

Aboriginal Self-Government, Extinguishment of Title and the Canadian State: Effectively Removing the "Other"?

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As Canada negotiates "self-government," it similarly endeavours to eliminate the "Other" through the requisite surrender of Aboriginal title. This paper considers the surrender of Aboriginal title as a valid means of reconciling Aboriginal people's relationship with the Canadian state. Does this policy effectively eliminate them as "Other"? This question is investigated within the framework of the literature that considers the position of Aboriginal peoples as "Other." Moreover, this work provides a critical analysis of the policy of extinguishment. Finally, this paper reflects upon the motivation driving self-government negotiations and considers the consequences of self-government in terms of remedying the "self-other" relationship.

Alors que le Canada négocie "l'autonomie gouvernementale," il entreprend dans le même ordre d'idées d'éliminer "l'autre," par la renonciation requise du titre autochtone. Cet exposé envisage la renonciation au titre autochtone comme un moyen valide de réconcilier le rapport des Autochtones avec l'état canadien. Est-ce que cette politique les élimine efficacement comme étant "l'autre"? Nous recherchons cette question dans le cadre de la documentation qui considère la position des peuples autochtones comme "l'autre." De plus, ce travail fournit une analyse critique de la politique d'extinction. Finalement, cet exposé réfléchit à la motivation qui mène à des négociations sur l'autonomie gouvernementale et envisage les conséquences de l'autonomie gouvernementale pour remédier au rapport "auto-autre."

In *Calder* (1973), the Canadian Supreme Court officially recognized and acknowledged the existence of "Aboriginal title."¹ Soon after, the federal government negotiated the first of its "modern" land claim/self-government agreements, the James Bay Northern Quebec Agreement. In this agreement, title to Aboriginal lands in this region was extinguished.² Henceforth, the federal government considered these Indigenous lands to

be part of the territory of the Canadian state. This is a striking example of how the federal government's self-government policy³ functions to extinguish Aboriginal title. As Dara Culhane explains, "at precisely the same moment that the Crown recognizes title, Aboriginal peoples must surrender it."⁴ In that spirit, the question this paper asks is: Why is extinguishment of Aboriginal title necessary?⁵ This paper argues that the federal self-government policy, which formally mandates the extinguishment of Aboriginal title, is designed to eliminate Indigenous peoples as the official "Other," thereby alleviating international pressure on Canada to provide for the self-determination⁶ of Indigenous peoples. By extinguishing title, Canada may claim that Aboriginal peoples in Canada are not "Othered"; rather, they are a part of the Canadian polity, equally included in the structures of the state and equal to other Canadian citizens as owners of private property. This paper aims at demystifying this assumption. In contemplating self-government as a remedy for "Othering," it argues that the problem of the "Indian" as "Other" is not solved simply through the extinguishment of title. To make this point, this paper explores the significance of extinguishment in light of the *terra nullius* doctrine as well as the settlement thesis. It proceeds to reflect on specific relevant legal cases affecting issues surrounding "Aboriginal title" and the effect these judicial decisions have had on self-government negotiations. Finally, the paper considers the implications of extinguishment for Indigenous peoples who seek self-determination within Canada.

Indigenous Peoples as "Other"

Though the concept of "Other" is readily associated with a number of disciplines (i.e., philosophy, cultural studies and English), within the social sciences it is chiefly located in the field of anthropology. This paper will demonstrate how the "Othering" of Aboriginal peoples has important political implications for both First Nations and the Canadian state, thus offering a unique perspective on the subject. To begin, it is important to understand how Aboriginal peoples in Canada have been constructed as "Other." This analysis is subdivided into two parts: (1) theoretical construction of the "Other," and (2) construction of Aboriginal identity.

Theorizing the "Other"

In brief, the theoretical conception of "Other" generally refers to those peoples that were colonized by the "West." It entails the way they are represented in various ways to the West, through the eyes of the West, and reflected back at those who have been colonized. It delineates an interpretation by the dominant or colonizer in which the dominated or

colonized are styled as "Other."⁷ In his works on the Orient as one of the oldest, richest colonies and as a deep, recurring image of "Other," Edward Said writes that the "relationship between the Occident (or West) and the Orient is a relationship of power, of dominations, of varying degrees of a complex hegemony."⁸ In his analysis, as a Western discourse, "institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles" support this process of "Othering."⁹ In her analysis of Said, Linda Smith writes that this process has worked partly because of the scholarly and the imaginative construction of ideas about the Orient.¹⁰ The idea of the West as having constructed the "Other" through its own projections and assumptions has been invoked to characterize numerous cultures and peoples. For instance, Terry Goldie explains that,

At least since Fanon's *Black Skin White Masks* (1952) it has been commonplace to use "'Other'" and "'Not-self'" for the white view of blacks and for the resulting black view of themselves. The implication of this assertion of a white self as subject in discourse is to leave the black "Other" as object.¹¹

The "West" has thus used the idea of "Other" to describe groups who commonly share an experience of colonial oppression or domination.

The concept of "Other" is certainly fruitful in analyzing the experiences of Aboriginal peoples in Canada, given their colonial and dominated status. Michael Asch, among others,¹² has explored the status of Aboriginal peoples as "Other" in his recent works. Asch analyzes the I-Thou/Self-Other dichotomy underlying the history of Aboriginal-state relations and current self-government negotiations. According to Asch, "the only situation where it is clear that a 'self' has 'self-determination' is when that 'self' is defined as a legitimate 'state' within boundaries that are recognized by the international community."¹³ Thus, there is no consensus on the parties to which the concept of "self-determination" applies, other than currently existing states.¹⁴ Asch departs from this conventional, state-oriented concept of "Self." He argues that an alternative to an approach that seeks to define "Self" precisely and as an abstract essence is to use a "relational" approach, such as that found in the works of Buber, Levinas and Ricoeur. From this perspective, the "Self" is a concept that can be understood only as a part in a relationship between "Self" and "Other."¹⁵ This pertains to the question of privilege and domination (otherwise there would be just a multitude of self-contained "selves"). In this instance, Aboriginal peoples find that the authority of the Canadian state threatens their autonomy, while the Aboriginal claim to title similarly is perceived by some as a threat

to the integrity of the state. Asch further argues that

Canada has been a leading advocate of the globalized definition of self-determination, especially in the context of those who, in colonial situations, seek to free themselves from an Oppositional "Other" since the inception of the United Nations. Canada has backed its rhetoric with actions that include, as typical examples, its role as a peacekeeper in many places and its leadership in the movement to boycott the Apartheid regime in South Africa.¹⁶

However, despite the rhetoric, Russel Lawrence Barsh maintains that Canada's support for self-determination has been limited, especially in light of domestic struggles.¹⁷

Constructing the "Other"

Understanding the historical construction of Aboriginal identity is critical to understanding the creation of the "Other" within Canada. According to Joyce Green, the process of "Othering" is an inherent component of the colonial process, originating at contact.¹⁸ It has been documented that the first European explorers in North America considered the Indigenous peoples to be subhuman and savages. Indeed, the names assigned to and traits associated with Indigenous groups were indicative of this perception. The early European explorers, for example, customarily referred to Inuit as "savages," the French calling them "Esquimauts," or eaters of raw meat. These terms reflect the perception of "Self," projecting an identity characterized by a lack of "civility" onto the "Other." Another example is the word "Mohawk," which translates into "man eater," referring to the perception of Aboriginal peoples as cannibals.¹⁹ As Olive Dickason explains,

Although they were judged to be *very tractable and easy to be brought to civility*, they were also taken to be *idolators and witches*. . . . The English also appear to have shared with Europeans in general the belief that all New World peoples were cannibals, a too-readily accepted generalization from early reports.²⁰

Thus, the colonizer has created the character of the noble savage. This reveals a dominant narrative that imposes an identity upon Indigenous peoples, a critical component in "Othering."²¹ To elucidate, Paulo Freire suggests that to dehumanize the oppressed is critical in the project of oppression – thus "Othering." The construction of Aboriginal peoples as subhuman was generalized and inherited by future settlers. Green explains that the way in which Aboriginal nations have been made "Other" is typical

of colonial endeavours. In support of this position, Abdul R. Janmohamed writes that, "by subjugating the native, the European settler is able to compel the Other's recognition of him and, in the process, allows his own identity to become deeply dependent on his position as master."²² He adds that "This transivity and the preoccupation with the inverted self-image mark the 'imaginary' relations that characterize the encounter." "Othering" is thus a factor in and a result of colonialism. It is entrenched in the identity of the Aboriginal that the colonizer constructs, and is embedded in its underlying tenets and beliefs.

The *terra nullius* doctrine (land without people), for instance, is predicated on this "Othered" construction of the identity of Indigenous peoples. By denying their humanity, Indigenous peoples were simultaneously denied title to their land. Instead of recognizing and acknowledging them as original inhabitants of the land, explorers and subsequent settlers perceived the land to be void and claimed it in the name of foreign, European powers. The land was hence settled under the premise that it was uninhabited. Federal policy-makers have constructed policy around this Eurocentric, racist attitude; Canadian courts and legislators proceeded on the basis that Canada holds underlying land title, no people having existed prior to the arrival of the Europeans. The *terra nullius* doctrine has thus played a critical role in shaping the Indigenous identity in Canada.

The *terra nullius* doctrine alone, however, was not sufficient to dispossess Indigenous peoples of their land: it was complemented by the settlement thesis. Both of these were implicit assumptions, forming the basis on which the state of Canada was founded and on which its legal system was predicated. The settlement thesis was the principle on which the colonists claimed sovereignty and underlying title to lands where Indigenous peoples already lived²³; sovereignty and underlying title were acquired by "settlement."²⁴ These principles are fundamentals of the legal code of Canada. This observation is critical to the perpetuation of Indigenous peoples as "Other" since it denies their title to the land and sovereignty over the land. Hence, until they are repealed or disavowed by the state, Aboriginal peoples will continue to be "Other" – regardless of their status within Canada (i.e., as citizens or as wards).

As a consequence, Aboriginal peoples have been fighting, both in and out of the court system, to assert and prove their claim to the land. According to Green, at present "Aboriginal rights, including political rights and sovereignty in relation to the land, exist subject to the pleasure of the Crown or its agent, Parliament."²⁵ She argues that, rather than

seeking a partnership with Indigenous nations through a continuing, evolving constitutional relationship, Canada has always sought to extinguish Indigenous particularity and to incorporate this particularity within the state.

Part of the reason for this federal policy stems from the fact that Canada has a reputable position in the international arena as a defender of human rights. For example, since the creation of the international peacekeeping forces by Prime Minister Pearson, Canada has been considered a leader in promoting resolution and peace. As Barsh explains, however, Canada follows contradictory practices when it comes to protecting human rights. On one side, Canada is perceived to be an international defender of human rights, advocating reform in countries such as Haiti, or sending peacekeepers or international observers to Bosnia. Yet, at the same time, it has dispossessed, marginalized and oppressed Aboriginal peoples as well as denied international demands for their self-determination. In 1987, Chief Louis Stevenson of the Peguis band invited the ambassador from South Africa to his community to demonstrate the "parallels between the treatment of Indians in Canada and the treatment of blacks in South Africa."²⁶ This incident galvanized public opinion and media pressure on the federal government to address the "Third World" conditions in which Aboriginal peoples were living. In light of the negative publicity and international attention Canada received as a result of this event, it has been perceived as critical that the Canadian state remedies its relationship with Aboriginal peoples, to prevent further international embarrassments. Although there have been many reasons in the past to motivate the federal government to "deal with the Indian problem," one of the current motivations is to improve Canada's reputation.²⁷ This, however, requires the inclusion of Indigenous peoples in the Canadian state; and the weapon of choice has been the extinguishment of title. This tactic aims to restore the integrity of the Canadian "Self." However, it is not simply a matter of directly redressing the I-Thou/Self-'"Other" relationship. It is, by extension, also a matter of identity, since the construction of the Aboriginal identity corresponds to the construction of Aboriginal peoples as "Other."

Cases for "Title"

The question remains, though: How does the federal government extinguish title? Does extinguishment effectively incorporate Indigenous peoples into the Canadian polity and subsume them to the state? Or are they still "Other," despite federal attempts to demonstrate otherwise? Before responding to these questions, it is necessary to reflect on the case law that

has worked both to create and to justify the elimination of title. Others, like Culhane,²⁸ also reflect on the impact of these cases, but this review is unique because it demonstrates how the political process of removing the "Other" has been affected by judicial intervention and how the courts have served to reinforce the perception of Aboriginal peoples as "Other." The results have consistently altered the basis for self-government negotiations, slowly expanding the burden of proof of extinguishment for the federal government. Given the purported federal agenda to remove Aboriginal peoples as "Other" through the extinguishment of title, a summary review of select and relevant cases serves to reveal the significance of judicial intervention and rulings in this political battle of "Self" and "Other."

Seemingly, in order to eliminate the "Other," it is imperative to eliminate Aboriginal title. According to Green, "the federal-Indian relationship has been frustrated by the federal insistence on its own legal view of the world, and its adherence to extinguishment as a condition of settlements."²⁹ Asch similarly maintains that, "At the core, the problem was defined as a *legal* concern that arose because Canada could justify its ultimate sovereignty and jurisdiction with respect to Indigenous peoples only by relying on legal precedents that derived from British colonial law."³⁰ Beginning in 1973, the Canadian courts began hearings on a case that would ultimately set the stage for future understandings of the concept of Aboriginal title – how it was created, where it was located and, most importantly, how it could be extinguished.

Calder et al. v. Attorney-General of British Columbia (1973)

In 1973 the Nisga'a peoples of Northern British Columbia sought "formal recognition of their Aboriginal title based on their occupation of the land since time immemorial."³¹ Frank Calder, founder and then president of the Nisga'a Tribal Council (presently the Nisga'a Nation) "maintained that his people's Aboriginal title had never been extinguished, and that none of their territory had been ceded to Britain."³² The Nisga'a petition was eventually overruled by the Supreme Court of Canada, the logic being that "white man's rule" prevailed. The case proved to be a long-term victory because of a dissenting decision by Justice Emmett Hall; he suggested that the Nisga'a still held title – based on occupancy; that is, title was acknowledged due to their continuing residency on their traditional lands. In essence, this case affirmed that "Aboriginal rights existed throughout what is now known as Canada, at the time of first European contact," thereby challenging the Canadian claim to title.³³ At this point, Prime Minister Trudeau decided it was time to begin negotiating land claim settlements with Indigenous communities to acquire underlying title,

thereby reaffirming the sovereignty of the Canadian nation-state. While the *Calder* case did not directly represent a victory for Indigenous peoples, it did prompt the federal government to start negotiations with Aboriginal peoples, despite the "ambiguities in that judgement regarding the content and existence of Aboriginal rights, including the fundamental relations between Indigenous peoples and the state."³⁴ This judgement is significant, in essence, because it set out the oppositional relationship by acknowledging Aboriginal title, and it was this title that the government recognized hence needed to be ceded to restore the integrity of the state as "Self."

Regina v. Sparrow (1990)

Following the dissenting remarks in *Calder*, and after almost twenty years of negotiating land claim settlements, the 1990 *Sparrow* judgement³⁵ similarly represented a "turning point in the Canadian legal approach to Aboriginal right."³⁶ In effect, it was a direct consequence of Section 35 of the *Constitution Act, 1982*. The *Sparrow* case concerned a British Columbia Aboriginal person who had used a fishing net larger than allowed by law. The court found Aboriginal rights to fishing and hunting and land had priority over later (post-contact), more restrictive legislation. The right in question was ultimately related to self-government. In this case, Justice Bertha Wilson referred to "the Indians' historic occupation and possession of their tribal lands," thereby reaffirming their title to these lands.³⁷ As a result, it was asserted that "the test of extinguishment [of an Aboriginal right in common law] is that the Sovereign's intention must be clear and plain."³⁸ This was a significant ruling because it placed the burden of proving extinguishment on the federal government. As a result, many treaty relationships were revisited and their legitimacy questioned. Many Aboriginal peoples, challenging the federal government, deemed treaties fraudulent due to the means by which they were obtained and therefore denied that any voluntary surrender of title had occurred.

Central to the *Sparrow* case is the view that rights are not stagnant or restricted to contact. According to Asch, "they must be interpreted flexibly so as to permit their evolution over time."³⁹ At this juncture, the burden began to shift to the "Self" to prove extinguishment, to effectively remove the "Other." Given the legal recognition of the persistence of Aboriginal rights and title, modern self-government negotiations would require an extinguishment clause that was non-negotiable, and implicit in the process, one that would extinguish Aboriginal title once and for all. While *Calder* opened up the negotiating process by compelling the Canadian government to enter into self-government negotiations, *Sparrow* arguably moved the quest for self-government one step further, giving Aboriginal peoples

more legitimacy and more power from which to negotiate. In essence, the judges in *Sparrow* prioritized Indigenous rights over restrictive federal legislation. At the same time, it pointed out the necessity for the government ensuring that clear surrender of title was obtained.

Van der Peet (1996)

In 1996, the *Van der Peet* judgement,⁴⁰ further addressing the topic of self-government and extinguishment, reversed the progress that had been made in recognizing Aboriginal title. Though this ruling announced self-determination as a right, Aboriginal/original inhabitant rights were proclaimed to exist only within the parameters of the state. The justices argued that Indigenous peoples held rights as Canadian citizens. Specifically, they ruled that Aboriginal rights are "held only by Aboriginal members of Canadian society [and] arise from the fact that Aboriginal peoples are Aboriginal."⁴¹ From this perspective, the courts chose to reflect specifically on the meaning of the word Aboriginal to legitimize their claim to the land. In sum, their rights derive from their recognition as "Indians" and not from the fact that their occupation of the land predated the existence of the state. Even further restricting the negotiation process, *Van der Peet* represented a step backwards, attempting to redirect the focus away from the claim to underlying title by Aboriginal peoples.⁴² This case marked a victory for the "Self" since it reinforced their perceptions and characterizations of the "Other" as existing exclusively within the confines of the state. It also served to once again dispossess Aboriginal peoples and disqualify their original occupation as a bargaining tool in the negotiation process.

Delgamuukw v. Regina (1997)

Most recently, the case of *Delgamuukw*⁴³ has come to be widely regarded as similar to the *Calder* case in the sense that it has again recalibrated the scope of Aboriginal-state negotiations. Indeed, it could be argued that the *Delgamuukw* ruling marks an end to negotiations as they historically functioned since it further affirms Aboriginal title. In fact, the gamut of Aboriginal title is extended to acknowledge the validity of oral tradition as a means to present title. Some, like Culhane, describe *Delgamuukw* as a victory, arguing that "history followed them (the appellants or members of Delgamuukw Houses) into the courtroom, and they carried the future out with them when they left."⁴⁴ Yet, what has really changed as a result of this case? *Delgamuukw* opens the door for the inclusion and revisiting of oral testament to provide support to title claims. The problem that arises, however, is that it does not outline how that testament will be scrutinized or validated. For example, who will determine the authority of the orators? How will they be judged? What will be

considered legitimate versus false evidence? Despite these lingering questions, Asch maintains that the end result of *Delgamuukw* is similar to the legacy of the *Calder* decision: anything is possible now.

So how does *Delgamuukw* alter negotiations? On the surface, it does not force any significant departure from the current self-government policy. Yet, by acknowledging the legitimacy of oral tradition, it not only serves to validate traditional Aboriginal culture but grants Indigenous peoples an increased degree of negotiating power, raising their position in negotiations to one of almost-equal. Monture-Angus explains this is significant because

Aboriginal history is oral history. It is probably fortunate for Aboriginal people today that so many of our histories are oral histories. Information that was kept in peoples' heads was not available to Europeans, could not be changed or molded into pictures of "savagery" and "paganism."⁴⁵

The key in this instance is that the "Other" was further legitimized, the courts making it more difficult for the "Self" to remove them, because it acknowledged not only their right to title but also to their customs and history. In sum, the most significant part of *Delgamuukw* is that it not only validates oral tradition, it includes it as a part of title in Canadian law. Hence *Delgamuukw* gives Aboriginal peoples a new form of property right that raises with it the issue of extinguishment and compensation, with which previously the government did not have to concern itself. In short, one can argue that the *Delgamuukw* decision reorients negotiations, given the judicial sanctioning of oral tradition and its new role in negotiations.

The significance of recent rulings is that they affirm that, though the state has the authority to extinguish title, the burden of proving extinguishment rests with the state. Moreover, as Asch points out, "Since there are very few explicit acts of Parliament or court decisions explicitly respecting the extinguishment, it can be presumed that, speaking broadly, Aboriginal rights continue to exist."⁴⁶ This perpetuates, instead of alleviates, the position of Aboriginal peoples as "Other" and intensifies the Self/Other dichotomy. In addition, as a result of judicial rulings regarding Aboriginal title, Canada's self-government negotiations are focused, more than ever, on how to extinguish title.

The federal government continues to work to legitimize its assertion that it retains underlying title and sovereignty. In this regard, Asch explains how "the courts have held that, notwithstanding the existence of certain Aboriginal rights, the Indigenous people who lived in Canada prior

to colonization were too 'primitive' to have a form of sovereignty and underlying title that required recognition by colonial authorities."⁴⁷ He adds, "At the same time, the courts have asserted that Aboriginal peoples did not hold sovereignty, jurisdiction and underlying title with respect to their lands and peoples and/or that the unilateral assertion of sovereignty, jurisdiction and underlying title by colonizers was sufficient to extinguish those held by Aboriginal peoples."⁴⁸ Hence, the mere declaration of sovereignty over Canadian territories by Great Britain was deemed sufficient to extinguish any pre-existing sovereignty. Indeed, even today, the Canadian state fails to concede that it never really held title, or that at least it was procured illegitimately in light of the fallacy of the *terra nullius* doctrine and settlement thesis.

How can the state deny that it is in the process of negotiating self-government arrangements with the extinguishment provision mandate without acknowledging a hole or a void in its "ownership" of all the land?⁴⁹ As long as the burden remains on the state to prove its possession of title, the opportunity exists for Aboriginal peoples to challenge the Crown's sovereignty. So why has this not occurred so far?⁵⁰

There are a variety of responses that present themselves as potential explanations to this question.⁵¹ First and foremost, to challenge the legitimacy of the state would, theoretically, detract from the state's authority to enter into negotiations with Aboriginal peoples, either for land claim settlements or self-government (often both are negotiated simultaneously). In this regard, without the financial support of the federal government there is little incentive to enter into this process. Hence, it is, some might contest, in the best interest of Aboriginal communities to engage in this course of action, to benefit from the courts' decisions and the federal government's need for political solutions to re-extinguish title. A second argument could prove simpler. It could be suggested that Aboriginal peoples are so entrenched in struggles over land claims, fiscal devolution and self-government that they are distracted by the rhetoric of the state and believe that they must cede title to be able to develop and compete in an environment predicated on private property. In short, some communities are more immediately concerned with altering their desperate situation by regaining control over the governance of their own affairs and reclaiming what is left of their land. In either scenario, there appears to be a lack of initiative on the part of Aboriginal leaders to challenge the current round of negotiations that mandate extinguishment. This reality gives rise to another question: What, if anything, does extinguishment mean to Aboriginal peoples? What, by comparison, does it mean to the Canadian government?

Indigenous Peoples: No Sense of Elimination

The problem with extinguishment is the simple fact that it holds no real meaning for Indigenous peoples. Many Aboriginal peoples, especially those entrenched in the traditions of their people, do not subscribe to the concept of "owning" the land and thus are unable to conceive of the idea of extinguishing their title to it. For example, Oren Lyons, a traditional Mohawk elder, argues:

We native people did not have the concept of private property in our lexicon, and the principle of private property was pretty much in conflict with our value system. For example, you wouldn't see "No Hunting," "No Fishing," or "No Trespassing" signs in our territories. To a native person such signs would have been the equivalent to saying "No Breathing" because the air is somebody's private property. If you said to the people, "The Ontario government owns all the air in Ontario, and if you want some you are going to have to go and see the Bureau of Air," we would all laugh. Well, it made the Indians laugh too when the Europeans said, "We are going to own the land." How could anyone *own* the land?⁵²

Hence, according to Lyons, private ownership is not congruent with an Aboriginal understanding of property. In short, aside from the ontological difference inherent in the Aboriginal worldview, which traditionally perceives land as being held in stewardship (as opposed to ownership), "Extinguishment, or even exchange of fundamental Aboriginal rights for rights derived from Another system, seems inconceivable to most Aboriginal people."⁵³ In fact, according to Culhane, it is unthinkable. She maintains that "the prospect of surrendering sovereignty, or 'Aboriginal title,' would constitute a betrayal of what they believe is their sacred covenant with the Creator to be stewards of the land."⁵⁴ For many Aboriginal peoples, their rights stem from their relationship with the Earth, which cannot be extinguished, ceded, surrendered or released.

Another reason why extinguishment may be relatively meaningless to some Aboriginal peoples is that it conflicts with the purpose driving self-government negotiations on their side. For instance, many Aboriginal communities enter into negotiations to settle outstanding grievances, pertaining to land and treaty obligations. There is no intention, on the part of Aboriginal peoples, to enter into negotiations to relinquish more rights and title, but rather to secure their rights, to redesign the federal-Aboriginal relationship along more reciprocal and equitable lines.

Political Implications

As outlined above, in the federal government's view, extinguishment serves the purpose of reaffirming federal paramountcy as well as theoretically removing the "Other" from the Canadian persona. In the eyes of the federal government, self-government today is a mechanism through which they can legitimately and explicitly obtain the surrender of title from Aboriginal peoples. As a result, they are effectively removing Aboriginal peoples as the "Other," as a body challenging the sovereignty of the state. Asch writes: "In short, Canada is now using methods that meet contemporary international standards to demonstrate that Indigenous peoples are voluntarily associated with Canada and can express their full political rights within it and that, therefore, their right to self-determination has, by their own volition, become the same as that of any other citizen of the country."⁵⁵

In fact, however, the federal government is entering into the process with a specific, underlying agenda to extract something it wants from Aboriginal peoples, yielding little in return. In fact, it can be argued that the self-government process that offers to further download the administration of Aboriginal peoples to the band level and change land ownership to fee-simple serves the federal agenda by allowing it to abdicate its responsibility for First Nations governance. Though the federal policy of assimilation has been officially rejected and denied, and though the courts have become more active in supporting Aboriginal claims, history repeats itself, as the federal government dominates and helps itself to land while Aboriginal peoples fight to maintain what is rightfully theirs. As a result, Aboriginal peoples remain "Othered."

In essence, "Othering" is not remedied or removed through the extinguishment of title, even if it is obtained through voluntary surrender. This is because self-government negotiations serve a dual function: to acknowledge the difference of Aboriginal peoples as original inhabitants while at the same time working to legitimately include Aboriginals in the Canadian state. As demonstrated above, the contradiction inherent in this process is perpetuated through an implied sameness with a perpetuated "Othering," rooted in difference. The fact remains that Indigenous peoples are considered, throughout the Canadian system, as "same but different."⁵⁶ For instance, Aboriginal people live on reserves, and are subject to the *Indian Act* (which grants them status, delineates the form of local governance, etc.) because they are different, but they are able to vote in federal and provincial elections because they are Canadian citizens and hence the same. In either regard, Aboriginal peoples remain "Other,"

despite Canada's superficial attempts to prove otherwise, for, despite state efforts to secure voluntary surrender of Indigenous lands, the extinguishment of title does not alter the colonial construction of the Aboriginal identity (i.e., as savage, barbarian, dehuman), and perpetuates a "same but different" attitude and treatment within Canadian society. Moreover, as First Nations endeavour to alter and renegotiate their relationship with the state, they are forced to simultaneously surrender that component on which their Aboriginality is based – their relationship with the land. Though voluntary surrender may present itself as a more humane and legitimate means to extinguish title, it does not appropriately recognize and affirm the rights of Aboriginal peoples to live unmolested in their national territory. The argument this paper has made is thus that the process of "Othering" that began at contact is not altered through extinguishment. As a result, it cannot be assumed that extinguishment of title is synonymous with the extinguishment of "Other."

Indeed it has been argued that self-government in Canada aims to remove Indigenous peoples as "Other," to protect Canada's reputation as an international leader and defender of self-determination. As pointed out repeatedly, however, extinguishment neither removes Aboriginal peoples as "Other," nor precludes future clashes between the government and Aboriginal peoples. Instead, it must be recognized that the federal government's initiative to remove the "Other" begins with its own policies. To restore the dignity owed to Aboriginal peoples requires a conscious effort on the part of the federal government to sincerely redress historical wrongs. In short, to be "Other" does not necessarily devalue the importance of being different, but it does require respect for history, for legacy, for tradition and for identity, which would serve to restore Aboriginal peoples to their place alongside Canada as First Nations. Thus, as Aboriginal nations seek self-determination in the next century, the post-colonial desire must be similarly a desire for decolonized communities to define their own identity, not as a reflection of the Canadian "Self," but as an expression of "them-selves."

Notes

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¹ See *Calder et al. v. Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313 (hereinafter to be referred to as *Calder*). The terms *Aboriginal*, *First Nation* or *Indian* will be used to represent the Indigenous

people of Canada (including status, non-status, treaty, non-treaty, etc.). Though Aboriginal peoples are not a homogeneous body, they are treated so by federal policy (i.e., the reserve system, status, etc.) and the self-government process. In this regard, this paper will address the topic of Aboriginal peoples and does not refer to any specific community.

- 2 The agreement was negotiated in the interest of Hydro Quebec to enable it to purchase the land from the local Indigenous peoples in order to develop a hydroelectric power base.
- 3 Note: While there is a difference between a land claim and self-government, both are often negotiated as a package. No specific discussion of the federal self-government policy or land claims policy will be offered in the body of this paper. Instead, it will be assumed that the reader is familiar with current policy and practices.
- 4 Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talonbooks, 1998), p. 347.
- 5 The principles of extinguishment are fourfold. Brian Slattery points out that "there are four principle legal means in English law by which a state can justify the acquisition of new territories." The four are simply: (1) conquest, (2) cession, (3) annexation, or (4) settlement. Yet Slattery adds a fifth category — prescription — in which he argues that, "for reasons associated with 'Other' basic values and principles of justices, territories illegitimately acquired may sometimes, by passage of time, be transformed into legitimate dominions. . ." See Brian Slattery, "The Land Rights of Indigenous Peoples, as Affected by the Crown's Acquisitions of Their Territory" (Ph.D. dissertation, Oxford University, 1979). See also Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," *Osgoode Hall Law Journal* 29 (1991), p. 1.
- 6 Note: the author differentiates between self-government (being more appropriately called self-administration) and self-determination (entailing political and economic autonomy and sovereignty).
- 7 Joyce Green, "Towards a Détente with History: Confronting Canada's Colonial Legacy," *International Journal of Canadian Studies* 12 (fall 1995), p. 85.
- 8 Edward Said, *Orientalism* (New York: Random House 1978), p. 5.
- 9 Ibid., p. 2.
- 10 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999), p. 2.
- 11 Terry Goldie, "The Representation of the Indigene," in *The Post-Colonial Studies Reader*, edited by Bill Ashcroft, Gareth Griffiths and Helen Tiffin (London: Routledge, 1995), p. 233.
- 12 See Goldie, "The Representation of the Indigene," and Green, "Towards a Détente with History."
- 13 Michael Asch, "Self-Determination of Indigenous Peoples and the Globalization of Human Rights Discourse: The Canadian Example" (presented at Conglass III, New York University: April 1997), pp. 7-8.
- 14 Ibid., p. 8. This, he maintains, is not surprising, nor does he anticipate, in the near future, a universally accepted definition.

- 15 Martin Buber, *I and Thou* (New York: Charles Scribner's Sons, 1970), p. 9. Of key importance, in this instance, is the view of the "Self" as protecting itself from an encroaching *exterior* "Other."
- 16 Asch, "Self-Determination."
- 17 Barsh writes that Canada has officially refused to endorse Indigenous peoples' rights to self-determination. By way of explanation, he argues that federalists may well fear U.N. endorsement of Aboriginal peoples' rights to self-determination as a precedent for Quebec. See: Russel Lawrence Barsh, "The Aboriginal Issue in Canadian Foreign Policy, 1984-1994," in the *International Journal of Canadian Studies* 10, no. 6 (1995): 127-129.
- 18 See Green, "Towards a Détente with History," pp. 85-105.
- 19 Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart Inc., 1994), p. 91.
- 20 Ibid., p. 92.
- 21 Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1970).
- 22 Abdul R. JanMohamed, "The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature," in *The Post-Colonial Studies Reader*, edited by Bill Ashcroft, Gareth Griffiths and Helen Tiffin (London: Routledge, 1995), p. 20.
- 23 Michael Asch, "First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology" (unpublished manuscript), p. 3.
- 24 Ibid., p. 11.
- 25 Green, "Towards a Détente With History," p. 97. Dara Culhane, *The Pleasure of the Crown*, also espouses this position.
- 26 Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Little, Brown and Company Press, 1990), p. 229.
- 27 Note that there are many other potential explanations as to why the federal government is involved in self-government negotiations, like that of neoliberalism. For more on this reason, see Gabrielle A. Slowey, "Neoliberalism and the Project of Self-Government," in *Citizens or Consumers? Social Policy in a Market Society*, edited by Dave Broad and Wayne Antony (Halifax: Fernwood Publishing, 1999), pp. 116-28.
- 28 Culhane, *The Pleasure of the Crown*.
- 29 Green, "Towards a Détente With History," p. 95.
- 30 Asch, "Self-Determination," p. 13.
- 31 Dave De Brou and Bill Waiser, *Documenting Canada* (Saskatoon: Fifth House Publishers, 1992), p. 571.
- 32 Dickason, *Canada's First Nations*, p. 349.
- 33 Ibid., p. 7.
- 34 Ibid., p. 2.
- 35 *Regina v. Sparrow* (1990) 70 D.L.R. (4th) 385 (S.C.C.) [1990] S.C.R. 1075.
- 36 Dickason, *Canada's First Nations*, p. 354.
- 37 *Regina v. Sparrow*.

- 38 Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" (unpublished manuscript), p. 11.
- 39 Ibid., p. 12.
- 40 *Van der Peet* (1996) 137 D.L.R. (4th) 289 (S.C.C.).
- 41 Asch, "From *Calder* to *Van der Peet*," p. 14.
- 42 Ibid., p. 24.
- 43 *Delgamuukw v. R.* (1991) 79 D.L.R. (4th) 185 (B.C.S.C.) [1997] S.C.R. 1010.
- 44 Culhane, *The Pleasure of the Crown*, p. 17.
- 45 Patricia Monture-Angus, *Thunder in My Soul* (Halifax: Fernwood Publishing, 1995), p. 11.
- 46 Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity," *Alberta Law Review* 30, no. 2 (1992), p. 478.
- 47 Asch, *First Nations*, p. 3.
- 48 Ibid., p. 8.
- 49 The state claims that it maintains underlying title throughout the self-government and land claims process and is simply proceeding to secure voluntary surrender as an assurance against any future claims.
- 50 Obviously, various claims and challenges have been launched by different Aboriginal groups to contest the title claims of the Canadian state – indeed, the land claims process arguably serves this specific purpose. Yet, what remains absent, for instance, is a co-ordinated effort or public presentation (media frenzy) by Aboriginal peoples/leaders to bring attention to this void in ownership.
- 51 It is beyond the purview of this paper to enumerate and analyze a comprehensive list of responses to this question. Hence, two specific hypotheses will be considered.
- 52 Oren Lyons, "Spirituality, Equality and Natural Law," in *Pathways to Self-Determination: Canadian Indians and the Canadian State*, edited by Leroy Little Bear, Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1992), p. 9.
- 53 Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), p. 222.
- 54 Culhane, *The Pleasure of the Crown*, p. 355.
- 55 Asch, *Self-Determination*, p. 15.
- 56 The argument of "same but different" is most often associated with feminist scholarship that describes the way the law and society have historically imagined women as both similar and different to men. In the context of this paper, the argument is being used to describe the way the law and society have historically considered Aboriginal peoples to be both similar and different to non-Native peoples. See Patrick Macklem, "First Nations and the Borders of the Canadian Legal Imagination," *McGill Law Journal* 36 (1991): 382-456.