



AROUND THE FRINGES OF INTERNAL DISPLACEMENT: TRENDING MASS MOVEMENT OF ABORIGINALS IN CANADA

Veronica Fynn

Abstract

In the name of religion and “civilization of the salvages,” Anglo-American/European descendants migrated across the globe leaving troubling legacies that span beyond simple voluntary mass movement of Aboriginal peoples. Their thirst for colonization and imperialism resulted in exclusion, social injustices, subjugation, decimation and forced displacement of several nations of indigenous communities. In essence, it was through historical and systematic legal mechanisms invented by alien races that will deny unborn generations of natives any social rights and protection. Highlighting some of these historical events of Anglo-American “invasion” of native communities in Canada to (a larger extent) and Australia, New Zealand, United States, and South Africa (to a lesser extent), this paper critically examines repeated trends of human rights abuses resulting in forced displacement of Aboriginals. Overall, the paper seeks to dissect the socio-politico biases and rhetoric used by the State and international community in responding to the concepts of “relocation” in Western countries versus “internal displacement” in Third World communities.

Keywords: Internal displacement, aboriginals, Canada, UNHCR, humanitarian assistance

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Veronica Fynn

When Europeans first came to the shores of North America, the Continent was occupied by a large number of sovereign and independent Aboriginal peoples with their own territories, laws, and forms of government. As late as 1873 the Ojibway spokesman Mawedopenais, stated during negotiations with the Crown for Treaty number three...we think it is great thing to meet you here. What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understood you as a representative of the Queen. All this is our property where you have come... This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow - us Indians - He has given us rules that we should follow to govern us rightly"¹

Overview

Unlike political upheaval and violent conflicts in the Global South which have been “demonized” with hunger, non-state interventions through “fraudulent” international humanitarian aid, failed states, gross human rights abuses, and sub-humanity unworthy of civilization; since the 1800s, the Western countries have romanticized and justified their worse crimes against humanity as just-war or low-key discrimination carefully orchestrated by inventing unequal laws systematically. In addition, they carefully designed myths that rendered the State (and citizens) superior to those from developing countries. Hence have never seen displacement of Aboriginals as comparable likes of refugees and internally displaced people in trouble areas of the Global South. In fact, the purpose for which offices of United Nations Organizations responsible for these populations (e.g. the UN High Commissioner for Refugees, the World Food Program, UN High Commissioner for Human Rights, International Organization for Migration, etc.) are located in Advance countries are different from the reason(s) behind their over-representation in conflict-ridden countries of the Global South.

In Western countries, officials of UNOs responsible for forced migration, whose top decision making powers are dominated by grey-headed White males of European descent are designated with the tasks of controlling the flow of migrants (refugees, undocumented immigrants etc.) - whether by means of national or international laws and policies. Their sole duty is to monitor their right of entry, control border crossing and prevent “illegals” from overcrowding their rich economy. Where as, UN humanitarian organizations in the Global South (still dominated by so-called well-

¹ The Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: The Royal Commission on Aboriginal Peoples, 1992) at 8.

meaning White humanitarian aid workers) see their role as one of “helping the dying poor and hungry” or “giving back to the community” as well as, using whatever means possible with assistance from unbalanced media to access funds in the form of charitable gifts. They effectively accomplish their goal by injecting guilt and sympathy in its citizens thereby creating a false sense of dependence on the Western economies. Now, detangling the reality of “creating a false sense of dependence” on the West by conflict-ravaged countries in the Global South with respect to say the amount of debt owe my the United States or how Western economies thrive on exploitations of natural resources from developing countries is beyond the scope of this paper. However, to imagine an aid-worker from Zimbabwe or Sahrawi rendering services to aboriginal children in Canada’s First Nations reserves (for example) is unheard of. Such proposition tends to be completely missing from academic discourses as the idea of the UN deploying troops into colonial Canada (for example) to protect First Nations IDPs is not only unacceptable but not allowed in Canadian monarchy. Why?

In an attempt to address this question, this paper, mainly based on historical evidences drawn from Canada and it’s allies (the United States, Australia, New Zealand and South Africa) argue that the manner in which alien races (largely descendants from Europe) used systematic mechanisms to “relocate” Aboriginals warrants international intervention similar to those prompted by violent conflicts and political unrest in Third World countries. This trendy act of “relocating” large numbers of Natives in Canada, Australia, New Zealand, the United States and South Africa (CANZUSSA) fits the conceptual description of internal displacement enshrined in the *Guiding Principle of Internal Displacement* (GPID), 1998². To this end, the United Nations is obligated under international law to provide legal protection/assistance to Aboriginals in CANZUSSA; irrespective of the methods used to forcibly displace Aboriginals. Whether colonizers/imperialists’ use of the law to isolate Natives provided some immunity for international invention or not, this research paper will show that the situation of Aboriginals in CANZUSSA is not much of a difference from those experienced by displaced persons in developing countries.

Many researchers have use different descriptions to explain the terms Aboriginals, Aboriginal rights, treaties, and constitution. For the purpose of the research the following operational definition are used to contextualize the scholastic analysis of this topic with specific reference to Canada.

Aboriginals (though not simplistically homogenous) refer to Inuits, Metis, and First Nations in Canada; Maori in New Zealand, Native Americans/American Indians in the United States, African descendants in South Africa and Aboriginals and Torres Strait Islanders in Australia who are considered the original inhabitants in these countries before the arrival of aliens (mainly Europeans descendants).

² Francis Deng, *Guiding Principles on Internal Displacement* (Geneva: UN Office for the Coordination of Humanitarian Affairs, 1998).

Aboriginal rights are those Aboriginal peoples have because of their occupation of North America as sovereign nations before the coming of Europeans. It encompasses all aspects of their culture, including rights to land, traditions and survival.³ Peter Cumming and Neil Mickenberg describe it as a composite of the following doctrines: 1) origins and recognition of aboriginal rights; 2) content of the right; 3) extinguishment of aboriginal title; and 4) compensation in cases of extinguishment.⁴ Both the *Royal Proclamation of 1763* and *St. Catherine's Milling* make clear the uninhibited and exclusive right of the sovereign to extinguish aboriginal title.⁵ Noteworthy, Aboriginal rights pre-existed the Constitution of Canada (1982) and are not create by it.

Treaty rights refer to the promises made when treaties were signed between First Nations and European settlers.⁶

Indians are from diverse nations ranging from the Mi'kmaq in the east, to the Iroquois in central Canada, Cree in the Prairies, Haida in the west. The *Indian Act* (1876) made Aboriginal membership dependent on descent down patrilineal lines even though some Aboriginal cultures are matrilineal. Indians registered under the *Indian Act* are referred to as "status Indians" and their communities are called "bands". Indians who are not registered under the Indian act are called "non-status Indians".⁷

Metis and "half-breeds" are other aboriginal people who do not have Indian status. Unlike Indians, there is no national registration scheme for Inuit - the smallest aboriginal group in Canada. However, they are included as beneficiaries in land claims agreements, which now cover almost all of their traditional territory.⁸

Historical Background in Canada

Contact with Europeans in Canada begun in the late eighteenth century. Archaeological evidence shows that human inhabitants occupied Canada for well over 9,000 years prior to the arrival of alien races. For example, presence of the Nuu-cha-nulth of Vancouver Island has been traced to 4000 years.⁹ In southern Ontario long before the arrival of the first Europeans, Aboriginal Canadians had established themselves. Aboriginal representations included the Algonquians (i.e., the Algonkin, Nipssing, Ojibwa and Ottawa who were nomadic but substituted hunting and fishing with agriculture) and the Iroquoians (i.e., the Huron and the Iroquois Confederacy who lived to the south of the Algonquians, the Huron on the southern shore of Georgian Bay, the Iroquois along Lake Ontario in present-day New York state).¹⁰ Later, after the founding of Upper Canada,

³ Shin Imai, *Aboriginal Law Handbook* (Toronto: Thomas Canada, 1999) at 6.

⁴ Peter A. Cumming & Neil H. Mickenberg, *Native Rights in Canada* 2d (Toronto: General Publishing Co., 1972) at 13.

⁵ *ibid* at 42.

⁶ Shin Imai note 3 at 7.

⁷ *ibid* at 10.

⁸ *ibid* at 11.

⁹ Paul Robert Magocsi, *Aboriginal Peoples of Canada: A Short Introduction* (Toronto: University of Toronto Press, 2002) at 293.

¹⁰ Brendan O'Brien, *Speedy Justice: The tragic Last Voyage of His Majesty's Vessel Speedy* (Toronto: The Osgoode Society, 1992) at 6.

Ojibwa in the colony came to be known as Chippewa. Up until the late eighteenth century, there were few Europeans north of the Great Lakes but for New France, the area was vital for commercial and military reasons.

Intensity of the contact grew upon the arrival of Captain James Cook at Nootka Sound around 1774 with central focus on trade. In the beginning it was mutual and peaceful but this would soon spill into never-ending hostilities taking myriad kinds, shapes and forms. As narrated by Paul Mogocsi, in 1792, American trader Robert Gray destroyed all of Wikinanish “in reaction to a perceived plot against his ship.”¹¹ Contrary to conventional wisdom, (as will be elaborated on later) Aboriginals did not just passively condone Europeans desire to control, abuse and exploit First Nations. According to Mogocsi, a century after Cook’s attack, Muquinna - a successor to the chief who met with Cook in 1774 - “reacted to an insult from a ship’s captain by seizing the ship and killing all but two of the crew.”¹²

As these attacks grew worse and trade (mainly conducted by the Hudson Bay Company (HBC)) between Aboriginals and Europeans declined, Aboriginals were “forced to relocate” to other areas with less influences from Europeans. One of such “forced relocation” occurred after the erection of Fort McLoughlin in Heiltsuk territory in 1833, which resulted in the displacement of many Heiltsuk. Similarly, when Fort Rupert was established on northern Vancouver Island in 1849, four independent Kwakwaka’wakw groups “reassembled” to form a composite community.¹³ After so many years, Peggy Blair recounts George Grant’s (a renowned Canadian philosopher and teacher) remorse with respect to Canada’s “force relocation” and assimilation of Aboriginals that consequently led to the “loss of Canadian identity due to assimilation by a dominant culture, the United States.”¹⁴ He writes,

My lament is not for Canada, however, but for the Hiawatha First Nations. It did not choose to go to court but was forced to defend the treaty rights of one of its members who had been charged with fishing without a licence. It lost the case, the result, I argue, of the same kind of assimilationist pressures and dominant cultural biases that Grant so eloquently described. Because of the ruling, six other First Nations are now trapped by the legalistic constraints of a decision, which prevents them from hunting and fishing off-reserve, even though they were never charged, presented no evidence, and made no submissions. My lament, in that sense, is for all of them.”¹⁵

Speaking of the US influences on Canada – the French had the roles in both countries. However, apart from a settlement in the Detroit area dating to the early 1750s, the French presence at the time of the Conquest of 1760 consisted only of military garrisons – a Michilimackinac, Detroit, and present-day Niagara, Toronto, and

¹¹ Paul Robert note 9.

¹² *ibid* at 294-295.

¹³ *ibid* at 295.

¹⁴ Peggy J. Blair, *Lament for a First Nation: The Williams Treaties of Southern Ontario* (Vancouver: UBC Press, 2008) in preface.

¹⁵ *ibid*

Kingston – a network of fur-trade post stretching throughout the territory of the upper lakes. Although not much changes occurred after 1760, during the first two decades of British rule, the land north of the lakes remained largely unsettled by whites, deriving its importance from the fur-trade empire. Indeed, under the *Royal Proclamation of 1763*, Britain, in an attempt to reassure the Indians that the transfer of sovereignty did not threaten their way of life, transformed the continental interior into an Indian territory where settlement was prohibited. This move brought some relief to the Indians, whose anxiety over their future had just triggered the *Pontiac Rebellion*,¹⁶ but of course, infuriated the land-hungry Thirteen Colonies. Then came the American Revolution, an event that changed the course of Canadian history as it prompting British North America (BNA) immigration by the United Empire Loyalists – American Loyalists who migrated to the BNA after the defeat of the British in the American Revolution War; it was a pledge of allegiance to King George III. Those Americans who supported the British during the war (vis-à-vis the Loyalists) had ulterior motives¹⁷ since in the mix of the war were Native people. As countless number of White settlers paraded their major interest – land ownership for Native American became problematic. What this meant was Aborigines had to be “persuaded, tricked, or coerced into giving up territory”¹⁸ – in essence they were compel to “relocate” (in other words, they were forcibly displaced) as their homeland became dominantly overcrowded with strangers who saw them as primitive savages.

In Mississauga, Ontario O’Brien purports that, by early 1780s the Aborigines comply with White settlers coercion to acquire their land. Partly due to the manipulative law, low numbers and poor mobilizations, Aborigines in Southern Ontario were unable to resist Loyalist encroachment. O’Brien perceived that, “their willingness to cede land reflected their realistic assessment of their own position and also may have been rooted in misunderstanding; [because] the Indians, lacking any concept of private property, believed that they were granting white settlers the right to use the land, not [to have full ownership] ownership of it.” So, in May 1781, for a mere three hundred suits of clothing” the Mississauga give away four miles of the west bank of the Niagara River to White Settlers. By the 1800’s the “waterfront territory in southern Ontario, stretching from the St. Lawrence River in the east of the Detroit River in the West” were all ceded “in exchange for British presents of guns, ammunition, clothing, trinkets, and the like.” These transactions are no different from the arrangements made with native African Chiefs by colonialist in exchange for land, apartheid, trans-Atlantic slave trade and “Rabbit Proof Fence.”¹⁹ Therefore, one may ask, how is it that only the stories of displaced people in Africa make it to the world’s largest welfare system (United Nations High Commissioner for Refugee)? Save the details for a sequel of this paper.

¹⁶ The Pontiac Rebellion was a war between Native American tribes originating from Ohio country, Illinois Country and the Great Lakes region of Canada due to their dissatisfaction over British policies after they (the British) have won the Indian French War between 1754 and 1763.

¹⁷ Brendan O’Brien note 10 at 6.

¹⁸ *ibid* at 7.

¹⁹ *ibid* at 11.

Also, a point worth noting is the fact that, it is an understatement to say that Aboriginals “lack concept of private property” because they did own land and manage it before the arrival of alien races. But whether their concept of land ownership was similar to that of the British and French is open for discussion as oppose to belittling their sense of ownership, especially from a Western perspective.

Despite the aforementioned, O’Brien discovers that it took Aboriginals approximately ten years to fully understand the legal implications of treaties they have signed with British settlers. He argues that,

White settlers, believing that native land rights had been extinguished by the surrenders, denied Indians the right to use, or even travel across, their lands. At the same time, they did not hesitate to encroach on whatever lands remained in Indian Hands. Years later some Mississauga elders reflected bitterly that, when the white men arrived, our fathers held out to them the land of friendship. The strangers then asked for a small piece of land on which they might pitch their tents; the request was cheerfully granted. By and by they begged for more, and more was given them. In this way they have continued to ask, or have obtained by force of fraud, the fairest portions of our territory. The Mississauga did what they could to protect their land and their rights.²⁰

Later discussions in this paper will show that Aboriginal continuously still resisting) invasion and control from White settlers, even to this day.

In The Beginning There Were Aboriginals...

It is indisputable fact that before the arrival of Alien races in CANZUSSA Aboriginal populations were, but with time their numbers have gradually dwindle with some experiencing possible extinction. In Canada, research estimates show that there were 100,000,000 Native Americans in 1492 – one fifth of the world’s population.²¹ Today, Canada’s 31.6 million population Aboriginals make up a scanty 3.8 per cent hitting the one million mark in 2006.²² For Australia, despite increases in self-identified Aboriginal population, the Australian Bureau of Statistics (2007)²³ reported that 5.7 per cent of its 19.8 million people did not identify their ethnic status thus bringing into question the validity of 455,028 people who identified themselves as aboriginal and/or Torres Strait Islander origin.²⁴ Statistics New Zealand 2006 Census shows that of its 4 million people, 14 per cent comprised Maori ethnic populations.²⁵ South Africa mid-year population

²⁰ ibid

²¹ Shin Imai at 3.

²² Statistics Canada, “Aboriginal Peoples” (January 15, 2008) online: <<http://www12.statcan.gc.ca/census-recensement/2006/rt-td/ap-pa-eng.cfm>>

²³ Australia Bureau of Statistics, “2006 Census QuickStats: Australia” (27 June 2007) online: <<http://www.censusdata.abs.gov.au/ABSNavigation/prenav/ProductSelect?newproducttype=QuickStats&btnSelectProduct=View+QuickStats+%3E&collection=Census&period=2006&areacode=0&geography=&method=&productlabel=&producttype=&topic=&navmapdisplayed=true&javascript=true&breadcrumb=LP&topholder=0&leftholder=0¤taction=201&action=401&textversion=false>>

²⁴ Australian Human Rights Commission, “A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia” (2008) online: <http://www.hreoc.gov.au/social_justice/statistics/index.html>

²⁵ Statistics New Zealand, “QuickStats About New Zealand” (nd) online: <<http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace/SnapShot.aspx?id=9999999&type=region>>

was estimated at approximately 47.4 million which constituted 79.6 African descent (note that, though higher in number, South African Natives were the minority during Apartheid).²⁶

On the other side of the Atlantic Ocean, United States population of 289, 593, 211 in 2006 presented a scant 1 per cent of Native American/American Indian descending from Alaska and Hawaii²⁷ - a marked difference in the 1600, when Native population in New England alone was estimated at 72,000.²⁸ These statistics point to the fact that Aboriginal populations in CANZUSSA were not always small in number. In fact, historical evidence confirms that Aboriginal populations were not only the original inhabitants of CANUSSA but that they also constituted the majority of the population before aliens walked upon their soil. With particular reference to Canada, consider a brief historical imprints of aboriginal originality.

Flaunting Trends: Everywhere They Went...

Alien races in CANZUSSA flaunted their legacies of imperialism, colonialism, forced displacement (e.g., deportation of the Acadians – descendants of the first French colonists who settled in Canada’s Maritime provinces) and forced displacement/extinction (e.g., disappearance of the Beothus – one of the first Aboriginal tribes to meet Europeans). Myriam Denov and Kathryn Campbell agree with the major philosophical perspective of this paper that, not only has research on displacement against Aboriginals in so-called advanced countries been neglected and under-researched but that it’s concept have been associated with poor developing nations.²⁹ To this end, wealthy countries have consciously and sophisticatedly diverted attention about forced displacement of Aboriginals in what I term as “political ineptitude” emblemized by flaunted trends of mass movement across the BIG FIVE: Canada, Australia, New Zealand, United States, and South Africa (CANZUSSA).

Generally, as the colonists migrated they always carried their own laws with them. They observed these formal rules (whether as an act of obeidance to the Queen of England or the King of France) in their newly acquired “home” as if nothing existed before they arrived. To justify their actions, they proudly argued that civility and obedience to the law (or any system for that matter) are inherent to their “superior race”.³⁰ To this end, they arrogantly renamed places once inhabited by Natives and

²⁶ Statistics South Africa, “Mid-year Population Estimates South Africa 2006” (1 August 2006) online: <www.statssa.gov.za/publications/p0302/p03022006.pdf>

²⁷ United States Census Bureau, “Population FactFinder” (1, July 2006) online: <http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=PEP_2009_EST&-mt_name=PEP_2009_EST_G2009_T001>

²⁸ Louise A. Knafla & Jonathan Swainger, *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005) at 9.

²⁹ Myriam Denov & Kathryn Campbell, “Casualties of Aboriginal Displacement in Canada: Children at Risk Among the Innu of Labrador” 20 *Refuge* 2 at 21-33.

³⁰ Peter Karsten, *Between Law and Custom: High and Low Legal Cultures in the Lands of British Diaspora, the United States, Canada, Australia, and New Zealand, 1600-1900* (Cambridge: Cambridge University Press, 2002) at 2.

imposed their customs upon them. This naming process is quite evident today in CANZUSSA and many other places with European imprints - for example, there are at least one place named after Queen Victoria, King George or Queen Elizabeth in CANZUSSA.

As they proceeded to create their own “common law” in these colonies, they soon found themselves at loggerheads with British statutes and Common-Law. A practice still camouflaged in the “Canadian Colony” today by way of imperialistic institutionalization of the Governor General Office. Then, referred to as the Colonial Office, Parliament, and the Law Lords of Privy Council in London, they sought to regulate, indeed at times to control, the ways in which British immigrants to CANZUSSA acquired land, interacted with indigenous people, including administering of their affairs.³¹ The initial reaction of the British Crown regarding incongruences of British Law in England and the colonies was to issue proclamations, create ordinances, and render judicial decisions in each colony so as to align their laws with that of the *Mother Country*.

A unique example that occurred in South Africa is cited by Peter Karsten (2002), “in 1828 the government of the Crown Colony of the Cape of Good Hope created Ordinance 50, declaring all free people to be equal before the Law irrespective of race, as, in deed they were in England”.³² Obviously, there was a “back-flip” to this law for the power-hungry colonists. They followed up their initial request with a mission to persuade (by all means necessary) Parliament in England “to grant them the constitutional power to make law for themselves, to be administered by officials responsible to their elected assemblies.”³³ And so they went about using “the rule of law” to displace, conquer, and destroy lives, properties and the very psychic of Aboriginal peoples even though past generations of the Original People were receptive to peaceful and respectful co-habitation with the alien races.³⁴

North America

As stated earlier, Europeans began their movement into north America as early as the eighteenth century. Nova Scotia’s Micmacs, Upper Canada’s, New England’s Abenakis, and New York’s Mohawks were the first few to experience this unfortunate but “legal” process. Karsten explicates a series of events to highlight some “illegal” nuances associated with the trends across CANZUSSA. In 1703, Karstens writes about a fraudulent land sale by Mohawk to British developers. Although Mohawk leaders disputed the sale, land title later discovered in 1765 confirms that the transactions had in deed occurred. In 1720, Abenakis complained that, “Englishmen were taking their lands contrary to previous land agreements. Simultaneously, in Nova Scotia, Lieutenant Governor Belcher’s Proclamations of 1762 granted the Micmacs “a common right to the

³¹ *ibid* at 3.

³² *ibid* at 3.

³³ *ibid* at 4.

³⁴ *ibid* at 23.

Sea Coast and all land reserved or claimed was criticized as silly and too precipitate by the Nova Scotia Assembly's London agent and annulled by the Board of Trade."³⁵ A century later Native in Canada will bear witness to the fact that "all are not equal" under the law as seen with the appointment of Joseph Trutch as Indian Affairs Commissioner in 1866. A legislature issued by the provincial government of British Columbia's

undid...all that Governor James Douglas has accomplished in the 1850 to protect the property rights of the native inhabitants there. Thus, in 1865, British Columbia's officials reduced the size of the reserve of the Head of the Lake Okanagans by calling upon the authority of a non-Head of the Lake Okanagans from the United States.

But, the worse was yet to come for Aboriginals in other parts of Canada with the passage of the dominion of Canada's *Indian Act* of 1876 which granted "provincial authority over native tribes and language groups within their borders, stipulated in such language as found in section 13 of British Columbia Terms of Union Agreement of 1871".³⁶

The Antipodes

Australian settlers' utter disrespect for Aboriginals with regards to using the law to forcibly displaced them spurred up on-going disagreement between the settlers and the Colonial Office. Although the first generation of Settlers to Australia acknowledged Aboriginal had well-defined boundaries, property rules and land-usage regulations;

In 1836, Justice Burton on the New South Wales Supreme Court held that Australia's aborigines were not in such a position with regard to strength to be considered free and independent tribes. They possessed no sovereignty. In 1889, the Privy Council's Law Lords repeated that Australia was 'terra nullius' (vacant land). Similarly, the commander of New Zealand's military detachment, dispatched to the Hutt Valley (east of Wellington) in 1845, observed of the claims to the region of the Ngati Rangatahi Maoris [that] no individual native or portion of the Tribe can substantiate a right to any part of his valley...no ancient pass nor cultivations exist – the dense Forests remained undisturbed till the axe of the European and European labour and perseverance opened out and displayed the capability of the district.³⁷

Karsten consistently purports that "the government of New Zealand and the Australian colonies often did ignore such customary rights of the native inhabitants" even to this day.³⁸ Notoriously known for removing Aboriginal children from their families under legal acts created by the State and church; Australia have been tampering with ethnic cleansing, cultural genocide, preventive miscegenation and forced displacement of Aboriginals. Clear evidence to this fact is seen in Prime Minister Kevin Rudd's formal apology to the Stolen Generations on 3 February 2008. In his "sorry speech" he blurts,

³⁵ *ibid* at 75.

³⁶ *ibid* at 76.

³⁷ *ibid* at 81-82.

³⁸ *ibid* at 83.

...today we honour the indigenous peoples of this land, the oldest continuing cultures in human history. We reflect on their past mistreatment. We reflect in particular on the mistreatment of those who were stolen generations - this blemished chapter in our nation's history (...) We apologise for the laws and policies of successive parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry (...) today take this first step by acknowledging the past and laying claim to a future that embraces all Australians. A future where this parliament resolves that the injustices of the past must never, never happen...³⁹

South Africa

In his book *Between Law and Custom*, Karsten recounts how European settlers once again trump the rights of South African Natives over their land. According to him

the Cape Colony's Governor, Sir Harry Smith, chose to brow-beat Chief Adam Kok of the relatively weak Griquas into leasing much of his people's domain to Boer tenants for small annual quitrents in the hope that this would solve his Boer problem in that quarter in 1848...[whilst he] simultaneously secured the approval of Secretary Grey for the extension of the Cape Colony's northern border to the Orange River, though Grey reminded him that this would encourage the Boers to come into contact with the natives once again when there was no power in the colony available to restrain them.⁴⁰

With Governor George Cathcart Sand River Convention, which granted Transvaal Boer and Orange Free States independence in 1852 and 1854 respectively, it soon became clear that the Boer encroachment on Chief Moshesh's Basuto was imminent. Local colonial official Richard Southey was assigned the task of redrawing boundaries between the Boer and Basuto a dissection that "could not have been more favourable to the Boers had a commission of burghers been invited to draw them" - a similar trend that gave rise to the Kaffir War in Chief Sandile's Gaika in 1850.⁴¹ Having survived 45 years of Apartheid, South African Natives "window of freedom" opened when on 11 February 1990 Nelson Mandela was released from 27 years of imprisonment. In his most famous "freedom speech", Mandela promise hope to black South Africa - "I pay tribute to the mothers and wives and sisters...the rock-hard foundation of our struggle...apartheid has no future...the apartheid destruction is incalculable...millions are homeless [displaced] and unemployed."

United States

Native Americans, ignorantly referred to as "red Indians" by Christopher Columbus, are the pre-Columbian dwellers of the Americas. Once again, the use of manipulative legal system will force this group out of their abode. As early as 1512, laws were codified (Laws of Burgos) to govern settlers' behaviour with respect to maltreating Aboriginals. Research evidence shows that although under treaties, title to Aboriginal land were supposed to have been obtained from the US government and then later resold to

³⁹ Ten TV, "Sorry, Kevin Rudd's Apology to The stolen Generation" (February 13, 2008) online: <<http://ten.com.au/videos.htm>>

⁴⁰ Peter Karsten supra at 94.

⁴¹ ibid at 95.

settlers, this laws was not obeyed at all times. According to Karsten, common to all of North American colonies was the fact that the colonial government has confirmed aboriginal title to those seats of land that they now have and had prohibited squatting by whites on these lands in 1652.”⁴² This statute, ignored more than it was enforced even as squatters persistently consumed Indian reserves; Karsten narrates how

in the early 1680's, one John Grout bought fifty acres in that township from two natives without the town's consent. Grout afterwards altered the deed to read five hundred acres. When the village sued, it recovered 400 of these acres, surrounded by lands owned by English settlers. Subsequently, the village decided to sell most of this land to another Englishman, Matthew Rice, to whom they also leased some meadowland. But Rice was no better than Grout; 'he tried to transform his lease into a kind of by-the-forelock fee simple title, and when some of us have discoursed with him about it he says wee are poor creatures & have noe money, & if you goo to Law & I [ar]rest you might goe to prison & there Lyu & Root.⁴³

A point worth noting is the fact that unlike the United States, squatters at Micmac reserves in Nova Scotia, New Brunswick, and Prince Edward Island seemed to have polarised themselves into the society in the early and mid-nineteenth century. As the colonial government in Nova Scotia made efforts to forcibly remove squatters in 1800's they were forced to “blend” into society “for [they] had neither the money for court actions nor the force to remove undesirables.” By 1859, the Nova Scotia legislature required squatters to

buy the Micmac land they were on, the funds to go into a trust reserve for the tribe. But many squatters paid little or nothing. This proved to be the case in New Brunswick as well, despite the efforts of frustrated superintendents of Indian affairs there. And even when the Mills of the Law were set in motion, they ground Micmacs as often as they ground squatters. The Indian Commissioner for Cape Breton, H. W. Crawley, reported in 1849 that under present circumstances he was powerless to protect 'Indian property.' It was vain to seek a verdict from any jury in this Island against the trespassers on the reserves; nor perhaps would a member of the Bar be found willing and effectually to advocate the cause of the Indians, in as much as he would thereby injure his own prospects, by damaging this popularity.⁴⁴

Unlike South Africa, Aboriginals in Canada and America are still in the “active business” of re-claiming their rights and territories, as long as colonial power ensues.

Canada-Aboriginal Legal History: Origin, Impact and consequences

David Flaherty suggests that,

legal historians of Canada searching for insightful models should start with J. William Hurst, even if some problems of transfer exist. His rationale is that Hurst's masterwork, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915*, (1964) used experience of the state of Wisconsin for understanding the legal history of the United States, thus Canada can

⁴² *ibid* at 107.

⁴³ *ibid* at 107.

⁴⁴ *ibid* at 107.

relate to such matters of contracts, railroads, insurance, and mineral wealth since it possesses similar orientation to specific topics and regions.⁴⁵

With all due respect to one of Canada's finest, I argue that the legal history of Canada minus that of Aboriginals is incomplete and lack critical any opportunity to engage critical debate and analysis. To support my argument, turn to Imai's admonition,

Canadian policy on Aboriginal people has been based on terrible distortions of history. An account provided in a 1969 university textbook on Canadian history: The Europeans who came to the shores of North America regarded it as a vacant continent, which lay completely open to settlement from the Old World. In the final analysis this assumption was justified. It is true that, the continent was already inhabited by tribes who claimed the land as their own. But in the whole of Canada there were probably no more than 220,000 Indians... The aborigines made no major contribution to the culture that developed in the settled communities of Canada... They remained a primitive remnant clinging to their tribal organization long after it had become obsolete...In the United States, where agricultural settlement was the primary aim, the Indian was not only useless but an active menace whose speedy extermination would be an unqualified boon.⁴⁶

These systematic and structural forces (mainly legal) have for many years been invasive, violent and traumatic Aboriginals in Canada. Aboriginal social problems are countless but certainly homelessness vis-à-vis displacement is of essence.⁴⁷ For example, Debra Sider's (2009) report that, 99 per cent of the individuals on the streets in Sioux Lookout, Ontario were Aboriginals⁴⁸ where as Aleem's research characterizes consequences of Canada's colonial government policies as "the violence plaguing Aboriginal communities has resulted in loss of cultural identity coupled with social and economic marginalization."⁴⁹ It has not always been like so.

Indigenous peoples have always used their own laws and regulations to govern themselves. Yet they were "often ignored, diminished, or denied as being relevant queries about the sources of...its cultural commitments, institutional receptiveness, and interpretive competency"⁵⁰. John Burrows explains colonial Canada perception with respect to the originality of Aboriginal laws in Canada,

their law and customs were either too unfamiliar or too primitive to justify compelling British subjects to obey them. These labels are offensive to me and many others because they presume the legal inferiority of Indigenous peoples. When Professor Peter Hogg was asked how did Canada acquire its legal system? He responded 'they received in Canada from the former Imperial power, the United Kingdom, and, to a much lesser extent, France, during the colonial period. In the absence of any competing legal system, English law followed British subjects and filled the legal void in the new territory. The doctrine of

⁴⁵ David Flaherty, "Writing Canadian Legal History" in David Flaherty, *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1981) Volume 1 at 7-8.

⁴⁶ Shin Imai supra at 3.

⁴⁷ Debra Sider, *A Sociological Analysis of Aboriginal Homelessness in Sioux Lookout, Ontario* (Toronto: Canada Race Relations Foundation, 2009) at 1.

⁴⁸ *ibid* at 1

⁴⁹ Rebecca Aleem, "International Human Rights Law and Aboriginal Girls in Canada: Never the twain shall meet?" Justice for Girls International (April 2009) online: <http://www.justiceforgirls.org/international_hr/index.html>

⁵⁰ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 6.

reception holds that we look to the English common law of colonization for the basic rules' for the sources of law in Canada. In this respect the doctrine of reception does not incorporate Indigenous peoples' wisdom and learning to formulate the basic rules of our legal system.⁵¹

It was under such perception and superiority complex that colonial Canada begun almost three centuries of legal prejudiced - camouflaged today as the "rule of law" under which "everyone is equal".⁵²

By adopting Legally Controlled Displacement (LCD), colonial Canada used the law to acquire much of Aboriginal land and property. Through the *Constitutional Act* of 1791 (an *Act of the British Parliament* creating Upper and Lower Canada) most of the features of English law and courts were brought to Upper Canada - for instance, the Court of the King's Bench was established by the *Judicature Act* of 1794. Without much regard for native law, Lieutenant Governor Simcoe believed that "every regulation in England should be proper in Upper Canada." Clearly a paternalistic legal framework that relied both on English common law and legislation purposely designed to "protect" and "support" Indians until they could be assimilated.⁵³ From 1791, British legal authorities were of the belief that all (including Indians) were equal under the English-Canadian law. Obviously, the reality this assumption was far-fetched amidst the creation of a legal duality (different rights for Indians and non-Indians) in Canada, which was later incorporated into the *Indian Acts*.⁵⁴

The *1867 Constitution section 91* (*British North American Act*, which established the new nation Canada by transferring responsibility of Aboriginals from British to Canada) gave the government exclusive jurisdiction over "Indians, [and] their land".⁵⁵ Unfortunately, the purpose of which the BNA Act (1867) was established was not accomplished as Aboriginals endured abuses and exploitations. With this concern, the *Indian Act*, first enacted in 1876 - rather to solving the problem of abuse, eventually set the stage for more subjugation of Aboriginal peoples as the Canadian government granted enormous power to "Indian agents" under the law. Under the *Indian Act*, an "Indian" is defined as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Consequentially, this enactment legalized Aboriginals as "permanent ward" of the Canadian State predisposing Aboriginals to further abuse and paternalism on the part of colonial Canada.

While the purpose of the *Indian Act* was intended to protect the rights of all Aboriginals in Canada, parts of it was criticized for being oppressive and paternalistic. The federal government acknowledges that the legislation provided an inadequate

⁵¹ *ibid* at 13-14.

⁵² Section 15(1) of the Canadian Charter of Rights and Freedom.

⁵³ James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre University of Saskatchewan) at 22.

⁵⁴ Sidney L. Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 17.

⁵⁵ Paula Mallea, *Aboriginal Law: Apartheid in Canada?* (Manitoba: Bearpaw Publishing, 1994) at 24.

framework for its contemporary relationship with Aboriginal communities as it supported high governmental control over Aboriginal land use decisions; limited bylaw making powers of Indian bands; bound justice enforcement; controlled Indian status and band membership; restricted band control over Indian finances; and ministerial supervision of band elections.⁵⁶

It recent years Canada have made some positive attempts to address the historical reality of Aboriginals existence by way of the Constitution (Section 35 of the *Constitution Act*, 1982) and international treaties (on November 17, 2010 Canada finally endorsed the UN *Declaration on the Rights of Indigenous Peoples*). In fact, to be precise, James Henderson believes that the Constitutional Proclamation ceremony (1982) formally ended the long oppressive colonial era for Aboriginal peoples.⁵⁷ Thus, at the national level, it can be argued that Canada has made some relative progress as the Constitution is known for setting out the legal foundation of any country, thereby determining the relationship between individuals and their governments, as well as prescribing limitations on different authorities/institutions characterize by “fair” distribution of law-making powers among different levels of government.⁵⁸

For Canada’s Aboriginals, to some extent the significance of this change is exemplified in section 35(1) of the *Canadian Charter of Rights and Freedom* – patriated 17 April 1982. It states that, “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada is hereby recognized and affirmed.” This legal provision corroborates with the fact that Canada did not only officially legalized Aboriginal rights but also openly recognized that Aboriginal rights pre-existed the *Canadian Charter* rights.⁵⁹ It proclaimed and entrenched the rights of First Nations as beyond the power of a transient legislative majority and individual rights and freedoms. Henderson reasoned, “it established a new integrative order in Canada which had previously been dismissed as inherently unrealistic”.⁶⁰ Despite the above progress, following are substantial evidence to show that enshrining Aboriginal people’s rights in the *Canadian Charter of Rights and Freedom* did not translate to ending oppression of their group by colonial Canada. In particular cases of land ownership, hunting and fishing with regards to Aboriginals the problem still exist except that it has transformed into more sophisticated systemic methods that are hard to detect since they are not individualized.

Displacing the Context of Colonialism in Canada

In 1948, without any real consultation or consent the Innu People of Labrador were moved from Davis Inlet to Nutak - 250 miles north of Canada. Barely 20 years after, they were relocated for the second time to Iluikoyak Island. The government of Canada (as parochial patriarchs of aboriginals) rationale for this move was to direct “the Innu to

⁵⁶ Myriam Denov & Kathryn Campbell note 29 at 21-33.

⁵⁷ James Youngblood Henderson supra note 53

⁵⁸ Shin Imai supra at 4.

⁵⁹ *ibid* at 5.

⁶⁰ James Youngblood Henderson supra at 34.

fishing as an economic activity.”⁶¹ This forced displacement led to a drastic reduction of Innus’ traditional economy as they had previously owned a large land base populated with game for food, clothing, and tools used for trading with others. As a consequence of forced displacement, the Innus have not only lost significant aspects of their traditional ways of survival, inherent in forced displacement⁶² but have also had their belief system tarnished through the imposition of Canadian educational systems (English and French). Myriam Denov & Kathryn Campbell argue that such

[a]ssimilation through education appeared to be one of the most important goals of the government officials and priests advocating the sedentarization of the Innu. Officials believed that through education, the Innu could be ‘civilized’ into mainstream ways of working and seeing the world. Within the village of Sheshatshiu [in Labrador] in the early 1950s, Joseph Pirson, an Oblate priest, believed this could be accomplished by sending the younger generation to school, where they would be taught the same curriculum as children elsewhere in Canada.⁶³

The exposure of Innus to the above vulnerabilities resulted in what the *Royal Commission on Aboriginal Peoples* (1995) referred to as culture stress and self-destructive behaviours characteristics apparent in societies that have undergone massive, imposed, or uncontrollable change. According to the *Royal Commission on Aboriginal People*, culture stress is,

a term used to refer to the loss of confidence in the ways of understanding life and living that have been taught within a particular culture. It comes about when the complex of relationships, knowledge, languages, social institutions, beliefs, values, and ethical rules that bind a people and give them a collective sense of who they are and where they belong is subjected to change. For aboriginal people, such things as loss of land and control over living conditions, suppression of belief systems and spirituality, weakening of social and political institutions, and racial discrimination have seriously damaged their confidence and thus predisposed them to suicide, self-injury and other self-destructive behaviours.⁶⁴

With this in mind, one can see clearly how Aboriginals in CANZUSSA have been associated (mainly by Europeans descendants who tend to be more privileged than Aboriginals) with substance abuse (alcoholism), suicide, disease prone, apathy, and little desire to acquire education.⁶⁵

⁶¹ Myriam Denov & Kathryn Campbell supra at 21-33.

⁶² According to paragraph 2 of the *Guiding Principles of Internal Displacement (1998)*: For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border. Although the *Guiding Principles* came way after most of the Aboriginals forced displacement in CANZUSSA, the impact and remnants (e.g., reserves) it caused on Aboriginals today still exist. Therefore, I see no justifiable reasons why humanitarian organizations cannot offer assistance to Aboriginals in these countries if their human rights are being violated.

⁶³ Myriam Denov & Kathryn Campbell supra at 21-33.

⁶⁴ Nancy Miller Chenier, *Suicide Among Aboriginal People: Royal Commission Report* (Ottawa: Government of Canada, 1995) at 2.

⁶⁵ *ibid* at 21-33.

In 1755, when Canada under Imperial English/British Empire put the management of all “Indian” (Aboriginal peoples) within *British North America* in the office of the *Superintendent General of Indian Affairs* the first noticeable impact was squandering of Aboriginal lands. Their lands taken away by force literally by virtue of the Canadian Indian policy until 1860,⁶⁶ when it was directed from the Colonial Office in London.⁶⁷ Few years later, with serious challenges in “supervising” Aboriginals the Royal Crown⁶⁸ realized the need to address Aboriginal land issues through proper negotiations. As documented by Blair, the Royal Crown started out with full recognition of Aboriginal title and rights,

In 1761, King George III instructed Governor Robert Monckton to support and protect the ‘Indians in their just rights and Possessions’ and to ‘keep inviolable the treaties and compacts which have been entered into with them...upon pain of our highest displeasure.’ With the 1763 Treaty of Paris, Aboriginal peoples in Canada fell under British jurisdiction, at least in terms of European law. Despite the Crown’s assertion of sovereignty over ‘discovered’ lands, however, the early practice of the British was to recognize the legal reality of Aboriginal title and rights through surrenders and treaties. In October 1783, King George issued a Royal Proclamation declaring that the Indian Territory, which included most of Ontario, was a hunting ground reserve for Aboriginal peoples until surrounded by them. As the Proclamation directed, ‘the several nations of Tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in such part of our Dominions and territories as not having been ceded to us are reserved to them as their hunting grounds.’⁶⁹

First Lieutenant-Governor of the Province of Upper Canada – John Graves Simcoe attested to this fact months after his appointment to office on 21 September 1791,

[t]he Indians can in no way be deprived of their rights to their territory and Hunting Grounds, save and except as formerly stated, and any portion of Lands ceded by them held as a Reservation must and shall be fully protected, as well as rights reserved on certain Streams and Lakes for fishing and hunting privileges or purposes.⁷⁰

Blair provides further evidence to corroborate the above argument. She connotes, in 1845, Sir Charles Bagot, Governor General of British North America issued a report to

⁶⁶ Sidney L. Harring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 64-69.

⁶⁷ The Colonial Office - headed by the Colonial Secretary - was first established to supervise colonial affairs in the BNA but later expanded its focus on Australia, New Zealand, the Western Indies, and Southern Africa for most part of the early nineteenth century.

⁶⁸ According to Heritage Canada, the Royal Crown has long been a monarchy -- under the kings of France in the 16th, 17th and 18th centuries, under the British Crown in the 18th and 19th centuries, and as a kingdom in her own right from Confederation onward. Through this imperialistic feudal system (practiced in the commonwealth including Canada, Australia, New Zealand, and Jamaica), the use of the Royal Crown in any design must receive the personal permission of Her Majesty, by her express direction. In Canada, permission is sought through the Office of the Governor General since February 6, 1952, when Queen Elizabeth II adopted a heraldic representation of the crown closely resembling the St. Edward’s Crown, which was used for her coronation on June 2, 1953.

⁶⁹ Peggy J. Blair supra at 10-12.

⁷⁰ *ibid* at 13-15.

the Imperial government regarding legislation in accordance with illegal fishing of salmon,

nearer the mouth of any of the rivers or creeks emptying into Lake Ontario or the Bay of Quinte than 200 yards or within two hundred yards up from the mouth of any such river or creek, precisely the areas that the Mississaugas had been reserved for their own exclusive use. The Bagot Report mentioned Aboriginal fisheries specifically, stating that all rangers, Chiefs, and officers should be informed of the new law and that any insufficiency of the law should be reported to the Governor General to prevent injustice and that if necessary, a legal enactment be introduced to supply additional power for its repression.

This is relatively significant amount of evidence to point towards the fact that the Royal Crown initially had Aboriginal peoples land issues at heart. But, if the major goal of the BNA was to respect Aboriginal land rights through the *Royal Proclamation* and other legislations, then what went wrong so that Aboriginal bear the brunt of a “broken promise” today? Blair puts forward an argument noting that the Bagot Report, suggested the “advance towards civilization” (knowing full well that Aboriginals still relied on their traditional activities) “could be facilitated more easily if the Crown obtained surrenders of the remaining un-ceded fishing islands.” This will be yet another beginning of on-going struggle for Aboriginals as they were systematically and “legally” forced out of their land.

To this end, Aboriginals garnered resistance to reclaim their land, property and tradition. One typical example can be seen with the Mississaugas, notably Peter Jones who begun intense lobbying for First Nations to be provided with title deeds for their lands and water. In response to Aboriginals resistance, Captain Thomas G. Anderson of the Indian Department recommended that,

the Crown expropriate any remaining unceded Indian lands, since it would relieve the Government, and this Department from much inconvenience and vexatious Law Suits which much otherwise continue for years to come...he urged the government to extinguish all Aboriginal rights except those on reserves and thus forever put an end to the question... that if the Government [does] not take some speedy and effectual means of security to the Natives...every inch of their Reserves will ere long to occupied by white settlers...and powerful race.⁷¹

You bet, Captain Anderson was dead right.

Just like fishing, throughout the colonies of North America British settlers claimed their right to hunt games. Some of the Royal Charters recited settlers’ rights “to fowl and hunt upon the lands they hold, and all other lands not enclosed, and to fish in all waters of said lands.”⁷² One English visitor to Carolina backcountry in the early eighteenth century marvelled in his diary at the vastness of property in the “New

⁷¹ *ibid* at 25-32.

⁷² Peter Karsten, *supra* note 30

World": "[h]unting was being as freely and peremptorily enjoyed by the meanest planter, as he that is the highest in dignity, and there were no strict laws to bind the privileges of a poor labourer that is master of his gun such as to satisfy the appetite of the rich alone."⁷³ We now know that Aboriginals did not only inhabit the land thousands of years before English settlers arrival but that their customs, traditions, and laws were well-developed, despite the settlers' distortion that they had no

form of writing, horses, or wheeled wagons – all deficiencies which have rendered the Aboriginal peoples inferior...In fact, the Aboriginal peoples living in what is now Canada was civilized, self-governing and sophisticated in ways unrecognized by their 'discoverers.' After contact and up to 1870, Aboriginal customary law remained unchanged and in place. Although fur-trading companies had local legal arrangements, it was not until after 1870 that the Aboriginal peoples began to sign treaties with the Canadian government.⁷⁴

Even when the rights of First Nations were brought to the colonists' attention, using their Eurocentric understanding of "civilization" they frivolously categorized Aboriginal laws as "primitive". They presumed that, Aboriginals should progress from savagery through an intermediate stage of barbarism, to reach the desired final state of European civilization – a phenomenon William Easterly coined as "the Whiteman's burden." This was (and still is) a philosophical thinking from which the so-called positivist doctrine evolves.⁷⁵ By rejecting "unwritten and customary laws of Native culture," they (colonial Canada) later justified their expansion across the world.⁷⁶ Although, historically, "Positive law"⁷⁷ were not much different from those of "unwritten" laws in that it was derived from moral precepts, customs, habits, and other sources which later became law by virtue of the King (or whoever was in power) proclaiming it as "supreme" and "sovereign". James Henderson analyses this mystical power of the law,

[incapable] of legal limit, the power of a sovereign thus defined the province of jurisprudence, making certain human conduct obligatory and creating the habit of obedience. It denied law any deeper mystery and reflected truths. Yet, attempting to scientifically describe what the law is, the purpose of positive law was to transform the existing law into another version of what the law ought to become through reform [of] natural society in North America, [i.e., from] the savage...societies which live by hunting or fishing in the woods and plains of the North American continent.⁷⁸

With no respect for Aboriginal "unwritten" laws, the Royal Crown exploited and extended their use of Natives' land till this day.

⁷³ *ibid*

⁷⁴ Paula Mallea *supra* at 24.

⁷⁵ James Youngblood Henderson note 53 at 8.

⁷⁶ *ibid* at 9.

⁷⁷ According to Dictionary.com positive law is a "statutory man-made law, as compared to "natural law," which is purportedly based on universally accepted moral principles, "God's law," and/or derived from nature and reason. The term "positive law" was first used by Thomas Hobbes in *Leviathan* (1651)."

⁷⁸ James Youngblood Henderson *supra* note 53 at 10-11.

Land Ownership and Usage - Hunting, Trapping and Fishing

Alluded to earlier, Aboriginals in Canada had always lived alongside other people and cultures for centuries; negotiating myriad arrangements – whether it was for food preservation, land ownership/sharing or dispute resolution. Even with Canada’s inevitable legal imposition on First Nations linguistics, political, educational and social rights, Aboriginals fought (and still fighting) tirelessly to keep their distinctive languages, cultures, and traditions - of course, not without challenges.⁷⁹ Before European arrivals, Aboriginals were generally distinguished by their tradition, dialect, hunting and fishing territories. The Anishnabe (for example) were predominantly hunting and fishing tribes. The Ojibway on the other hand, value fish products as a cultural and subsistence way of life.⁸⁰

In spite of the aforementioned, Aboriginal land claims comprise one of the most sensitive and volatile issues confronting their group and governments in CANZUSSA. In particular regard to Canada, even though in later years the Supreme Court of Canada decisions have made it clear that Aboriginal title to land existed as a legal right prior to the colonization of North America by Europeans;⁸¹ the history of dispossession is discouraging. In 1969, after centuries of forced acquisition of Aboriginal lands, the Government of Canada presented the *White Paper on Indian Policy*, which stated its policy of immediate and total assimilation of First Nations peoples into mainstream Canada by putting an end to the Reserve land system (vis-à-vis refugee camps run by the government of Canada). Aboriginal peoples regarded this to be the ultimate dispossession, and reacted virtually unanimously against the *White Paper*.⁸² Under the *Indian Act*, reserves are tracts of land that are titled to Her Majesty who holds the land from the benefit of a Band. The land is not own by individual Indians but by the band⁸³ solely for the purpose of “benefitting” the group. “Benefitting” here implies Aboriginals, like “children”, needed the Crown to look after their wellbeing doing everything possible in their “best interest.”

Although, centuries of interaction transpired between Natives and colonial Canada with regard to land ownership and usage, to date, little has been written on the extent to which treaties between the Crown and Aboriginal peoples restricted the use of their land.⁸⁴ Several treaties were written to this effect. *Treaty 9* (for instance) covers lands in northern Ontario that lie north of the Robinson-Superior. It was negotiated and

⁷⁹ J. Edward Chamberlin, “Culture and Anarchy in Indian Country” in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 7.

⁸⁰ Peggy J. Blair supra note 14 at 1.

⁸¹ Kent McNeil, “The meaning of Aboriginal Title” in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 136.

⁸² Paula Mallea supra at 183.

⁸³ Sidney L. Harring supra note 66.

⁸⁴ Arthur J. Ray, “Ethnohistory and the development of native law in Canada: advancing Aboriginal Rights or re-inscribing colonialism?” in Frederica Wilson & Melanie Mallet, *Metis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law Inc., 2008) at 9.

signed in 1905 and 1906 by Commissioners Duncan Campbell Scott⁸⁵ and Samuel Steward, representatives of the federal government, Commissioner Daniel McMartin, representative of the Province of Ontario, and numerous Aboriginal leaders of Cree and Ojibwa peoples living in the area. The written text of the treaty contains a series of promises made by the federal government in return for the apparent agreement of Aboriginal people to surrender certain rights, initially to 130,000 square miles of ancestral lands, and “relocate” to reserves of 524 square miles. In 1929-30, adhesions were made to *Treaty 9* extending its coverage over an additional 128,000 square miles to Ontario’s present border with Manitoba. Signing ceremonies occurred at Trout Lake in 1929, and Windigo River, Fort Severn, and Winisk in 1930. *Treaty 9* currently covers more than two-thirds of present-day Ontario.⁸⁶

Early in the seventeenth century, as the fur trade with European visitors identified the inhabitants of Ontario (including the Algonquin, Nipissing, Ojibway, and Ottawa tribes) their desirability in the rich hunting and fishing ground in the region increased. According to oral traditions the Ojibway and Iroquois struggled to gain control of their lands. Archaeological fact indicates that around 3000 BC, Aboriginals used sophisticated tools (like spears and harpoons) for fishing and hunting way before Europeans arrival in Canada. The importance of subsistence fishing and hunting was crucial to the Anishnabe and Ojibway peoples.⁸⁷ Similarly, earliest explorers had stated that not only were hunting and fishing important cultural activities for the Mississaugas and Chippewas but that these Natives used ingenious harvesting techniques. For example, in 1698, Louis Hannepin described the intriguing methods by which the “savages” fished:

[They] catch all sorts of fish with Nets, Hooks and Harping-irons [harpoons or spears] as they do in Europe. I have seen them fish in a very pleasant manner. They take a fork of wood with two Grains of Points and fit a Gin to it, almost the same way that in France they catch partridges. After they put it in the water and when the fish, which are in great plenty by far than with us go to pass through, and find they are entered in the gin, they snap together this sort of Nippers or Pinchers and catch the Fish by the Gills.⁸⁸

Fishing, however, was not the only means of subsistence among Aboriginals, it was traditional, ceremonial and ritualistic – it was a way of life. The Ojibways hunters

⁸⁵ The highly acclaimed Canadian Poet who is also infamous for being the Worst Canada according to a 2007 poll administered by Canada’s National History Society. As Head of the Department of Indian Affairs between 1932 – he believed that residential schools albeit abusive and violent towards Indians was the solution to the “Indian problem”: “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone...Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.” (1920). Daniel N. Paul, “We were not the savages” [nd] online: <<http://www.danielnpaul.com/IndianResidentialSchools.html>>

⁸⁶ Patrick Macklem, “The impact of Treaty 9 on natural resource development in northern Ontario” in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 97-98.

⁸⁷ Peggy J. Blair supra note 14 at 1-2.

⁸⁸ *ibid* at 10.

embellished respect from their community regarding “the active deer-slayer or brave beaver-trapper as a man to be respected, who can support a family, a brave who gains the women’s hearts, and whose praises the songs repeat.”⁸⁹ There were many spiritual rituals associated with hunting. Peggy Blair recounts a notable situation during the time of Manidogizisons (Manido moon). According to her,

in early February and March, when it was believed that the supernatural man-eating Windigo would attach and destroy camps. In the harsh months of winter, stores of berries, sugar, and rice would quickly be depleted, leaving bands almost completely dependent on hunting and ice fishing. To ward off the Windigo, many precautionary steps were taken, such as making a feast with the first animal killed, but offering part of it in sacrifice.⁹⁰

Animals were not only used for sacrifices but provided special medicinal powers,

For hunting beaver, medicine would be smeared on the end of a stick, which is attached to the trap planted in the ground. The stick doused in medicine attracts the beaver without fail. For luck in deer hunting, a man usually chewed some kind of root that rubbed it on the cheeks, eyes, hands or weapons. Other deer medicines were believed to ‘poison’ the animals’ blood, which the hunter threw away as an offering to the Manido’s spirits who helped him in his pursuit.⁹¹

Despite such profound acknowledgement of Aboriginals hunting ingenuity, Knafla & Swainger explicate Aboriginals unrelenting wisdom in efforts to initiate peaceful negotiations with Europeans. They acknowledge how Indigenous Chiefs dealt with European “invasion” into their territories. Using a particular protocol Indigenous Chiefs requested foreigners’ obedience of this protocol. That is, prior to signing a treaty, “the Chiefs requested that the Crown and its settlers not enter their territory without concluding an agreement.”⁹² For example, before *Treaty Number 6*⁹³ was signed in 1876; unbeknownst to the Indigenous peoples, the Hudson’s Bay Company had sold their lands to the British Crown. To clarify, “the Chiefs sent a message to the representative of the Queen to inform her of the true situation [that] all over the West Coast of Canada, Indigenous peoples prevented surveyors and intruders from illegally coming into their territory”.⁹⁴ Obviously these tactics did not work as documents such as, the *Royal Proclamation of 1763* was never binding upon Indigenous peoples even though “it bound the British Crown and its colonial agents to follow certain rules in relation to Indigenous peoples and lands.”⁹⁵ In actual fact, the *Royal Proclamation* (it can be argued)

⁸⁹ ibidi at 1.

⁹⁰ ibid at 2.

⁹¹ ibid at 2.

⁹² Louise A. Knafla & Jonathan Swainger supra note 28.

⁹³ Treated No. 6 - The negotiation of this treaty took place during a difficult period for the Plains Cree, who were suffering from the rapid decline of the buffalo. The documents indicate that their concerns included medical care and relief in case of need. Taken from the Government of Canada Indian and Northern Affairs Canada website, online <<http://www.ainc-inac.gc.ca/al/hts/tgu/tr6-eng.asp>>

⁹⁴ Sharon Venne, “Understanding Treaty 6: an Indigenous perspective” in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 184.

⁹⁵ Louise A. Knafla & Jonathan Swainger supra at 153.

is “a codification of the norms of customary international law for entering into treaties as international law required that a sovereign [entity] enters into formal agreements with another sovereign [entity] prior to entering lands occupied by those peoples.”⁹⁶ To this end, the *Royal Proclamation* was considered binding between Aboriginals and the Crown by extending legal norms of international law to Indigenous peoples colonial Canada.⁹⁷ So for that moment the “Crown” commissioner requested a “Peace and Friendship Treaty” (for example) be entered into with the Cree, Assiniboine, Saukteau, and Dene Peoples in the Western part of present-day Canada.⁹⁸

A point worth noting is the fact that Aboriginals struggle to get the government to adhere to promises is not just unique to Canada. Paula Mallea posits,

In New Zealand, the *Treaty of Waitangi of 1840* promised the Maori that the government would protect lands, forests, fisheries, to their full, exclusive and undisturbed possession. Yet within 25 years there was a new 1863 *New Zealand Settlements Act* under which 1 ¼ million acres of the best land was summarily confiscated.⁹⁹

There is no better similarity of New Zealand’s Treaty of Waitangi in Canada other than the multi-million dollar Hudson’s Bay Company (the Bay) – one of the oldest companies in the world, incorporated by the British Royal Charter in 1670.

Rupert’s Land

The Hudson Bay Company (HBC) was established on the banks of the Red River by Thomas Douglas - Fifth Earl of Selkirk.¹⁰⁰ His commitment to emigration schemes for the relief of Scots and Irish peasants was reported tested in Prince Edward Island and Upper northwest Canada as “astute accumulation of stock enabled Selkirk to take charge of the Hudson’s Bay Company’s experiment in colonization and to test his theories about the northwest.”¹⁰¹ Selkirk was granted 116,000 square miles of land with “a token rent of 10 shillings and the availability of two hundred potential servants” under land agreement to establish an agricultural settlement with the hope that he would provide land in his settlement for retired Company traders,¹⁰² in order to lessen the attraction of independent trade for retired Company employees. This marked the onset of HBC’s claim to power, colonial control and millions of dollars in profit.

Rupert’s Land is one of Canada’s marked historical legacies of how authoritative and damaging the impact of “remote leadership” was on Aboriginals. Whilst sitting on his Throne, Charles II of England granted the Hudson’s Bay Company¹⁰³ a significantly

⁹⁶ *ibid* at 185.

⁹⁷ *ibid* at 185

⁹⁸ Sharon Venne *supra* note 94 at 187.

⁹⁹ Paula Mallea, *supra* at 3.

¹⁰⁰ Sidney L. Harring *supra* note 66 at 18.

¹⁰¹ Kathryn M. Bindon, “Hudson’s Bay Company Law; Adam Thom and the Institution of Order in Rupert’s Land 1839-54” in David Flaherty, *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1981) Volume 1 at 44.

¹⁰² *ibid* at 45.

¹⁰³ The Hudson Bay Company was the first established fur trade post in James and Hudson Bays which expanded to 97 posts between 1774 and 1870.

large portion of North American in honour of his cousin and HBC's governor Prince Rupert. This process of land exploitation, "characterized by social and commercial conflict" brought together Europeans, Amerindians, and half-breed/Metis in the settlement of Red River colony.¹⁰⁴ As the colony grew, the need for more formal structures bred diverse concerns. This led to the need to establish monopolistic control through a more regular judicial system. With this process underway, the community saw the HBC's systematic introduction of law and order as a way of stirring up conflict. For instance, the appointment of the Company's first governor,

Adam Thom, a Lower Canadian journalist and lawyer, became both legal interpreter and judge for the settlement in 1839 [posed some problems]. As the first Recorder of Rupert's Land, Thom formulated an appropriate code of laws for the community. As a Company employee and judge, however, he exacerbated cultural and social tensions and provoked the francophone majority of the Red River settlement to articulate many criticisms of the Company's administration. While the court records offer substantial proof of Thom's capabilities as Recorder, the reactions of the community to his behaviour and to his application of the law suggest Thom's failure as a judge. Indeed, through Adam Thom the administration of justice was the means whereby the contradictions of the Company's colonial role became manifest. After 1849 the community repeatedly rejected Thom as a suitable official. In this, the settlers were upon the inappropriate linking of the pursuit of justice and commercial monopoly which underlay the legal organization of Rupert's Land under Hudson's Bay Company rule. Charles II Royal Charter in 1670 granted the Hudson's Bay Company exclusive control of Rupert's Land. The area was defined by all waters draining into Hudson Bay. Thus the Charter did not apply to the Western part of the prairie interior of British North America or the Pacific coast.

This will continue until the end of the eighteenth century when traders challenged HBC's monopoly. In response the British government established the *Canada Jurisdiction Act, 1803* with the intention of resolving jurisdictional problems when crimes were committed in areas not covered by the 1803 Act. Even though the possibilities of violence in the northwest increased as a result of HBC's monopolistic legal control, the 1803 Act was never enforced, partly due to its vagueness. After some 330 years, modern day HBC has relinquished its initial fur-trade and diversified into different business joint ventures. But the question thus remains, are Aboriginals capable of reclaiming some benefits (profits) from this 3.9 million km² of land (almost one third the area of Canada)? Let's consider how Aboriginals have managed to engage in locals and international advocacy.

Local and International Engagement: Possible Solution?

For the longest time possible, unlike most minority groups in the developing world that draw their protection from the UN humanitarian system, First Nations in Canada had always looked up to the Canadian Constitution for protection of their inherent rights as first occupants of this land. Unfortunately, they have not seen much change despite constitutional progresses. Part of the reason this is so, Henderson argues is because,

¹⁰⁴ Louise A. Knafla & Jonathan Swainger supra at 12.
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Aboriginal rights are distinct from individual freedoms and rights in Canadian laws, which are typically based on Eurocentric political ideologies of liberalism and conservatism positing as reconstructive legal theory or reasoning. They are distinct from equality or equal protection language or individual right based on Eurocentric “class,” “race,” or “identity” or various oppressed and disadvantaged groups, such as the civil or Charter rights movements of blacks, women, gays, and so on. These modern rights emphasize anti-discrimination in public and private action to remedy some of the oppression of the colonial era.¹⁰⁵

Canadian researchers have argued that the reason we see little or no change with regards to Aboriginal-colonial Canadian relationship is partly due to the fact that Aboriginal people relinquished their ancestral rights to colonial Canada who then “promised” to protect them. For instance, the establishment of Indian Reserves (vis-à-vis refugee camps) started by the French regime, had a major purpose of “shielding” Native people from the influence of immigrants, thereby creating a particular worldview of Aboriginals today. Aboriginal “imagined” that such “resettlement, displacement, residential schools, and other coercive measures” of assimilation were aimed at protecting them by creating better conditions for their community.¹⁰⁶

As time went by, colonial Canada gained much control - by using systematic legal models they could afford to break legal promises to Aboriginals, neglect their duty to consult and “silence” Aboriginals (by virtue of containing them in the “refugee camps”) thereby limiting easy access to international sources for help. On the positive side of globalization, things have changed in recent years with the advent of the Internet and polarization of international borders crossing. On the one hand, Canada’s duty to consult with Aboriginals is not only of major public interest (e.g., media) but also subject to international scrutiny by various advocacy groups. Dwight Newman cites an example in his book, *The Duty to Consult: New Relationships with Aboriginal Peoples* where the Court held in *Haida Nation v. B.C. and Weyerhaeuser*, (2002) that the government out to have consulted the Haida Nation prior to replacement and transfer of a tree farm license to Weyerhaeuser, a large forestry corporation. According to the Supreme Court, this duty to consult with Aboriginals arouse even prior to a final proof of a claim in the courts.¹⁰⁷

This is just one miniscule example of how Aboriginals have looked local sources (e.g., the courts) for restorative justice. Space and time will not allow extensive discussion in this regard, however, let’s consider a brief summary of Aboriginals resilience and resistance in their struggle to reclaim their rights.

Aboriginal Resistance and Restorative Justices

Despite Aboriginals long suffering in Canada with respect to violations of their basic human rights, they have always resorted to peaceful/non-violent measures when

¹⁰⁵ James Youngblood Henderson supra note 53 at 229.

¹⁰⁶ Thibault Martin & Steven M. Hoffman, *Power Struggles: Hydro Development and First Nations in Manitoba and Quebec* (Manitoba: University of Manitoba Press, 2008) at 22.

¹⁰⁷ Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 9-12.

negotiating with colonial Canada. Imai sites another example of Aboriginals brilliancy in fostering peaceful interactions with Europeans settlers, yet with hard luck. He narrates,

in the winter of 1763, Nipissing and Algonquin messengers were dispatched across Indian country. They carried strings of wampum and spread word of an important conference to be held at Niagara Falls. Two thousand chiefs gathered the next summer. There were Mi'kmaq from the east coast, Cree from the north, Iroquois from Lake Ontario, Lakota from the west – twenty-four nations in all. They met with William Johnson, Superintendent of Indian Affairs, to negotiate a peace treaty between the British and the First Nations. There were two treaties... One, following the convention of the First Nations was an exchange of gifts and wampum belts... The second, following British convention, was the Royal Proclamation of 1763. This proclamation recognized the 'several Nations or Tribes of Indians' and stated that Indian lands could only be surrendered after a public meeting, to the Crown. In order to prevent "frauds and abuses" individual settlers were not allowed to purchase land directly from the Indians. In the spring of 1987, there was another historic conference. Representatives of Aboriginal peoples from across Canada arrived in Ottawa to negotiate the amending of the Constitution to recognize the right of Aboriginal peoples to self-government. In the 200 years between these events, economic, social, and legal policies were designed to assimilate Indians and destroy the distinctiveness of their nations. Courts did not recognize rights of Aboriginal peoples, and gave no respect to treaties. The most famous...was the decision in *R. v. Syliboy*, which states, 'the savages' right of sovereignty even of ownership were never recognized.¹⁰⁸

R. v. Syliboy (1929), a landmark case Aboriginal legal history in Canada, is another clear evidence to show that establishment of section 35(1) of the Canadian Charter of Rights did not end Aboriginal oppression from colonial Canada. Harring posits how the *Supreme Court of Canada* and the *British Columbia Court of Appeal* affirmed the strength of the constitutional premise for Aboriginal rights by rejecting the

Crown's litigation strategy and arguments [to] denied the existence of Aboriginal rights instead of recognizing and affirming them...[by] attempt[ing] to convince the courts [that] there were no Aboriginal rights or interests requiring constitutional or legal protection. The federal and provincial governments described the wording of section 35(1), as an "empty box" or claimed they were perambulatory in nature given no substantive constitutional rights or legal effects.¹⁰⁹

Aboriginals' suffering and pain have been so immense to the extent that some have associated their experience with Apartheid in South Africa. Mallea articulates,

when Chief Louis Stevenson of the Peguis Band invited the South African Ambassador to visit his Reserve in Northern Manitoba some years ago, he intended to draw the appalling third world conditions among his people. He also wanted to draw a parallel between the Canadian Reserve System and the South African system of apartheid.¹¹⁰

¹⁰⁸ Shin Imai supra at 27-28

¹⁰⁹ Sidney L. Harring supra at 46.

¹¹⁰ Paula Mallea supra at 1.

Admittedly there are varying degrees of apartheid practiced around the globe and Aboriginal in Canada experience is not much different from those of other displaced communities in the developing world.¹¹¹ Regardless, Aboriginals in Canada were not passive subjects to colonial Canada exploitation. They resisted, every step of the way. An earlier example was documented in July 1701 when a little town in Montreal hosted some 1,300 Natives for a conference on peace between the French and the five Iroquois Nations (including the Montagnais, Algonquins and Hurons). The Iroquois, armed by the Dutch, launched series of attacks on the New France Natives, after enduring persistent losses from the French expeditions against them.¹¹²

After their experience with the French, the Iroquois made concerted efforts to make the English understand their desire to remain independent of their control as confirmed by Charlevoix, "Never did a savage have greater merit, greater genius, more value, more prudence, and more discernment."¹¹³ Almost a 100 years after, reports by surveyor William Chewett confirmed that natives in Lake Simcoe and Thames River areas did not only harassed white settlers who were in the habit of taking over their lands without proper consent but that they also protested the hunting of deer and other animals by them. In most recent years, numerous advocacy groups have arisen, amongst which are the *National Indian Brotherhood*.

The *National Indian Brotherhood* was another resistance force created to reject the transfer of Constitutional authority over status Indians from Canada to the various provinces. As Canada reconstructed the political monopoly of England's monarchy, governmental power and social life permanently placed First Nations under the heel of Canada's own interest and opinions. Regardless, Aboriginals rejected Eurocentric ideology and policy – socialism, liberalism, or conservatism – as solutions to Aboriginal empowerment and poverty. They argued that honouring treaties and Aboriginal rights was a necessity if First Nations were to be treated justly along with other Canadians. They knew that the entire legitimacy of the colonial order in Canada, the glorified movement toward self-rule of the colonialists was based on oppression of the Aboriginal confederacies and their treaty relations with the British Sovereign.¹¹⁴

Injustice toward indigenous peoples in Canada is not only historical but persistent. Researchers on Aboriginal issues have argued for several possible solutions to dealing with the amount of injustices they have suffered. In particular, social justice advocates have suggested the restorative justice model that supports self-determination/self-governing of Aboriginals. Val Napoleo et al. argue that since Aboriginals efforts to restorative justice can be seen as a critical step to moving forward, then sustaining Aboriginal self-governing (knowing that Indigenous laws flows from

¹¹¹ *ibid* at 2.

¹¹² Alain Beaulieu & Roland Viau, *The Great Peace: Chronicle of a Diplomatic Saga* (Montreal: Edition Libre Expressions, 2001) at 10-14.

¹¹³ *ibid* at 99.

¹¹⁴ James Youngblood Henderson, *supra* at 20-21.

sources that lie outside of the common law and civil law traditions) as a legal framework whereby “indigenous laws and legal orders can be used (in part) to ask critical and unsentimental questions about the sources and functions of law, the legitimacy and authority of law, the ways in which laws change, and the internal power imbalances and oppression within legal orders;” is imperative. By so doing, such “legal framework [could] advance an understanding of law as whole [thereby] separate[ing] from the dominant understanding of formal, centralized law created and perpetuated by the common and civil law in Canada”.¹¹⁵

Ongoing injustices against Aboriginals stemming from this chronic colonial relationship between the Canadian State and Indigenous people also begs for need to examine the concept of self-government with regard to solving the “indian problem”.¹¹⁶ Stephanie Irlbacher-Fox suggests that such approach should take “the form of proposing indigenization, or power-sharing proposals that maintain the continuity of the institutional status quo.” Eventually, it is hoped that these suggestions may better “accommodate difference and so restore indigenous peoples to wellness by changing indigenous cultural norms to better operate within those social and political structures that have been oppressive to indigenous peoples”.¹¹⁷ According to Indian and Northern Affairs Canada, the government of Canada has “set out arrangements for Aboriginal groups to govern their internal affairs and assume greater responsibility and control over the decision making that affects their communities”¹¹⁸ so that Aboriginal governments can be able to work in partnership with other governments and the private sector to promote economic development and improve social conditions. As Prime Minister Stephen Harper acknowledges Canada’s “sad chapter” by apologizing to former students of Indian Residential Schools, it is hope that “sorry” will transform into affirmative action and change.

Conclusion

On one hand, Williams argues that modern international law refuses to recognize indigenous peoples as “peoples,” entitled to rights of self-determination as in United Nations and other human specified major international rights legal instruments.¹¹⁹ Yet on the other, the *Royal Commission on Aboriginal Peoples* maintains that constitutional renewal and national unity can be legitimately achieved only if the status of Aboriginal peoples is elaborated in the Constitution in a manner acceptable to them as well as to the Federal and provincial governments that is, the Constitution must also reflect accurately the position of the Aboriginal nations and their historical relations with the

¹¹⁵ Val Napoleon, Angela Cameron, Colette Arcand, & Dahti Scott “Where is the law in restorative justice” in Yale D. Belanger, *Aboriginal Self-Government in Canada: Current Trends and Issues* (Purich Publishing: Saskatoon, 2008) at 348-349.

¹¹⁶ Stephanie Irlbacher-Fox, *Finding Dahshaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: UBC Press, 2009) at 3.

¹¹⁷ *ibid* at 4.

¹¹⁸ Indian and Northern Affairs Canada, “Self-government” (November 13, 2009) online: <<http://www.ainc-inac.gc.ca/al/ldc/ccl/sgb-eng.asp>>

¹¹⁹ Robert A. Williams, Jr., “Encounters on the frontiers of international human rights law: redefining the terms of indigenous people’s survival in the world” (1990) 4 *Duke Law Journal* at 660-704.

crown.¹²⁰ The distinct message here is that Aboriginal issues in Canada can be address on both national and international levels. Although, much has changed over the years, it is still not to late for the UN to become a little bit more involved with Aboriginals in CANZUSSA. Progress should not stall at the Declaration on the Rights of Indigenous People or political rhetoric. Precisely, exploring opportunities with the UN's Human Rights Committees with regard to restoring dignity to Aboriginals could offer some hope. The same kind of dignity Chief Dan George's talked about in the Centennial Manifesto presented to 35,000 people on Canada Day, 1967, at the Empire Stadium in Vancouver,

How long have I know you, Oh Canada" A hundred years? (...) And today, when you celebrate your hundred years, Oh Canada, I am sad for all the Indian people throughout the land. For I have known you when your forests were mine; when they gave me my meat and my clothing. I have known you in your streams and rivers where your fish flashed and danced in the sun, where the waters said 'com, com and eat of my abundance.' I have known you in the freedom of the winds. And my spirit, like the winds, once roamed your good lands. But in the long hundred years since the white man came, I have seen my freedom disappear like the salmon going mysteriously out to the sea. The white man's strange customs, which I could not understand, pressed down upon me until I could no longer breathe. When I fought to protect my land and my home, I was called a savage. When I neither understood nor welcomed his way of life, I was called lazy. When I tried to rule my people, I was stripped of my authority.¹²¹

In it all, the closing of this piece begs the question: if Aboriginals in CANZUSSA have experienced this much human rights violation including the inherent impact of being physically, mentally and internally displaced, why have not the United Nations humanitarian system offered humanitarian services to them? I do not have a direct answer, do you?

¹²⁰ The Royal Commission on Aboriginal Peoples supra at 7-8.

¹²¹ James Youngblood Henderson supra at 17.

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