number of constitutionally protected “aboriginal and treaty rights”. Among other things, it changed the *Fisheries Act* to impose a new definition of “Aboriginal Fisheries”, limiting protection to “serious harm” as defined by undeclared federal policy. It replaced the *Canadian Environmental Assessment Act* so environmental review was no longer required for “minor projects”, Aboriginal involvement was reduced, and timelines for ecological assessment were shortened. It allowed internet posting to serve as “notice” of activities under the Canadian Nuclear Safety Commission. It limited the ability to challenge works approved by the federal cabinet under the *National Energy Board Act*. It amended the *Indian Act* to allow leasing of reserve lands and reduce the community support needed for changes in land designations. It eliminated federal oversight of Canada’s estimated 32,000 major lakes and 2.25 million rivers under the *Navigable Waters Protection Act* so only 97 lakes and portions of 62 rivers remained protected. Waterways and Indigenous territories were suddenly vulnerable to the highly contentious Northern Gateway Pipeline proposed to bring oil from Alberta’s tar-sands to the Pacific coast.<sup>10</sup> In short, the legislation was a direct assault on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) whose Article 19 requires states to consult and cooperate in good faith with Indigenous peoples and to obtain “their free, prior and informed consent” to legislative measures affecting them.<sup>11</sup>

## 2.2 Taking Action

As they discussed the situation the four decided to set up a teach-in at Station 20 West, a community centre serving poverty-stricken neighbourhoods of Saskatoon where many Indigenous people live. To advertise the event they started a Facebook page. Jessica Gordon named it “Idle No More” as a reminder “to get off the couch and start working”. As it turned out, many others were alarmed by Bill C-45. On November 30<sup>th</sup>, Tanya Kappo in Edmonton used the #IdleNoMore hashtag which spread like wildfire on Facebook and Twitter.<sup>12</sup> The original Saskatoon meeting was replicated in Regina, Prince Albert, North Battleford and Winnipeg, then the movement spread nation-wide. But nothing could stop the Conservative majority.

10. “Federal Omnibus Legislation: Bill C-38: Jobs, Growth and Long-term Prosperity Act & Bill C-45: Jobs and Growth Act, 2012”, *AFN*, <http://www.afn.ca>; “CUPE signs joint statement supporting Chief Spence and Idle No More” Canadian Union of Postal Workers, 2013. <http://cupe.ca/> (7/02/ 2013).

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

12. Olivier, Cassidy and Stephanie Ip, “Idle No More has grown into national protest on First Nations rights”, *The Province*, Vancouver, 4 Jan. 2013, <http://www.theprovince.com>; Warren, Jeremy, “Idle No More born on the Web”, *The Star Phoenix*, Saskatoon, 19 Dec. 2012, <http://www.thestarphoenix.com> (7/01/ 2012).

On December 4<sup>th</sup>, opposition parties proposed 1,600 amendments. All were rejected. Several prominent AFN chiefs tried to enter the House of Commons to speak. They were stopped at the door.<sup>13</sup> On December 5<sup>th</sup> the bill passed to the Senate, but with Conservative control of both houses, there was nothing to hinder its progress. It received the royal assent required to become law on December 14<sup>th</sup>, 2012.

Aboriginal peoples constitute only about 4% of Canada's population.<sup>14</sup> Their ancestors once controlled 100% of the land, but they have no designated representation in Parliament. Treaty rights are routinely ignored or unilaterally interpreted to the benefit of settler society. With no formal political clout, they have been forced to find creative ways to assert their rights. Idle No More wanted Canada to amend the omnibus bills, withdraw legislation threatening Indigenous lands and waterways, restore funding that had been cut from communities and advocacy organizations and set up Nation to Nation processes to manage long-term implementation of treaties and resource sharing.<sup>15</sup> These issues were widely agreed upon by Indigenous people of most political persuasions. December 10<sup>th</sup> was declared a National Day of Action. Rallies, demonstrations, blockades of roads and bridges and flash-mob round dances in shopping malls proliferated across the country. Idle No More now had the support of the AFN, but there was no formal leadership or central organization. People took their own initiatives based on a large variety of past campaigns. With demonstrations popping up in London, New Zealand, Egypt, Hungary and elsewhere, comparisons were made with the Occupy movement of 2011.<sup>16</sup>

### 2.3 Seeking Solutions

On December 11<sup>th</sup>, 2012, Chief Theresa Spence of Attawapiskat started a hunger strike in support of Idle No More. Despite the presence of the De Beers diamond mine on her traditional territory in northern Ontario, housing on her reserve is deplorable. The province of Ontario will reportedly profit by 6 billion dollars over

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13. Anishinabek Nation Grand Council Chief Patrick Madahbee, Serpent River First Nation Chief Isadore Day, Onion Lake Cree Nation Chief Wallace Fox and Assembly of Manitoba Chiefs Grand Derek Nepinak. Barrera, Jorge and Kenneth Jackson, "Chiefs take fight to House of Commons doorstep", *APTN National News*, 4 Dec. 2012 [http://aptn.ca/pages/news/ \(6/01/ 2013\)](http://aptn.ca/pages/news/ (6/01/ 2013)).
  14. The 2006 census counted 1,172,790 (50,485 Inuit, 389,785 Métis, 698,025 First Nations). Aboriginal population growth is faster than Canadian growth. Statistics Canada, "Aboriginal Population Profile" [www12.statcan.ca](http://www12.statcan.ca) (5/02/2013).
  15. Palmater, Pamela, "Idle No More: What do we want and where are we headed?" *rabble.ca*, 4 Jan., 2013 <http://rabble.ca> (9 Jan. 2013).
  16. Gollom, Mark, "Is Idle No More the new Occupy Wall Street?", *CBC News*, 8 Jan. 2013, <http://www.cbc.ca>.

the 17-year life of the mine, but Attawapiskat is to receive little more than \$2 million per year, and the promised improvements to infrastructure have not materialized.<sup>17</sup> Spence sprang to fame the previous winter after declaring a state of emergency and calling in the Red Cross.<sup>18</sup> Now she vowed to fast until Harper and the Governor General met to discuss outstanding issues with Indigenous leaders.<sup>19</sup> This galvanized more support. As Harper attempted to shuffle responsibility to departmental ministers, celebrities broadcasted, human rights organizations wrote letters and the Christmas shopping season was marked by more demonstrations, blockades and flash mobs.<sup>20</sup> Eventually Harper capitulated. The AFN arranged a meeting for January 11<sup>th</sup>, 2013, styled as a follow-up to the January 24<sup>th</sup>, 2012 Crown-First Nations Gathering. The point of the AFN's quest for "on-going dialogue may have escaped Harper. As the son of an Imperial Oil accountant with a master's degree in economics from a university subsidized by oil companies, his focus then, as with the omnibus "budget bills", was on the economy as he understood it."<sup>21</sup>

Indigenous response to the announcement of a second meeting between the Crown and the AFN was understandably skeptical – particularly after an audit of Attawapiskat was conveniently leaked to the press. Media focus shifted to Chief Spence's fiscal integrity and questioned whether her liquid diet of fish broth and moose blood was really a fast.<sup>22</sup> The Mikisew Cree and Frog Lake First Nations promptly dragged public attention back to the issues that had started Idle No More. They applied to Federal Court for judicial review of Bills C-38 and C-45, claiming that changes to the *Fisheries Act* and *Navigational Waters Act* violated

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17. Barrera, Jorge, "Equality for Aboriginal Peoples: Attawapiskat", APTN News, 20/03/2013.
  18. "9 questions about Idle No More" CBC News, 5 Jan, 2013 <http://www.cbc.ca>; "About Attawapiskat" *Huffington Post*, <http://www.huffingtonpost.ca> (5/02/ 2013). Read 505 comments505
  19. Barrera, Jorge, "Attawapiskat chief begins first day of hunger strike with sacred fire, sweet grass, tobacco" *APTN National News*, 11 Dec. 2012, [www.aptn.ca](http://www.aptn.ca) (5/02/ 2013).
  20. MacDougall, Greg, "Idle No More: On the meaning of Chief Theresa Spence's hunger strike" 22 Dec. 2012 <http://rabble.ca/> ( 9/01/ 2013); "Arrange meeting requested by Chief Spence, Lawyers Rights Watch Canada tells PM" *Lawyers Rights Watch Canada*, 29 Dec. 2012, <http://www.lrwc.org/> (9/01/ 2013).
  21. "Crown-First Nations Gathering", *AFN*, <http://www.afn.ca/> "Crown-First Nations Gathering Outcome Statement", Prime Minister of Canada, 24 Jan. 2012, <http://pm.gc.ca> (9/01/2013). "Agenda: Crown-First Nations Gathering – Strengthening Our Relationship – Unlocking Our Economic Potential" Aboriginal Affairs and Northern Development Canada, <http://www.aadnc-aandc.gc.ca>.
  22. "Attawapiskat chief slams audit leak as 'distraction'" CBC News, 7 Jan, 2013, <http://www.cbc.ca> (9/01/2013).



their aboriginal and treaty right to meaningful consultation.<sup>23</sup> The Mikisew Cree had already received strong Supreme Court affirmation for the duty to consult and they phrased this new initiative in terms of interests shared with all Canadians.<sup>24</sup>

## 2.4 The Second Crown First Nations Gathering

The days leading up to the second Crown-First Nations meeting were tense. Participants and format changed hour by hour. Could Chief Spence be persuaded to end her fast? Would the Prime Minister attend or would he just send the Minister of Aboriginal Affairs? Governor General David Johnson announced that he would not participate. Chief Spence refused to end her fast. Prominent chiefs supported her, insisting the Governor General's presence was necessary. The Governor General announced a "ceremonial" dinner after the meeting. Chief Spence seemed to waver back and forth. There were behind the scenes threats to oust Shawn Atleo from leadership of the AFN. "The Idle No More movement has the people ... that can bring the Canadian economy to its knees", declared Manitoba Grand Chief Derek Nepinak. "We have nothing to lose".<sup>25</sup>

Facing prospects that the meeting would fall apart, the AFN held an impassioned press conference on January 10<sup>th</sup>, 2013. National Chief Shawn Atleo said Idle No More represented a tipping point. Saskatchewan Regional Chief Perry Bellegarde said they wanted peaceful co-existence, not exploitation that made them poor on their own land. They wanted respect for UNDRIP's standard of "free, prior and informed consent". Atleo came close to tears over the failure of police to investigate the murders or disappearances of over 600 aboriginal women, saying real numbers approached 2,000. British Columbia Regional Chief Jody Wilson-Reybold pleaded for the importance of this meeting. Idle No More was standing up for rivers and waters. The unilateral C-45 process was not appropriate, reiterated Atleo. "We have a legal construct in this country that denies that we are peoples with rights".<sup>26</sup> Idle No More issued a press release reaffirming its educational goals and announcing an international day of action for January 28<sup>th</sup>, 2012.<sup>27</sup>

23. *Chief Steve Courtoreille et al. v. The Governor General in Council et al.* FCTD T-43-13. Chief Clifford Stanley and others v. The Governor General in Council and others FCTD T-44-13. Both represented by Robert Janes, Victoria, B.C.

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

25. Ljunggren, David, "Native Canadians could block development, Chief warns" *Reuters*, 10 Jan. 2013 <http://ca.news.yahoo.com> (7/02/2013).

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

27. Houle, Shannon M. "Idle No More World Day of Action - January 28, 2013" *Idle No More*, Press Release 10 Jan. 2013 [www.idlenomore.ca](http://www.idlenomore.ca) (12/02/2013).

In the end, the AFN meeting went ahead, not in a First Nations' venue, but in the Prime Minister's office with the sound of drummers and 3,000 Idle No More protesters in the background. The Prime Minister stayed for the full three and a half hours instead of skipping all but the first and last minutes as he had originally planned. Chiefs representing the Yukon, Manitoba and Ontario boycotted the event in solidarity with Chief Spence. She vowed to continue fasting, though she did attend the Governor General's reception where she was offered a "special welcome" and concern for her health.<sup>28</sup>

Curiously, the Prime Minister did not issue a press release about this passionately discussed meeting though he did issue one about a Diamond Jubilee medal ceremony to "honour Her Majesty Queen Elizabeth II's sixty years of service to the people of Canada". Three prominent Canadians had rejected the medal in solidarity with Idle No More and Chief David Montour later returned his after learning one was granted to an inflammatory opponent to Indigenous rights.<sup>29</sup> Canadians were left to rely on Shawn Atleo's report that Harper had pledged further "high-level discussions" to increase momentum on treaty negotiations, resource revenue sharing, and land claims, as well as "a more hands-on role in managing the relationship between the government and Canada's native people".<sup>30</sup>

## 2.5 Aftermath

During the run-up to the January 11<sup>th</sup> meeting, Chief Spence had almost become the face of Idle No More. In a rare interview on January 13<sup>th</sup>, 2013, Sylvia McAdam specified that while she supported Chief Spence, neither Spence nor the AFN – nor any other political organization – could speak for the activists. Idle No More was a peaceful educational movement, she said. It wanted to work "within legal boundaries" and did not condone blockades.<sup>31</sup> Several chiefs had announced that January 16<sup>th</sup> would be a national day of action and, whether the founders approved or not, Idle No More signs appeared at blockades of major roads and rail lines across the

28. Mackrael, Kim and Gloria Galloway, "Governor General offers Chief 'special welcome' at ceremonial meeting" *The Globe and Mail*, 11, Jan. 2013, updated 21 Jan. 2013 [www.theglobeandmail.com/](http://www.theglobeandmail.com/) (7/02/2013).

29. "3 prominent Canadians reject Diamond Jubilee medals: Maude Barlow, Naomi Klein, Sarah Slean refuse medals in solidarity with Spence, Idle No More", CBC News, 13 Jan. 2013, <http://www.cbc.ca/>; "Six Nations chief won't wear same medal as activist McHale", *Metroland News Service*, Hamilton, <http://metronews.ca/> (9/02/2013).

30. Galloway, Gloria, Kim Mackrael, Adrian Morrow, "PM meets Chiefs, vows improved relations", *Globe and Mail*, 12 Jan 2013, A4.

31. CTV News.ca staff, "Idle No More cofounder supports Spence, not blockades", 13 Jan. 2013 <http://www.ctvnews.ca/> (7/02/2013).



country. Many protesters felt this was the only way they could bring attention to the deplorable conditions in their communities.<sup>32</sup>

In December, a small businessman in British Columbia, had written letters to Queen Elizabeth II and Prime Minister Harper in support of Chief Spence. Now he received a reply from the Queen. "This is not a matter in which The Queen would intervene," it said. "As a constitutional Sovereign, Her Majesty acts through her personal representative, the Governor General, on the advice of her Canadian Ministers and, therefore, it is to them that your appeal should be directed". But her Canadian Prime Minister had not responded to his letter.<sup>33</sup>

On January 24<sup>th</sup>, Chief Spence announced the end to her hunger strike. Representatives from the opposition parties and from the AFN had all signed declarations committing to support a 13-point list of objectives including Indigenous consent to federal legislation affecting inherent or treaty rights.<sup>34</sup> A few weeks later, people from her reserve were blockading the ice-road to the diamond mine in an attempt to get DeBeers to at least fulfill its initial commitments.<sup>35</sup> Manitoba Grand Chief David Harper declared that the AFN had no right to represent Indigenous people regarding treaty rights. Some Chiefs considered breaking from the AFN, saying the "sovereign Nation-Crown Relationship" had been "severely impaired by the Government of Canada", but the AFN survived.<sup>36</sup>

Idle No More had erupted in a context where almost every court in the country was dealing with one Aboriginal issue or another. Schools and welfare on reserves are notoriously underfunded and when the Canadian Human Rights Commission refused to hear a complaint there was an appeal to Federal Court. With an audience of primary school students proving basic human rights are understandable even in kindergarten, the judge sent the case back for re-hearing.<sup>37</sup> Why is so much litigation necessary?

Court actions are expected to be a major obstacle to the Northern Gateway Pipeline proposed to bring Alberta oil through the mountains to the scenic west

32. "Idle No More protesters stall railway lines, highways", CBC News, 16 Jan. 2013 updated 17 Jan., <http://www.cbc.ca> (9/02/2013).

33. "Queen declines to intervene in Chief Spence's protest", CBC News, 17 Jan. 2013 <http://www.cbc.ca> (18/01/ 2013).

34. "Chief Theresa Spence to end hunger strike today", CBC News, 24 Jan. 2013 <http://www.cbc.ca>.

35. Barrera, Jorge "Diamond mine hit by second Attawapiskat blockade" APTN National News, 11 Feb. 2013 <http://aptn.ca> (13/02/ 2013).

36. Carlson, Kathryn Blaze, "Manitoba chiefs won't break with AFN but continue to question assembly's mandate", *National Post*, 23 Jan. 2013 <http://news.nationalpost.com/> (7 /02/2013).

37. *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (CanLII), <http://canlii.ca>; *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*, 2010 CHRT 7.

coast. Indigenous nations in British Columbia have been leading objections with strong support from environmentalists. Alaska is still suffering from the 1989 Exxon Valdez oil spill and even Christie Clarke, British Columbia's business-oriented Liberal Premier, complained that the project gives all the profits to Alberta and all the risks to B.C.<sup>38</sup>

Now, in January 2013, the Hupacasath First Nation applied for an injunction to prevent Canada from ratifying a treaty with China under the *Canada-China Foreign Investment and Promotion Act* (FIPA), which has been widely criticized for relinquishing control over natural resources to a foreign state. Here again, the failure to consult brought Indigenous rights into alliance with other Canadian interests.<sup>39</sup> On January 28<sup>th</sup>, 2013 Romeo Saganash, a Cree New Democratic Party (NDP) Member of Parliament from northern Quebec, took a different tack. He tabled a private member's bill, C-469, *An Act to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples*.<sup>40</sup> The next day the *Ottawa Citizen* published a letter signed by a long list of prominent legal experts charging the Canadian government with engaging in a fifteen-year campaign to diminish the "aboriginal and treaty rights" protected by the *Constitution Act, 1982*.<sup>41</sup> The week ended with a decision from the Ontario Superior Court requiring the release of residential schools' documents under the Indian Residential Schools Settlement Agreement.<sup>42</sup> Again, why did it take a court order to get the government to comply with the mandate of a commission that it had established itself?

The effect of Idle No More's popular support can plainly be seen in NDP Aboriginal Affairs critic Jean Crowder's motion that the 2013 budget should fo-

38. Gerson, Jen, "First Nations showdown could be Northern Gateway pipeline's biggest obstacle", *National Post*, 31 July, 2012 <http://news.nationalpost.com>; Mason, Gary, "B.C. Premier Christy Clark warns of national crisis over pipeline"; "Rally draws thousands to B.C. Legislature to oppose Northern Gateway" *The Globe and Mail*, 22 Oct. 2012 <http://www.theglobeandmail.com> (9/02/2013).

39. *Hupacasath First Nation v. Minister of Foreign Affairs Canada and AGC*, Federal Court Trial Division T-153-13; Bains, Camille, "China-Canada FIPA: BC First Nation Wants Deal Ratification Stopped" *Canadian Press*, 21 Jan, 2013 (7/02/2013).

40. Saganash tables private members' bill on UN Declaration on the Rights of Indigenous People" CBC News, 26 Jan 2013, <http://www.cbc.ca>. Full text: Gordon, Jessica, "Bill C-469 Private Members Bill – Romeo Saganash" Idle No More, 1 Feb. 2013, <http://idlenomore.ca> (9/02/ 2013).

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

42. *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684 (CanLII), <http://www.canlii.org>; "Assembly of First Nations Welcomes Ontario Superior Court Decision to Disclose Documents to Truth and Reconciliation Commission" 30 Jan.2013 <http://www.afn.ca> (9/02/2013).

cus on improving outcomes for Indigenous peoples and be accompanied by treaty implementation with full and meaningful consultation “as required by domestic and international law”. This received a rare unanimous vote.<sup>43</sup> The week ended with scandal. Aboriginal Senator Patrick Brazeau regaled his fellow Conservatives with some very un-statesman-like comments about Chief Spence. Then he promptly got himself arrested for domestic violence.<sup>44</sup> As Ottawa pundits reiterated reasons why Aboriginal organizations had opposed Brazeau’s appointment in the first place, three Aboriginal Liberal Senators walked out of a meeting on the proposed *First Nations Accountability Act* saying the Conservatives continued to ignore the need for responsive consultation.<sup>45</sup> As for Idle No More, it announced partnership with Have a Heart Day for February 14<sup>th</sup> to support Indigenous children and end violence against women and girls.<sup>46</sup>

The next week, a Human Rights Watch report on the “Highway of Tears” set Royal Canadian Mounted Police media managers back-pedaling in high gear. Despite years of publicity about missing and murdered Aboriginal women, there is still wide-spread fear that police will retaliate if incidents are reported. Some say they have been raped or abused by the police themselves.<sup>47</sup> The RCMP is also facing several law suits as hundreds of current and former police women claim an atmosphere of intimidation and abuse in the work-place.<sup>48</sup> The RCMP blamed the victims for failing to report, but shouldn’t there be a neutral institution to take complaints? The week ended yet again with scandal. John Duncan, the Minister of Aboriginal Affairs was forced to resign because of an “ethical lapse”. He had written a letter to the Tax Court on behalf of a constituent. Some people thought Idle No More had played a role, but no mention was made of the even greater ethical lapses involved in the failure to respect the spirit and intent of treaties, the gross

43. Vote No.611, 41<sup>st</sup> Parliament, 1<sup>st</sup> Session, Sitting No 204, 5 Feb.2013, <http://www.parl.gc.ca>; “Assembly of First Nations Welcome All-Party Support for Treaty Implementation and Respect for Aboriginal Title and Rights” *AFN*, 7 Feb. 2013, <http://www.afn.ca> ( 9/02/2013).

44. Harper, Tim, “Senator Patrick Brazeau crashes after years of boorish behaviour” *The Star*, 7 Feb. 2013 <http://www.thestar.com> ( 9/02/ 2013).

45. Lunn, Susan, “Liberal senators walk out on Aboriginal Affairs minister”, *CBC News*, 6 Feb. 2013, updated 7 Feb. <http://www.cbc.ca> ( 9/02/2013).

46. Gordon, Jessica, “On February 14<sup>th</sup>, Worldwide, We Are Idle No More”, 5 Feb. 2013, <http://idlenomore.ca> (9/02/2013).

47. “Canada: Abusive Policing, Neglect Along ‘Highway of Tears’” , 13 Feb. 2013; *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, Human Right Watch, Feb. 2013. <http://www.hrw.org>.

48. “Commission Releases Report on Investigation into RCMP Workplace Harassment”, *Complaints Commission for Public Complaints against the RCMP*, 14 Feb. 2013, <http://www.cpc-cpp.gc.ca> ( 14/02/. 2013).

underfunding of education and welfare for children on reserves and the lack of investigation into the disappearances and murders of Aboriginal women.<sup>49</sup>

This volatile atmosphere left little time to reflect on some of the more fundamental questions surrounding the status of Indigenous peoples in relation to Canada. What does “the rule of law” mean? Is Canada really a “free and democratic society”? What rights should Indigenous peoples have? Can a just and fair future be built on a colonial foundation? Do environmental issues unite us all? The answers to such questions depend largely on the philosophy of law applied.

### 3. The Philosophy of Idle No More

Idle No More is not a movement that places Indigenous rights in opposition to settler society. According to Sylvia McAdam, her ancestors taught that we live in the age of Wesakechak, a benevolent trickster.<sup>50</sup> When a baby is born, Wesakechak gives it a piece of the creative flame. This determines the person’s characteristics, whether male or female, Cree or Polish, etc. but we are all part of the same original energy.<sup>51</sup> In other words, this philosophy is fully consistent with the principle of equality that is fundamental to international law as defined at the United Nations whose purpose is “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.<sup>52</sup>

#### 3.1 The People are the Leaders

Idle No More’s concept of social order is resolutely egalitarian. None of the inadvertent initiators participated in the much publicized meeting between the Prime Minister and the AFN. None used the movement’s phenomenal popularity to become prominent in the media. Insistence that no individual or organization can speak for the movement is ubiquitous among spokespersons, demonstrating that support for any particular initiative does not bestow representative capacity. “From day one we wanted this to be something that was led by everyday people, a horizontal movement”, explained Tanya Kappo in Edmonton, while Quebec’s Melissa Mollen Dupuis pointed out that Idle No More has resisted attempts by the leaders of Aboriginal organizations to co-opt the movement because of its grow-

49. “Aboriginal Affairs Minister John Duncan resigns from cabinet”, CBC News, 15 Feb. 2013, [http://www.cbc.ca\(15/02/2013\)](http://www.cbc.ca(15/02/2013)).

50. “Native Languages of the Americas: Wesakechak Stories and other Cree Legends” <http://www.native-languages.org/cree-legends.htm> (7/02/2013).

51. Schertow, John Ahni, “Cree Cultural Teachings by Sylvia McAdam” *Intercontinental Cry*, 7 Jan. 2012 <http://intercontinentalcry.org/> ( 5/01/2013).

52. *Charter of the United Nations*, 1945, Art. 1(2). <http://treaties.un.org>

ing popularity.<sup>53</sup> As stated by Devon Meekis on the official Idle No More website: “There have been talks of getting leaders to lead, however, we are the leaders!!! Remember that!!!!”<sup>54</sup>

This places Idle No More at odds with Euro-American traditions that seek heroes and give Canadian society a vertical structure.<sup>55</sup> Prime Minister Harper sees himself as the personification of a hierarchically ordered state, leading him to misinterpret the insistence on his presence at meetings. He apparently thinks that improved relations with Indigenous peoples will require “high level” talks and a more “hands-on” approach. He has consistently ignored or side-stepped popular consultation whenever possible. But Idle No More has specified that “the vision of this grassroots movement does not coincide with the visions of the Leadership ... While we appreciate the individual support we have received from chiefs and councilors, we have been given a clear mandate ... to work outside of the systems of government and that is what we will continue to do.”<sup>56</sup>

A mismatch concerning the meaning and importance of “chiefs”, “leadership” and the AFN itself, lies at the root of the Conservative administration’s seeming inability to understand just what, exactly, is required to fulfill Indigenous demands for consultation.<sup>57</sup> The fact that the AFN is defined by the colonially imposed *Indian Act* is a factor here, and Harper’s rigidly hierarchical concept of proper political relations contrasts sharply with Idle No More’s accommodation of multiple and sometimes contradictory points of view. “The Chiefs have called for action and anyone who chooses can join with them, however this is not part of the Idle No More movement” they insisted in the days leading up to the January 16<sup>th</sup> blockades.<sup>58</sup>

Idle No More’s concept of leadership by the people perpetuates that seen in the iconic Oka crisis of 1990 where a Quebec police officer asked “Are you the leader?” and Johnny Cree responded, “No. I’m just a spokesperson. There is no leader. The

53. Curtis, Christopher, “Idle No More founders distance themselves from chiefs”, *Postmedia News*, 1 Jan. 2013. <http://www.calgaryherald.com> (9/01/2013).

54. Meekis, Devon, “Face and Leaders of Idle No More is the Grassroots People” 3 January, 2013 <http://idlenomore.ca/> (6/01/2013).

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

56. Curtis, Christopher, “Idle No More founders distance themselves from chiefs”, *Postmedia News*, 1 Jan. 2013. <http://www.calgaryherald.com> (9/01/2013).

57. For more discussion, see Woo, Grace Li Xiu, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada*, Vancouver: UBC Press, 2011, pp. 112–124.

58. Curtis, *id.*

people lead.”<sup>59</sup> Idle No More has not defined how it expects this philosophy to translate into political order and it is evident that opinions vary widely among Indigenous peoples. The Haudenosaunee in particular have a long history of asserting political independence and many Kanienkehaka/Mohawks refuse to this day to vote in Canadian elections.<sup>60</sup> Others, like the *Indian Act* chiefs of the AFN, are willing to work with existing structures so long as fundamental principles are met.

### 3.2. Nation to Nation Relations

To many Canadians, Chief Spence’s insistence on the participation of the Governor General to resolve Indigenous problems seemed somewhat misguided. After all, his role, like that of the Queen herself, has been reduced to a ceremonial level. Yet Spence was supported on this issue by many prominent Chiefs. This is because the treaties their ancestors signed were made with “Her Most Gracious Majesty the Queen of Great Britain and Ireland” or, in the case of Attawapiskat and other signers of *James Bay Treaty No. 9*, “His Most Gracious Majesty”.<sup>61</sup> Although treaty signing was conducted by commissioners from the “Dominion of Canada”, a “Dominion” was defined as a British colony.<sup>62</sup> So the party offering the treaty was Great Britain.

This is confirmed by Indigenous oral tradition. Attawapiskat, located near the shores of James Bay, is so far north that it initially avoided the diseases and social chaos that accompanied colonization. When miners and geological surveyors began to penetrate the region at the beginning of the 20<sup>th</sup> century, there was talk of building a northern railroad and treaty commissioners were sent to secure control.<sup>63</sup> In 1975, the International Court of Justice affirmed in the *Western Sahara* case, that even when a territory’s occupants were stateless nomads, incorporation in a state had to “be the result of the freely expressed wishes of the territory’s people acting with full knowledge of the change in their status, their wishes having been

59. Maclaine, Craig, Michael Baxendale, “This Land is Our Land: The Mohawk at Oka”, Montreal: Optimum Publishing International Inc., 1990 p. 17.

60. Woo, Grace Li Xiu, “Canada’s Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations”, LGD 2003 (1), at n. 19. <http://www2.warwick.ac.uk>.

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

62. Lord Hailsham of St. Marylebone, *Halsbury’s Laws of England*, 4<sup>th</sup> ed. vol.10, Butterworth’s, London 1996, p. 856.

63. Morrison, James, “Treaty Research Report – Treaty No. 9 (1905–1906)” Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986. Aboriginal Affairs and Northern Development Canada, <http://www.aadnc-aandc.gc.ca> (9/01/2013).



expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage".<sup>64</sup> However, this standard was not met when treaties with Indigenous peoples were negotiated.

According to one band that signed Treaty 9, the commissioners appeared on August 3<sup>rd</sup> 1905. The next day, one announced that Britain would take care of their land for them. They would be given \$8 per person per year and a yearly visit from a doctor. No legislation would interfere with their hunting, trapping or fishing and, if they were ever in need, help would be provided. "This will be all for now; I will give you one hour to think it over. If you do not accept this treaty, the government will do whatever it wants with you."<sup>65</sup> This is hardly a basis for informed consent.

The English text of the treaty plainly states, "the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights titles and privileges whatsoever, to the lands included within the following limits..." Yet, the Indigenous signers had to rely on interpreters and their languages did not conceptualize the world in English legal terms. They did not think they were giving up self-government or what we call "sovereignty". Indeed, less than a decade later, the League of Nations' Permanent Court of International Justice ruled that calling an agreement a "treaty" presupposed that sovereignty remained intact.<sup>66</sup> And, in 1897, the Judicial Committee of the Privy Council held that the treaties with "Indians" were contracts.<sup>67</sup> They did not include clauses permitting assignment. Marriage contracts do not permit anyone to substitute their son or anyone else in the role of husband. Why should these treaties permit Britain to unilaterally abdicate its responsibilities in favour of Canada? Especially without the knowledge or consent of the other party?

Recently someone discovered the diary of George McMartin, the Treaty Commissioner for Ontario, gathering dust in an archive. His account confirms oral Indigenous versions of what they were told.<sup>68</sup> So there is some basis for the Manitoba Chiefs' claim that the British Crown has a direct responsibility for Canada's First Nations. From their perspective, Ellen Gabriel was right when she charged that the Queen's was "shirking her responsibilities" in her January letter.<sup>69</sup>

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

65. Morrison, "Treaty Research Report", *supra* note 79.

66. *Case of the S. S. "Wimbledon"*, 1923, PCIJ. <http://www.worldcourts.com> (12/02/ 2013).

67. *Robinson Treaty Annuities case* (1897) A.C. 199 (UK) at 204 per Lord Watson.

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

69. "Manitoba Chiefs pledge unity as Spence continues fast", CBC News, 18 Jan. 2013, <http://www.cbc.ca> (9/02/2013).

### 3.3 Peace and the Environment

Despite lack of clarity concerning how Idle No More's diverse supporters think relations with Canada should be structured, there is no doubt concerning the quality of the relationship sought. Unlike the road and rail blockades that characterized Indigenous protests in the wake of Oka, Idle No More opposes confrontational tactics. Adapting to past experience, its members have seen the futility of stand-offs that culminate in public violence. Historically, as at Oka, violence has usually been the result of police or military attempts to use force to resolve disputes. On December 17<sup>th</sup>, 2012 the Confederacy of Treaty No. 6 First Nations issued a press release saying they did not recognize the legality of any laws passed by the government of Canada because they had been implemented without consultation.<sup>70</sup> But there has been remarkably little sabre rattling of this kind. Even Chief Nepinak, who spoke of bringing the Canadian economy to its knees, conceded that "We can't win in any kind of environment where we're using force."<sup>71</sup> So blockades, thus far, have not lasted long and when police are called or court injunctions obtained, the protesters typically disperse before anyone is arrested.

This methodology is not unlike that used by the Maori in 19<sup>th</sup> century New Zealand who confounded British soldiers by avoiding any meeting on the battlefield.<sup>72</sup> They are not playing by the colonizers' rules. Peace is a fundamental value. As explained by McAdam, the high Indigenous suicide rate is a sign that people are not at peace in their own families. To create peace, one must be united with one's own people. Her reflections are informed by the social and psychological devastation caused by the residential schools that removed children from their families throughout the 20<sup>th</sup> century in a deliberate attempt to eradicate Indigenous cultures. The genocidal character of this programme has gained increasing recognition.<sup>73</sup> Prime Minister Harper himself issued an apology in 2003, stating on behalf of Canadians that, "we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country."<sup>74</sup> However apology alone cannot repair the damage done or correct entrenched colonial assumptions. The on-

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70. Norrell, Brenda, "Treaty Six First Nation says 'No' to Canada's laws violating Indigenous rights" Censored News, 17 Dec. 2012, <http://bsnorrell.blogspot.ca> (9/02/2013).

71. "Blockades mark Idle No More in Manitoba: CN Rail obtains court injunction as blockade takes over tracks", CBC News, 16 Jan. 2013, <http://www.cbc.ca> (9/02/2013).

72. Belich, James, *The Victorian Interpretation of Racial Conflict*, Toronto: McGill-Queen's University Press, 1986.

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

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

going over-representation of Indigenous people among child apprehensions and in prisons along with the incessant failure of all levels of government to consult meaningfully on matters affecting Indigenous rights support the charge that the pressure to assimilate continues.

Yet the eye-for-an-eye quest for retribution found in the Old Testament of the Christian Bible as well as in the Canadian Criminal Code is remarkably absent from Idle No More discourse. The focus instead is on improving present and future relations by enhancing democratic principles. More than one Idle No More supporter has referred in private to their elders' prediction that Native Americans were meant to initiate a new world order. At a Vancouver teach-in, one speaker characterized the injustices that accompanied colonization as a 500 year Sun Dance – an ordeal sent by the Creator to strengthen the people, a prayer for life and world renewal.<sup>75</sup> The complex history of inter-cultural relations includes co-operative effort as well as cruel exploitation and many Indigenous people are of mixed heritage. Moreover, according to McAdam, the Cree concept of *wakewewin* is much more comprehensive than the English language concept of kinship. It means that we are related to everything, not just our human relatives. So relations to the land are seen more in terms of stewardship than ownership.<sup>76</sup> Thus the peace sought by Idle No More includes peace with what we in English would call “the environment”. That is one of the movement's main attractions for non-Indigenous supporters. Environmentalists, human rights organizations and unions are all concerned about resource exploitation by foreign companies that pollute without benefitting the local population.

#### 4. Canada's Administrative Philosophy

This realignment of settler society in favour of environmental protection marks a significant departure from colonial values. These only began to unravel with the assertion of equality rights following World War II and much reform is needed to bring Canadian practice into accord with official norms.<sup>77</sup> For example, according to the Supreme Court of Canada, the starting point of jurisprudence on aboriginal land rights remains the 1888 reasoning of England's Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen*.<sup>78</sup> The case concerned a dispute between the province of Ontario and the Dominion of Canada over the right to

75. See eg. “Sun Dance”, Native Americans On-line, <http://www.native-americans-online.com> (7/02/2012).

76. Schertow, *supra* n.49.

77. See e.g. Woo, *Ghost Dancing*, *supra* n.57, pp. 77–86.

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

issue timber licences on Anishinabek territory. Lord Watson described the land tenure of “the Indians” as “a personal and usufructuary right dependant on the good will of the sovereign”.<sup>79</sup> The traditional Indigenous users of the land were not included in this discussion. British sovereignty was assumed on the basis of documents that reflect the European Doctrine of Christian Discovery. At the time of the crusades, Pope Urban II’s 1095 Papal Bull *Terra Nullius* had approved the seizure by European princes of land belonging to non-Christians.<sup>80</sup> Following this logic, the 1496 charter granted by King Henry VII to the Cabots and entered in evidence in *St. Catherine’s Milling* authorized the claim of any islands or countries that belonged to heathens or infidels.<sup>81</sup>

In other words, Canadian law concerning Indigenous land rights has yet to be reconciled with modern human rights standards that Canada has agreed to uphold. This brings it into conflict with two major Idle No More premises. First, it denies human equality. Despite the protection for religious freedom and equality rights in Canada’s 1982 *Charter of Rights and Freedoms*, Canada continues to uphold the colonial legality that accorded preference to Christians.<sup>82</sup> Second, Canadian law and policy treat land and resources as commodities that may be bought, sold, exploited – or, in the case of the Cabots, stolen. This violates the custodial paradigm for human relations with the environment supported by Indigenous traditions and increasing numbers of modern Canadians.

#### 4.1. The Democratic Deficit

The solution to this situation will require more comprehensive consideration than the ordinary run of legal issues. Population dynamics make it impossible to return to the national categorizations of 1496 and, as observed by Chief Bob Chamberlin, Vice president of the Union of B.C. Indian Chiefs, a “one-size-fits-all approach

79. *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, (U.K.).

80. Morales, Robert, “Debunking the Doctrine of Discovery”, oral presentation, 24 Jan. 2013, *Lawyers Rights Watch Canada: The Gap Between Law and Practice*, 24 Jan. 2013, <http://www.lrwc.org>; “Doctrine of Discovery and *Terra Nullius*”, Synod 2001, Anglican Church of Canada, Evangelical Lutheran Church of Canada, <http://archive.anglican.ca> (15/02/2013).

81. Evidence submitted to the Privy Council in *St. Catherine’s Milling and Lumber Co. v. The Queen on Information of the Attorney General of Ontario*, H.L. vol.XVI 46 J.C. (1889), UBC Law Library KG42 P748 No.69. See similarly: “The Letters Patents of King Henry the Seventh Granted unto Iohn Cabot and his Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknowen Lands; March 5, 1498” *The Avalon Project*, Yale University Law School, <http://avalon.law.yale.edu> (15/02 2013).

82. *Constitution Act, 1982*, ss. 2 and 15. Implementation of s.15 was delayed until 1985.

blatantly denies the cultural diversity of the First Nations".<sup>83</sup> However, rather than establishing structures to facilitate on-going negotiations in accord with Canadian constitutional principles and international law, the concept of democracy itself is being challenged by the current Canadian administration.

Bill C-45 was the spark that set off the Idle No More movement. As described by Liberal MP Ralph Goodale, "It's a complete dog's breakfast, calculated to be so humongous ... that it cannot be intelligently examined ... by a conscientious Parliament. Worse still, routine matters and positive measures are interwoven willy-nilly with destructive and contentious issues so that at the end of the day there can be no clear vote on anything".<sup>84</sup> Officially, passage of a bill into law requires committee consideration: "After a detailed analysis of the bill, often involving the hearing of witnesses, and a clause-by-clause study, the committee reports the bill back to the House of Commons."<sup>85</sup> C-45's omnibus procedure made this impossible. However, despite the sense that the Conservative majority had subverted the very purpose of Parliament, Canadians in general seem resigned to wait until the next election to rectify the situation.

Although the opposition parties did not know how to mount a legal challenge, Indigenous lawyers did. Several Supreme Court of Canada decisions support the "duty to consult".<sup>86</sup> UNDRIP, so reluctantly ratified by Canada, set out the standard of "free, prior and informed consent". Bill C-45 did an end-run around all of these hard-won principles. As Pamela Palmater, one of the first Idle No More spokespersons said, "Just as the early days of contact when the settlers needed our help to survive the harsh winter months, and seek out a new life here, Canadians once again need our help."<sup>87</sup>

83. "Proposed National First Nations Education Legislation is a Threat", Union of B.C. Indian chiefs, 14/03/2013, [http://www.ubcic.bc.ca/News\\_Releases](http://www.ubcic.bc.ca/News_Releases).

84. Ralph Goodale, Wascana, SK, 25 Oct. 2012, House of Commons Hansard #169, 41<sup>st</sup> Parl., 1<sup>st</sup> Sess., <http://www.parl.gc.ca>.

85. "5. How Does a Bill Become Law?" Government of Canada, Legisinfo, Frequently Asked Questions, <http://parl.gc.ca/LegisInfo> (7/01/ 2013).

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

87. Palmater, *supra* n.14.

It may seem ironic that Canadians must now rely on colonized minorities to defend democracy, but the same hazy approach to history that allows the government to ignore Indigenous rights to self-government has also clouded understanding of the principles underlying half-remembered British procedural tradition. Anglo-Canadian history incorporates two contradictory concepts of law. One is based on the use of force as seen in the Cabot Charter which was preceded by William the Conqueror's establishment of Norman rule in England and followed by the colonial assault on Indigenous peoples. The other champions popular rights through principles like equality before the law, due process and the monarch's obligation to protect the laws of the land, even to the extent of allowing a conquered colony like Quebec to keep its own laws.<sup>88</sup>

The law of conquest and aggrandisement was rejected in principle at the League of Nations and through the decolonization movement of the twentieth century. As a pioneer at both the League of Nations and the United Nations, Canada tends to feel smugly secure in its democratic credentials.<sup>89</sup> However, the Harper administration has revived the use of archaic prerogative powers and this has been supported by the Supreme Court of Canada. In *Friends of the Earth v Canada*, the Federal Court found that the Minister was permitted to formulate a climate change plan that did not accord with Canada's Kyoto commitments. Leave to appeal was denied and a reformulated challenge dismissed.<sup>90</sup> In the *Khadr* case the S.C.C. went so far as to ignore the *Convention against Torture* and the *Convention on the Rights of the Child* to overturn a lower court order requiring the government to ask for the repatriation of a Canadian youth illegally detained in Guantanamo.<sup>91</sup>

In Britain, by contrast, the 21<sup>st</sup> century began with a comprehensive analysis of the country's "democratic deficit". This culminated in a reorientation away from hierarchical structures including a reduction in the use of prerogative powers, increased transparency and reforms to improve processes for consulting with

88. For discussion see Woo, *Ghost Dancing*, *supra* n.57.

89. See e.g. McLachlin, Beverley, "Remarks of the Right Honourable Beverley McLachlin, P.C. Globalization, Identity and Citizenship October 26, 2004", <http://www.scc-csc.gc.ca> (12/02/2013).

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

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



citizens including establishment of legislative assemblies for Scotland, Wales and Northern Ireland.<sup>92</sup> Thus, in spite of the fact that Canada's constitution was founded on British tradition, it is now moving in the opposite direction. Instead of instituting reforms to decolonize Indigenous peoples and affirm the democratic principles asserted by the *Constitution Act, 1982*, it is reviving the prerogative powers that characterized the worst aspects of feudal society. Until Idle No More, few spoke out to prevent this erosion. As observed by the Voices-Voix coalition, the avalanche of detailed technical assaults on established democratic procedure is difficult for most members of the public to cope with or even to understand.<sup>93</sup>

## 4.2 The Response to Idle No More

According to paradigm theory, an old model of thought is rarely forsaken unless there is a new model to take its place.<sup>94</sup> With its philosophy still in a formative stage, it is not surprising that Idle No More soon lost the attention of major Canadian media. Indigenous peoples are faced by so many complex legal struggles that Idle No More is commonly mentioned as an element of two or three stories a day in the Aboriginal media. But when the Aboriginal People's Television Network aired *We Were Children*, a heart-wrenching account of child abuse in residential schools, the attention of the other media was directed to the inauguration of a new pope and in-depth reporting on Lululemon's recall of inadvertently see-through yoga pants.<sup>95</sup> This is one of the reasons why Idle No More emphasizes the need for education. The anomalies that contradict established theories of Canadian statehood are becoming too numerous to ignore. Kuhn also predicted that when an established paradigm is challenged it may be asserted with increased vigour. Perhaps this explains the Harper administration's seeming inability to understand that,

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

93. "Petition to support the Declaration of the Voices-Voix Coalition" *Voices-Voix*, <http://voices-voix.ca> (12/02/2013)

94. Kuhn, Thomas, *The Structure of Scientific Revolutions*, London: University of Chicago Press, 1962.

95. Wolochatiuk, Tim dir.; Jason Sherman ed, *We Were Children*, APTN 19/03/ 2013; Oswald, Brad, "We Were Children docudrama lays bare residential school horrors", "Winnipeg Free Press" 03/19/2013.

in a country as vast and diverse as Canada, Indigenous peoples are not the only ones who see a need for more comprehensive consultation.

Protests over the violation of Aboriginal rights and democratic principles have been accompanied by other challenges to the Harper administration's attempt to implement its vision of the country's social and economic needs. A British Columbia coal mine's plan to import temporary workers from China led to court proceedings amid allegations that qualified Canadian applicants had been rejected to favour foreigners willing to work for sub-standard wages.<sup>96</sup> Faced with similar prospects of litigation delay for pipelines serving the Alberta tar sands, Natural Resources Minister Joe Oliver appointed Vancouver lawyer Doug Eyford as a "First Nations envoy" to "defuse the tension between First Nations and the energy and pipeline industry". Eyford is also the federal government's chief negotiator on comprehensive Aboriginal land claims. His mandate is "dialogue in search of solutions", but the fact that his "objective assessment" will be based on confidential conversations used to compile a report that will not be made public precludes effective dialogue and has already irritated Indigenous representatives ever wary of back-door deals. "It's going to be a long hot summer", predicted Chief Allan Adam of the Athabasca Chipewyan First Nation in Alberta.<sup>97</sup> As for Idle No More, they had already announced "Sovereignty Summer" declaring: "The Harper government's agenda is clear: to weaken all collective rights and environmental protections, in order to turn Canada into an extraction state that gives corporations unchecked power to destroy our communities and environment for profit."<sup>98</sup>

The 2013 budget was announced for March 21<sup>st</sup>. The recycled *Jobs Growth and Long Term Prosperity* label is turning Harper's obsession with economic propaganda into a bit of a national joke.<sup>99</sup> Unless there is another omnibus implementation bill in the making, something may have been learned from the debates of the previous year because there were not so many irrelevant add-ons. However, it was billed as an austerity budget. No one was really surprised that it paid little

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

97. Scoffield, Heather, "Harper Names First Nations Envoy To Deal With Concerns On Pipelines" *Canadian Press*, 03/19/2013 <http://www.huffingtonpost.ca>; Woods, Michael, "New envoy for aboriginal pipeline concerns calls early criticism 'a shame'", *Postmedia News*, 20/03/ 2013, <http://www.canada.com>.

98. Houle, Shannon M. "Idle No More Solidarity Spring: A Call to Action from Idle No More & Defenders of the Land" INM press Release, 18/03/2013, <Http://idlenomore.ca> (22/03/2013).

99. Stinson, Scott, "Everything you need to know about the 2013 budget, from cheaper clothes for baby to better weather forecasts", *National Post*, 21/03/2013 <http://news.nationalpost.com>.

heed to the need to “improve outcomes” for Aboriginal people that had received unanimous recognition by Parliament just a month earlier. An unspecified amount was committed to refurbishing the Parliament buildings but the provision for 250 new houses in Nunavut will not solve the sub-standard housing and infrastructure problem for the majority of those who have found themselves marooned on the fortune in oil or diamonds claimed by outside interests. Meanwhile, with no move to provide equal funding for schools and social benefits on reserves, public money will continue to be spent fighting what must surely be a losing court battle. First Nations were accorded \$241 million over five years as part of a general skills training program but welfare benefits on reserves are now subject to mandatory enrolment in work programs even though most are far from job markets. As both the New Democrats and Liberals were quick to point out, money for higher learning will not help those with sub-standard primary education and substantial numbers of young people remain marginalized.<sup>100</sup> In an obvious attempt to cast a conciliatory light on things, AFN National Chief Shawn Atleo, observed that “Budget 2013 makes reference to First Nations in almost every section, which suggests that the unprecedented attention and engagement of our peoples is beginning to be heard, but the investment just isn’t there.”<sup>101</sup>

It is not easy to learn new patterns of thought so we can only wonder about what might have been done with real consultation. The quest for open and honourable treaty implementation is obviously facing an up-hill battle. Governmental disconnect with reality is perhaps best seen in a collateral report on a different topic: “Environment Canada declined to release large portions of a memo regarding the Harper government’s giant panda deal with China on the grounds that disclosing the information could threaten Canada’s national security.”<sup>102</sup> Meanwhile, an Idle No More procession that began on January 16<sup>th</sup>, 2013 in tiny Whapmagoostui on Hudson Bay was due to arrive on Ottawa’s Parliament Hill. After walking 1,500 kilometres through temperature that reached minus 50 C, the six Cree youths who began the trek were joined by hundreds of others and gained a Facebook following

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100. APTN News panel, 21/03/2012; “Highlights from the 2013 federal budget: Deficit grows in the short-term but on track to balanced budget, says Flaherty”, CBC News, 21/03/2013 <http://www.cbc.ca>; Nerenberg, Karl, “Budget 2013: Welcome to workfare for First Nations in Canada”, *rabble.ca*, 22/03/2013, <http://rabble.ca>.

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

102. De Souza, Mike, “Stephen Harper personally asked for China’s pandas, memo says”, *Postmedia News*, 23/03/2013, <http://www.canada.com>.

of more than 30,000.<sup>103</sup> When they finally reached Ottawa, Harper fled to Toronto to greet a pair of pandas.<sup>104</sup>

## 5. Conclusions

Canada's economy is founded on vast reserves of land and natural resources. One is oil, another is water. And then there are minerals. All was once the exclusive domain of Indigenous nations whose families and social institutions were deliberately shattered by 19<sup>th</sup> and 20<sup>th</sup> century policies designed to force assimilation. Most now struggle to survive at third world standards while aggressive corporate expansion into remote regions continues to saddle them and everyone else with massive pollution and destruction of the natural habitat.

But the world has changed. Indigenous people now have the moral force of international human rights law behind them. With cell phones and the internet people everywhere are keeping in touch as never before and discovering common ground. Women are at the core of the Idle No More movement. They have overcome the social chaos created by the genocidal residential schools. They are reclaiming their languages and cultures and earning advanced university degrees while raising children on sub-poverty incomes. Educated, resilient and tough, bolstered by the failed efforts of generations of their elders, they have become film makers, authors, actors, lawyers, teachers, comedians and political analysts. They have the creativity needed to survive and they are not likely to disappear. As stated by Cree Actress Michelle Thrush when she organized a "Hug-in" in Calgary, the oil capital of Alberta's Conservative heartland: "We are all human beings and in order to end racism we need to talk, ask questions and be able to look at each other with compassion".<sup>105</sup>

In the end, it was catastrophe, not protest that marked the summer of 2013. On June 20<sup>th</sup>, floods of unprecedented dimensions began to ravage Alberta, closing down the city of Calgary and environs for weeks,<sup>106</sup> On July 6<sup>th</sup>, a 72 car train loaded with crude oil slid out of control and demolished the town of Lac-Mégantic,

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

104. "Rick Mercer Mocks Stephen Harper's Love Of Pandas" *The Huffington Post Canada*, 04/03/2013.

105. Srinivasan, V.L. "Idle No More joins actress Michelle Thrush in Calgary to give 100 hugs" *Beacon News*, 8 Feb. 2013 <http://beaconnews.ca> ( 9/02/2013).

106. "Flood-ravaged Alberta continues to rebuild a month later", *CBC News*, 18 July 2013.

Quebec.<sup>107</sup> Two days later a freak storm devastated Toronto.<sup>108</sup> For the rest of the summer the media focused on scandalous over-spending by Senators while Indigenous lawyers reeled under the Supreme Court's finding that raising the duty to consult as a defence was an abuse of process in a situation where Indigenous trappers had blocked logging on their traditional territory.<sup>109</sup> Then on Aug. 26<sup>th</sup> the Federal Court rejected the Hupacasath application for an injunction to stop the non-consultative implementation of the Canada-China trade agreement, ruling that its adverse effects were "speculative".<sup>110</sup>

The future of Idle No More is difficult to predict. If the movement has done anything at all, it has ended the social isolation caused by the colonial process. It has united disparate interests within the Indigenous world and forged new and sometimes unexpected alliances with settler society, raising awareness of the importance of community and consultative processes. . But its greatest educational task remains ahead. Will Canada's courts ever rethink colonial precedents to uphold the Indigenous rights affirmed by the constitution and international law? Will the First Nations lead us by example to revitalize democracy and reshape economic relations so they are ecologically sustainable and fair for all? Will we learn from the ecological disasters we've made? Or will the relentless hunger of colonial social and economic models succeed at reviving the prerogative powers that lay at the root of the worst abuses of feudal ideology? It depends, perhaps, on how idle the rest of us remain.

#### **Декolonизация и движение Idle No More в Канаде**

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#### **Резюме**

Канадское движение Idle No More<sup>111</sup> началось с инцидента, произошедшего в связи с инициативой премьер-министра Стивена Харпера о продвижении законов, не обеспечивающих интересы большинства, что подрывает основы демократии и охраны окружающей среды. Руководствуясь философским

107. McDiarmid, Jessica, "Lac-Mégantic train explosion: a regulatory failure?" *the Star.com*, 29 July 2013, <http://www.thestar.com/> (04/09/2013)

108. Carys Mills, "Toronto's July flood listed as Ontario's most costly natural disaster" *the Star.com*, 14 Aug ... 2013, <http://www.thestar.com/> (04/09/2013)

109. Weston, Greg, "Senate expense scandal left no paper trail, really?" CBC News, 2 Sept. 2013 (04/09/2013); *Behn v Moulton Contracting Ltd*, 2013 SCC 26 (CanLII), 2013 SCC 26,

110. *Hupacasath First Nation v. The Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2013 FC 900

подходом, созвучным с международным принципам прав человека, движение всколыхнуло общественность и способствовало усилению союза правительства с оседлым поселением. По иронии судьбы, коренные народы в настоящее время находятся в лучшем положении, чем канадцы, с точки зрения консультаций с общественностью и соблюдения демократических принципов, которые были выявлены в настоящее время. Верховный суд Канады недавно подтвердил, что процедура проведения консультаций с коренными народами по вопросам, которые затрагивают их права является обязательной, в связи с чем имело место несколько судебных исков, основанных на этом решении. Исправление несправедливости и усиление демократии требуют полной переоценки колониального прошлого Канады и тех институциональных рамок, с которыми сталкиваются коренные народы. Движение Idle No More, выросшее в круговорот flash mob свидетельствует о наличии нового поколения, готового взять на себя эту задачу.

**Ключевые слова:** британский колониализм, монархия, демократия, коренные народы, права, суверенитет