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TAKING THE ROAD LESS TRAVELLED:
Indigenous Self-Determination and Participation in Canadian Institutions

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Abstract: Despite ever-increasing pressure for Indigenous self-determination, Canadian society continues to resist its implications. Describing the conflict as a clash of two fundamentally incompatible paradigms, I create a framework that sheds light on the inner workings of paradigmatic political change. With the goal of self-determination clearly at the centre, this article studies whether such a direct constitutional challenge can be supplemented by indirect approaches. Two types of indirect approaches are considered: self-government approaches that (temporarily) accept elements of the existing constitutional paradigm and institutional approaches that see Indigenous peoples (temporarily) working within existing rules and institutions. Rejecting the former outright in the case of Indigenous peoples in Canada, I apply analogous principles from chemistry to help assess the qualities institutional approaches must have to be considered effective political catalysts. In particular, any successful political catalyst must not compromise self-determination's goals and must hasten the process through a series of more attainable intermediate changes. Institutional approaches must also meet a third criterion, which speaks to establishing Indigenous security and trust in the ability of institutional approaches to bring about self-determination. With these criteria in hand, I suggest that introducing guaranteed Indigenous representation and Indigenizing legislatures can work together as political catalysts that hasten self-determination in ways that Indigenous peoples feel secure pursuing.

Keywords: Indigenous peoples; self-determination; legislatures; political change; catalysis

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Introduction[1]

Indigenous peoples[2] continue to demand self-determination based on their prior sovereignty over lands now commonly known as Canada. The recent "Idle No More" movement once again underscores the profound disagreement that arises from the unwillingness of Canadian governments to consider such demands. Initially a movement against the exclusion of Indigenous voices in federal legislation affecting traditional lands and waters, Idle No More expanded as Indigenous peoples once again collectively asserted the importance of a nation-to-nation relationship. The federal government refuses to reconsider the legislation and ignores calls for a nation-to-nation approach. The Canadian public is also divided with 38% supporting the movement (Ipsos Reid 2013). The majority seems to identify with theories that suggest Indigenous sovereignty has been marginalized – if not eliminated entirely – by the state's assertion of sovereignty (Cairns 2000; Flanagan 2000). Finding common ground seems impossible.

The literature contains many hints on how to overcome such a stalemate. A developing global human rights regime has increasingly challenged colonialism over the past half-century (Turpel 1992; Henderson 2004; Banting, Kymlicka 2006). The United Nations General Assembly (2007) recently adopted the *Declaration on the Rights of Indigenous Peoples*, which focuses specifically on furthering Indigenous self-determination. Indigenous scholars focus locally on what Coulthard (2007) calls "self-recognition", emphasizing the importance of individuals reinvigorating traditional knowledge within themselves and their communities before educating others (also Turner 2006; Corntassel 2008; Alfred 2009). Lastly, legal experts believe recent Supreme Court of Canada rulings may contain the missing ingredient (Slattery 2005; Walters 2006; Hoehn 2012). Most of the focus has been on concurrent rulings from 2004 – *Taku River Tlingit First Nation v. British Columbia* and *Haida Nation v. British Columbia* – that show an unprecedented willingness by the Court to pressure the Crown to recognize the full implications of prior Indigenous sovereignty.

Global human rights, Indigenous resurgence, and changing legal views certainly stimulate public dialogue and pressure governments. Yet, the outcome is far from certain. It could be that these approaches simply require more time and attention. It is true that the past half-century has seen them result in greater if still insufficient respect for Indigenous self-determination. My fear, however, is that even if they are the best approaches we might be overlooking complementary approaches that accelerate Indigenous self-determination. With this in mind, I argue that

[1] My deepest thanks go to Michael Murphy, my M.A. supervisor, for patiently discussing many of the ideas presented on the pages that follow. I am grateful for the feedback received from the anonymous reviewer and the editor of *Federal Governance*. Finally, this work would not have been possible without financial support. In particular, I thank the family of William Dow Ferry, in whose name I received a fellowship during my M.A. studies, and the Fonds Wetenschappelijk Onderzoek (Research Foundation Flanders).

[2] The term Indigenous resists colonial definitions rooted in non-Indigenous ideas, laws, and customs (e.g., "Aboriginal", "status Indian", and so on). Alfred and Corntassel (2005: 597) capture the spirit in which I use the term: "*Indigenous peoples* are just that: Indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies and states that have spread out from Europe and other centres of empire. It is this oppositional place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonization by foreign peoples, that fundamentally distinguishes Indigenous peoples from other peoples of the world." As Corntassel (2003) suggests elsewhere, it is best that Indigenous peoples define themselves using a flexible set of criteria related to the abovementioned definition. Lastly, I do not change quotes to reflect my usage out of respect for decisions made by other authors.

greater consideration should be given to the highly contentious idea of Indigenous participation in institutions such as the Canadian Parliament and provincial legislatures. On the surface, this seems counterintuitive to a nation-to-nation relationship, violating the principle of mutual non-interference found in treaties such as the Two Row Wampum (see Williams 2004). It is also not a claim to be made lightly. Indigenous peoples are justifiably sceptical of participating in institutions that strip them of their rights and identities. If that is not enough, others feel it will have little to no impact. These are serious concerns that must inform the discussion. I nevertheless argue that the potential of institutional approaches requires further exploration. I caution against pursuing such approaches without any conditions at all. This paves the way for reforms that could help maximize this potential by acting as much-needed catalysts on the road to self-determination.

Section One – Understanding Paradigmatic Political Change

Paradigmatic political change is never straightforward. As ideas conflict, differences emerge on how to maximize shared goals. This section clarifies the dynamic relationship between *goals* and *approaches* associated with Indigenous self-determination to shed light on the nature and range of approaches available to Indigenous peoples. However, it is first critical to outline the common set of principles associated with self-determination and to defend against those who mistakenly suggest Indigenous peoples do not – or should not – have common goals.

Indigenous Self-determination and the Clash of Paradigms

Does Indigenous diversity makes it difficult to speak of common goals? Cairns (2000: 113) suggests, in the starkest contrast of many, that autonomy makes sense for rural peoples, but "for the growing class of successful urban Aboriginals – many of them intermarried – their way of life and civic expectations may over time come to differ little from their non-Aboriginal neighbours." Similar statements are made using state imposed lenses. The *Constitution Act, 1982* creates the categories 'Indian', 'Inuit', and 'Métis'. The *Indian Act* further categorizes 'Indian' as either status or non-status. The purpose is not to cover the nature, extent, and meaning of Indigenous diversity, though it exists in much the same way that Canadians or Europeans could be described as diverse. It is instead to combat those that, deliberately or not, use diversity to obscure or detract from the most fundamental and universal of Indigenous goals: *self-determination*. "Indigenous peoples seek to regain control over their individual and collective futures and to negotiate relationships with the non-indigenous societies with whom they share a state – relationships predicated on principles of co-equality and mutual consent rather than on paternalism and domination" (Murphy 2008: 199). Though Indigenous diversity impacts how self-determination manifests, it does not diminish its normative force. Though true self-determination still eludes Indigenous peoples, (flawed) forms of self-government affirm the possibility of accommodating both urban and rural circumstances. With respect to the latter, the Nisga'a Final Agreement gives the Nisga'a almost total autonomy over a small piece of their traditional territory (discussed more later). With respect to the former, problematic ideas such as amalgamating nations and establishing urban reserves that deliver services nevertheless show that constituent diversity does not impact the goal but only changes how it is attained (Baron, Garcea 1999; Hawkes 2003). Recent evidence suggests that common identities are even emerging in urban centres that cut across Indigenous diversity (Andersen 2005). Therefore, it could be just as easily said that Indigenous peoples increasingly share goals associated with their collective resistance to colonialism.

Recent legal studies convincingly describe self-determination as engaged in a clash of irreconcilable paradigms (Woo 2011; Hoehn 2012).[3] The *assimilation paradigm* has dominated legal decisions and government policies for centuries. Rooted in principles such as *terra nullius*, European explorers are said to have discovered uninhabited lands when they crossed the Atlantic centuries ago. "They assumed that Indigenous peoples were nomadic and that this foreclosed any claim to sovereignty or a territory" (Hoehn 2012: 86). The assimilation paradigm left state sovereignty unquestioned, sustaining non-Indigenous domination. The assimilation paradigm has become subtler over time. As Young observes generally, "weaker units may be vulnerable to domination by more powerful units not because they directly interfere, but because they determine conditions under which the weaker party is forced to act" (Young 2005: 145). Alfred (2005) sees this newer form of domination as "invisible", where Indigenous existence still contends with a colonial system that continually pressures them to conform. The assimilation paradigm endures.

The emerging *self-determination paradigm* asserts that Indigenous peoples should be treated as free and equal *as peoples* with sovereignty over their unceded traditional territories. This introduces "a gap between theory and nature in the form of a significant 'anomaly'… that casts doubt on basic postulates or doctrines of the [earlier] paradigm" (Hoehn 2012: 83). So what specific 'anomalies' are Indigenous peoples and their supporters introducing into the discussion when they talk about honouring the treaties and using a nation-to-nation approach? The following list covers the fundamental vision associated with self-determination as found in early treaties, the *Report of the Royal Commission on Aboriginal Peoples* (Canada 1996), and the *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations General Assembly 2007):

- Recognition of the *equality of peoples* not understood as individual equality, but equality between national groups.
- Recognition of prior and unceded *Indigenous sovereignty* over traditional territories.
- Establishment of a *nation-to-nation approach*, based on the previous two points.

Maintaining a nation-to-nation relationship leads to a further set of *ethical principles* such as those found within the Iroquois Great Law of Peace: *peace, friendship, and respect* between interdependent yet sovereign nations (Turner 2006). Without these principles leading to respectful *dialogue* that promotes the equal *democratic freedom* of all nations, the legitimacy of the relationship is at stake.

It is far from clear which paradigm will prevail. Hoehn (2012) believes a total legal shift is inevitable, leading to full respect for Indigenous sovereignty under section 35 of the *Constitution Act, 1982*. His prognosis overlooks two additional options that he cites but gives little weight. 'Anomalies' could be absorbed by the existing paradigm or simply ignored. All of these options – replace, absorb, or delay – betray the scientific origin of the paradigm theory Hoehn and others cite. Though I do not question the idea of two competing paradigms, the very nature of

[3] Woo and Hoehn cite the work of Thomas Kuhn (1996), who focuses on dramatic epistemological shifts within the natural sciences (e.g., Newtonian versus Einsteinian explanations of gravity). Kuhn defines a paradigm as "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community" (175).

political conflict makes all three options possible. The clash of paradigms is better understood as a *political* conflict all the way down where their very different positions matter greatly. The dominant and entrenched assimilation paradigm will do what is politically necessary to maintain its grip. Challenges will first be ignored. If this fails, new explanations will be devised (e.g., Flanagan 2000). If this fails, piecemeal replacement of their fundamental tenants reluctantly follows. Even if the two paradigms are normatively incommensurable they will coexist for the foreseeable future. The Nisga'a Final Agreement, the first modern treaty, exhibits the tension arising from coexisting paradigms (Graban 2007). On the one hand, the Nisga'a have ultimate title over a small portion of their traditional lands. Even if the lands were sold, the Nisga'a government would control those lands, including the right to expropriation. On the other hand, this is not clearly recognized by the state, leaving it entirely open to interpretation. Despite reason to be hopeful, self-determination is still far from inevitable.

Direct and Indirect Approaches to Self-Determination

Muldoon (2008: 117) uses two "levels of politics" to bring greater clarity to paradigmatic political clashes:

> In societies divided by antagonistic principles of legitimacy, democracy cannot cordon off its own values and institutions from contestation without opening itself up to claims of arbitrariness and violence. In these situations, politics will need to be played out at two levels: first, within the confines of the democratic game and secondly, at the level of the constitutional principles of the game itself.

Conflict exists at *institutional* and *constitutional* levels based on whether ideas are contested within or against existing democratic institutions. Not surprisingly, existing paradigm supporters prefer to resolve conflict at the first level, their dominance having played a constitutive role in societal institutions and the rules within them. The emerging paradigm speaks directly to the second level, challenging the very legitimacy of existing institutions and rules. The clash of paradigms is therefore best understood as between existing institutions and a new constitutional vision (with its concomitant institutional implications).

The institutional-constitutional nature of paradigmatic conflict defines the *direct* approach to self-determination. By direct, I refer to the primary channel of political conflict and locus for debate aimed at achieving paradigmatic change. By rejecting the legitimacy of existing institutions and their dominance, supporters of the new paradigm engage in a battle of ideas targeted at bringing others to their cause. The direct approach unsurprisingly uses the language of justice. Protests, hunger strikes, canvassing, social media campaigns, and many other means become the primary avenues for asserting alternative constitutional principles, rules, and institutions. In this battle, Turner (2006: 96) feels traditional knowledge must guide "word warriors who engage European philosophy for the purpose of defending indigenous rights, sovereignty, and nationhood." Word warriors require knowledge and skills to convince Indigenous and non-Indigenous alike to embrace the new paradigm. At its extreme, the tremendous differences lead to violence. Most Canadians know about the 1990 Oka Crisis wherein Kanien'kehaka (Mohawk) warriors clashed with the police and military. It is just one of many examples of violence in recent memory (see Turpel 1992; Ladner 2009). Supporters of the existing paradigm back up their ideas using the coercive power of the state when the threat becomes unbearable. The recent Idle No More protests, round dances, and other demonstrations fall

under the direct approach. On 4 December 2012, Indigenous leaders, carrying a wampum belt reminding the federal government of their treaty relationship, were prevented by police from entering the House of Commons. Despite its ability to draw attention, the direct approach has had limited results. For instance, the Burnt Church Crisis between Mi'kmaq and non-Indigenous lobster fishers resulted in legal action (*R. v. Marshall* 1999a, 1999b) that saw the government begrudgingly shift licenses from the latter to the former (Bedford 2010). The Oka Conflict led to the establishment of the Royal Commission on Aboriginal Peoples, which after four years of research and consultation in hundreds of Indigenous communities resulted in a five-volume *Report* (Canada 1996) that was quickly ignored.

Indirect approaches receive less attention. That is because they involve setting one of two dimensions of the direct approach aside (but never both); they either accept elements of the existing paradigm's constitutional principles or work within existing institutions and rules. I call the former the *self-government approach* and the latter the *institutional approach*. Indirect approaches always involve options that could easily be considered inconsistent with the new paradigm's main tenants. Purists are usually suspicious of indirect approaches, labeling them unnecessary, incomplete, colonial, and profoundly unjust compromises that jeopardize the ends being sought (e.g., Monture-Angus 1998; Corntassel 2008; Alfred 2009). The path and the goal always go hand-in-hand and must never be divorced. They view indirect approaches as illegitimate and ineffective, and only deepening feelings of alienation. They are *illegitimate* because they violate the fundamental principle of non-interference found in treaties such as the Two Row Wampum. Self-government maintains non-Indigenous interference, while shared participation is Indigenous interference. Many worry that institutional approaches legitimize fundamentally colonial institutions and their past and present assimilationist policies. Purists also generally believe Indigenous leaders who pursue indirect approaches are *ineffective* "sell-outs" who support policies that ultimately undermine the dreams of Indigenous peoples (Caillou 1997). Self-government, they quickly point out, domesticates or "privatizes" political conflict, removing it from the public sphere and making it more difficult to hold the state accountable (MacDonald 2011). They similarly feel that Indigenous electoral participation distracts and silences Indigenous peoples while creating an illusion of legislative cooperation and consensus. Purists therefore prefer to avoid the risk of co-optation altogether.

Indirect approaches are also potentially *alienating*. Indigenous peoples do not identify with them on principle (illegitimate), because they have failed to deliver (ineffective), or both. Throughout Canada's troubling colonial history, legislative institutions played a central role in stripping Indigenous peoples of their rights and attacking their identities (Johnson 1993; Monture-Angus 1998). Even expanding Indigenous enfranchisement throughout the 1960s had an alienating effect. Enfranchisement initially gave many Indigenous peoples some hope. Studies suggest initial electoral participation rates in some areas compared favourably with the wider community. However, enthusiasm quickly waned (Bedford, Pobihushchy 1995; Kinnear 2003). Representatives overwhelmingly cater to the interests of non-Indigenous majorities upon which their electoral success depends. Even worse, participation in "colonial ridings" undermines the very idea of collective Indigenous rights, reinforcing the idea that "the individual is everything" (Henderson 1994: 320). Each time Indigenous peoples misplace hope in institutional approaches only serves to deepen feelings of alienation. Self-government approaches can easily have the same alienating effect. Far from encouraging treaties, the modern British Columbia Treaty Process, now almost twenty years old, has had limited success. Signed

agreements – with the Nisga'a, Tsawwassen, and Maa-nulth First Nations – do little to encourage others to follow suit. In fact, legal avenues have proven more effective, with recent rulings such as *Tsilqot'in Nation v. British Columbia* (2007) highlighting the fundamental lack of respect for Indigenous interests within the treaty process (Hoehn 2012). For purists, alienation simply reflects the inappropriateness and insincerity of indirect approaches. Yet, if indirect approaches exist that overcome the first two challenges, the alienation challenge must still be overcome. Otherwise, they would remain pathways to self-determination tragically disguised as traps Indigenous peoples have seen countless times before.

At this point, I abandon further consideration of the self-government approach. I ultimately agree with those who feel that it undercuts self-determination altogether. Others have already convincingly made this point, so I only offer a summary justification here. Even the most substantial agreements, such as the Nisga'a Final Agreement (1999), fall dramatically short of self-determination. Alfred (2001: 57) makes it clear that the Agreement – despite transfers totaling over two hundred million dollars – fails to prevent assimilation as a lack of economic opportunities means "Nisga'a people will find themselves having to sell off land, mineral, fish and timber rights to fund their government and social programs." In exchange for funding and exclusive jurisdiction over only eight percent of their traditional territory, they *voluntarily* and *permanently* (as can be said) surrendered the vast majority of their lands and relinquished tax-exemption status under the *Indian Act* (see Corntassel 2008; Tully 2008). Most of all, self-government neither shifts nor expands the political conflict. It instead compromises the goal of self-determination at the same time as it extinguishes the political conflict. Doubting that any other paths to self-determination exist, Papillon (2012: 306) feels that "instead of reinforcing tribal sovereignty, [self-government] becomes a form of assimilation to the institutional, political, and cultural framework established by the dominant society." Self-government should thus be considered an *inhibitive* indirect approach to self-determination. On the other hand, and taking up Papillon's challenge, I believe institutional approaches can instead be *catalytic*.

Institutional Approaches & The Challenges of Illegitimacy, Ineffectiveness, and Alienation.

Institutional approaches that support self-determination must clearly promote its aims, act as a catalyst, and overcome feelings of alienation. Failing to meet all three falls short in one way or another. This part begins by introducing the compatibility thesis, which suggests that institutional approaches are not only a legitimate but also a necessary part of achieving Indigenous self-determination. Endorsing its findings, the remainder creates three tests that determine whether any given institutional approach furthers self-determination. Drawing on analogous principles of chemical change, the first two tests measure whether an approach acts as a political catalyst. The third relates to the ability of institutional reforms to overcome the alienation challenge.

Growing support exists for the *compatibility thesis*, which endorses self-determination understood as full autonomy but also acknowledges empirical factors that make institutional approaches legitimate and necessary (Young 2000, 2005; Williams 2004). "Complementists" believe that unavoidable interdependence necessitates shared institutions where Indigenous and non-Indigenous people can resolve conflicts and solve common problems as equal peoples. According to Young (2005: 146), "the prima facie principle of non-interference in the internal jurisdiction of a self-determining unit may be suspended, then, in order that the common decisions of units be enacted to prevent domination by one of the units of another." Overlap

means that the earlier ethical principles of peace, friendship, and respect between free and equal peoples must also guide shared civic life within common institutions. This way shared institutions help maintain a nation-to-nation relationship given a situation of unavoidable interdependence. This is not to suggest purists are wrong. Complementists and purists are both right at the crucial level of engaging in fruitful political conflict of the most fundamental kind. Purists continually and uncompromisingly reinforce the goal, bringing people to the cause and strengthening their spirits. Complementists focus more closely on the rough political waters that inevitably come with such an arduous journey.[4] I therefore suggest that institutional approaches legitimately lend an often-needed hand. Granted that Indigenous involvement in institutional approaches is legitimate, it must still address the ineffectiveness and alienation challenges.
Academics in many different fields commonly echo the analogous relationship between effective chemical and political change by invoking the idea of catalysis. Writing nearly two centuries ago, Swedish chemist Berzelius (1836) first used the term to describe his paradoxical findings. He found that adding a foreign substance ("catalyst") hastened reactions by its mere presence. Modern theories now suggest that the catalyst gets involved in a unique way that accelerates the reaction without changing the result (Timberlake 2011). Catalysts increase the reaction rate between substances by reducing the overall activation energy needed. Contrary to Berzelius, catalysts facilitate a chain of intermediate reactions that all have lower activation energies. Simply put, catalysts create an *alternative pathway*. Does it make sense to speak of institutional approaches as *political* catalysts? If so, what criteria determine whether an approach is a catalyst or – as suggested earlier of self-government – an inhibitor. To be a catalyst, institutional approaches should pass two tests: the *neutrality test* and the *reduced energy test*. If by getting involved in the reaction, a political catalyst compromises self-determination then it fails the neutrality test. Passing the reduced energy test depends on whether it creates an easier pathway to the goal. For instance, institutional approaches might provide new avenues for exerting political pressure. Introducing new approaches always alters the complex political chain of events in one way or another. However, a successful catalyst must do so in a way that makes it easier to convince people and society generally to adopt the change being sought.

Institutional approaches that pass the first two tests serve as complementary pathways for change. Indigenous peoples must still exert their political will, which means overcoming the alienation challenge. Though this is typically not a problem for individuals or groups who deliberately seek greater societal influence, it poses a problem when feelings of alienation exist between people and the political institutions affecting them. Therefore, for effective political catalysts to work, they must be secure from Indigenous perspectives. I call this the *security test*. Overcoming feelings of alienation often means "legal and political guarantees will need to be put in place such that sub-state nations will feel secure that their rights of citizenship and self-

[4] I am reminded of what Lord Acton (1862: 3) wrote a century and a half ago: "The pursuit of a remote and ideal object, which captivates the imagination by its splendour and the reason by its simplicity, evokes an energy which would not be inspired by a rational, possible end, limited by many antagonistic claims, and confined to what is reasonable, practicable, and just. One excess or exaggeration is the corrective of the other, and error promotes truth, where the masses are concerned, by counterbalancing a contrary error. … Theories of this kind are just, inasmuch as they are provoked by definite ascertained evils, and undertake their removal. They are useful in opposition, as a warning or a threat, to modify existing things, and keep awake the consciousness of wrong. They cannot serve as a basis for the reconstruction of civil society, as medicine cannot serve for food; but they may influence it with advantage, because they point out the direction, though not the measure, in which reform is needed. They oppose an order of things which is the result of a selfish and violent abuse of power by the ruling classes, and of artificial restriction on the natural progress of the world, destitute of an ideal element or a moral purpose."

determination are not subject to arbitrary interference or override by the larger and more powerful national communities with whom they coexist" (Harty, Murphy 2005: 99). I am also persuaded by arguments that suggest institutional design can play a key role in overcoming relationships of domination, coercing and realigning the self-interest of all peoples towards the goals of the self-determination paradigm (e.g., Weinstock 2010).

Of course, political change is not chemical change. Unlike many chemical reactions that are difficult to reverse, politics always remains and ongoing struggle between competing paradigms – a fact some embrace. For Mouffe (2000: 15), "what is specific and valuable about modern liberal democracy is that, when properly understood, it creates a space in which this confrontation is kept open, power relations are always being put into question and no victory can be final." Moreover, in the messy game of politics, some political catalysts must continually be applied (e.g., institutionalized) to fight ongoing and opposite pressures.

Section Two – Shared Institutions and Self-Determination

Though complementists highlight the importance of shared institutional approaches, they stop short of endorsing specific approaches. Williams (2004) sees merit in a House of First Peoples (Canada 1996), Senate representation (the 1992 Charlottetown Accord), and legislative representation (Canada 1991), but concludes that, at the level of political strategy, they could undermine self-determination. Murphy (2008) similarly sees advantages, suggesting that even Indigenous participation in legislatures currently constituted is a useful, if still an imperfect, political strategy. Using the three tests, this section assesses whether frequently mentioned reforms act as catalysts that also overcome Indigenous feelings of alienation. I first evaluate the institutional implications within popular Indigenous proposals: treaty federalism and RCAP. I then consider two additional approaches: guaranteed legislative representation and Indigenization.

Treaty Federalism

Treaty federalism stresses Crown respect for the prominent role treaties play in defining a nation-to-nation relationship. Despite what some believe, treaties did not see Indigenous peoples surrender their sovereignty but affirm a relationship between sovereign peoples. In a seminal contribution, Henderson (1994: 326) states,

> Treaty federalism was and still is an existing constitutional concept and mechanism to allow Aboriginal peoples to take over their affairs and destiny. It is consistent with their constitutional right to think and freely express Aboriginal conscience about their relations with both the imperial Crown and Canada. As a constitutional standard of Canada, treaty federalism … focuses on the legal documents that interlinked to create Canada rather than on the fate of being born into a race or a particular culture. It is a concept and mechanism that is essential for the elimination of the adverse effects of colonialism and systemic racism in the modern constitutional debate between colonial and Aboriginal peoples about the meaning of Canada.

Advocates argue that the state must act in accordance with the *Constitution Act, 1982*, section 35, which affirms this treaty relationship through its respect for the inherent rights of Indigenous peoples (Henderson 1994; Ladner 1997, 2003b). Treaty federalism seeks a separate, third

order of government linked to Canada's provincial and federal levels that is "constitutionally recognized not constitutionally subordinate" (Ladner 2006: 16). Henderson suggests that treaty federalism has implications for legislative participation based on what he calls "democratic principles" – a term he uses to highlight support for the compatibility thesis. Pointing out that the few Indigenous representatives elected under the current system represent 'colonial ridings', he demands that Indigenous interests inform shared political debate through "Treaty Delegates" representing Indigenous ridings. Each treaty would have one such delegate in the House of Commons who would promote their inherent and treaty rights. Where treaties do not exist, national communities would define boundaries.

Treaty federalism looks more like a direct approach with an institutional corollary. Given that its supporters primarily call on Canadians to do the right thing by their own constitution, the idea of Treaty Delegates seems to follow largely based on support for the compatibility thesis. It therefore passes the neutrality test. As for the reduced energy test, its impact is negligible. Because it deviates little from the direct approach, it changes the pathway little. If priority were placed on implementing first its institutional elements, it would look more like the guaranteed representation approach discussed later. Overall, treaty federalism, noting its institutional features, remains a direct approach fully aligned with the goal of self-determination. It helps by convincing Canadians of the importance of recognizing treaties and Indigenous self-determination as a result.

Report from the Royal Commission on Aboriginal Peoples (RCAP)

Based on four years of research, community consultations, and meetings, resulting in a five-volume *Report* with over 4,000 pages, RCAP's constitutional vision aligns with the self-determination paradigm. Like treaty federalism, it outlines a nation-to-nation relationship informed by existing treaties, constitutionally entrenching a third order of government (Canada 1996, vol. 2). Yet, its indirect elements provide a different avenue. The *Report* suggests a third order of government requires a third chamber of Parliament – a House of First Peoples – that gives Indigenous peoples a permanent voice in "shared-rule decisions". Most of the sixty to eighty nations would have one representative, while some would have two. Learning from Sámi Parliaments that "simply lack clout", the *Report* states that the House "should have real power … to initiate legislation and to require a majority vote on matters crucial to the lives of Aboriginal peoples. This legislation would be referred to the House of Commons for mandatory debate and voting" (Canada 1996, vol. 2). Though the final vision did not make it into the official recommendations, an intermediate step did that introduced the idea of an "Aboriginal parliament" established by the House of Commons. Only temporary, it would advise the House of Commons and Senate while public consultations could occur to discuss the composition and constitutional establishment of a House of First Peoples.

RCAP follows the same pattern as treaty federalism, with a slight twist. Like treaty federalism, RCAP promotes institutions that easily align with the self-determination paradigm. It, therefore, also passes the neutrality test. Would greater emphasis on the two-staged approach to a House of First Peoples not only lead to its own establishment, but the establishment of RCAP's constitutional vision? It seems reasonable to suggest that, under the right conditions, Parliament would be willing to pass legislation establishing an Aboriginal parliament. At this stage an Aboriginal parliament would only have the power to advise the other two chambers. It therefore is unclear how an Aboriginal parliament would differ from the Assembly of First Nations

(AFN) – the main pan-Canadian Indigenous organization that provides advice to Parliament but lacks any real clout. If the Aboriginal parliament somehow receives more attention than the AFN, it could reduce the energy required to achieve self-determination by demanding that the Canadian government follow through with the next steps. If the next steps are followed, then perhaps the "real power" of the House of First Peoples could entrench the rest of RCAP's recommendations and eventually self-determination. The institutional approach sections of RCAP represent a political catalyst on the grounds that it passes the reduced energy test. It is nevertheless weak given that it requires not one but two significant and even unlikely leaps. It does score well against the security test, at least initially. If an Aboriginal parliament is introduced and consultations occur, feelings of alienation could quickly weaken. However, any major hurdles would dramatically reverse this trend. On the whole, it would be a stretch to conquer all of these challenges.

Guaranteed Legislative Representation

In recent decades, the idea of guaranteed legislative representation – better known as Aboriginal Electoral Districts (AEDs) – emerged and failed at the national level and in seven provinces (Niemczak 1994). Most proposals considered guaranteed seats proportional to the percentage of self-identifying Indigenous peoples (Canada 1991; Milen 1991; Gibbins 1991; Niemczak 1994; Schouls 1996; Knight 2001). Proportionality means that 3.6% (or about eleven) of House of Common seats would become AEDs given that the most recent census shows 3.6% of people self-identify as Indigenous (Statistics Canada 2008). Such logic easily extends to the provinces. Indigenous peoples could also choose to vote in standard electoral districts, but not in both types for any given election. Therefore, the number of AEDs rises if more people of Indigenous ancestry identify with Indigenous electoral rolls.

Some feel that even Indigenous representatives of "colonial ridings'" can act as a political catalyst with little risk of doing harm (Knight 2001; Murphy 2008). As Knight (2001: 1081) states, that Indigenous peoples "may be outvoted on a given issue is not a reason to oppose guaranteed representation, because the likelihood remains that on many issues increased representation can make a positive difference." One need only consider the story of Elijah Harper, an Indigenous member of the Manitoba legislature, who ignited a movement in the summer of 1990 that stopped the Meech Lake Accord because Indigenous interests were ignored in constitutional discussions.

> While Elijah Harper utilized all procedural mechanisms at his disposal in the Manitoba legislature to block the passage of the House resolution in support of the Accord, Aboriginal people in Manitoba signed up in droves for legislative committee appearances. … Harper generated and consolidated support like never before. Standing with Elijah were all the Chiefs of Manitoba, Aboriginal women's organizations, elders, youth, and countless other First Nations peoples outside of Manitoba (Turpel, Monture 1990: 345-346).

The Harper story is certainly exceptional. During Idle No More, the government included several Indigenous MPs who sat silently while Indigenous self-determination was eroded. Several features of parliamentary systems limit the ability of existing Indigenous representatives to promote Indigenous interests. For instance, caucus and party solidarity allows for private discussion but everyone is expected to support the collective decision publicly. One prominent

Māori representative from New Zealand stated that he constantly felt torn between Māori interests and party politics (Fleras 1991). Indigenous representatives in Canada also face this challenge (Gibbins 1991). I therefore remain sceptical of Indigenous participation without introducing AEDs that make it easier to pass the three tests.

AEDs pass the neutrality test to the extent that Indigenous peoples participate while resisting "the allure of co-optation" (Tully 2008: 287). Though purists reject institutional participation, no clear arguments show that AEDs inevitably lead to co-optation. This is not to deny that "not everyone is capable of active resistance" and that "co-operation with colonialism … is most certainly wrong, especially where leaders are concerned" (Alfred 2009: 97). It is instead to suggest that the problem exists globally wherever Indigenous leaders assert themselves. What matters most, therefore, is *how* traditional knowledge is introduced into shared institutions (Turner 2006). Indigenous representatives could use a variety of strategies, such as forming their own parties, walking out, or simply refusing to take seats until certain conditions are met. Perhaps Indigenous peoples should push for AEDs only when they collectively feel ready to deal with its pressures. Yet, even this seems to trade smaller risks for the larger risks associated with missed opportunities to introduce representatives who can assert self-determination. Moreover, evidence from New Zealand suggests that AEDs reinforce "self-recognition" as representatives successfully assert Māori interests and traditions. McLeay (1980: 61) states, "through the provision of reserved seats in New Zealand, Māori have demonstrated their ability as legislators." AEDs run a much smaller risk than self-government approaches that demand the voluntary and permanent co-optation of Indigenous interests. AEDs, on the other hand, can exist without forcing Indigenous peoples to agree with government policies. Even a proportionate number of AEDs could lead to Indigenous influence within government. On balance they help – albeit weakly – promote "the principle that governments must never fall permanently into the hands of a faction, however broadly defined" (Henderson 1994: 322). Ultimately, Indigenous peoples need to assess this risk of participating for themselves, keeping in mind that institutional approaches complement, and even depend on, the always more important direct approaches.

AEDs pass the reduced energy test on the grounds that Canadians have already considered the idea and that it has the potential of promoting self-determination despite limitations. I highlight this by refuting critics who suggest that, first, a small number of AEDs will have little impact on shared decisions and, second, they will allow non-Indigenous representatives to ignore Indigenous interests. Georges Erasmus, a long-standing Indigenous leader, raised the first concern when he expressed scepticism that even a dozen representatives could have an impact within the House of Commons (Malloy, White 1997). Others worry that AEDs instill the notion that non-Indigenous representatives can ignore Indigenous interests (e.g., Phillips 1995; Schouls 1996; Mansbridge 2000; Knight 2001). A Royal Commission in New Zealand went so far as to recommend the abolition of Māori seats largely based on this concern (Iorns 2003). On the surface, this causes concern because Indigenous issues might always be out-voted. I nevertheless support the view that AEDs can only improve matters as nearly all representatives already ignore Indigenous interests without electoral consequences.

Critics overstate the degree that representatives solely promote their constituents' interests. The existence of political parties ensures that those who govern represent a broad spectrum of different regional, ethno-cultural, national, and ideological interests. Prime Ministers normally

appoint cabinet members from across many such differences. With more Indigenous members to choose from, AEDs can only increase this likelihood. Opposition parties, too, promote the interests of constituencies where they lost because they realize that to form government they need to win additional seats. Governments with Indigenous representatives will have an equal interest in maintaining such support. All parties who run candidates in AEDs need to promote Indigenous interests in their platforms to garner support in those ridings. Even Indigenous representatives who sit as independents or form their own parties can vote *en bloc* to try to persuade governments to consider their interests. This could prove particularly effective when the issue concerns many Indigenous nations or in a minority government situation where Indigenous representatives hold the balance of power – a situation made more likely with AEDs. On balance, concentrating Indigenous votes empowers Indigenous representatives to assert their interests and resist co-optation. It also makes it more difficult for non-Indigenous representatives and mainstream political parties to ignore them.

Many of these dynamics have played out in New Zealand, highlighting how AEDs carve out a political space where Māori more effectively push for self-determination. Even though AEDs have not always protected Māori interests since their creation over a century ago, they helped during years where Indigenous people in Canada faced colonialism's full force. As early as 1900, Māori representatives successfully pushed for local control over health care and social matters (Sullivan 2003). Māori cabinet members were also able to protect Indigenous lands and officially enshrine their language in shared institutions in the 1970s and 1980s. Moreover, the shift towards a new electoral system (mixed member proportional) made it so all political parties began seriously competing for Māori votes. Perpetual minority governments now give the Māori even greater influence, leading to resource transfers and land settlements. Experts believe it is possible to say that "Māori electorates have been a major force in determining which political party governs" (Sullivan 2004: 127), "it is a position that most minorities in similar decolonial situations can only dream about" (Maaka, Fleras 2005: 134), and it is the "dawning of Māori political might" (Durie 1998: 102).[5] AEDs in Canada would struggle to have the same impact, particularly given the first-past-the-post electoral system and the proportionately smaller number of guaranteed seats. Parallels can nevertheless be drawn that suggest they could still spur on other successes based on pressures within and outside legislatures, especially when Indigenous representatives hold the balance of power.

Can AEDs pass the security test? Many reject participation because they feel it supports institutions that have historically marginalised them. According to some, AEDs make participation more palatable by allowing Indigenous peoples to participate as members of unique communities with separate identities (Ladner 2003a). They help "dispel the impression that indigenous peoples are seeking assimilation into dominant institutions" (Turpel 1992: 600). Participation through AEDs can therefore feel more secure, allowing Indigenous representatives, when necessary, to distance themselves from the decisions and views of non-Indigenous representatives. Guaranteed representation also strengthens the symbolic aims of Indigenous peoples. Many prominent Indigenous scholars feel that AEDs positively reinforce Indigenous nationhood within Canadian institutions (Turpel 1992; Henderson 1994; Ladner 2003a). They cement the permanent place of Indigenous peoples showing "the public at large the legitimacy of a cooperative and bicultural approach to governance" (Murphy 2008: 212).

[5] This discussion is largely informed by Murphy (2008).

Again, New Zealand's extensive experience suggests AEDs have a positive impact in this regard (McLeay 1980; Fleras 1985, 1991; Iorns 2003). This runs counter to the assimilationist tendency to exclude Indigenous peoples from being heard in shared institutions. Consequently, Māori increasingly vote in Māori electoral districts. The number of people on the Māori electoral rolls doubled from 40% to 80% between 1990 and 2006 (see Sullivan 2003; Fitzgerald *et al.* 2007). Māori increasingly identify with guaranteed representation despite participating in shared legislatures being a messy affair.

Critics also suggest that a limited number of AEDs cannot accommodate Indigenous diversity. Indigenous peoples would resist the homogenizing effect this would have on them. As Schouls (1996: 742) argues, "Aboriginal claims to differentiated citizenship and the commitment of AEDs to the principle of electoral equality are in the end largely incompatible objectives." Similarly, Ladner (2001, 2003b) feels it is unjust to expect two or more nations to participate within a single AED as it goes against traditions, identities, and wishes. Both correctly highlight the tension between representative democracy and constituent diversity. Advocates of treaty federalism, as seen earlier, try to overcome this challenge by proposing seats along treaty lines. However, this mostly shifts, not lessens, the tension. Many treaty groups have significant internal diversity and divergent communities of interest. The populations falling under numbered treaties also vary, some with small populations that struggle to justify a single AED (Canada 2004). Treaty-based proposals also exclude many Indigenous peoples, such as non-treaty and off-reserve populations. Yet, those who argue that AEDs should mirror Indigenous diversity simply expect too much (Williams 2004; Murphy 2008). Even existing representatives find it difficult to represent social, cultural, religious, gender, class, and regional diversity within their constituencies. Knight (2001: 1087) summarises converging views when he says that we can only balance the need to represent all groups "with the knowledge that at some point mirror representation is impossible to achieve." Lastly, we should not forget that Indigenous peoples share many of the symbolic goals that AEDs advance such as overcoming colonialism and achieving Indigenous self-determination. Because common feelings of oppression run through most communities, it should be easier to deal with Indigenous representatives even if they come from another nation. Moreover, successful representatives generally champion issues affecting diverse constituents. The future electoral success of individual Indigenous representatives similarly depends in part on their willingness to represent localised issues such as specific land claims, environmental concerns, or economic disparity.

On the whole, I am not prepared to make a general claim that Indigenous representation always benefits Indigenous peoples. Indigenous peoples themselves must assess the extent that AEDs complement their vision of self-determination. It nevertheless seems that AEDs can act as a secure political catalyst, particularly if they make it easier for Indigenous representatives to compete within legislative institutions. Though the New Zealand case both provides reason for optimism and evidence that AEDs do not quickly lead to full self-determination, AEDs have played a catalytic role in furthering Indigenous interests. I am more concerned that AEDs, on their own, fail to convince the majority of Indigenous people to participate even if it is an effective political catalyst. The next section considers a complementary institutional approach: Indigenization.

Indigenization

Indigenization is a broad category of institutional approaches that fundamentally speak to the alienation challenge. State symbols play an important role in forming and maintaining public identification with institutions, signaling boundaries between those who belong and those who do not (Armstrong 1982). Public symbols are not fixed, and attitudes towards them vary both across and within national groups. To overcome feelings of alienation, Indigenous peoples require "consistency between their private identities and the symbolic contents upheld by public authorities, embedded in the societal institutions, and celebrated in public events. Otherwise, Aboriginal individuals feel like social strangers; they feel that the society is not *their* society" (Breton 1984: 125-126, emphasis in original). Leaders in Northern Ireland understood this when signing the 1998 Belfast agreement, which reads: "All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division" (Northern Ireland Office 1998). Indigenization aims to help those with strong Indigenous identities feel more comfortable within shared institutions (Hunter 2003). Instead of theorizing about the full range of possibilities, I focus on two examples that highlight its potential for encouraging Indigenous participation.

Our parliamentary system is perhaps more flexible than many believe. White (1991, 2001) shows particular interest in how the Northwest Territories and Nunavut promote consensus government alongside the Westminster model in what he calls "a non-partisan Westminster cabinet-parliamentary regime." Although the lack of political parties represents a significant difference that many Canadians would likely resist, it promotes key aspects of Indigenous governance while simultaneously preserving most characteristics of the Westminster model. White believes the ability to hybridize institutions is an important factor in explaining the high levels of Indigenous participation. High Inuit participation rates in Nunavut's institutions does not stem solely from their numerical dominance, but also from "a government operating according to Inuit norms and culture" (White 2001: 93). How we can replicate lessons from Canada's Arctic elsewhere in the country remains an open question. Benefits might also come from modifying the decoration typically found in shared institutions, or establishing question periods dedicated to Indigenous issues. Indigenization need not entail radical institutional transformation to promote greater respect for Indigenous peoples.

Similar efforts in British Columbia show some willingness to change in this regard. In 2000, Indigenous leaders informed the government of four offensive murals found in the Legislative Assembly of British Columbia's prominent lower rotunda. They wrote, "these paintings of bare-breasted Aboriginal women and of Aboriginal people in subservient positions are … highly offensive, demeaning and degrading to First Nations people" (British Columbia 2001: 7). In response, the Speaker appointed an independent panel to examine the issue. The panel recommended the removal and relocation of the murals. In 2007, the Legislature passed a motion supporting the recommendation. Considering the psychological barrier posed by the murals, Premier Campbell (2007: 7107-7108) stated that,

> If literally tens of thousands of British Columbians feel insulted and hurt by the depictions [we must remove them]. … We want this place to be inclusive. We want First Nations to be comfortable. We want young First Nations kids who

> walk into that rotunda to say to themselves: 'Some day that could be my place. Some day I could sit in that chamber. I am not someone who is apart.

One opposition member linked the total absence of Indigenous representatives directly to the symbolic barriers present throughout the current system of governance (Krog 2007: 7118-7119). Members of both parties clearly recognised the need for Indigenous peoples to feel that the Legislature does not denigrate (and perhaps should positively reflect) their values and interests. Provincial Indigenous leaders welcomed the decision, stating that it represented a positive step towards resolving broader issues within common political institutions.

As a standalone institutional approach, Indigenization fails as a political catalyst and only provides minimal and perhaps even temporary security. As Alfred (2009: 51) states:

> Symbols are crucially important, but they must not be confused with substance. When terminology, costume, and protocol are all that change, while unjust power relationships and colonized attitudes remain untouched, such "reform" becomes nothing more than a politically correct smokescreen obscuring the fact that no real progress is being made toward realizing traditionalist goals.

Though Canadians are willing to recognize Indigenous cultures, they ignore how symbols most often act as a "smokescreen" for an agenda that falls far short of Indigenous self-determination. Tokenistic forms of Indigenization can pass the neutrality test to the same extent as AEDs, though they struggle with the reduced energy test. Indigenizing institutions could, at best, gradually sensitize Canadians to Indigenous interests and values – in which case it would be a weak catalyst. As far as the security test goes, it might offer some initial security but could ultimately deepen feelings of alienation if results do not follow. Yet, this could be too narrow an interpretation. First, some forms of Indigenization inherently have positive consequences that, though they fall short, can have small catalytic effects. One could argue that Harper "Indigenized" Canada to the importance of including Indigenous peoples in all future constitutional dialogues. Similarly, the removal of murals reminds the majority of the need to be more sensitive to forms of racism that they often ignore or miss. The same could be said for introducing a consensus approach, which is far from being purely symbolic if it can lead to new forms of decision-making. Second, and more to the point, Indigenization could work in tandem with the above examples generally and AEDs specifically. One of the major challenges of AEDs is that they appear as another trap despite its catalytic potential. Indigenization, on the other hand, on its own lacks promise despite its ability to overcome Indigenous feelings of alienation. So far, Canadian governments have promoted the later while neglecting the former. If instead taken together, the two could empower Indigenous peoples to Indigenize the relationship in ways that both match their traditions and reflect their interests. In practice, this would require a series of incremental steps that depend first on AEDs promoting Indigenous interests. It nevertheless seems to offer the potential of reversing the momentum and showing greater respect for Indigenous self-determination, a nation-to-nation vision, and its ethical principles.

Conclusion

Achieving Indigenous self-determination requires selecting from a very difficult list of political approaches that challenge supporters of the assimilation paradigm to either justify or reconsider

their deeply held colonial views. Though direct approaches offer the clearest and most effective route to self-determination, I have tried to develop a framework that considers whether indirect approaches can act as political catalysts that hasten its realization. To evaluate the potential of indirect approaches, I described two features of a successful political catalyst: it must not compromise self-determination and it must provide an easier pathway to self-determination. Moreover, successful political catalysts must overcome Indigenous feelings of alienation. Ruling out self-government approaches because they compromise self-determination, I studied four institutional approaches. The two institutional approaches preferred by Indigenous peoples stray little from direct approaches and represent weak catalysts at best. On the other hand, introducing guaranteed representatives and Indigenization within Canadian legislatures, taken together, may have catalytic potential that could also overcome Indigenous alienation.

Yet, indirect approaches – and institutional approaches in particular – by their very nature require Indigenous peoples to open themselves up to greater political conflict with colonial institutions, ideas, and people. Though comparison with New Zealand showed that this could promote self-determination, it remains conditional on Indigenous peoples being ready to engage in legislative politics. While I believe the risk to self-determination is greater when not participating, I also recognize that having Indigenous leaders who can represent self-determination without being co-opted is a priority. But even this might be shortsighted given that institutional approaches have the advantage of being fluid and open-ended, always reflecting and responding to the relationships between those present. Indigenous peoples demand self-determination, and a relationship defined by respectful dialogue, friendship, and equality. Having Indigenous representatives with Indigenous traditions and self-determination at heart can reinforce the multinational composition of the land and the rightful place of its First Peoples.

Participating in Canadian legislatures represents the beginning of an institutional quest, not the end of one. Even with the aforementioned reforms, participation in shared Canadian institutions will always have significant risks, limits, and challenges. Non-Indigenous dominance might still drown out Indigenous voices, although introducing guaranteed Indigenous representatives should make this more difficult. AEDs and Indigenization also struggle to represent Indigenous diversity in an effective way. Some argue that they have a strong homogenizing effect on many national communities. This limit seems difficult to overcome, though in the case of AEDs we cannot reasonably expect representatives to mirror such diversity. Nevertheless, AEDs can put pressure on Indigenous representatives, political parties, and Canadian institutions to respond to diverse interests and identities. At the same time, we must eradicate those symbols of our colonial history so that Indigenous peoples feel fully accepted and reflected. Addressing many of these concerns certainly requires further incremental reforms that might ultimately make Canada's legislative institutions look very different than the ones we recognize. They may start looking more like the ones we should have had all along.

Sadly, feelings of alienation can be so strong that even the reforms mentioned here will not achieve the healing required for some individuals and communities. Many may continue to seek only autonomy, knowing its serious limits and tacitly allowing Canadian governments to affect them without their direct involvement. Such sacrifices seem unnecessary. Solutions exist that reflect the complex interdependence and respect strongly (and often exclusively) held Indigenous identities. Finding ways of reforming Canadian institutions to promote Indigenous

self-determination and encourage feelings of security is not easy. My hope is that I have shown that there are roads less travelled that might take us there.

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