

## An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction?

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### I. INTRODUCTION

Yellowknife-Dene political scientist Glen Coulthard sums up the goals of the indigenous rights movement *Idle No More*<sup>1</sup> as a struggle for land and jurisdiction.<sup>2</sup> Over the last forty years, American and Canadian governments made much progress on the land question in the Arctic and sub-Arctic; however, from an irrational fear of the unknown, politicians in Washington, D.C. and Ottawa have effectively blocked the pathways to aboriginal jurisdiction or self-government. In Arctic North America, indigenous land issues have largely been settled, but indigenous governments still seek to restore jurisdiction over their lands and citizens. During the late-twentieth century in the Yukon, Northwest Territories, and Nunavut, as well as in Nisga'a territory in the northwest corner of British Columbia, First Nations negotiated provincial and local government powers. But, faced with both federal and provincial opposition, continent-wide progress on the question of indigenous jurisdiction has since stalled.

First Nations want land and jurisdiction—American and Canadian governments have granted some land but not much jurisdiction. If the

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1. "Idle No More" is an ongoing protest movement, which began in December 2012, originating among the Aboriginal peoples in Canada comprising the First Nations, Métis, and Inuit peoples and their non-Aboriginal supporters in Canada, and to a lesser extent, internationally. Idle No More calls on all people to join in a peaceful revolution to honor indigenous sovereignty and to protect the land and water. It has consisted of a number of political actions worldwide, inspired in part by the liquid diet hunger strike of Attawapiskat Chief Theresa Spence and further coordinated via social media. A reaction to alleged legislative abuses of indigenous treaty rights by the Stephen Harper Conservative federal government, the movement takes particular issue with the recent omnibus bill, Bill C-45. For more information, see *The Story*, IDLE NO MORE, <http://www.idlenomore.ca/story> (last visited June 20, 2014) and *Calls for Change*, IDLE NO MORE, [http://www.idlenomore.ca/calls\\_for\\_change](http://www.idlenomore.ca/calls_for_change) (last visited June 20, 2014).

2. Email from Glen Coulthard, Assistant Professor, First Nation Studies, Univ. of British Columbia, to Tony Penikett (Sept. 29, 2013) (on file with author).

governments do not open their hearts and minds to the cause, First Nation frustration could turn into violent confrontation.

## II. LAND

Aboriginal leaders claim that, for the most part, Canada did not buy their ancestral homelands, or even rent them, nor did their colonial predecessors Britain and France. Instead, European settlers effectively expropriated the lands, as the English Enlightenment thinker John Locke proposed, by mixing their labor with the soil.<sup>3</sup> “Thus this law of reason makes the deer that Indian’s who hath killed it; it is allowed to be his goods who hath bestowed his labour [sic] upon it, though, before, it was the common right of every one.”<sup>4</sup> Later in the eighteenth and nineteenth centuries, settler governments acquired Indian lands by writing “treaties” that imprisoned indigenous people on reserves.<sup>5</sup>

When Northern Europeans came to North America, they traded with indigenous populations of great cultural diversity.<sup>6</sup> Britain, France, and the Netherlands all made peace and friendship treaties, as well as important military alliances, with indigenous nations.<sup>7</sup> At the beginning

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3. See generally, JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690), reprinted in 5 THE WORKS OF JOHN LOCKE (1823), available at <http://www.efm.bris.ac.uk/het/locke/government.pdf>.

4. *Id.* at 117.

5. Ted S. Palys, *Prospects for Aboriginal Justice in Canada*, SIMON FRASER UNIV. (Nov. 2, 1996), <http://www.sfu.ca/~palys/prospect.htm>.

The history of Indian administration in Canada from that point onward, is one of increasing control by government authorities over natives. A partial list includes: (a) attempts to suppress ‘pagan rituals’ and promote Christian religions by banning important cultural festivals such as the Potlatch, Thirst Dance, and Sun Dance; (b) efforts to suppress traditional native structures of self-government, and to teach the elements of English-style ‘good government,’ through imposition of elected ‘band councils’; (c) diminishing the influence of natural parents and heightening the in loco parentis role of the Christian churches by requiring children to leave their parents and attend government-sponsored residential schools where use of Indian languages and other aspects of ‘Indian-ness’ were punished; (d) controlling aboriginals’ efforts to organize and pursue aboriginal rights by initiating a ‘pass’ system where Indians could not leave their reserve without permission of the Indian Agent, and making it illegal to hire a lawyer to pursue any form of aboriginal rights or land claim; and (e) undermining aboriginal justice structures by giving paramourcy to the Indian Act and other federal and provincial law.

*Id.* (internal citations omitted).

6. On the East Coast, Peace and Friendship Treaties were signed with Mi’kmaq, Maliseet, and Passamaquoddy First Nations prior to 1779. See *Peace and Friendship Treaties*, ABORIGINAL AFF. & N. DEV. CANADA (Sept. 15, 2010), <https://www.aadnc-aandc.gc.ca/eng/1100100028589/1100100028591>.

7. Tony Penikett, *A ‘Literacy Test’ for Indigenous Government?*, 1 N. PUB. AFF. 32, 32 (2012). After the conquest of Mexico, the European powers fought for the rest of North America. The British, Dutch, French and Spanish all actively sought allies among Indian nations who were too weak to fight off the invaders, but too strong to be ignored. After British

of the eighteenth century, indigenous peoples were still the majority in North America, but by the end of the century, Europeans had taken over.<sup>8</sup> When Ottawa's Chief Pontiac, an ally of the French, went to war against the British victors at the Plains of Abraham, his armies included forces from most of the tribes on the Western Great Lakes, all of whom were aggrieved at British squatters on their land.<sup>9</sup>

So successful were Chief Pontiac's armies that Britain adopted a new colonial policy in the Royal Proclamation of 1763.<sup>10</sup> Under this policy, settlers could only obtain land from the British Crown after the Crown had purchased it in publicly negotiated treaties from the Indian (now known as *indigenous*) governments that owned it.<sup>11</sup> A negotiation of 400 treaties in both Canada and the United States followed this proclamation, as colonists settled the West.<sup>12</sup> But colonial governments soon violated most of these treaties.

In 1867, the United States bought Alaska from Russia without consulting the Aleut, Athabascans (Dene), Inuit, Tlingit, or Upik.<sup>13</sup> By the end of the nineteenth century and the "winning" of the West, the negotiation of Indian treaties had become a closed chapter in American history.<sup>14</sup> It was not until the discovery of oil at Prudhoe Bay in 1968 that the U.S. government finally recognized a need to reckon with the "Indian

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and Iroquois forces defeated the French army at the Battle of the Plains of Abraham in 1759, and the conclusion of the Seven Years' War, France signed the Treaty of Paris in 1763, ceding all lands east of the Mississippi to the British.

*Id.*

8. See generally, COLIN CALLOWAY, ONE VAST WINTER COUNT: THE NATIVE AMERICAN WEST BEFORE LEWIS AND CLARK (reprt. ed. 2006).

9. 2 FRANCIS PARKMAN, THE CONSPIRACY OF PONTIAC AND THE INDIAN WAR AFTER THE CONQUEST OF CANADA 2–40 (1994).

10. Leslie MacKinnon, *Royal Proclamation of 1763, Canada's 'Indian Magna Carta,' Turns 250*, CBC NEWS (Oct. 6, 2013), <http://www.cbc.ca/news/politics/royal-proclamation-of-1763-canada-s-indian-magna-carta-turns-250-1.1927667>. The Royal Proclamation of 1763, issued by King George III, essentially defined the relationship between the Crown and the native peoples in the new territories in North America acquired by the British—land that would become Canada. The document became a guide to all treaty-making since, and its presence is felt in the legal underpinnings of the Confederation in 1867 and in the Charter of Rights and Freedoms in 1982. See *id.* Some refer to it as the Indian Magna Carta. *Id.*

11. See generally JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900 (2003).

12. Hereinafter "aboriginal title," as defined by the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (Can.), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

13. See generally DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS 1960–1971 (2001).

14. After 1871, the United States did not sign any Indian treaties until 1971 when Congress adopted the Alaska Native Claims Settlement Act (ANCSA).

title”<sup>15</sup> for the state’s lands and resources. Negotiations involved much backroom bargaining, lobbying, and political posturing, largely in the halls of Congress.<sup>16</sup> Eventually, in 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA), which gave Alaskan natives almost a billion dollars and forty-four million acres (178 km<sup>2</sup>) of land.<sup>17</sup> The scale of the Alaska settlement excited Canadian indigenous peoples (collectively known as First Nations),<sup>18</sup> but Congress’s insistence on corporate, as opposed to tribal, governance came as a huge disappointment.<sup>19</sup> In the 1960s, officials in Ottawa tended to think that Aboriginal rights had been largely extinguished and the way forward lay in assimilationist initiatives such as Prime Minister Pierre Trudeau’s 1969 White Paper. For Canadian advocates of assimilation, ANCSA provided a wake-up call.

Following the Canadian Supreme Court’s 1973 split decision in an Aboriginal rights case brought by the Nisga’a Nation,<sup>20</sup> Canada finally sent treaty negotiators to tables in Northern Quebec, the Northwest Territories, and the Yukon. Because the Arctic and sub-Arctic region make up

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15. The Royal Proclamation of 1763 acknowledged “Indian title” to North American lands and established treaty-making as the instrument to buy out or “extinguish” this right. In Canada, “aboriginal title” has replaced the “Indian title” terminology. In *Delgamuukw*, the Supreme Court of Canada defined “aboriginal title” as an “aboriginal right” under section 35 of Canada’s 1982 Constitution Act. See *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (Can.). “Indian Title” or “Aboriginal Title” is a term of art that has been used by British, Canadian, and American courts for hundreds of years, meaning the informal ownership of land due to continuous, exclusive use of said land over a long period of time. I refer to the indigenous or “Indian” interest in the ancestral lands, recognized in the Royal Proclamation of 1763 and the Marshal Court’s decisions in the nineteenth century.

16. See WEAVER, *supra* note 11.

17. 43 U.S.C. §§ 1601–1629h (2012).

18. During Canada’s constitutional debates in the 1980s and 1990s, to assert their identity as aboriginal peoples, Indian Act chiefs renamed the National Indian Brother as the Assembly of First Nations. Today, the term “First Nations” describes the Aboriginal peoples in Canada who are neither Inuit nor Métis. *Description of the AFN*, ASSEMBLY OF FIRST NATIONS, <http://www.afn.ca/index.php/en/about-afn/description-of-the-afn> (last visited June 20, 2014). Currently, Canada recognizes over 630 First Nations governments with a population of almost 700,000. *Id.*

19. In 1969, Prime Minister Pierre Trudeau and his Minister of Indian Affairs, Jean Chrétien, unveiled a policy paper that proposed ending the special legal relationship between Aboriginal peoples and the Canadian state, and dismantling the Indian Act. This white paper was met with forceful opposition from Aboriginal leaders across the country and sparked a new era of Indigenous political organizing in Canada. See *The White Paper 1969*, U BRIT. COLUM., <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-white-paper-1969.html> (last visited Apr. 21, 2014).

20. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>.

40% of Canada's landmass,<sup>21</sup> with half of its population as indigenous people,<sup>22</sup> reconciliation of the indigenous-settler divide and resolution of questions about who owned the land ultimately required government action. In 1975, through an accelerated process driven by a political need to start the James Bay hydro megaproject, the federal government of Canada, Quebec's provincial government, and the James Bay Cree negotiated a land claims settlement.<sup>23</sup> In 1984, after five years of negotiation and with energy development in the Beaufort Sea pending, the Inuvialuit of the Western Arctic also concluded a treaty with Canada.<sup>24</sup> In this treaty, the Inuvialuit secured fee simple title or collective ownership to 35,000 square miles of land, including minerals, oil, and gas rights on a portion of their lands.<sup>25</sup> The Inuvialuit also received compensation of \$45 million CAD.<sup>26</sup>

In 1987, as a result of a report called "Living Treaties, Lasting Agreements," from a task force on national treaty-making practices led by public servant Murray Coolican,<sup>27</sup> the Canadian government began to update its "take it or leave it" policies.<sup>28</sup> Gradually, a more flexible

21. **Figure 1:** Population distribution in the Canadian Arctic regions. Figure 1 is adapted from *Canada, Arctic Indigenous Population*, UNEP/GRID-ARENDAL (Mar. 21, 2006), <http://www.grida.no/graphicslib/OpenFile.aspx?id=19b09e64-2c43-4eda-b00f-fb68a2a4b9fa>. See generally TONINA SIMEONE, SOC. AFFAIRS DIV., PARLIAMENT OF CANADA, *THE ARCTIC: NORTHERN ABORIGINAL PEOPLES* (2008), available at <http://www.parl.gc.ca/content/lop/researchpublications/prb0810-e.htm> (Figure 1 on page 1).

22. See SIMEONE, *supra* note 21.

23. Signed in 1975, "[t]he *James Bay and Northern Quebec Agreement* (JBNQA). . . was the first major comprehensive land claims agreement in northern Canada, heralding in a new era in aboriginal land claims." *JBNQA*, Makivik Corp., <http://www.makivik.org/history/jbnqa/> (last visited June 20, 2014). It provided \$225 million in compensation to the James Bay Cree and the Inuit of Northern Quebec, to be paid by Canada and Quebec. *Id.*

24. *Inuvialuit Final Agreement*, INUVIALUIT REGIONAL CORP., <http://www.irc.inuvialuit.com/about/finalagreement.html> (last visited June 20, 2014).

25. *Id.*

26. See ROBERT MCPHERSON, *NEW OWNERS IN THEIR OWN LAND: MINERALS AND INUIT LAND CLAIMS* 144-48 (2003).

27. See *Murray Coolican Biography 2012*, NOVA SCOTIA OFFSHORE ENERGY RESEARCH ASS'N, <http://www.oera.ca/wp-content/uploads/2013/04/Murray-Coolican-Biography-2012.pdf> (last visited June 20, 2014).

28. **Schedule of Modern Land Claims Agreements**

Name of Agreement	Year
James Bay and Northern Quebec Agreement	November 1975
Northeastern Quebec Agreement	January 1978
Inuvialuit Final Agreement	June 1984

Comprehensive Land Claims Policy emerged, in which Canada might entertain First Nation proposals during negotiations. Further changes followed as governments negotiated twenty modern treaties in Northern Canada.<sup>29</sup> Each treaty counted as a small step in a continuous organic evolution of Canada's treaty-making policies.<sup>30</sup> Further changes followed

Gwich'in Comprehensive Land Claim Agreement	December 1992
Nunavut Land Claims Agreement	May 1993
<b>Yukon First Nations Final Agreements:</b>	
Champagne and Aishihik First Nations	May 1993
First Nation of Nacho Nyak Dun	May 1993
Teslin Tlingit Council	May 1993
Vuntut Gwitchin First Nation	May 1993
Little Salmon/Carmacks First Nation	July 1997
Selkirk First Nation	July 1997
Tr'ondëk Hwëch'in First Nation	July 1998
Ta'an Kwäch'an Council	January 2002
Kluane First Nation	October 2003
Kwanlin Dün First Nation	February 2005
Carcross/Tagish First Nation	October 2005
Sahtu Dene and Metis Comprehensive Land Claim Agreement	September 1993
Nisga'a Final Agreement	May 2000
Tlicho Land Claims and Self Government Agreement	August 2003
Labrador Inuit Land Claims Agreement	December 2005
Nunavik Inuit Land Claims Agreement	July 2008
Tsawwassen First Nation Final Agreement	March 2009
Eeyou Marine Region Land Claims Agreement	July 2010
Maa-nulth Final Agreement	April 2011

*Modern Treaties, LAND CLAIMS AGREEMENTS COALITION*, <http://www.landclaimscoalition.ca/modern-treaties> (last visited Apr. 3, 2014).

29. *See id.*

30. The government slightly modified the language for the Yukon Treaty in 1993 so that extinguishment of aboriginal rights and title applied only to lands beyond the boundaries of a treaty. For the Nisga'a treaty in 1999, the federal government further "modified" the extinguishment language, providing a variety of alternatives. *See Fact Sheet: The Nisga'a Treaty*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, <http://www.aadnc-aandc.gc.ca/eng/1100100016428/1100100016429> (last modified Sept. 15, 2010).

as federal, provincial, and territorial governments negotiated twenty modern treaties in Northern Canada.<sup>31</sup>

Unlike the nineteenth century treaties that consigned American Indians to “reservations” and Canadian First Nations to “reserves” on marginal land and almost permanent poverty, the twentieth century treaties Canada negotiated with the First Nations, the Inuit, and the Métis of the Arctic and sub-Arctic in the years following the Alaska settlement make significant headway for land and resource rights of indigenous peoples.<sup>32</sup>

These treaties recognize title to tens of thousands of square miles of resource-rich land<sup>33</sup> and establish indigenous governance of those lands, while honoring the principles of sustainability and stewardship.<sup>34</sup> Because the wildlife co-management boards favor conservation and subsistence harvesting over recreational and commercial fishing and hunting, these northern treaties embed the principle of sustainability—the only part of Canada’s constitutional order to do so. The boards work because they involve a sharing of power between indigenous northerners and settlers. In other words, they operate as instruments of regional rather than national government and remain accountable to local communities.

The scale of these northern treaties, negotiated late in the twentieth century, dwarfed their nineteenth century predecessors. For example, in 1992, 7,000 Athabascans (Dene) and Tlingit secured title to 25,400 square miles of land, with sub-surface resource rights to two-thirds of that total.<sup>35</sup> To put that in context, this is more land than is contained in all of the Indian reserves in Southern Canada, which are home to half a million First Nations citizens.<sup>36</sup> In addition to the land settlement, the Yukon treaty also guaranteed subsistence food harvesting, participation in wildlife and natural-resource management, and special accommodation for economic and employment opportunities, plus compensation of

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31. *See supra* note 28.

32. *See generally Modern Treaties, supra* note 28.

33. *See id.*

34. *Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians And The Government Of The Yukon*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_fagr\\_ykn\\_umb\\_1318604279080\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf) (last visited Apr. 21, 2014) [hereinafter *Umbrella Agreement*].

35. Subject to the Umbrella Agreement, the total amount of Settlement Land for the requirements of all Yukon First Nations shall not exceed 16,000 square miles (41,439.81 square kilometres). *See Umbrella Agreement, supra* note 34, at 81.

36. The total land base of the 2,267 Indian reserves (reservations) is approximately 2.6 million hectares or about 10,039 square miles. *See Reports-Canada*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (Sept. 15, 2010), [https://www.aadnc-aandc.gc.ca/eng/1100100034846/1100100034847#THE\\_INDIAN\\_RESERVE\\_LAND\\_BASE\\_IN\\_CANADA4](https://www.aadnc-aandc.gc.ca/eng/1100100034846/1100100034847#THE_INDIAN_RESERVE_LAND_BASE_IN_CANADA4).

\$243 million.<sup>37</sup> However, the federal government refused to “include the right to commercial harvests of renewable resources.”<sup>38</sup>

In 1993, the treaty for the Inuit of Nunavut gave them collective ownership of 137,355 square miles, making them the largest private landowners in the world.<sup>39</sup> In the Nunavut treaty, Canada also promised the Inuit, the stewards of Arctic lands and waters for millennia, a Marine Council.<sup>40</sup>

All the northern agreements with indigenous peoples provide tools such as co-management, land-use planning and water boards, and dispute resolution instruments, so that they may use these treaties to better manage their own lands and resource development and to mitigate climate change.<sup>41</sup>

### III. TREATY IMPLEMENTATION

Today, indigenous peoples hold legal title to vast stretches of North America. The 1971 Alaska land claim was the richest in American history. Yukon First Nations now have legal title to thousands of square miles of land and governance of those properties; however, responsible environmental governance or stewardship requires the close coordination of regional, indigenous, and national government operations. Canada’s Nunavut treaty sets out rules for governing the territory’s environment and, although the Inuit have title to only 20% of the landmass, they are partners in all institutions of land, water, and wildlife management.<sup>42</sup> In this way, subsistence harvests, sustainability, and stewardship are all linked to evolved notions of sovereignty.<sup>43</sup>

Although enshrined in the laws and constitution of Canada, key self-governance provisions outlined in most of these indigenous land

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37. See Doug McArthur, *The Changing Architecture of Governance in Yukon and the Northwest Territories*, in *NORTHERN EXPOSURE: PEOPLES, POWERS AND PROSPECTS IN CANADA’S NORTH* 187, 196 (Frances Abele et al. eds., McGill-Queen’s University Press 4th rev. ed. 2009).

38. *Id.*

39. “The Nunavut Land Claims Agreement makes the Inuit of Nunavut the largest private landowners in North America, with outright ownership of more than 355,842 square kilometers (137,355 square miles), an area nearly as large as California.” *Territory Map*, CANADA’S ARCTIC: NUNAVUT, <http://www.nunavuttourism.com/images/guides/mapnunavut.pdf> (last visited Apr. 8, 2014).

40. Nunavut Land Claims Agreement, Art. 15.4.1.

41. See Luis Millan, *Climate Change Intersects with Inuit Land Claims Agreements*, *THE LAWYERS WEEKLY* (Apr. 23, 2010), <http://www.lawyersweekly.ca/index.php?section=article&articleid=1149>.

42. See Franklyn Griffith, *2030 North: Session 5: Canada’s North – A new Strategy*, 1–4 (June 3, 2009), available at <http://2030north.carc.org/pdfs/S5%20Canada’s%20North%20A%20New%20Strategy%20Presentation%20and%20Recommendations.pdf>.

43. *See id.*



treaties and governance agreements have yet to be implemented. *De jure* law does not often translate into *de facto* law. Environmental lawyer and chair of the Canadian Arctic Resources Committee, Charles Burchill, suggests that the principles of sustainability and stewardship can and will evolve through processes of mediation, accommodation, and consensus-building: “Put differently, the benefits of these processes are not limited to the resolution of differences between parties.”<sup>44</sup>

In 2003, indigenous signatories to Canada’s new northern treaties from British Columbia, Yukon, the Northwest Territories, Nunavut,<sup>45</sup> Nunavik, northern Quebec, and Labrador formed the Land Claims Agreements Coalition to lobby the federal government for faithful fulfillment of its obligations.<sup>46</sup> With the 1982 addition of Section 35 to the constitution, Canada resolved to append these modern treaties to the Canadian constitution, and, as written, they are remarkable nation-building achievements.<sup>47</sup> Most of these agreements, however, have generated serious unresolved disputes about how they shall be implemented.

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44. Email from Chuck Burchill, Chair, Canadian Arctic Resources Committee, to author (Jan. 20, 2010) (on file with author).

45. “Article 12 of the agreement requires government, in cooperation with the Nunavut Planning Commission, to adopt a plan to monitor Nunavut’s natural environment . . . . Article 15 of the agreement provides for the establishment of a Nunavut Marine Council to bring together institutions of public government and government department to focus on the offshore. . . . [B]ut due to lack of government funding, this article . . . remains unimplemented.” THE STANDING SENATE COMMITTEE ON FISHERIES AND OCEANS (Apr. 15, 2008) (Can.), available at [http://www.parl.gc.ca/Content/SEN/Committee/392/fish/45335-e.htm?comm\\_id=7&Language=F&Parl=39&Ses=2](http://www.parl.gc.ca/Content/SEN/Committee/392/fish/45335-e.htm?comm_id=7&Language=F&Parl=39&Ses=2). Following years of inconclusive negotiations, discussions and a conciliation process, NTI launched a court case in December 2006 over the Government of Canada’s failure to implement the Nunavut Agreement, including those parts of Articles 12 and 15. *See id.* *See also* Stephen J. Mills & Stephanie Irlbacher-Fox, *Living Up to the Spirit of Modern Treaties? Implementation and Institutional Development, in* NORTHERN EXPOSURE: PEOPLES, POWERS AND PROSPECTS IN CANADA’S NORTH 233 (2009). “On February 22, 2013 Bernard Valcourt was appointed Minister of Aboriginal Affairs and Northern Development. Within a few days of assuming the portfolio the minister asked to meet the leaders of the Land Claims Agreements Coalition and taking advantage of their presence in Ottawa at the Coalition’s fourth national conference did so on March 1.” Terry Fenge, Address at Creating Canada: From the Royal Proclamation of 1763 to Modern Treaties: A Symposium Hosted by the Land Claims Agreements Coalition, Canadian Museum of Civilization (October 7, 2013).

46. Terry Fenge, *Inuit and the Nunavut Land Claims Agreement: Supporting Canada’s Arctic Sovereignty*, POLICY OPTIONS 84, 87 (Dec. 2007–Jan. 2008) (Can.), available at <http://www.irpp.org/assets/po/the-mood-of-canada/fenge.pdf>.

47. *See* Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, Part II (U.K.) PART II: RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA  
Marginal note: Recognition of existing aboriginal and treaty rights  
- 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.  
- Definition of “aboriginal peoples of Canada”  
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada.

Most of Canada's modern treaties with northern indigenous nations include chapters containing standard, off-the-shelf alternative dispute resolution (ADR) tools, including mediation, but without adaptations for cultural and environmental circumstances.<sup>48</sup> Only a minority of indigenous groups, notably the Inuvialuit, the Nisga'a, and the Inuit of Nunavut, were successful in bargaining arbitration provisions into their treaties in negotiations at locations across Northern Canada. Canadian law does offer a continuum of options in dispute resolution to indigenous peoples, including negotiation, mediation and other forms of ADR, adjudication (informal and non-binding arbitration), informal but binding arbitration, and litigation (formal and binding court rulings).<sup>49</sup> Any or all of these processes may be employed in both rights-based and interest-based negotiations. Together, these should theoretically allow for fast, effective, and fair conflict resolution.

Unfortunately, these tools have not been effective in practice. Although the Inuit have tried seventeen times to invoke the arbitration clauses in the Nunavut treaty, Canada's Department of Finance (to name just one department) has refused to participate even in legally sanctioned arbitrations.<sup>50</sup> Worse, because Canadian federal policy forbids indigenous parties engaged in treaty negotiations from simultaneously litigating contentious issues—an anomaly in national public policy—dispute resolution measures are rarely tested during the negotiation process. Therefore, Canadian treaty-making severely limits opportunities for dispute resolution experimentation or self-design. Not only does federal policy prohibit First Nations from litigating while negotiating, federal officials

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- Marginal note: Land claims agreements

- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

available at <http://laws-lois.justice.gc.ca/eng/const/page-16.html> (last visited Apr. 8, 2014).

48. *Guide for the Management of Dispute Resolution Mechanisms in Modern Treaties*, ABORIGINAL AFF. & N. DEV. CAN., 16, [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AL/STAGING/texte-text/fari\\_1343831241721\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AL/STAGING/texte-text/fari_1343831241721_eng.pdf) (last modified Aug. 1, 2012).

49. Based on author's own experience.

50. Terry Fenge, *Asserting Sovereignty in the Arctic: Inuit and the Nunavut Land Claims Agreement*, in NILLIAJUT: INUIT PERSPECTIVES ON SECURITY, PATRIOTISM AND SOVEREIGNTY 49 (Scot Nickels et al eds., Inuit Qaujisarvingat: Inuit Knowledge Centre & Munk-Gordon Arctic Security Program 2013) available at <http://www.inuitknowledge.ca/sites/naasautit/files/attachments/20130125-En-Nilliajut-InuitPerspectivesSecuritySovereigntyPatriotism.pdf>. (last visited Apr. 8, 2014). Recently the Government of Canada published guidelines, rationalizing its refusal to arbitrate modern treaty disputes of a financial nature. See GUIDE FOR THE MANAGEMENT OF DISPUTE RESOLUTION MECHANISMS IN MODERN TREATIES, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, [www.aadnc-aandc.gc.ca/eng/1343831539714/1343831960404](http://www.aadnc-aandc.gc.ca/eng/1343831539714/1343831960404) (last visited Mar. 20, 2014).

have also refused to participate in the dispute resolution procedures established in the treaties they signed.

In May 2008, the Standing Committee on Aboriginal Peoples of the Canadian Senate issued “Honouring The Spirit of Modern Treaties: Closing the Loopholes,” an interim report on a special study regarding the implementation of comprehensive land claims agreements in Canada. In their concluding remarks, the Senators wrote:

Signatory nations to comprehensive land claims agreements have every right to expect their treaties will be respected and the commitments made therein will be honoured. All Canadians, Aboriginal and non-Aboriginal alike, have the right to expect that when the Government of Canada makes solemn commitments, it will, in good faith, keep its promises.<sup>51</sup>

The report also states that the challenges related to “the implementation of modern treaties have meant the achievement these Agreements represent has often been overshadowed.”<sup>52</sup> Such failure to implement these modern treaties disrespects their intent and objectives and is “as destructive of the process of reconciliation as some of the larger and more explosive controversies.”<sup>53</sup>

It then closes with the words of one of the committee’s witnesses:

These treaties, which are appended to the Constitution as expressions of section 35 rights, represent enormous nation-building achievements for Canada. However, failure to faithfully implement the provisions of these treaties as negotiated puts Canada at risk of generating new legends of broken treaty promises for our country. This is not a trivial matter.<sup>54</sup>

Other than political agitation, are there other options? The Inuit of Nunavut have chosen to go to court with a billion dollar implementation-failure lawsuit. In the interest of sound environmental stewardship, social peace, the rule of law, and good governance, how then might present and potential conflicts among indigenous and international treaty signatories be addressed?

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51. STANDING SENATE COMM. ON ABORIGINAL PEOPLES, INTERIM REPORT, HONOURING THE SPIRIT OF MODERN TREATIES: CLOSING THE LOOPHOLES 55 (2008) (Can.) [hereinafter *Interim Report*].

52. *Id.*

53. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (Can.).

54. See *Interim Report*, *supra* note 55.

## IV. INTERNATIONAL IMPLICATIONS

A handful of Canada's indigenous treaties contain clauses on the nation-state's international obligations regarding cooperative conservation.<sup>55</sup> For example, the Yukon Final Agreement calls for Canada to make reasonable efforts to ensure that Yukon First Nation interests are represented when issues involving fish and wildlife management arise in international negotiations.<sup>56</sup> The Labrador Inuit Final Agreement includes similar language in relation to aquatic plants, fish habitat, management, and stocks.<sup>57</sup> Agreements with the Yukon First Nations, the Sahtu Dene, and the Métis affirm that amendments to international treaties should not diminish indigenous peoples' rights. Three recent Canadian treaties<sup>58</sup> contain provisions about dispute resolution, arbitration, and an "obligation to consult with First Nations in respect of the development of positions which Canada will take before an International Tribunal where a First Nation Government Law has given rise to an issue concerning the performance of an International Legal Obligation of Canada."<sup>59</sup>

In 1999, Miguel Alfonso Martinez, the United Nations Special Rapporteur on Indigenous Treaties, found that for 500 years, colonial powers consistently failed to honorably implement the provisions of agreements made with indigenous nations.<sup>60</sup>

Given the historic failures of colonizing states to respect their treaty promises, could rights won in an indigenous treaty be subordinated to those framed in new international agreements? Canada's general intentions on this score could not be clearer. For example, the final agreement for Yukon's Carcross-Tagish First Nation reads:

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55. See, e.g., Gwich'in Comprehensive Land Claim Agreement, Can.-Gwich'in Nation, § 12.6, Apr. 22, 1992, available at <http://mvlwb.com/sites/default/files/documents/GCLCA3.pdf>.

56. See *Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians And The Government Of The Yukon*, ABORIGINAL AFF. & N. DEV. CAN., [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texttext/al\\_ldc\\_ccl\\_fagr\\_ykn\\_umb\\_1318604279080\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texttext/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf) (last modified Feb. 9, 2011).

57. See *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, ABORIGINAL AFF. & N. DEV. CAN., [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texttext/al\\_ldc\\_ccl\\_fagr\\_labi\\_labi\\_1307037470583\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texttext/al_ldc_ccl_fagr_labi_labi_1307037470583_eng.pdf) (last modified Dec. 29, 2010).

58. The Yukon Final Agreement, the Labrador Inuit Final Agreement, and the Sahtu Dene and Métis Treaty.

59. See Gwich'in Final Agreement, 12.6, Management of Migratory Species: At the intersection of indigenous and international treaties, by Tony Penikett, member of the Arctic Governance Steering Committee.

60. See STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS, UNITED NATIONS WORKING GROUP ON INDIGENOUS PEOPLES (1997), available at [http://www1.umn.edu/humanrts/demo/TreatiesStatesIndigenousPopulations\\_Martinez.pdf](http://www1.umn.edu/humanrts/demo/TreatiesStatesIndigenousPopulations_Martinez.pdf) (last visited Apr. 23, 2014).

Where there is a conflict between this chapter and the 1987 Canada-USA Agreement on the Conservation of the Porcupine Caribou Herd, the 1985 Porcupine Caribou Management Agreement, or the Treaty between the Government of Canada and the Government of the United States of America concerning Pacific Salmon, those agreements and the Treaty shall prevail to the extent of the conflict.<sup>61</sup>

Federal legal experts say that the reason they had to specify this is because, absent this clause, the land claim agreement provisions would prevail over the legislation implementing these agreements.<sup>62</sup>

The United Nations (U.N.) General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) on September 13, 2007.<sup>63</sup> Article 36 of the UNDRIP states the contemporary political realities of the Inuit Circumpolar Council (ICC), the Saami Council, and the Arctic Council:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across the borders. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.<sup>64</sup>

The UNDRIP received overall support from the Nordic countries, and Russia eventually expressed its support for most of the provisions.<sup>65</sup> Canada and the United States joined a minority of four countries (along with Australia and New Zealand)<sup>66</sup> in voting against the UNDRIP.<sup>67</sup> In Canada, both Conservative and Liberal administrations thought that the declaration was not feasible because adoption would be inconsistent with

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61. The Carcross/Tagish First Nation Final Agreement, Can.- Carcross/Tagish First Nation, § 16.3.11, Oct. 22, 2005, *available at* <http://cyfn.ca/wp-content/uploads/2013/08/carcross-tagish-fa.pdf>.

62. The general rule is that, as a constitutional document, provisions contained in a land claim agreement will prevail over legislation implementing international treaties.

63. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶ 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

64. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 36, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

65. Press Release, UN High Commissioner for Human Rights, UN Expert on Indigenous People Concludes Visit to the Russian Federation (Oct. 16, 2009), *available at* <http://www.unhcr.ch/hurricane/hurricane.nsf/0/7847C99256608064C1257651004FBB67?Opendocument>.

66. Email from Danika Littlechild, Cree Nation Lawyer, to author (Apr. 20, 2010) (on file with author).

67. The new Labour government has since reversed Australia's position.

Canadian law and treaty-making policy.<sup>68</sup> In the words of an Inuit organization's lawyer and negotiator, John Merritt, this left the Canadian Government in the peculiar position of arguing "that the reach of international human rights instruments<sup>69</sup> can be confined to those countries that vote for them."<sup>70</sup>

On November 12, 2010, Canada finally issued a statement of qualified support for the UNDRIP: "Today, Canada joins other countries in supporting the United Nations Declaration on the Rights of Indigenous Peoples. In doing so, Canada reaffirms its commitment to promoting and protecting the rights of Indigenous peoples at home and abroad."<sup>71</sup>

The government's press release goes on to add an important qualifier: "Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada."<sup>72</sup> In other words, the UNDRIP is an agreeable declaration, but it does not legally matter nor does it apply to Canada. Time will tell whether federal judges will import the UNDRIP's language into their decisions.

Inevitably, pessimists will insist that, if liberal nations such as Canada do not live up to their legal commitments in the Kyoto Accords<sup>73</sup> or

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68. John J. Noble, retired Canadian Ambassador to Swed. and Ger., Remarks at Claiming our Future: Implementing Land Claims Agreements for Social and Economic Prosperity Conference, Beyond Our Borders: Modern Treaties in the International Arena (May 13, 2009).

69. UNDRIP qualifies as an international human rights instrument.

70. Email from John Merritt, Indigenous Rights Legal Counsel, to author (July 7, 2009) (on file with author). Michael Byers adds: "Which is correct—if the treaty or declaration is not a codification of customary international law." Michael Byers holds a Canada Research Chair in Global Politics and International Law. His work focuses on issues of Arctic sovereignty, climate change, the law of the sea, and Canadian foreign and defense policy. He holds major research grants from ArcticNet and the Social Sciences and Humanities Research Council of Canada. Dr. Byers is the author of the national bestseller *Intent for a Nation* and most recently, *Who Owns the Arctic?* He is a regular contributor to the *Globe and Mail*, *Toronto Star*, and *Ottawa Citizen*. *Michael Beyers*, THE UNIVERSITY OF BRITISH COLUMBIA, DEPARTMENT OF POLITICAL SCIENCE, <http://www.politics.ubc.ca/about-us/faculty-members/bfont-color-blue-full-time-facultyfontb/michael-byers.html> (last visited Apr. 12, 2014).

71. Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (Nov. 12, 2012), <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

72. *Id.*

73. The Kyoto Protocol to the United Nations Framework Convention on Climate Change is a binding international agreement signed by 192 countries that commits industrialized nations to lower their greenhouse gas emissions to contribute to the international effort on slowing climate change. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

indigenous treaties, there is little hope of achieving environmental justice or inter-societal reconciliation. In addition, Canada withdrew from the Kyoto Accords in 2011, thereby alienating itself from the other 191 countries that are party to the international agreement to halt climate change.<sup>74</sup> These same pessimists may also conclude that, despite the innovative arrangements benefiting indigenous peoples and the environment in the Arctic Environment Protection Strategy,<sup>75</sup> the Arctic Council,<sup>76</sup> Alaska, Canada, Finnmark,<sup>77</sup> and Greenland, nation-states still rule, treaties are made to be broken, and Arctic lands and waters are destined for despoliation.

In any case, why might the failure to honor indigenous treaty commitments be anything but a domestic matter? There are at least two reasons. First, a failure to respect the rule of law is surely a sign of bad governance. Second, indigenous treaties are still, in some respects, “international,” due to the cross-border geography in which several of the indigenous nations live. The UNDRIP Article 37 reads:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.<sup>78</sup>

Colonial-era treaties between European states and indigenous nations were undoubtedly international, though over time they were “domesticated” by settler governments.<sup>79</sup> The U.S. Supreme Court has decided that indigenous treaties are *sui generis*, meaning they no longer

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74. Ian Austen, *Canada Announces Exit From Kyoto Climate Treaty*, N.Y. TIMES, Dec. 12, 2011, available at [http://www.nytimes.com/2011/12/13/science/earth/canada-leaving-kyoto-protocol-on-climate-change.html?\\_r=0](http://www.nytimes.com/2011/12/13/science/earth/canada-leaving-kyoto-protocol-on-climate-change.html?_r=0).

75. See generally Arctic Environmental Protection Strategy, U.S.-Can.-Den.-Fin.-Ice.-Nor.-Swe.-Russ., June 14, 1991.

76. Permanent Participants include Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States. See *Member States*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/member-states> (last visited April 18, 2014).

77. Finnmark is a northern county of Norway, with a large Saami population. The Finnmark Act is a national legislation from Norway to provide land and resource co-management in the county.

78. G.A. Res. 61/295, *supra* note 68.

79. See Pablo Gutiérrez Vega, *The Municipalization of the Legal Status of Indigenous Nations by Modern (European) International Law*, 12 LAW & ANTHROPOLOGY 17 (Richard Pots ed., 2004).

have the status of international treaties, a view fiercely disputed by indigenous groups who signed such treaties during the colonial period.<sup>80</sup>

Lawyer Shelley Wright warns that this debate is far from over.<sup>81</sup> If one holds to the idea that indigenous treaties have the character of “international” agreements, the Court may not be seen as truly “independent” because all nine of Canada’s Supreme Court justices are appointed by the federal government, one of the parties to the treaties. An arbitration panel or tribunal, by contrast, would normally have both indigenous and government representatives, with a neutral chair chosen by both parties. This structure would help guarantee the panel’s independence. In his 1999 report to the United Nations, Martinez recommended that all colonial states create bipartite courts to address treaty implementation issues.<sup>82</sup>

As far back as 1704, the British Privy Council, in a treaty interpretation case, *Mohegan Indians v. Connecticut*, declared that independent third-party tribunals should decide such cases.<sup>83</sup> In 1975, New Zealand established the Treaty of Waitangi Tribunal, a bi-national and bilingual court to adjudicate treaty disputes.<sup>84</sup> The tribunal is independent, but its judgments are not final and are reported to the Cabinet simply as recommendations.<sup>85</sup> The principle of independent and final adjudication of treaty disputes still has merit, though no such tribunal operates in any of the Arctic states.<sup>86</sup>

Nevertheless, the twenty modern or northern Canadian treaties appear to have made positive steps toward advancing indigenous people’s

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80. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

81. E-mail from Shelly Wright to author, (Dec. 22, 2009) (on file with author). “Professor Sakej Henderson of the Native Law Centre in Saskatoon has argued for many years on the international and constitutional basis of existing treaties.” Sakej Henderson, Professor, *Treaty Governance*, in *ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES I.2*. (Yale D. Belanger, ed., 3rd ed. 2008).

82. See *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, in UNITED NATIONS COMMISSION ON HUMAN RIGHTS SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES (June 22, 1999), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>.

83. See generally Mark D. Walters, *Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*, 33 *OSGOODE HALL L.J.* 785 (1996); See also BRUCE CLARK, *JUSTICE IN PARADISE* 89–98 (1999).

84. The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975. See WAITANGI TRIBUNAL, <http://www.justice.govt.nz/tribunals/waitangi-tribunal> (last visited Apr. 23, 2014). The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown that potentially breach the promises made in the Treaty of Waitangi. *Id.*

85. See *id.*

86. See *id.*



rights.<sup>87</sup> In much of the Arctic, land ownership questions are settled and, despite numerous implementation issues with modern land claims settlements, indigenous treaty signatories in Canada have recovered large areas of their traditional territory.

As Charles Emmerson writes:

In some cases—such as the ownership of land in the Arctic—matters are broadly settled, bar a few still disputed parcels of territory. In other cases—such as that of ownership of the seabed—matters are more open, despite the existence of international law. As in the past, each advance of economic and political interest in the Arctic—on land, on sea, on the seabed—forces international law to catch up with emerging realities. The gaps are filled with politics.<sup>88</sup>

Indigenous groups will certainly press their land treaty implementation grievances in legislative arenas and in the courts but, absent the political will of federal, provincial and territorial leaders to honorably resolve treaty disputes, these grievances will surely fester.

#### V. IMPACTS OF A SETTLER HISTORY

In the 1970s, land claims negotiations got underway in the Canadian north and a settler backlash started to make the news. By the 1980s, hard work and compromise by indigenous peoples and national governments helped solve most problems. An organization called the Society for Northern Land Research flourished only briefly in the Yukon, but its leaders stayed politically active for years afterwards. The insecurity aroused by indigenous claims crossed party lines. Prominent Liberals liked to quote a speech by Prime Minister Pierre Elliott Trudeau given at the Seaforth Armory in Vancouver on August 8, 1969:

We can go on adding bricks of discrimination around the ghetto in which they live, and at the same time helping them preserve certain cultural traits and certain ancestral rights. Or we can say you are at a crossroads - the time is now to decide whether the Indians will be a race apart in Canada, or whether they will be Canadians of full status . . . . [P]erhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society one section of a society have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties among ourselves. . . . [Indians] should become Canadians as all other Canadians. . . . This is the only basis on which I see our society can develop as equals.

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87. Penikett, *supra* note 64.

88. CHARLES EMMERSON, *THE FUTURE HISTORY OF THE ARCTIC* 84 (2010).

But aboriginal rights, this really means saying, ‘We were here before you. You came and took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and to restore them to us.’ –[O]ur answer is ‘no. —We can’t recognize aboriginal rights because no society can be built on historical might-have-beens . . . .’ We will be just in our time. That is all we can do. We will be just today.<sup>89</sup>

The West Coast had long been a theatre of resistance to indigenous rights claims. In 1867, Joseph Trutch, chief commissioner of lands and works of the Crown Colony of British Columbia, wrote:

The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them, and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to the Government or to individuals.<sup>90</sup>

One hundred years later, Mel Smith, constitutional advisor to British Columbia premiers, argued that Indian claims in British Columbia had been settled by the creation of Indian reserves, without treaties.<sup>91</sup> Smith went on to write a best-selling book, *Our Home or Native Land*, attacking Indian claims.<sup>92</sup> Tom Flanagan, political scientist and advisor to Stephen Harper, proposed a return to the policy of assimilation.<sup>93</sup> In his best-selling book, *First Nations, Second Thoughts*, Flanagan clearly airs his assimilationist manifesto:

In order to become self-supporting and get beyond the social pathologies that are ruining their communities, aboriginal people need to acquire the skills and attitudes that bring success in a liberal society, political democracy, and market economy. Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen.<sup>94</sup>

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89. Robert Head, *Trudeau's Words About Aboriginals Resonate*, CALGARY HERALD, Jan. 3, 2012, available at <http://spon.ca/trudeaus-words-about-aboriginals-resonate/2012/01/04/>.

90. Letter from Joseph W. Trutch, Chief Comm. of Lands and Works, on Lower Fraser River Indian Reserve to the Acting Colonial Sec'y (Aug. 28, 1867) (on file with the Legislative Library of British Columbia).

91. See MELVIN H. SMITH, *OUR HOME OR NATIVE LAND?: WHAT GOVERNMENTS' ABORIGINAL POLICY IS DOING TO CANADA* (1996).

92. *Id.*

93. See generally TOM FLANAGAN, *FIRST NATIONS? SECOND THOUGHTS* ch. 10 (2d ed. 2008).

94. *Id.* ch. 10.

The thinking of Trudeau, Smith, and Flanagan appealed to many Northerners, but by 1973 the Supreme Court of Canada had changed Trudeau's mind when it divided on the question of whether the Nisga'a Nation still held aboriginal title to the Nass Valley in Northwestern B.C.<sup>95</sup> At the time, Trudeau observed that "maybe you have more rights than we thought you did."<sup>96</sup>

By the late nineteenth century, when Indian tribes no longer posed a military threat to settlement, the Government of the United States had largely lost interest in treaty-making. Canada stopped a few years later. Yet whenever there was a frontier resource development pending, governments rushed to use treaties to erase any vestiges of aboriginal title. When Canada wanted to build the trans-continental railroad, it wrote the Numbered Prairie Treaties.<sup>97</sup> A half-century later, when Quebec sought to cement the James Bay hydro project, Canada treated with the Quebec Cree and Inuit.<sup>98</sup> When Americans discovered huge oil reserves in Alaska, the United States Congress greased the development with a billion-dollar land claims settlement.<sup>99</sup>

The Yukon Treaty represented hard bargains about practical matters, negotiated in the communities with the federal and territorial governments at the table with First Nations, including their "non-status Indian" cousins.<sup>100</sup> Together, these indigenous peoples refused to let their communities be arbitrarily divided by the Indian Act.<sup>101</sup> Because the negotiations took almost twenty years, in communities with active consultation of non-indigenous citizens, the resulting agreements contain sensible measures for sharing power over lands and resources between both the indigenous minority and the settler majority. In the end, the vast majority of Yukoners, indigenous and non-indigenous, were reconciled to the result and the territorial legislature unanimously approved the treaty.<sup>102</sup> Sadly, most Canadians still have no idea of the struggles involved to reach that point.

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95. Joseph Gosnell, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, Issue 4 – Evidence (Feb. 22, 2000), available at [http://www.parl.gc.ca/Content/SEN/Committee/362/abor/04evae.htm?Language=E&Parl=36&Ses=2&comm\\_id=1](http://www.parl.gc.ca/Content/SEN/Committee/362/abor/04evae.htm?Language=E&Parl=36&Ses=2&comm_id=1).

96. *Id.*

97. *The Numbered Treaties (1871–1921)*, ABORIGINAL AFFAIRS & N. DEV. CANADA, <https://www.aadnc-aandc.gc.ca/eng/1360948213124/1360948312708> (last updated June 4, 2013).

98. James Bay and Northern Quebec Agreement, Nov. 11, 1975, available at <http://www.gcc.ca/pdf/LEG000000006.pdf>.

99. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (1971).

100. Comprehensive Claims Policy

101. See Umbrella Agreement, *supra* note 34.

102. Yukon Legislative Assembly

By 1982, Prime Minister Trudeau, the provincial and territorial premiers, and national aboriginal leaders had agreed to add a provision, Section 35, to the Canadian constitution, that recognized “existing aboriginal rights” for Indians, Inuit, and Métis.<sup>103</sup> By the end of the twentieth century, the land question in the Canadian Arctic and sub-Arctic had largely been settled, primarily because of cooperative work between indigenous peoples and settler communities and by territorial governments, and the federal department of Indian and Northern Affairs (the Canadian equivalent of the U.S. Department of the Interior). The same could be said for the jurisdiction question. In Alaska, the Alaska Native Claims Settlement Act had severed tribal governments from their ancestral lands.<sup>104</sup> For First Nations in the Canadian provinces who expected to import into their homelands the jurisdictional models developed in the northern territories, the 21st century has so far been a time of growing frustration and fury, as represented by the advent of the *Idle No More* movement.<sup>105</sup>

## VI. INDIGENOUS JURISDICTION

Part of the problem with claims for indigenous jurisdiction is that Canadians do not understand them, southern Canadians especially.<sup>106</sup> This central misunderstanding needs to be unpacked and resolved in a large thoroughgoing national debate.

No better evidence of this misunderstanding exists than a notorious opinion page article by Jeffrey Simpson in Canada’s “national newspaper,” *The Globe and Mail*.<sup>107</sup> On January 7, 2012, under a headline *Too Many First Nations People Live in a Dream Palace*, Simpson wrote:

Large elements of aboriginal Canada live intellectually in a dream palace, a more comfortable place than where they actually reside. Inside the dream palace, there are self-reliant, self-sustaining communities – “nations,” indeed – with the full panoply of sovereign capacities and the “rights” that go with sovereignty. These “nations” are the descendants of

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103. See Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 35 (Can.).

104. See Daniel Ors & N. Bruce Duthu, Corporate Citizenship in Alaskan Villages: The Long Term Impacts of ANCSA (Aug. 26, 2012) (unpublished manuscript), *available at* [http://www.academia.edu/2025453/Corporate\\_Citizenship\\_in\\_Alaskan\\_Villages\\_The\\_Long\\_Term\\_Impacts\\_of\\_ANCSA](http://www.academia.edu/2025453/Corporate_Citizenship_in_Alaskan_Villages_The_Long_Term_Impacts_of_ANCSA).

105. See *The Blossoming of “Idle No More”: Canada’s First Nations Movement*, GLOBAL RES. (Mar. 14, 2014), <http://www.globalresearch.ca/the-blossoming-of-idle-no-more-canadas-first-nations-movement/5373516>.

106. Residents of the provinces who mostly reside close to the U.S. border.

107. Jeffrey Simpson, *Too Many First Nations People Live in a Dream Palace*, THE GLOBE AND MAIL (Jan. 5, 2013), <http://www.theglobeandmail.com/globe-debate/too-many-first-nations-people-live-in-a-dream-palace/article6929035/>.

proud ancestors who, centuries ago, spread across certain territories before and, for some period, after the “settlers” arrived.

Today’s reality, however, is so far removed in actual day-to-day terms from the memories inside the dream palace as to be almost unbearable. The obvious conflict between reality and dream pulls some aboriginals to warrior societies; others to a rejection of dealing with the “Crown” at all; others to fights for the restoration of “rights” that, even if defined, would make little tangible difference in the lives of aboriginal people; and still others, such as Attawapiskat Chief Theresa Spence, to go on a hunger strike.<sup>108</sup>

Jeffrey Simpson cannot imagine that “isolated communities of a thousand or so people” can be vibrant and self-sustaining, capable of discharging the panoply of responsibilities of “sovereignty.”<sup>109</sup> That is to live within the “dream palace” of memory, for him. He seems to know nothing about the twenty-some treaties and the Aboriginal self-government agreements negotiated across northern Canada over the last four decades.<sup>110</sup>

Simpson speaks of the “marginal economic value” of reserve lands in southern Canada as if First Nations chose those tiny reserves and marginal lands, rather than the Canadian Government. “Of course, there are some communities that offer the antithesis of dependency,” writes Simpson.<sup>111</sup> “They benefit from participating directly in the exploitation of natural resources near their communities, which should be the driving thrust of all public policy.”<sup>112</sup> For Simpson, the only economic choice seems to be between mines that might provide jobs for a few years and the protection of a caribou herd or a salmon fishery that has sustained a First Nation community for thousands of years and, with the blessing of sound public policy, might do so for a thousand more. That is Simpson’s reality.

Some chiefs might choose the first path, others the second. More might say this is a false choice. Most chiefs would prefer to maintain both the wage economy and subsistence harvest for their community and its individual members, many of whom quite naturally want to work and hunt, just as their non-native neighbors do, especially in the North. This “reality,” which the northern land claims settlements painfully negotiated

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108. *Id.*

109. *Id.*

110. See generally TONY PENIKETT, RECONCILIATION: FIRST NATION TREATY MAKING IN BRITISH COLUMBIA (2006).

111. Simpson, *supra* note 107.

112. *Id.*

over the last forty years, provides for First Nations in Canada's Far North.<sup>113</sup>

The intellectual dream palace of Simpson's editorial was once upon a time occupied by European princes, who imagined that, by sticking a cross or a flag in the ground and waving the sword of sovereignty, they could occupy and expropriate the ancestral property of the people who preceded them.<sup>114</sup> Nowadays, that dream palace is home to federal and provincial politicians and bureaucrats who believe that the treaties and other agreements they signed can simply be filed and forgotten.<sup>115</sup>

Simpson is the most articulate of the ardent assimilationists, but he demonstrates no sense of the hard bargains negotiated over decades between the federal government, indigenous groups, and territorial governments that created practical arrangements for governing areas larger than some European states.<sup>116</sup> Before Canada existed, people occupied these lands and governed themselves. In Canadian political parlance, they were "pre-existing political communities." In reality, they still exist.

Debates among settler experts about indigenous government began when Conquistador Hernán Cortés attacked and destroyed Tenochtitlán, the capital of the Aztec Confederacy in Mexico, which, in 1519, was the world's largest city.<sup>117</sup> Ever since, colonizers have tended to criticize indigenous governments as small, weak, and ineffective.

In 1550, Charles V of Spain summoned a Council of fourteen jurists to Valladolid to inquire into the legitimacy of the Spanish conquest and the capacities of the "Indians."<sup>118</sup> Theologian Dr. Juan Ginés de Sepúlveda told the Council: "In his conquest of the Mexico Indians, Hernán Cortés definitively proved the superiority of the Spaniard. The Indians were an inferior race whom Spain had every right to Christianize—by force, if necessary."<sup>119</sup>

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113. The "Far North" refers to Alaska in the USA and to the three northern territories: Nunavut, Northwest Territories and Yukon, in Canada.

114. See generally RONALD WRIGHT, *STOLEN CONTINENTS: 500 YEARS OF CONQUEST AND RESISTANCE IN THE AMERICAS* (2005).

115. TONY PENIKETT, *RECONCILIATION: FIRST NATION TREATY MAKING IN BRITISH COLUMBIA 174–184* (2006).

116. See Vuntut Gwitchin First Nation Final Agreement, Can.-Vuntut Gwitchin First Nation-Yukon, 1993, available at <http://www.aadnc-aandc.gc.ca/eng/1293733613237/1293733672387>. The Vuntut Gwich'in Treaty gives the First Nation title to 7,744.06 km<sup>2</sup> of land. See *id.*

117. HUGH THOMAS, *RIVERS OF GOLD: THE RISE OF THE SPANISH EMPIRE, FROM COLUMBUS TO MAGELLAN* 490 (2003).

118. See PENIKETT, *supra* note 127, at 24.

119. JUAN GINÉS DE SEPÚLVEDA, *DEMOCRATES ALTER OR ON THE JUST CAUSES FOR WAR AGAINST THE INDIANS* (1547).

Bartolomé de Las Casas, the retired bishop of Chiapas, who had for decades been petitioning the Spanish crown on behalf of indigenous Mexicans, spoke next.<sup>120</sup> Las Casas spoke for five days straight, arguing that, long before the Spanish invasion, indigenous Americans had great cities, kings, judges, and laws.<sup>121</sup>

After the conquest of Mexico, European powers fought for the rest of North America. All sought allies among Indian nations. After British and Iroquois forces defeated the French army at the Plains of Abraham, France signed the 1763 Treaty of Paris and ceded to the British all land east of the Mississippi.<sup>122</sup>

This outcome angered former French allies. Chief Pontiac began to preach resistance among tribes in the western Great Lakes region.<sup>123</sup> In May 1763, his army quickly captured nine British forts.<sup>124</sup> The British then issued the Royal Proclamation of 1763, which promised that the Crown would only obtain lands for settlement through publicly negotiated treaties with Indian nations.<sup>125</sup> Through this proclamation, Britain had finally recognized Indian governments and Aboriginal title to their ancestral lands.

Meanwhile, intellectuals continued to pass judgment on the character of indigenous governments. Thomas Hobbes wrote that American Indians had only the government of “small families.”<sup>126</sup> But Benjamin Franklin so admired the Iroquois Confederacy that he borrowed their invention—federalism—for the U.S. Constitution.<sup>127</sup>

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120. LEWIS HANKE, *ALL MANKIND IS ONE* 93 (1974).

121. *Id.*

122. *Treaty of Paris*, THE QUEBEC HISTORY ENCYCLOPEDIA (2005), <http://faculty.marianopolis.edu/c.Belanger/quebechistory/encyclopedia/TreatyofParis1763-QuebecHistory.htm>. This was the treaty of peace, signed on February 10, 1763, which brought to a close the Seven Years' War between Great Britain and France, and by which France ceded Canada to Great Britain.

*Id.*

123. 1 FRANCIS PARKMAN, *THE CONSPIRACY OF PONTIAC AND THE INDIAN WAR AFTER THE CONQUEST OF CANADA* 206–07 (1994).

124. See PENIKETT, *supra* note 127, at 41.

125. *Royal Proclamation 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No.1

126. THOMAS HOBBE, *Leviathan*, in *THE NATURAL CONDITION OF MANKIND AS CONCERNING THEIR FELICITY AND MISERY* ch. XIII (1651) (“It may peradventure be thought there was never such a time nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life there would be, where there were no common power to fear, by the manner of life which men that have formerly lived under a peaceful government use to degenerate into a civil war.”).

127. See Benjamin Franklin on the Iroquois League, in a letter to James Parker, 1751, SMITHSONIAN SOURCE (2007), <http://www.smithsoniansource.org/display/primarysource/>

Treaties signed by the Cherokee Nation in 1785 and in 1791 failed to prevent harassment from the Georgia State Legislature.<sup>128</sup> In 1831, the Cherokee asked the U.S. Supreme Court to recognize them, signatories of international treaties, as a “foreign state.”<sup>129</sup> In *Cherokee Nation v. Georgia*, Chief Justice John Marshall ruled against them: “Their relation to the United States resembles that of a ward to his guardian.”<sup>130</sup>

In a later Cherokee case, *Worcester v. Georgia*, Justice Marshall found in their favor: “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . .”<sup>131</sup> President Andrew Jackson sided with Georgia’s settlers, writing in a letter to John Coffee, “[T]he decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.”<sup>132</sup> On President Jackson’s orders, U.S. soldiers rounded up the Cherokee and force-marched them west to Oklahoma’s Indian Territory.<sup>133</sup> Four thousand Cherokees died on this “Trail of Tears,” as American presidents signed, then violated, dozens of Indian treaties between 1815 and 1860.<sup>134</sup>

When 12,000 Cherokee survivors of the Trail of Tears landed in Oklahoma, they soon created colleges, courts, and a bicameral legislature,<sup>135</sup> however, in 1885, disaster visited again through Massachusetts Senator Henry Dawes. “They have got as far as they can go,” he wrote in his diary.<sup>136</sup> “There is no enterprise to make your home any better than that of your neighbour’s. There is no selfishness, which is at the bottom of civilisation.”<sup>137</sup> Once Congress passed the Dawes Act, the government began to subdivide tribal lands.<sup>138</sup> Theodore Roosevelt subsequently

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128. See PENIKETT, *supra* note 127, at 52.

129. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 3 (1831).

130. *Id.* at 17.

131. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

132. See PAUL F. BOLLER & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FALSE QUOTES, MISQUOTES, & FALSE ATTRIBUTIONS 53 (1990). In Paul Boller’s book, historian Robert V. Remini claims Jackson never made such a statement. The tale is based on something Jackson wrote in a letter to John Coffee, “[T]he 5th decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate,” meaning the Court’s opinion was moot because it had no power to enforce its edict (not being a legislative body). *Id.*

133. PENIKETT, *supra* note 127, at 56.

134. *Id.* at 57.

135. *Id.*

136. Diary of Senator Henry Dawes (1885), in PATRICK NEAL MINGES, SLAVERY IN THE CHEROKEE NATION: THE KEETOOWAH SOCIETY AND THE DEFINING OF A PEOPLE, 1855–1867, 89, (2003).

137. *Id.*

138. *Dawes General Allotment Act*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/152952/Dawes-General-Allotment-Act>. (last visited April 14, 2014).



praised the Dawes Act as “a mighty pulverizing engine to break up the tribal mass.”<sup>139</sup>

As Canada opened up its western regions with a transcontinental railway, it negotiated a series of numbered treaties. At Fort Carlton in 1876, Cree Chiefs met Canada’s treaty commissioners to negotiate Treaty Six, an event full of international ceremony and solemnity.<sup>140</sup> Ironically, that same year, Parliament passed an Indian Act that completed the transformation of Indian Nations from allies of Britain and France into wards of the Canadian state.<sup>141</sup>

Senator Henry Jackson, sponsor of the Alaska Native Claims Settlement Act, did not want to see racial “enclaves” established in Alaska, so Congress outlawed tribal governments and mandated state-regulated native corporations, thereby overturning the Marshall Doctrine established in *Worcester v. Georgia*.<sup>142</sup> The idea of tribal government in Alaska, however, has not completely died. In his review of the Alaska lands settlement, Thomas R. Berger recommended the restoration of tribal government as the means to protect their lands.<sup>143</sup> Donald Mitchell, author of *Take My Land, Take My Life: The Story of Congress’s Historic Settlement of Alaska Native Land Claims, 1960–1971*, dismissed Berger’s proposal as “romantic.”<sup>144</sup>

Professor Oran Young characterizes this debate as part of a modernizer versus traditionalist struggle. “The modernizers have seized on the Alaska Native Claims Settlement Act (ANCSA) corporations to pro-

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139. Theodore Roosevelt, President of the U.S., First Annual Message (Dec. 3, 1901).

140. PETER ERASMUS, *BUFFALO DAYS AND NIGHTS* 237 (1999).

141. Indian Act, R.S.C., 1985, c. L-2, available at [www.thecanadianencyclopedia.com/articles/indian-act](http://www.thecanadianencyclopedia.com/articles/indian-act).

142. See generally *Worcester v. Georgia*, 31 U.S. 515 (1832).

143. THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION*, (Oct. 1985), available at <http://www.alaskool.org/projects/ancsa/vlgjour.htm> (“I have now completed my journey to the villages of Alaska, and I have written my report. It boils down to three subjects: land, self-government, and subsistence. Land. My first and most important recommendation is my recommendation for retribalization of Native corporation land at the village level. I put this recommendation ahead of all others. The 1971 Alaska Native Claims Settlement Act and 1980 Alaska National Interest Lands Conservation Act constitute a great division of Alaska lands among the federal government, the state government and the Native people. Alaska Natives received 44 million acres of land, approximately 10 percent of all the land in the state. Deep structural flaws in ANCSA make it likely that the Native people will lose their land . . . .” The great urgency lies in ensuring the village people retain control of their land. So I have urged that the village corporations should transfer their land to the village tribal governments. This will keep the land in Native ownership; it will also solve the problem of the New Natives, or “after-borns,” who would, as tribal members, have the same rights to access to and use of tribal lands as anybody else. To do this without having to cash out dissenting shareholders, Congress would have to pass enabling legislation.”).

144. DONALD C. MILLER, *TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS’S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960–1971* (2001).

mote their vision of the future (becoming corporate Natives in the process), and the traditionalists struggle to enhance the power of various tribal entities (such as tribal councils or Indian Reorganization Act councils) by seeking to assert control over Native lands that could be accepted as 'Indian country' in Alaska."<sup>145</sup>

When in 1973 Trudeau sent federal negotiators back to treaty tables in British Columbia, Northern Quebec, the Northwest Territories, and the Yukon, following the Supreme Court of Canada's 1971 decision in *Calder* (the Nisga'a land rights case), Northern indigenous groups rejected Alaska's corporate model. Instead, Yukon and Nisga'a chiefs chose a tribal model called "Aboriginal Self-Government."<sup>146</sup>

Yukon First Nations negotiated Canada's first "third-order" aboriginal self-government agreements with the Government of Canada and the Yukon Territorial Government. The Yukon self-government agreements recognize both local and quasi-provincial powers for that territory's First Nations. McArthur describes these "unique and innovative"<sup>147</sup> agreements as having established a template for the federal government as it undertook self-government negotiations with First Nations, particularly in British Columbia and the Northwest Territories. The Yukon self-government and related provisions have the following notable elements:

- Agreements and First Nations governments replace the Indian Act and band governments;
- Self-government chapters are included in each claims settlement but excluded from Section 35 protection;
- First Nations governments have the authority of municipalities, with many of the powers of provinces and territories;
- First Nations have ownership of and jurisdiction over settlement lands and residents;
- First Nations have authority over culture, heritage and social services, regardless of residency;
- First Nations powers are concurrent with those of the territorial and federal governments, with complex paramountcy and conflict-of-law provisions in a number of cases, and in cases like taxation, all three levels of government share powers;

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145. ORAN YOUNG, ARCTIC POLITICS: CONFLICT AND COOPERATION IN THE CIRCUMPOLAR NORTH 82 (1992).

146. Penikett, *supra* note 7, at 2

147. MCARTHUR, *supra* note 37, at 8212.

- First Nations participate jointly in numerous Yukon-wide resource management boards;
- First Nations governments have property taxation powers over occupants of settlement lands;
- First Nations governments have direct taxation powers over citizens on settlement lands; there are provisions for agreements with Canada and Yukon to occupy tax room over non-citizens on settlement lands;
- Canada is committed to negotiating and concluding financial transfer agreements to deliver programs and services, and to operate governments.

There is a reduction in transfers based on own-source revenue capacity at a ratio (or tax-back rate) of less than 1:1, with arrangements to be set out in the transfer agreements.<sup>148</sup>

The 1999 Nisga'a Treaty recognized tribal title to 1,238 square miles of land and guaranteed \$190 million in capital.<sup>149</sup> Building on the Yukon model of self-government agreements, the Nisga'a reversed the historical trend by negotiating province-like powers into their treaty, with the support of the Provincial NDP and Federal Liberal governments.

Denouncing the Nisga'a self-government chapter as a "race-based" government, opposition leader Gordon Campbell asked the B.C. Supreme Court to declare the treaty unconstitutional.<sup>150</sup> Rejecting Campbell's argument, the court said self-government "rights cannot be extinguished, but they may be defined [given content] in a treaty. The Nisga'a Final Agreement does the latter expressly."<sup>151</sup>

On becoming the Liberal premier of British Columbia, Campbell appealed the *Campbell* decision in the court of public opinion with a province-wide referendum on Aboriginal self-government.<sup>152</sup> Campbell's 2002 referendum proposed that, "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia."<sup>153</sup> A majority of the minority of British Columbians who voted endorsed Campbell's proposition but, for good

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148. *Id.*

149. Nisga'a's Final Agreement, Nisga'a Lisims-Ca., Apr. 27, 1999, Chapter 1, available at [www.nnkn.ca/files/u28/nis-eng.pdf](http://www.nnkn.ca/files/u28/nis-eng.pdf).

150. PENIKETT, *supra* note 127, at 56

151. *Campbell et al. v. British Columbia*, [2000] B.C.S.C. 1123. (Can.).

152. PENIKETT, *supra* note 127, at 131.

153. *Id.*

reasons, his government could not maintain its position at the negotiating table.

#### VII. FUTURE INSECURITIES

The vital interests of indigenous British Columbians and Yukoners lay not in municipal works, dirt roads, and water trucks, but in the lands and waters around their villages. Through the treaties negotiated between 1973 and 1992, the Yukon First Nations retain some tribal lands, mineral rights, taxation, and land-use planning powers, as well as co-management of fish and game resources.<sup>154</sup> Canadians usually think of these powers as “provincial,” which is a problem, especially because the provinces are even less willing to share jurisdiction than federal ministers.

Progress towards the restoration of indigenous government has been painfully slow. At the current rate, British Columbia will still be negotiating treaties in the 23rd century. Twenty years after Yukon First Nations negotiated Canada’s first tribal self-government agreements with the territorial and federal governments, they still represent the majority of all such agreements in the country. Additionally, the Supreme Court of Canada has yet to declare itself on indigenous government.

Regardless, key aspects of Arctic indigenous cultures, including language, survived these disputes, even when their ancestral structures of government did not. Around the Circumpolar North, the Inuit, Saami, and Dene still speak their languages—as do the distant cousins of the northern Dene, the Navajo.

Today, the Navajo Nation (Diné Bikéyah) governs a territory of over 27,000 square miles in Arizona, New Mexico, and Utah, with a growing population of over 250,000, making it the largest First Nation in the United States.<sup>155</sup> On the Canadian side of the Alaska-Yukon border, the White River First Nation today claims less than 200 members.<sup>156</sup>

As a matter of right, the Diné would say they own a right to govern themselves but is the White River First Nation—a tiny Dene village on the Alaska-Yukon border—entitled to self-government?

Assimilationists such as Flanagan and Simpson would say no. For them, size matters, as it did for former B.C. Attorney General Geoff

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154. *Id.* at 132.

155. *History*, NAVAJO NATION GOVERNMENT, (last visited April 21, 2014), <http://www.navajo-nsn.gov/history.htm>.

156. *Contact Us*, WHITE RIVER FIRST NATION, [http://whiteriverfirstnation.com/contact-us/?Contact-form-id=137&contact-form-sent=260&\\_wpnonce=601b4849d3](http://whiteriverfirstnation.com/contact-us/?Contact-form-id=137&contact-form-sent=260&_wpnonce=601b4849d3) (last visited April 21, 2014).

Plant, who told a roomful of lawyers, “You cannot have self-government for 150 people, 50 percent of whom are FAS or FAE.”<sup>157</sup>

First Nation lawyer Debra Hanuse strongly disagrees with these arguments. A former treaty commissioner and member of the ‘Namgis Nation, Hanuse feels that size should *not* be a factor when it comes to jurisdictional right.<sup>158</sup> While size does affect a community’s administrative capacities, and therefore its position in financial negotiations with federal authorities, it should not affect a First Nation’s inherent right to self-government, she claims.<sup>159</sup>

It took 150 years for colonization to dismantle First Nations’ governments, and it may take a minimum of 150 years to reconstitute them. According to Hanuse, “the only time that size matters” is when examining questions of administrative capacity and the practicalities of who pays for what.<sup>160</sup> Whether Canadian First Nations really have a right to self-government under Section 35 of the Canadian Constitution, the Supreme Court has yet to decide. But in the *Campbell* case, the B.C. Supreme Court decided that a land treaty could define those governance rights.<sup>161</sup> Despite this decision, political progress on indigenous governance and jurisdiction seems to have slowed almost to a halt.

#### VIII. CONCLUSION

Despite the English minority in Quebec and the French minority in the rest of Canada enjoying collective rights, the current government seems to have an ideological aversion to the collective rights of indigenous peoples. As a result, indigenous leaders are now seeking new paths to jurisdiction on their lands.<sup>162</sup>

In Alaska, Congress severed the natural link between tribal authority and tribal lands. When the five littoral states of the Arctic Ocean de-

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157. Geoff Plant, Speech to Aboriginal Law Section of the B.C. Bar Association (Nov. 13, 2003). “Plant was referring to Fetal Alcohol Syndrome (FAS) and the less visible, but still serious, health condition Fetal Alcohol Effect (FAE), both of which result from healthy alcohol consumption by the victim’s mother while pregnant. Both FAS and FAE have plagued Aboriginal communities since colonial times.” PENIKETT, *supra* note 127, at 130.

158. PENIKETT, *supra* note 127, at 130.

159. *Id.*

160. Debra Hanuse, Brainstorming Governance, Panel Discussion at the Morris J. Wosk Centre for Dialogue (July 2, 2003), in Penikett, *supra* note 64, at 195.

161. *Campbell et al. v. British Columbia*, [2000] B.C.S.C. 1123 (Can.).

162. Terry Fenge, *Asserting Sovereignty in the Arctic: Inuit and the Nunavut Land Claims Agreement*, NILLIAJUT: INUIT PERSPECTIVES ON SECURITY, PATRIOTISM AND SOVEREIGNTY 49, 52 (2013) (“It might be that the current Government of Canada’s difficulties with implementing modern treaties and using the NLCA for sovereignty assertion purposes reflects a deeper, ideological aversion to the place of collective rights in Canada.”).

cided to use the U.N. Convention on the Law of the Sea principles to settle offshore boundary disputes, they ignored Inuit usufructuary rights to seabed resources.<sup>163</sup> In disputes about the Beaufort Sea and the Northwest Passages, Canada and the United States have ignored Inuit treaty rights. The Arctic Council has rejected the voices of the Northern Forum, regional governments, and settlers who helped forge the accommodations built into northern North American land claims treaties and self-government agreements. All these count as failures, not of indigenous governments, but of Arctic governance.

This begs the question: For both Arctic and non-Arctic indigenous peoples' jurisdiction, where do they go from here? The future of indigenous government cries out for a national—and international—debate. Absent this debate, the citizens of Canada and the United States may be forced to face far less peaceful confrontations on the ancient question of jurisdiction for Aboriginal American governments.

With over 400 years of colonization, the systematic downgrading of indigenous governments from nations and allies to corporations and municipalities has been a long and painful process. The restoration to a few indigenous governments in Canada of province-like powers is one healing step on the long road to recovery, but progress has stalled and opportunities have been lost.

Unless and until the Supreme Court of Canada makes a definitive ruling on the questions of aboriginal self-government or jurisdiction, political agitation by both chiefs and first citizen movements, such as *Idle No More*, remains the only option. Things could change with a new federal government but that is far from certain. Sadly, the short answer is that little can be done (and nothing is likely to be done) to fix this five-hundred-year-old injustice.

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163. Arctic Ocean Conference, May 27–29, 2008, *The Ilulissat Declaration* (May 28, 2008), available at [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).