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The Harper Government, the Aboriginal Right to Self-Determination, and the Indian Act of 1876

Diplomová práce

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Abstrakt

Indiánský zákon z roku 1876, jenž ve své relativně nezměněné podobě platí již téměř 140 let, je základním právním předpisem určujícím práva a povinnosti prvních národů a jejich postavení v rámci Kanady. Byť je dlouhodobě kritizován jako diskriminační, chrání zvláštní postavení této skupiny původních obyvatel v kanadské společnosti. S prohlubujícími se socio-ekonomickými problémy původních obyvatel sílí hlasy volající po změně tohoto zákona. První národy pak především žádají uplatnění svého ústavně zakotveného práva na sebeurčení v rámci jakékoliv budoucí právní úpravy. Současná konzervativní vláda Stephena Harpera naproti tomu klade důraz zejména na soběstačnost a finanční odpovědnost původních obyvatel. Legislativní kroky, jež konzervativci zřídka konzultují se samotnými zástupci původních obyvatel, sledují obecné priority Harperovy vlády založené na principech tržní ekonomiky a nereflektují požadavek na sebeurčení a samosprávu indiánských komunit. Protestní hnutí Idle No More založené v roce 2012 v reakci na některé Harperovy zákony týkající se původních obyvatel bojuje za indiánská práva a ochranu přírody neodmyslitelně spjaté s identitou původních obyvatel. Cílem této diplomové práce je analyzovat odlišné pohledy na právní zakotvení původního obyvatelstva v Kanadě, které v případě prvních národů vychází z Indiánského zákona. Porovnáním priorit vlády Stephena Harpera ve vztahu k původním obyvatelům a požadavků původních obyvatel vyjádřených ústy stoupenců hnutí Idle No More autorka práce poukáže na nekompatibilitu politik Harperovy vlády a uplatňování práva původních obyvatel na sebeurčení.

Abstract

In its relatively unchanged form and effective for nearly 140 years the Indian Act of 1876 is the basic law governing the rights and responsibilities of First Nations and their status within Canada. The law protects the special status of Indigenous groups in

Canadian society albeit it has been criticized as discriminatory. Voices calling for change of the legislation are growing stronger with the deepening socio-economic problems of Aboriginal peoples. First Nations primarily require the assertion of their constitutional right to self-determination in any future reform. In contrast, the current Conservative government of Stephen Harper emphasizes self-sufficiency and financial responsibility of Native peoples. Legislative actions that Conservatives rarely consult with representatives of the Indigenous peoples themselves correspond to the general priorities of the Harper Government based on the principles of market economy and do not reflect the demands for self-determination and self-government of Indigenous communities. The Idle No More protest movement founded in 2012 in reaction to some of Harper's laws pertaining to Aboriginal peoples fights for their rights and environmental protection inextricably linked with their identity. The purpose of this thesis is to analyze different perspectives on the legal anchor of Indigenous peoples in Canada which in the case of First Nations is based on the Indian Act. By the comparison of the priorities of Prime Minister Stephen Harper related to Native peoples and the demands of Aboriginal peoples expressed by supporters of the Idle No More movement the author of this thesis highlights the incompatibility of the Harper Government's policies and the enforcement of Indigenous peoples' right to self-determination.

Klíčová slova

Kanada, původní obyvatelé, první národy, Indiánský zákon, právo na sebeurčení, právo na samosprávu, Stephen Harper, Idle No More

Keywords

Canada, Aboriginal peoples, First Nations, Indian Act, right to self-determination, right to self-government, Stephen Harper, Idle No More

Rozsah práce: 108 829 znaků

Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracovala samostatně a použila jen uvedené prameny a literaturu.
2. Prohlašuji, že práce nebyla využita k získání jiného titulu.
3. Souhlasím s tím, aby práce byla zpřístupněna pro studijní a výzkumné účely.

V Praze dne 4. ledna 2015 Kristýna Onderková

Poděkování

Na tomto místě bych ráda poděkovala vedoucí diplomové práce Mgr. Ing. Magdaleně Fiřtové, Ph.D. a konzultantovi Gyorgy Tothovi, Ph.D. za cenné připomínky a rady při vytváření práce.

TEZE DIPLOMOVÉ PRÁCE

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V čem se oproti původními zadání změnil cíl práce?
Cíle práce zůstávají téměř stejné, změnila se pouze metoda postupu, jak těchto cílů dosáhnout. Diplomová práce se bude snažit najít odpověď na otázku, zda vládní reformy nebo úplné nahrazení Indiánského zákona mohou uspět a přinést zlepšení postavení prvních národů, pokud bude konzervativní vláda pokračovat ve stylu jednání s jejich zástupci ve stejném duchu jako doposud. Na základě rozhovorů se zástupci prvních národů bude práce odrážet jejich námitky.
Jaké změny nastaly v časovém, teritoriálním a věcném vymezení tématu?
Časové, teritoriální ani věcné vymezení tématu se nezměnilo.
Jak se proměnila struktura práce (vyjádřete stručným obsahem)?
Struktura práce se značně zpřesnila, bude rozdělena do dvou velkých částí - teoretické části a části s případovou studií - a i některé konkrétní kapitoly, které v práci nebudou chybět, byly identifikovány. V teoretické části budou kriticky zanalyzovány filozofie týkající se původních národů se zvláštním důrazem na myšlenky Hawthornovy zprávy a pojetí „citizens plus“ Alana Cairnse a porovnány s bílou knihou a filozofií tzv. nediferencovaného občanství Toma Flanagana. Součástí této části bude úvodní historická kapitola, jež stručně zmapuje vývoj Indiánského zákona od roku jeho přijetí (1876) až do roku 2006, kdy se stal Steven Harper předsedou kanadské vlády. Další součástí bude kapitola, která bude zkoumat nejdůležitější nedávné iniciativy Harperovy vlády, včetně návrhu zákona C-428, jehož konečným cílem je nahrazení Indiánského zákona, návrhu zákona C-27, který se týká finanční odpovědnosti a transparentnosti administrativy komunit prvních národů nebo návrhu zákona o soukromém vlastnictví půdy v rezervacích (FNPOA). Případová studie ve druhé části představí hlavní problémy, se kterými se potýká jedna konkrétní vybraná indiánská komunita, možnými dopady politik Harperovy konzervativní vlády na její členy a jejich názory na efektivnost Harperovy vlády.
Jakým vývojem prošla metodologická koncepce práce?
Největším posunem je rozhodnutí zaměřit podstatnou část práce na jednu konkrétní kanadskou indiánskou komunitu a udělat případovou studii. Ta bude na příkladu této komunity demonstrovat problémy, jež se týkají ve větší či v menší míře všech původních obyvatel Kanady.

Které nové prameny a sekundární literatura byly zpracovány a jak tato skutečnost ovlivnila celek práce?
Bylo nalezeno velké množství nových zdrojů, které budou v práci použity zejména v první části, která byla výše blíže popsána. Jedná se zejména o tyto zdroje:
- Boldt, Menno. 1993. Surviving as Indians. Toronto: University of Toronto Press.

- Bourassa, Carrie and Peach, Ian. 2009. "Reconceiving Notions of Aboriginal Identity". Research paper for the Institute on Governance. http://www.uregina.ca/gspp/marchildon/WRTCfiles/Reading%201%20-%20Dec.%202.pdf. [2013-11-17].

- Curry, Bill. 2013. "First nations losing appetite for small-step changes to Indian Act". The Globe and Mail (Toronto), January 11. http://www.theglobeandmail.com/news/politics/first-nations-losing-appetite-for-small-step-changes-to-indian-act/article7211830/. [2013-11-19].

- Den Tandt, Michael. 2013. "Indian Act, racist relic of 1876, should be abolished – and so should reserves". Canada.com (Toronto), January 6. http://o.canada.com/2013/01/06/0107-col-dentandt/. [2013-11-19].

- Dickason, Olive Patricia. 1992. Canada's First Nations: A History of Founding Peoples from Earlier Times. Toronto: University of Oklahoma Press.

- Gourdeau, Éric. 2003. "Les autochtones et le Québec". In Weidmann-Koop and Marie-Christine, eds. Le Québec aujourd'hui: Identité, société et culture. Saint-Nicolas: Les Presses de l'Université Laval, 121-140.

- Holmes, Joan. 2002. "The Original Intentions of the Indian Act". Paper prepared by Joan Holmes & Associates Inc. for a conference hosted by Pacific Business and Law Institute, Ottawa, April 17-18. http://www.joanholmes.ca/Indian%20Act%20Paper%20Final.pdf. [2013-11-19].

- Ivison, Duncan. 2000. Political Theory and the Rights of Indigenous Peoples. Cambridge: Cambridge University Press.

- Leslie, John. 1999. The Development of Canadian Indian Policy, 1943-1963. PhD thesis. Department of History. Carleton University. http://www.collectionscanada.gc.ca/obj/s4/f2/dsk1/tape9/PQDD_0013/NQ42797.pdf. [2013-11-17].

- Memmi, Albert. 1965. The Colonizer and the Colonized. London: Beacon Press.

- Montpetit, Isabelle. 2012. "Background: The Indian Act". CBC News (Toronto), May 30. http://www.cbc.ca/news/canada/background-the-indian-act-1.1056988. [2013-11-19].

- Quequish, Christian. 2012. "Walking to abolish the Indian Act". Wawatay News (Sioux Lookout), July 19. http://www.wawataynews.ca/archive/all/2012/7/19/walking-abolish-indian-act_23154. [2013-11-19].
Charakterizujte základní proměny práce v době od zadání projektu do odevzdání tezí a pokuste se vyhodnotit, jaký pokrok na práci jste během semestru zaznamenali (v bodech):

- Největší změnou je nová metodologie - práce bude případovou studií.

- Bylo nalezeno velké množství nových zdrojů, které budou hrát důležitou roli při vypracování první části diplomové práce.

- Byl upraven název práce, aby lépe odpovídal možnému legislativnímu vývoji v Kanadě.

- Došlo k upřesnění struktury práce.

- Bylo rozhodnuto, že práce bude psaná v angličtině.

Podpis studenta a datum:

Schváleno:	**Datum**	**Podpis**
Vedoucí práce		
Vedoucí diplomového semináře		

Content

Introduction

> "Canada's relationship with the Indigenous peoples within its borders is governed by a well-developed legal framework a number of policy initiatives that in many respects are protective of Indigenous peoples' rights. But despite positive steps, daunting challenges remain. The numerous initiatives that have been taken at the federal and provincial/territorial levels to address the problems faced by Indigenous peoples have been insufficient […] and overall there appear to be high levels of distrust among Indigenous peoples toward government at both the federal and provincial levels. […] Concerted measures, based on mutual understanding and real partnership with Aboriginal peoples, through their own representative institutions, are vital to establishing long-term solutions. To that end, it is necessary for Canada to arrive at a common understanding with Indigenous peoples of objectives and goals that are based on full respect for their constitutional, treaty, and internationally-recognized rights."[1]

James Anaya, the Special Rapporteur on the rights of Indigenous peoples appointed by the Commission on Human Rights, summarized in his 2014 *Report* the current situation of Indigenous peoples in Canada and outlined what needs to be done to change the unfavorable state of affairs. Anaya particularly emphasized *full respect for constitutional, treaty, and internationally-recognized rights* of Aboriginal peoples that are the focus of this thesis. Compatibility of the enforcement of the right to self-determination, which is one of such rights, by Indigenous peoples with the policies of Prime Minister Stephen Harper will be the main subject of the research.

Aboriginal peoples neither dissolved in Canadian non-Indigenous society nor have they died out as predicted in the early years. On the contrary, more and more people claim allegiance to Aboriginal ancestry which oftentimes stems from the benefits and generous social support that Native peoples receive from the federal budget. The debate around the controversial Indian Act of 1876, which – along with the Canadian Constitution of 1982 – provides the basis for the rights of one of the largest groups of Indigenous peoples in Canada, the First Nations, has been going on since its approval. Recently, however, resounding calls for the act's amendment or even replacement have been issued both by the country's political elites, and First Nations' leadership.

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[1] James Anaya, "The Situation of Indigenous Peoples in Canada", *Report of the Special Rapporteur on the rights of Indigenous peoples*, Human Rights Council, General Assembly, United Nations, Geneva, Switzerland, July 4, 2014,http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf (accessed November 7, 2014), 1-2.

Since 1969 when the *White Paper*, a first major federal attempt to replace the Indian Act, was presented, successive governments have more or less continued to endorse a special status for Aboriginal peoples in Canada. However, the dramatic difference in living standards of Native and non-Native Canadians has not diminished, and the socio-economic situation of Aboriginal communities keeps deteriorating. Canadian governments have tried to solve the issue and find new ways to improve the conditions of Aboriginal peoples but despite many different efforts, they failed to achieve amelioration of the Native peoples' situation.

The most pressing problems of Aboriginal peoples nowadays are alcoholism, domestic violence, sexual abuse, suicides and parasuicides,[2] unemployment, poverty, drug addiction (especially to cocaine, mescaline, speed, ecstasy, and PCP), dysfunctional families, incest, and aggressive behavior.[3] Canadian statistics indicate that Aboriginal peoples are twice as likely to be unemployed (approximately 14%) as the rest of the population (around 7%).[4] Almost one fifth of Indigenous peoples have an income below the minimum wage compared to one tenth of other Canadians.[5] The life expectancy of Native peoples is shorter because they face more illnesses. At the same time, Canada's Indigenous population is growing twice as fast as the rest of the population, which in case of on-reserve Indians results in overcrowded spaces with dreadful social consequences.[6]

In contrast with the previous Liberal governments' approach of "equal negotiation" – an approach towards Native peoples consisting in negotiations and dialogue between the federal government and Aboriginal communities, and a gradual process of sharing important competencies in the areas of education or health in order to enhance Native self-government, a currently proposed Conservative legislative framework has adopted a very different way of dealing with the issue. The Harper Government calls for responsibility and self-sufficiency for Indigenous peoples. It seeks

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2 Parasuicide is a suicide attempt.

3 Éric Gourdeau, "Les autochtones et le Québec", in *Le Québec aujourd'hui: Identité, société et culture*, ed. Marie-Christine Weidmann-Koop (Saint-Nicolas: Les Presses de l'Université Laval, 2003), 137-8.

4 Government of Canada, "Indicators of Well-being in Canada: Work – Unemployment Rate", *Report of the Human Resources and Skills Development Canada*, Ottawa, Canada, 2013, http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=16 (accessed November 17, 2014).

5 Chantal Collin and Hilary Jensen, "A Statistical Profile of Poverty in Canada", Social Affairs Division of the Parliament of Canada, Ottawa, Canada, 2009, http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.htm#a9 (accessed November 17, 2014).

6 Statistics Canada, "Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census", Ottawa, Canada, 2008, http://www12.statcan.ca/census-recensement/2006/as-sa/97-

to boost their economic activity and reduce Aboriginal dependence on federal funding and social benefits. How does it want to achieve this? What are the current legislative proposals? What could the main implications of the Harper Government's approach be?

The main research question of this thesis will be whether the Harper Government's and First Nations' ideas on if and how to reform the Indian Act of 1876, and consequently how to improve Indigenous socio-economic problems, have enough shared elements for finding common ground, or are too far apart for compromise. More precisely, I will examine whether the Aboriginal rights to self-determination and self-government, the enforcement of which is a priority for Indigenous peoples, are compatible with the Harper Government's policies.

Rights to Self-Determination and Self-Government

It is very complicated to define the concepts of self-determination and self-government. For the purposes of this thesis, I will use the definitions of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) because it is an internationally recognized document that is directly relevant to the issue of Aboriginal peoples. On September 13, 2007, the General Assembly of First Nations (AFN)[7] acknowledged that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirmed the importance of the right to self-determination of all peoples "by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development".[8]

In its Articles 3 and 4, the UNDRIP further elaborated and specified the argument and stated that Indigenous peoples have the right to self-determination, and in exercising their right to self-determination, Aboriginal peoples were endowed with "the right to autonomy or self-government" in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[9] In other words, the right to self-determination means therefore that they have the right to

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558/pdf/97-558-XIE2006001.pdf (accessed November 7, 2014), 14.

7 The Assembly of First Nations is an official organization of First Nations, in which each band is represented by its chief. The AFN' mission is to protect and promote the Indigenous rights and interests.

8 General Assembly of the United Nations, "United Nations Declaration on the Rights of Indigenous Peoples", *Resolution adopted by the UN General Assembly,* Geneva, Switzerland, October 2, 2007, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed November 7, 2014), 3.

determine their own identity, membership, and structures of their institutions in accordance with their customs, procedures and traditions (Article 33).[10] The right to self-government, which is part of the right to self-determination, means that Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions (Article 20).[11]

In political theory there are competing models of determination: state versus self. In the state-centered models, self-determination is defined in ways that reflect and strengthen state interests over those of Aboriginal peoples. In contrast, Native models of self-determining autonomy assert much broader interpretation of self-determination, wherein all other rights stem from it. The federal government tries to curb this discursive framework since it fears that extensive recognition of self-determining autonomy rights might weaken its position and undermine Canadian territorial and political integrity.[12]

In this thesis, I will focus on the right to self-determination of Indigenous peoples, and I will examine how its assertion is perceived by the Harper Government, the First Nations, as well as the Canadian civic society. Therefore, I will also concentrate on the right to self-government – a crucial self-determining autonomy right – the exercise of which should be the goal of any future legislative and practical steps of the Government of Canada as argued by the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Anaya:

> "Any existing legal barriers to the effective exercise of Indigenous self-government, including those in the Indian Act, should be removed, and effective measures should be taken to build Indigenous governance capacity. Canada should continue to engage in, and adequately fund, meaningful negotiations to transfer governance responsibilities to First Nations, Inuit and Métis governments and to financially support, at adequate levels, the development and operation of Indigenous self-governance institutions."[13]

The inherent right to self-government is recognized as an existing Aboriginal right under Section 35 of the Constitution Act of 1982.[14] It is based on the belief that

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9 General Assembly of the United Nations, "United Nations Declaration", 4.
10 Ibidem, 12.
11 Ibidem, 8.
12 Augie Fleras and Roger Maaka, "Mainstreaming Indigeneity by Indigenizing Policymaking: Towards an Indigenous Grounded Analysis Framework as Policy Paradigm", *Indigenous Policy Journal* 20, No. 3 (Fall 2009): 12.
13 Anaya, "The situation of indigenous peoples", 24.
14 Although recognition of the right to self-government is not explicitly stated in Section 35, it is interpreted in this manner.

Indigenous peoples have the right enforceable through the courts to govern themselves in internal matters concerning their communities due to their unique identities, cultures, traditions and institutions.[15] The right to self-government includes jurisdiction over the definition of governance structures, (band) membership in First Nations, family matters, education, health services, and ownership of land. However, in order to exercise such jurisdiction, agreements must be negotiated with the Canadian federal government.[16]

In 1983, Canada's House of Commons set up a parliamentary committee known as the Penner Committee to inquire into matters of Aboriginal self-government. In its report, the Penner Committee acknowledged that the right to self-government was inherent to all First Nations as protected by the Constitution. In 1995, the Liberal government of Jean Chrétien introduced the so called Inherent Right Policy in order to negotiate practical arrangements to implement Native self-government through new self-government agreements (SGA). The Penner Committee also recognized that no single form of government was applicable to all Indigenous communities, because of their great diversity. Thus, the self-government agreements of different forms based upon the particular historical, political, economic, and cultural circumstances of each First Nation can be negotiated with the federal government to enhance greater Aboriginal control and law-making authority.

Despite the recent developments related to the SGA, which will be described in more detail below, the Indian Act remains the prevailing legal regime in Aboriginal affairs. It does not permit the effective exercise of Aboriginal self-government and orders that almost all decisions made by First Nations, such as funding for reserve programs and infrastructure, changes in band by-laws, and the leasing of land, must seek the approval of the federal Minister of Aboriginal Affairs and Northern Development.[17] In order for Indigenous peoples to exercise their right to self-determination and self-government, which is their main priority, it is thus first necessary to change the current legislative settings. The government of Prime Minister Stephen Harper makes changes to the legislative framework, however, whether the way how this is done will lead to Aboriginal peoples' exercise of the right to self-determination and self-government will be the subject of this research.

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[15] Aboriginal Affairs and Northern Development Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", Ottawa, Canada, 2010, https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#esga (accessed November 7, 2014).

[16] Anaya, "The Situation of Indigenous Peoples", 6.

Structure, Methodology, Territorial, and Periodization

This work will be divided into two major parts. The first part will provide a theoretical framework, the second one will be partly an analysis of the Harper Government's current legislation, partly a practical case study. Both major parts will be divided into two chapters. In the first chapter I will introduce the legal anchoring framework of Indigenous peoples, more specifically of First Nations, in Canada in historical and political context. The second chapter will introduce and compare the main theoretical approaches dealing with the status of Native peoples – the *Hawthorn Report*'s and Alan Cairn's concept of "differentiated citizenship", in contrast to the *White Paper* and Thomas Flanagan's philosophy of "undifferentiated citizenship" – with regard to the question of the Aboriginal right to self-determination and of self-government.

In the second major part of my thesis, I will first analyze the recent approach of the Canadian Conservative government to the Aboriginal issue, current legislative proposals, and the prospective reform of the Indian Act of 1876 vis-à-vis the theoretical concepts. I will focus on the various Aboriginal calls for self-determination and self-government, and how these coincide with or diverge from the policies and visions of the Harper Government. I will try to determine to what extent and whether the views and demands of Indigenous peoples regarding the self-determination are compatible with the ideas of the Harper Government.

To find answers to these questions, I will elaborate a case study of "Idle No More" (INM), which emerged in November 2012 as an Indigenous protest movement against government's legislative abuses of Native peoples' rights, especially against the newly proposed omnibus Bill C-45. The mission of the movement, which is to seek "to assert Indigenous inherent rights to sovereignty and reinstitute traditional laws and Nation to Nation Treaties by protecting the lands and waters from corporate destruction,"[18] serves as a justification of my motivation to include this case study into my research.

A discourse analysis of the Idle No More movement's statements and stances on the issues of self-determination and self-government on the one hand, and the rhetoric and proposals of the Harper Government on the other hand, will offer suitable

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[17] Anaya, "The Situation of Indigenous Peoples", 12.

[18] "The Story", official website of "Idle No More", http://www.idlenomore.ca/story, (accessed October 10, 2014).

comparative basis for qualitative research to study Aboriginal reactions to Harper's policies towards Native peoples. It will show whether the issues dealt with by the two sides are mutually compatible, and whether only general proclamations are being delivered or some specific suggestions as well are being presented by both sides. It will tackle the question whether any possible compromise reform or replacement of the Indian Act may be possible.

In terms of time framework, the thesis will mainly deal with the period between 2006, when Stephen Harper assumed the post of the Prime Minister of Canada and the present. Since both Harper's public policies have deliberately been, as I claim, in relatively sharp contrast with the previous Liberal government's approach to Aboriginal question, the thesis cannot avoid a brief introduction of the milestones of the federal Aboriginal policy between 1876 and 2006. To establish the context of the current shape of the Aboriginal question in Canada, the thesis will briefly provide social and historical context of development of Aboriginal policy in Canada between 1876 and 2006. In contrast, I will not address the period prior to the adoption of the Indian Act. Although the Indian question has been an important issue since the beginning of the European colonization of North America, and it was one of the topics of the Royal Proclamation of 1763, the Quebec Act of 1774, and the Constitution Act of 1867, my main research focus is on the First Nations, whose legal status is inextricably linked with the Indian Act of 1876.

Aboriginal peoples do not have the same territorial perception of the world as modern Western civilization for which the boundaries between states are of crucial importance. Their mental and physical connection with the land and the environment in which they live reach beyond the Canadian borders and encompass much of the territory of the whole continent. However, since the main focus of the work is the Canadian legislative framework concerning First Nations, and more specifically Harper's public policies, my thesis will concentrate on Canada. Making any claims about the Indian policy of the United States government would necessitate a thorough explanation of that nation state's legislative and administrative system, the Indigenous affairs of which are in some ways similar to Canada's, but differ in others. On the other hand, I will also briefly touch upon the transnational dimensions of Indigenous rights to self-determination and self-government, because it is a worldwide phenomenon and globally operating organizations such as the United Nations have become notably involved in such issues.

Although the main focus of my thesis will be self-determination, which is primarily a political and legal concept, the economic dimension of the Aboriginal question will also be mentioned because of the economic implications of the government's legislative and practical steps for the Indigenous peoples' self-determining identity elements (such as the right to fish or environmental protection), and more generally for their living conditions.

Methodologically, the thesis will fall within the field of Political Science with disciplinary overlaps with History and Law. Legal and sociological approaches will help me to explain how federal law and legal proceedings impact upon Aboriginal peoples within this qualitative research framework. The focal point of my qualitative research will be a comparative discourse analysis of the Harper Government and representatives of Canadian Indigenous peoples. Empirical research will involve Idle No More which will be enabled by a case study of the movement.

Overview of Sources

Discourse analysis requires both a thorough analysis of major primary documents, such as bills and laws affecting the status and rights of Aboriginal peoples, government reports, reports of the United Nations, statements of politicians, and representatives of Indigenous communities, as well as a qualified understanding of theoretical concepts presented in number of monographs, collections, scholarly articles, and newspaper articles. In the first part of the thesis I will mainly use primary sources to explain the basic matters that are the concern of the research, as well as monographs of the main scholars, which outline the most important concepts. In the second part I will draw both directly from the bills and laws of the Harper Government, and use scholarly articles and newspaper articles covering the Idle No More protest movement because it is a relatively new phenomenon, which is not yet fully described in the literature.

As one of the key primary sources I will use the most fundamental Canadian legislation concerning First Nations, the Indian Act of 1876. The Act has determined the status of First Nations in relatively unchanged form for nearly 140 years. It specifies who "Status Indians" are, it sets out the definitions of reserves and bands, and how they operate, it defines the federal government's authority over Indian communities concerning inter alia land ownership, taxation or education. Thus, as I will argue, it is one of the main obstacles for the exercise of the Aboriginal rights to self-determination

and self-government, and it stands at the very crux of the matter which is the subject of this thesis.

In 1966–67, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies,* also known as the *Hawthorn Report*, was conducted and published by anthropologist Harry B. Hawthorn and his non-Aboriginal research team. This was the first non-governmental impetus for a significant reform of the Indian Act since its adoption because it drew attention to the poor conditions of Aboriginal peoples in Canada.[19]

The *Hawthorn Report* is another important primary source for this thesis because it introduced one of the relevant concepts of the Aboriginal status. Hawthorn argued that the disadvantaged situation of Aboriginal communities stemmed from ill-designed government policies. In particular, he criticized the residential school system, which contributed to low levels of education, leading to poor economic chances among First Nations. Furthermore, the *Report* supported the idea that since Indigenous peoples had inhabited the American continent before the arrival of Europeans, who subsequently treated them as inferior and subordinate, a positive recognition of Status Indians as so called "citizens plus", would counterbalance their historical mistreatment.[20] The term "citizens plus," which was at the time very positively received by Indian groups (such as the Nisga'a Nation),[21] was subsequently adopted into Indigenous affairs scholarship by Canadian political scientist Alan Cairns.

The publication of the *Hawthorn Report*, along with the introduction of the term "citizens plus," launched consultations between the federal government and First Nations' leadership across Canada in order to amend the Indian Act. In 1969, the Government of Pierre Elliott Trudeau proposed the *Statement of the Government of Canada on Indian Policy* known as the *White Paper*, which is another relevant primary source for this thesis.

The drafters of the *White Paper* agreed with the *Hawthorn Report*'s conclusion that the system of separate institutions and the special legal status of First Nations created by the Indian Act were ineffective, and contributed to their lagging behind the

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19 Harry B. Hawthorn, ed., "A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies", Indian Affairs Branch, Ottawa, Canada, October, 1967, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ai-arp-ls-pubs-sci3_1326997109567_eng.pdf (accessed October 10, 2014), 5.

20 Ibidem, 7.

21 Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000), 164.

non-Aboriginal Canadians in well-being. However, the proposed means of reform in the *Hawthorn Report* and the *White Paper* substantially differed.

The Trudeau Government's policy towards Aboriginal peoples based on Western liberal mindset[22] can be interpreted in the light of the U.S. Civil Rights Movement, especially the emancipation of Afro-Americans in the 1960s, and the rhetoric of the U.S. Supreme Court ruling in *Brown v. Board of Education* of 1954, as evidenced by the *White Paper*'s statement "separate but equal services do not provide equal treatment".[23] It suggested abolishing the special status of Indigenous peoples in order to fully integrate them in Canadian society, revoking the Indian Act, and terminating the Department of Indian Affairs and Northern Development. Simultaneously, Section 91 of the British North America Act was proposed to be amended, so the separate treatment of Aboriginal peoples would be eliminated.[24]

Most First Nations opposed the government's proposal because it would have meant the end of their special legal status and their right to self-determination and self-government would be suppressed. The rhetoric of the proposal was criticized for being peremptory and unyielding.[25] *Citizens Plus*, an Indian response to the *White Paper*, also called the *Red Paper*, was published in 1970 by the Indian Association of Alberta, with the support of the National Indian Brotherhood (NIB). The *Red Paper* partly adopted the *Hawthorn Report*'s concepts, and suggested that the constitutional basis of Indian rights and their legal status should be preserved, because only the First Nations themselves can renegotiate them.[26] In the same year Trudeau withdrew his proposal but this abortive attempt at reforming Indigenous affairs further reinforced First Nations' mistrust of the federal government.[27]

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22 Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993), 21.

23 Hamar Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Seattle: University of Washington Press, 2008), 101.

24 "Statement of the Government of Canada on Indian Policy, 1969", *Paper presented to the First Session of the Twenty-eighth Parliament by the Honorable Jean Chrétien*, Minister of Indian Affairs and Northern Development, http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191 (accessed October 10, 2014).

25 Susana Mas, "Trudeau Liberals Woo High-Profile Aboriginal Candidates Ahead of 2015", *CBC News*, September 29, 2014, http://www.cbc.ca/news/politics/trudeau-liberals-woo-high-profile-aboriginal-candidates-ahead-of-2015-1.2764945 (accessed October 10, 2014).

26 Indian Chiefs of Alberta, "Citizens Plus", *A Presentation by the Indian Chiefs of Alberta to Right Honorable P. E.Trudeau, Prime Minister and the Government of Canada*, June 1970, http://ejournals.library.ualberta.ca/index.php/aps/article/download/11690/8926 (accessed October 10, 2014), 189-190.

27 John Leslie, "The Development of Canadian Indian Policy, 1943-1963" (PhD thesis, Department of History, Carleton University, 1999), http://www.collectionscanada.gc.ca/obj/s4/f2/dsk1/tape9/PQDD_0013/NQ42797.pdf (accessed

Another important primary source, the *Erasmus-Dussault Report* of the Royal Commission on Aboriginal Peoples (RCAP), was issued in 1996. The RCAP was put together in order to respond to the worsening conditions in Indigenous communities, the growing number of First Nation land claims, and rhetorically also in order to redeem the past wrongs committed by non-Aboriginal Canadian society. Compared to the team of Harry Hawthorn, the Commission included four Aboriginal persons, who represented a majority, since there were seven members in total.[28]

The five-volume, 4,000-page *Report* with its 440 recommendations covered an extensive range of issues. It suggested that radical measures ought to be implemented in order to replace the old colonial and paternalistic governmental approach towards Native peoples with an approach based on partnership. It endorsed changes such as the idea of a new Royal Proclamation stating Canada's commitment to a fresh relationship between Aboriginal peoples and the majority population, the reform of the Department of Indian Affairs and Northern Development, the creation of an Aboriginal parliament, a bank of Indigenous development, an independent tribunal dealing with treaties and territories, an action plan on health and social conditions, a new Native educational system, and last but not least, a system of dual citizenship.[29]

The critics of the RCAP stressed the *Report*'s disproportionate emphasis on self-government and, inversely, its omission of Aboriginal peoples' representation in non-Aboriginal bodies. The recommendations of the *Erasmus-Dussault Report* simply did not fit into mainstream Canadian historical tradition and political context.[30] On the other side, the Assembly of First Nations criticized it for its moderation, but later blamed the Liberal government for failing to put into practice the *Report*'s recommendations.[31]

Furthermore, the RCAP' idea of implementing a trade and economic policy that advocates replacing foreign imports with domestic production[32] in Aboriginal communities was criticized for its backwardness and malfunction. As criticized by Thomas Flanagan, an American-born conservative political scientist and a former

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October 10, 2014), 418.

28 "Royal Commission Report on Aboriginal Peoples", Government of Canada Web Archive, Library and Archives Canada, Ottawa, Canada, 1996, http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html (accessed October 10, 2014).

29 Ibidem.

30 Cairns, "Citizens Plus", 141, 157.

31 "Royal Commission Report".

32 "Import substitution", Encyclopædia Britannica, http://www.britannica.com/EBchecked/topic/284081/import-substitution (accessed October 10, 2014).

advisor to Stephen Harper, the economic vision of the RCAP was almost exclusively based on land and natural resources,[33] and since staple economies have proven to be economically unstable due to the so called "Dutch Disease" or "resource curse",[34] the long-term optimal performance of such models is, as I argue, dubious.

Thomas Flanagan whose major piece of work bears the title *First Nations? Second Thoughts* is one of the leading critics of the RCAP' promotion of Aboriginal self-government. According to his critical approach, a greater political autonomy of Indigenous peoples is counterproductive because it places them outside the economic realities of today's world. Flanagan, who had a significant impact on shaping Stephen Harper's policy towards Indigenous peoples, advocates the concept of "undifferentiated citizenship," which contradicts the *Report* of the RCAP, as well as the concept of "citizens plus".

In his book Flanagan develops the controversial idea of the so-called "Aboriginal orthodoxy". He rejects what he sees as its racially-based defense of Aboriginal rights, its obsession with the demand of repairing past wrong done to Aboriginal groups, and its precipitous effort to separate the world of Indigenous peoples and non-Indigenous Canadians.[35] Flanagan also disagrees with the division of Aboriginal history with respect to European settlement into periods of "separate worlds", "contact and co-operation", "displacement and assimilation", and "negotiation and renewal",[36] taking issue specifically with the claim that Indigenous peoples were civilized and sovereign before the conquest.[37] He supports his claim of the lack of Indigenous sovereignty with the non-existence of any pre-contact Aboriginal states as understood by the Western world.[38]

In each chapter Flanagan challenges one of the basic tenets advocated by the Aboriginal orthodoxy: an Aboriginal inherent right to self-government, the same level of civilization of Indigenous peoples and Europeans at the time of conquest, the Aboriginal sovereignty possession, Aboriginal nationhood, the power of band councils,

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33 Thomas Flanagan, *First Nations? Second Thoughts* (Cambridge: Cambridge University Press, 2000), 180-184.

34 Paul Segal, "How to Spend It: Resource Wealth and the Distribution of Resource Rents", *Paper prepared by the Kuwait Programme on Development*, Governance and Globalization in the Gulf States of the LSE's Department of Government, October 2011, http://www.lse.ac.uk/middleEastCentre/kuwait/documents/Segal.pdf (accessed November 10, 2014).

35 Flanagan, "First Nations", 194.

36 "Royal Commission Report".

37 Flanagan, "First Nations", 36.

38 Ibidem, 94.

the legal endurance of Aboriginal titles and the legitimacy of Native land claims, the need for the modernization of land-surrender treaties, and the Aboriginal need for financial support from the federal government. For the purposes of this thesis I will focus mainly on Flanagan's chapters concerning the Aboriginal inherent right to self-government and Aboriginal nationhood related to the question of self-determination.

Alan Cairn's 2000 book *Citizens Plus: Aboriginal Peoples and the Canadian State* will be used for outlining the aspects of the *Hawthorn Report*'s concept of "citizens plus", which will then be compared with the idea of "undifferentiated citizenship", promoted by Flanagan. In the book, Cairns presents his basic idea that Indigenous peoples differ from non-Aboriginal Canadians, but not completely, because of their common living space.[39] He dismisses the possibility of secession and argues that the future of Aboriginal peoples lies "inside" the Canadian federation. The concept of "citizens plus" thus combines the recognition of the distinctiveness of Indigenous peoples with their inclusion in Canadian society.[40]

Will Kymlicka, one of the most eminent contemporary Canadian political philosophers, deals with the position of minorities in his 1995 book *Multicultural Citizenship: A Liberal Theory of Minority Rights*. In contrast with both Cairns and Flanagan, Kymlicka views the Canadian First Nations as well as for example Puerto Ricans in the United States, as "national minorities" based on several criteria such as self-government, a common culture and language.[41] Kymlicka's more general approach will be compared to Flanagan's and Cairns' concepts that are in particular dedicated to the situation of the First Nations. His findings will be used to understand the broader context of the problems of multicultural societies.

In the second part I will include the ideas of John Ralston Saul, a prominent Canadian author, essayist and proponent of rights of Indigenous peoples. Saul is a strong supporter of the Idle No More movement,[42] which influenced his latest book the 2014 *The Comeback*. To analyze the movement's demands I will also draw from scholarly articles of Marc Woons, a specialist on Indigenous-state relations in Canada, and three co-publishing professors from Free University of Brussels and experts on legal aspects of Indigenous peoples Derek Inman, Stefaan Smis, and Dorothée Cambou.

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39 Cairns, "Citizens Plus", 5.
40 Ibidem, 90-1.
41 Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), 79–80.
42 John Ralston Saul, "The Resurgence of Indigenous Power", commentary on The Comeback, *thestar.com*, official website of John Ralston Saul, http://www.johnralstonsaul.com/ (accessed

1. Aboriginal Peoples, First Nations and the Indian Act

> "We the Original Peoples of this land know the Creator put us here. The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The laws of the Creator defined our rights and responsibilities. The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provides us with all our needs. We have maintained our freedom, our languages, and our traditions from time immemorial. We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the land upon which we were placed. The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation."[43]

This is *A Declaration of First Nations,* which was adopted during a First Nations' gathering in Ottawa in 1980. It is also proudly published on the Assembly of First Nations Internet website. It mentions the most important claims of First Nations' political elites, the right to self-determination and the right to self-government, it is a classic example of their holistic perception of the world, and it mirrors the official rhetoric of the AFN, Indian councils and bands. Holism is the persuasion that all natural systems should be perceived as wholes, not as collections of component parts since the parts are interconnected and cannot exist independently.[44] Aboriginal peoples' way of life is based on the holistic theory, as well as their demands. These demands will be discussed below; however, in order to understand the issue, it is first necessary to explain who First Nations and Aboriginal peoples are according to History and Law.

The Origin and Composition of Indigenous Peoples in Canada

Regarding the composition of Canadian society from a historical perspective, it was originally formed by three major groups: Aboriginal peoples, the French, and the English. Native peoples' homelands were occupied by French settlers who were later overrun by English settlers. Nowadays, the descendants of English and French colonists constitute a voluntary federation of the Canadian government, which itself has survived

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December 20, 2014).

[43] "A Declaration of First Nations", official website of the Assembly of First Nations, http://www.afn.ca/index.php/en/about-afn/a-declaration-of-first-nations (accessed November 10, 2014).

[44] "Definition of Holism in English", Oxford Dictionaries Language Matters, http://www.oxforddictionaries.com/definition/english/holism (accessed November 10, 2014).

two French Canadian attempts to secede.[45] In the case of Indigenous peoples, the question of voluntariness is perhaps even more complex.

"Aboriginal peoples", "Native peoples", and "Indigenous peoples",[46] are all common terms used for the descendants of the first inhabitants of Canada who came to the continent across the Bering Strait roughly between 73 000 and 12 000 BC.[47] I will mainly focus on one particular group of Aboriginal peoples, the First Nations since the Indian Act only applies to them; but I will also deal with issues which concern Indigenous peoples in general, and which may basically be related to all Aboriginal groups.

Section 35 (1) of the Canadian Constitution Act of 1982 reads that the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. Section 35 (2) explicitly recognizes the rights of three Aboriginal groups: the Indians (First Nations), the Métis (the half-caste descendants of Aboriginal peoples and European settlers) and the Inuit[48] (Eskimos).[49] The terms "Indian" and "Eskimo" are controversial in the Canadian context. The latter is perceived as pejorative because it originally meant "eats something raw".[50] The controversy of the former consists in the fact that it is also used for the inhabitants of India who have the historical right to such a designation. This erroneous designation is generally attributed to Christopher Columbus, who, on arrival to the North American continent, thought he was in India. Both names were created and used during a long history of dispossession of Native peoples by non-Native Canadians, and therefore they are regarded as Eurocentric and prejudiced. "Indian" is, however, a legal term used both in the Constitution Act of 1982 and in the Indian Act of 1876.[51]

Besides the above mentioned Section 35, Canada's Constitution Act of 1982 refers to Indigenous peoples in two other sections. In Section 25, it sets that treaty or

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45 Kymlicka, "Multicultural Citizenship", 12.

46 Although in the various primary and secondary sources there are different ways of capitalization, the method used in this thesis is taken from the official website of the Canadian government, see the Translation Bureau official website available at http://www.btb.termiumplus.gc.ca/tcdnstyl-chap?lang=eng&lettr=chapsect4&info0=4.

47 Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earlier Times* (Toronto: University of Oklahoma Press, 1992), 21.

48 Most Inuits live in the northern territory of Nunavut, which was created as a new Canadian political subdivision in 1999.

49 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), c 11, http://laws-lois.justice.gc.ca/eng/Const/FullText.html (accessed November 10, 2014).

50 On the contrary, according to some linguists, it in fact means "she laces a snowshoe".

51 For the purposes of this thesis, I chose to use the term "First Nations" because it is the name mostly used by the communities themselves.

other rights and freedoms shall not be construed, abrogated or derogated from any Aboriginal peoples of Canada. It means that the Canadian Charter of Rights and Freedoms, in which Section 25 is included, must be enforced in a way that does not diminish Indigenous rights.[52] Furthermore, Section 37 provides for a conference regarding the constitutional matters that directly affect the Aboriginal peoples of Canada.[53]

This constitutional framework, especially its Section 35, is groundbreaking, since the Constitution Act of 1867, also known as the British North America Act (specifically its Section 91 [24]) had established that the federal government had legislative jurisdiction over Indians and lands reserved for Indians, which had enabled the federal government to unilaterally impose the Indian Act on Aboriginal peoples.[54] The Constitution Act of 1982 thus constitutionally enshrined Indigenous rights for the first time in Canadian history.

Currently about 1.4 million people in Canada declare having Indigenous roots, representing roughly 4.3% of the whole Canadian population, whereas in 2011 851,560 people identified as First Nations, representing 60.8% of the total Native population.[55] First Nations live in Ontario, Quebec and the Western provinces as well as in British Columbia, but they make up the largest share of the total population in the Northwest Territories, the Yukon, Saskatchewan, and Manitoba.[56] Registered or "Status" Indians representing 74.9% of all First Nations people are those who are registered as Indians according to the provisions of the Indian Act. "Non-Status" Indians are those who are of Indian ancestry and cultural affiliation, but they are not registered as Indians under the Indian Act, or have lost their right to be registered as Indians under the same legislation.[57]

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52 Graham Garton, "Section 25 – Aboriginal Rights and Freedoms Not Affected by Charter", Justice Canada, April 2005, http://www.canlii.org/en/commentary/charterDigest/s-25.html (accessed December 22, 2014).

53 The Constitution Act, 1982.

54 The Constitution Act, 1867, 30 & 31 Vict, c 3, http://canlii.ca/t/ldsw (accessed November 10, 2014).

55 Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit", Ottawa, Canada, 2011, http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm (accessed November 10, 2014).

56 Ibidem.

57 Tonina Simeone, "Primer on Aboriginal Issues", Social, Health and Cultural Affairs Section of the Information and Research Service of the Parliament of Canada, Ottawa, Canada, 2011, http://carolynbennett.liberal.ca/files/2010/07/Primer-on-Aboriginal-Issues_EN.pdf (accessed November 10, 2014), 1.

A "band" is a group living and working together as a single unit, constituted under the Indian Act of 1876.[58] Although bands had existed long before the Indian Act was passed, they were informal when judged from a modern legal perspective. The structure of First Nations is nowadays based on Indian bands and band councils whose chiefs[59] represent each band in the Assembly of First Nations. There are approximately 617 First Nation communities[60] and the First Nation land base is approximately 3.5 million hectares representing 0.35 percent of the total land area of Canada.[61]

The Indian Act of 1876

The Indian Act of 1876 remains the basic legal anchor of First Nations' rights and responsibilities in the current Canadian legal system. It intervenes in the economic, social, and cultural aspects of the lives of First Nations. It covers both private and public questions such as Indian Status and band membership, property rights, housing, inheritance, administration of reserves, political rights and freedoms, elections, taxation, Indian lands and resources, and education.[62]

The original intention of the legislation was to absorb Indians into the rest of Canadian society. Indians were to be "civilized" and Christianized, and their traditional community structures, ceremonies and rituals were to be eliminated. The main purpose was assimilation;[63] however, some provisions of the Indian Act were designed to protect First Nations, since the government was obliged by treaties to protect Indian interests and lands. Nevertheless, the Indian Act eventually proved to be a colonial instrument for subordination of First Nations.[64]

The Indian Act was amended several times. For example, the section that stipulated that First Nation women lost their Status when they married non-Status men

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58 Indian Act, R.S.C. 1985. c. I-5. http://laws-lois.justice.gc.ca/eng/acts/I-5/page-1.html (accessed October 1, 2014).

59 The term "chief" is commonly used by First Nations.

60 Aboriginal Affairs and Northern Development Canada, "First Nations People in Canada", Ottawa, Canada, 2014, https://www.aadnc-aandc.gc.ca/eng/1303134042666/1303134337338 (accessed October 1, 2014).

61 Aboriginal Affairs and Northern Development Canada, "Land Base Statistics", Ottawa, Canada, 2014, http://www.aadnc-aandc.gc.ca/eng/1359993855530/1359993914323 (accessed December 22, 2014).

62 Indian Act.

63 Carrie Bourassa and Ian Peach, "Reconceiving Notions of Aboriginal Identity", *Research paper for the Institute on Governance*, 2009, http://www.uregina.ca/gspp/marchildon/WRTCfiles/Reading%201%20-%20Dec.%202.pdf (accessed October 1, 2014), 4.

64 Duncan Ivison, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000), 118.

was abolished by Bill C-31[65] in the 1980s, due to its discriminatory character and its incompatibility with the Canadian Charter of Rights and Freedoms of 1982.[66] In the 2001 *Speech from the Throne*, Chrétien Government expressed the view that it was necessary to reform the Indian Act and supported "an initiative of First Nation communities in strengthening governance, including implementing effective and more transparent administrative practices,"[67] however, it did not result in legislative changes. Substantial reform of the Indian Act has not been carried out, which means that this law is currently one of the oldest applicable Canadian legislation. It is also one of the most controversial laws, hated by many for its archaic, assimilatory, manipulative, and even racist character,[68] and cherished by some as necessary for the protection of the collective rights of First Nations.

Many First Nations have an ambiguous relationship with the Indian Act. They denounce its paternalism, but they are reluctant to renounce some of its protections[69] (one of the most advantageous of such protections is Section 87 of the Indian Act, which exempts Status Indians from provincial and federal taxation).[70] Without these protections, the risk that First Nations were assimilated into Canadian non-Native society would increase.

2. Nations, Citizens Plus or "Undifferentiated" Citizens?

As stated in the *Declaration of First Nations*—"The Creator has given us *the right to govern ourselves* and *the right to self-determination*. The rights and responsibilities given to us by the creator cannot be altered or taken away by any *other Nation*."[71]—First Nations determine themselves as nations. As nations, Aboriginal

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65 Mary C. Hurley and Tonina Simeone, "Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act", Social Affairs Division, March 18, 2010, http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c3&Parl=40&Ses=3&source=library_prb#a21 (accessed October 1, 2014).

66 The Constitution Act, 1982.

67 Adrienne Clarkson, (Speech from the Throne to Open the First Session of the 37th Parliament of Canada, Ottawa, Canada, January 30, 2001), http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2001-eng.htm (accessed December 20, 2014).

68 Boldt, "Surviving as Indians", 7.

69 Isabelle Montpetit, "Background: The Indian Act", *CBC News*, May 30, 2012, http://www.cbc.ca/news/canada/background-the-indian-act-1.1056988 (accessed October 1, 2014).

70 Indian Act.

71 "A Declaration of First Nations". Emphasis by the author.

groups demand to be given powers similar to those of local governments, based on the right to self-government others call for recognition of their sovereignty.[72]

In this chapter I will discuss the concepts developed by scholars Thomas Flanagan and Alan Cairns who dedicated their research to establishing a theoretical framework for the status and rights of Indigenous peoples in Canada. I will analyze and compare their theoretical approaches to the Aboriginal question in order to see the issue from very different perspectives. The concept of "undifferentiated citizenship" advocated by Flanagan was partly influenced by the Trudeau Government's *White Paper*, and it forms the ideological basis for the policy of the Harper administration.[73] Cairns' concept of "citizens plus" is based on the *Hawthorn Report*'s suggestions. Both concepts are inextricably linked with the questions of the legal anchoring of Aboriginal peoples in Canada, and with their rights to self-determination and self-government.

The Rights to Self-Determination

The term "First *Nations*" is from the theoretical perspective rather problematic itself. It was first officially used to describe Indians in the 1980s by the National Indian Brotherhood (NIB) at the First Nations' Constitutional Conference in Ottawa. The *Declaration of First Nations* was then adopted and the NIB was transformed into the Assembly of First Nations.[74] The term "Indian" became politically incorrect and ceased to be used in the press and in official communications despite its entrenchment in Canadian legislation. Yet opinions about the aptness of calling First Nations "nations" differ greatly.

The Royal Commission on Aboriginal Peoples labelled the relationship between Aboriginal peoples and non-Aboriginal people as a "nation-to-nation" relationship.[75] Alan Cairns criticizes this designation since it suggests the existence of a mini-international system within Canada, and jeopardizes the Canadian political and territorial integrity because it gives the impression that Canada does not constitute a single unified nation. As a replacement, Cairns proposes to interconnect Native identity and Canadian citizenship. Instead of nations, he suggests that Aboriginal peoples should

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72 Thomas King, *The Inconvenient Indian* (Minneapolis: University of Minnesota Press, 2013), 194.

73 Marci McDonald, "The Man behind Stephen Harper", *The Walrus*, October 2004, http://thewalrus.ca/the-man-behind-stephen-harper/ (accessed December 20, 2014).

74 Menno Boldt and Anthony J. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 17, No. 3 (September, 1984): 537.

75 "Royal Commission Report".

be understood as "citizens plus" – Canadians with special rights. Furthermore, he claims that the terminology of nations does not cover the large number of Indians living off-reserves, most frequently in big cities, and that it favors First Nations living on reserves.[76]

Thomas Flanagan rejects the terminology of nations on the grounds that Aboriginal peoples do not meet the basic criteria for being nations such as civilization, significance, territory and sovereignty.[77] He does not agree with Cairns' idea that the national label disrupts the cohesiveness of Canada, and thus creates a mini-international system within the State because, according to him, First Nations are not really nations and a mere designation cannot cause disruption of the country's integrity as is also evident from Article 46 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which clearly indicates that

> "nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[78]

In contrast, Will Kymlicka considers Canadian Native peoples as "national minorities". He explains that Canada is both multinational due to its colonial roots and federal organization, and polyethnic because of the substantially large number of immigrants flowing into the country every year.[79] He points out that it is necessary to distinguish between national minorities, such as Aboriginal peoples, who represent "distinct societal cultures" and ethnic minorities, such as immigrants, who do not. Subsequently, he differentiates between so called internal restrictions and external protections, by which he defends his concept of "group-specific rights".

The term "distinct societal culture" describes a group which has its own language and political institutions that it has been able to preserve despite both internal and external influences. A distinct societal culture should be granted group-differentiated rights such as territorial autonomy, or guaranteed representation in state

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[76] Cairns, "Citizens Plus", 167.
[77] Flanagan, "First Nations", 84.
[78] General Assembly of the United Nations, "United Nations Declaration", 14. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed November 7, 2014),
[79] Kymlicka, "Multicultural Citizenship", 17.

institutions in order to balance its own minority position.[80] First Nations are thus a typical example of a "national minority" with distinct societal cultures.

External protections represent claims of a minority group against the majority population in order to protect their rights and distinctiveness from the majority society. An example is the promotion of school education in languages of Indigenous peoples. Internal restrictions relate to rights that a minority group claims against its own members. An example is the former Status loss of First Nation women married to non-Status First Nation men. The difference between the two essentially consists in the fact that external protections can be justified to promote equality, whereas internal restrictions limit the autonomy of individuals and are thus inconsistent with liberal values.[81]

An example of external protections is the reserve system established by the Indian Act of 1876. Its main purpose is to protect the First Nations' group-specific collective rights, by which it is essentially meant the land base of First Nations which would otherwise be exposed to economic competition by the majority population. The downside of such a system is, however, that common ownership leads to the difficulty for individuals in getting loans because they lack the kind of collateral that banks want. It results in a reduced business potential of First Nations, and eventually to their low competitiveness in Canada's capitalist system.[82] Collective rights are thus paradoxically regarded as one of the causes of First Nations' socio-economic problems.

Canadian national political columnist Michael Den Tandt advances this line of argument when he claims that the lack of individual property rights among First Nations represents one of the fundamental problems, because it prevents the securing of mortgages and the accumulation of wealth. It can be argued that the Native reserve system and collective rights thus produce misery,[83] and this is why many First Nations suffer from "third world conditions in a first world country".[84]

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80 Kymlicka, "Multicultural Citizenship", 80.
81 Ibidem, 42.
82 Ibidem, 43-44.
83 Michael Den Tandt, "Indian Act, Racist Relic of 1876, Should Be Abolished – And So Should Reserves", *Canada.com*, January 6, 2013, http://o.canada.com/2013/01/06/0107-col-dentandt/ (accessed October 1, 2014).
84 Joan Holmes, "The Original Intentions of the Indian Act", *Paper prepared by Joan Holmes & Associates Inc. for a conference hosted by Pacific Business and Law Institute*, Ottawa, Canada, April 17-18, 2002, http://www.joanholmes.ca/Indian%20Act%20Paper%20Final.pdf (accessed November 2, 2014), 27.

First Nations are not economically self-sufficient and raise relatively little money on their own, therefore they are heavily dependent on financial aid from the federal government. It is a problem of the whole Canadian Aboriginal community – up to 60% of the income of Indigenous peoples comes from federal funds, and the Canadian government spends billions of dollars of its budget for Aboriginal peoples' support every year.[85]

This issue is further discussed by Flanagan, who assumes that because land and houses on reserves are owned collectively by bands and not by individuals, they are under-invested and badly maintained. He likens the issue to the situation in the Soviet Union and the Eastern Bloc. That's why he proposes privatization[86] which is, however, currently not possible under the Indian Act. More importantly, private ownership is inconsistent with the traditions of First Nations and it would imply the removal of an element of First Nations' identity. Such collective rights are at the core of the Aboriginal right to self-determination, since they differentiate them from the rest of Canadian society.

The Rights to Self-Government

In the last decade of the 20th century, an attempt to negotiate a constitutional anchoring of the Indigenous peoples' right to self-government was included in the proposed Charlottetown Accord. The Charlottetown Accord suggested amending the Constitution of 1982 and enacting a law allowing for guaranteed representation of Indigenous peoples in the Canadian House of Commons and Senate. Representatives of Aboriginal peoples were to get a say in the selection of Supreme Court judges and in the debates over the future constitutional amendments. According to the Charlottetown Accord, they were to be consulted when discussing legislation that might directly affect them.[87] The proposed agreement, which would also grant a special status to French Canadians, was, however, rejected in a general referendum in October 1992.

Although such audacious proposal remained mere theoretical recommendation, the RCAP of 1996 further developed the nation-specific special status approach toward Aboriginal peoples. Inspired by the *Report* of the RCAP, the Liberal governments of

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85 Simeone, "Primer on Aboriginal Issues", 5.
86 Flanagan, "First Nations", 108.
87 "Consensus Report on the Constitution", Charlottetown, August 28, 1992, https://www.saic.gouv.qc.ca/publications/Positions/Part3/Document27_en.pdf (accessed October 14, 2014).

Jean Chrétien and Paul Martin began the process of power transfer to First Nations in areas such as education, health, and housing through the approach of "equal negotiation". In consequence, the First Nations Land Management Act was adopted in 1999 – a law allowing First Nation bands to opt out of 34 land-related sections of the Indian Act and assume control over their land and natural resources.[88]

In 2005, the Kelowna Accord was signed between the prime ministers (federal and provincial) and the representatives of Aboriginal peoples. The agreement promised investments of five billion Canadian dollars in education, health and housing for Native peoples in order to reduce socio-economic disparities between them and the non-Aboriginal society.[89] The Kelowna Accord was particularly appreciated by Aboriginal communities for its effort to include representatives of Indigenous peoples in negotiations in the spirit of the suggestions of the RCAP.[90]

Will Kymlicka believes the logic behind the idea of Aboriginal peoples' right to self-government included in the proposed Charlottetown Accord and supported by the RCAP is the principle of representation and power sharing. According to this liberal perspective, Indigenous peoples should not be obliged to obey a constitution drawn up by their historical "conquerors", which they did not have the chance to influence. They should not be governed by bodies formed of non-Aboriginal peoples only. They should not be expected to obey laws passed by non-Aboriginal legislators and they should not be answerable to courts where Aboriginal peoples are not represented.[91]

First, self-government could serve Native communities as a means of equalization and strengthen their position in relation to the majority population. Thus, First Nations could decide themselves what to adopt from non-Aboriginal society and what and how to preserve in their own traditions. Second, the idea that "responsibility begins at home"[92] means that self-government would transfer the responsibility over First Nations' actions, their advancement or deterioration, to themselves. It would ease

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88 First Nations Land Management Act, S.C. 1999, c. 24, http://laws.justice.gc.ca/eng/acts/F-11.8/ (accessed October 14, 2014).

89 Lisa L. Patterson, "Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005", Political and Social Affairs Division, May 4, 2006, http://www.parl.gc.ca/Content/LOP/researchpublications/prb0604-e.htm (accessed October 14, 2014).

90 Magdalena Fiřtová, "Kanada a původní obyvatelé: Harperova cesta k ekonomické soběstačnosti", *Mezinárodní politika* 10 (October 2012), http://ustavmezinarodnichvztahu.cz/article/kanada-a-puvodni-obyvatele-harperova-cesta-k-ekonomicke-sobestacnosti (accessed October 1, 2014).

91 Kymlicka, "Multicultural Citizens", 169.

92 Cairns, "Citizens Plus", 111.

the burden of the federal government, which could no longer be blamed for the poor socio-economic situation of First Nations.[93]

However, specific circumstances must be taken into account when considering the possibility of the functioning of self-governed First Nations in Canada. First, they form neither a coherent nor a homogenous group. Compared to Québécois or Inuits, they do not live in one particular area, but are dispersed across all Canadian provinces.[94] There are altogether more than 600 Indian bands in Canada.[95] They vary both in the size of their territory and the number of their members. Moreover, different First Nations have different cultural traditions, historical experience, and ways of life. They even speak different languages and have different positions on some issues. Taking into account all these differences, I assume pan-Indian self-government of First Nations would be in practice very difficult. The self-government of individual First Nations would be an option; however, it would mean enormous political fragmentation of Canada.

One could also argue that there is no need for pan-Indian self-government of First Nations because band councils, larger groupings called tribal and chiefs' councils, and the Assembly of First Nations are able to adequately protect and promote the interests of First Nations. Furthermore, some groups such as the Cree,[96] the Sechelt Indian Band,[97] or the Yukon First Nations[98] have already obtained substantial competencies and the corresponding self-government arrangements were signed between the federal government and these groups.

On the other hand, even though band councils have gradually obtained autonomy in spheres like education, health, or collective control over their reserve land, council resolutions are still only effective when approved by the Department of Aboriginal Affairs and Northern Development under the Articles 20, 24, 45, 49, 50, 54, 83, 86, 117, and 121 of the Indian Act.[99]

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93 Cairns, "Citizens Plus", 111.
94 Kymlicka, "Multicultural Citizens", 29.
95 Aboriginal Affairs and Northern Development Canada, "First Nations People in Canada".
96 Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18, http://laws-lois.justice.gc.ca/eng/acts/C-45.7/ (accessed October 12, 2014).
97 Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27, http://laws-lois.justice.gc.ca/eng/acts/S-6.6/ (accessed October 12, 2014).
98 Yukon First Nations Self-Government Act, S.C. 1994, c. 35, http://laws-lois.justice.gc.ca/eng/acts/Y-2.6/ (accessed October 12, 2014).
99 Indian Act.

The self-government agreements[100] do not fall under the Indian Act and enable First Nations to obtain the power to introduce and enact laws concerning their people, to tax, to provide for municipal planning, and to decide on lands and resources. Each First Nation community has its constitution containing the membership code, establishing governing bodies, and protecting the rights and freedoms of its members. There have been 21 self-government agreements completed so far and other 90 agreements are currently under negotiation.[101] However, these Indigenous governments have only limited law-making powers under the agreements. Areas such as defense, foreign policy, immigration, security or transport remain under federal jurisdiction.[102] In addition, the process of submitting a proposal and negotiating an agreement is complicated and lasts for years or even decades (according to the Department of Indian Affairs and Northern Development, on average, it takes 15 years to reach a final agreement).[103]

Moreover, Martin Papillon, a member of the Department of Political Science at Université de Montréal and a specialist in Canadian Politics, Federalism, and Indigenous Studies, claims that in the spirit of neoliberalism and economy-based agenda, the Harper Government is currently moving away from the self-government agreements as they could be considered a practical government recognition of Aboriginal inherent rights to self-determination and self-government, and is increasingly pushing for the terms "governance agreements" and "good governance".[104] These "governance agreements" represent a "[…] form of Aboriginal, federal, and provincial partnership in the financing, development, and delivery of services, toward a common goal – that is, to 'close the gap' between the social and economic conditions of Aboriginal peoples and other Canadians"[105] but they also divert attention from the wider debate on the rights of Indigenous peoples which form an integral part of the narrative of First Nations.

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[100] Examples of the SGA are for instance the Yale Final Agreement and the Sioux Valley Final Agreement.

[101] Aboriginal Affairs and Northern Development Canada, "Fact Sheet: Aboriginal Self-Government", Ottawa, Canada, 2014, https://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294 (accessed December 7, 2014).

[102] "Aboriginal Self-Government", official website of Newfoundland and Labrador Heritage, http://www.heritage.nf.ca/law/aboriginal_self_gov.html (accessed December 20, 2014).

[103] Daniel Schwartz, "7 Questions about First Nations Accountability", *CBC News*, February 20, 2013, http://www.cbc.ca/news/canada/7-questions-about-first-nations-accountability-1.1331320 (accessed December 20, 2014).

[104] Martin Papillon, "The Rise (and Fall?) of Aboriginal Self-Government", in *Canadian Politics, 6th ed.,* eds. J. Bickerton and G. Gagnon (Toronto: University of Toronto Press, 2014), 127.

In order to strengthen the position of First Nations and to materialize their relative autonomy that they have hitherto won into genuine Native self-government, it would first be necessary to amend the Indian Act of 1876, which remains the prevailing legal regime in Aboriginal affairs, and change the balance of power between the Department of Indian Affairs and Northern Development and the councils. For all the above mentioned reasons, I assume, however, that feasibility of such a transformation is complicated.

Flanagan believes that even if such a power transfer was accomplished, there is a structural problem of factionalism and corruption in the small-sized band councils buttressed by the large "unearned" federal support awarded to First Nations. He questions the very ability of First Nations' self-government on the basis of the problematic defense of large democracies described in *The Federalist Papers*.[106] He also lists other problematic issues linked to the small size of self-governing groups, such as the shortage of financial resources and skilled personnel.[107] In conclusion, Flanagan assumes that self-government cannot solve the problems of First Nations – on the contrary, it can give rise to new ones.[108]

Even Alan Cairns is critical of the scope of Aboriginal self-government proposed by the RCAP. Apart from the aforementioned dispersion of Indigenous peoples, many of whom now live in cities and have little interest in self-government, Cairns is concerned that applying the model of the RCAP would jeopardize common allegiance and belonging to a single polity by Native and non-Native peoples which is, according to him, essential for the harmonious functioning of the country.[109]

The Possible Courses of Action

The different approaches towards questions of self-determination and self-government of Aboriginal peoples in Canada generate different recommendations about practical steps guiding the future public policy. There can be identified different flaws of each concept.

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[105] Papillon, "The Rise (and Fall?)", 126.
[106] James Madison, "Federalist No. 10: The Same Subject Continued (The Union as a Safeguard Against Domestic Faction and Insurrection)", *New York Daily Advertiser*, November 22, 1787, http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0010 (accessed November 10, 2014).
[107] Flanagan, "First Nations", 95.
[108] Ibidem, 104.
[109] Cairns, "Citizens Plus", 28.

First, dispersion of First Nations across Canada, the internal diversity of various bands together with no state-forming historical tradition of Indigenous peoples in Canada suggests that it is highly unlikely that First Nations will secede and create their own state. Canadian governments refuse the right of Aboriginal peoples to form an independent state as evidenced by the fact that Canada initially opposed the *Draft Declaration on the Rights of Indigenous Peoples* precisely because of concerns over the interpretation of its provisions addressing Native land and resources, and Canadian territorial integrity.[110] However, the possibility of creating an independent state on the basis of Article 3 of the UNDRIP has always been purely hypothetical because Indigenous groups do not have such aspirations.[111] On the other hand, Will Kymlicka believes that granting Aboriginal peoples greater autonomy would lead to increased stability and solidarity within Canadian society, and not the opposite. Furthermore, it can be a threat to liberal democratic principles, adherence to which is of vital importance in Canada, if the needs and demands of Indigenous peoples were not accommodated.[112]

Thomas Flanagan has a very different view on how to proceed in Indigenous affairs. "In order to become self-supporting and get beyond the social pathologies that are ruining their communities, Aboriginal peoples need to acquire the skills and attitudes that bring success in a liberal society, political democracy, and market based economy. Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen."[113] Instead of the enforcement of rights to self-determination and self-government, Flanagan suggests a return to the policy of voluntary assimilation of Indigenous peoples with an emphasis on their economic self-sufficiency. He implies that economic development is not possible without a normalization of political rights and without the reform of the Indian Act, which keeps Indigenous peoples in economic isolation.

Flanagan proposes three concrete reforms which should be carried out regarding the situation of Native peoples. First, what is needed are better auditing, the creation of a professional corps of Aboriginal public servants, and, most importantly, self-financing

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[110] "Canada Votes 'no' as UN Native Rights Declaration Passes", *CBC News*, September 13, 2007, http://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160 (accessed December 20, 2014).

[111] Brenda Gunn, "Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook", Indigenous Bar Association, Winnipeg, Canada, 2011, http://www.indigenousbar.ca/pdf/undrip_handbook.pdf (accessed December 20, 2014), 11.

[112] Kymlicka, "Multicultural Citizenship", 192, 195.

through taxation. He suggests that instead of the current large financial support from the federal government, First Nations should raise money from taxes. This possibility is already entrenched in Section 83 of the Indian Act,[114] but band councils only use this power to tax non-Aboriginal people who own property on reserves.[115] Second, the concentrated power of corrupt and inefficient band councils who have control over land, housing, education, employment, and welfare need to be split among multiple actors. Third, collective ownership has to be replaced by individual ownership in order to strengthen the economic activity of Aboriginal peoples.[116]

One of the problems of Flanagan's analyses lies in his categorical statements that sometimes resemble the theory of natural selection and social Darwinism. He has a very uncompromising rhetoric, for example, he rejects a widely accepted dating of the historical presence of Indigenous peoples on Canadian territory. He questions Aboriginal land claims and the extensive federal social support of Native peoples' descendants, and he laments that "Indians did not do anything to achieve their status except to be born."[117]

In order to support his calls for assimilation, he argues that "in the largest context, the policy of civilization has succeeded"[118]. He explains that the influence of modern civilization on Aboriginal peoples was inevitable once the European settlers were in North America. First, the invention of cars meant the end of isolation and the beginning of urbanization. Second, the mechanization of agriculture caused by the population growth and increased need for nutrition led to the transformation of farms, which became unsuitable for reserves. In addition, First Nations could not afford the costly equipment necessary for mechanization, and they were thus forced to lease land to outside operators. Third, traditional Indian occupations such as fishing and hunting were progressively in decline. Last but not least, a demographic explosion caused an exodus of First Nations from overcrowded reserves, so their interaction with non-Aboriginal society was inescapable.[119]

I contend that such "success" of Euro-Canadian civilization described by Flanagan is dubious because its appraisal varies based on different standards of those

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[113] Flanagan, "First Nations", 196.
[114] Indian Act.
[115] Flanagan, "First Nations", 103.
[116] Ibidem, 197-8.
[117] Ibidem, 22.
[118] Ibidem, 45.
[119] Ibidem, 171-4.

who carry it out. Flanagan's view is very Eurocentric. Indigenous peoples do not necessarily perceive the influence of Western civilization as a step forward. Moreover, it is uncertain whether the principles of market based economy and private ownership would function for the benefit of First Nation communities if their land was broken up into individual pieces as Flanagan claims in the part of his book on the success of the Euro-Canadian civilization.[120]

Most importantly, Flanagan does not consider the fact that collective rights are considered by First Nations as their inherent right given to them by the Creator. This belief is based on holism and it forms an inseparable part of First Nations' very existence. It is therefore unthinkable and practically impossible for First Nations to give it up. In other words, Flanagan's arguments and propositions clearly refer to his assumption of Western civilization superiority while denying the principle of equal rights and self-determination. This puts him in the colonial camp of reasoning – a camp which has been rejected by Aboriginal peoples, the Royal Commission on Aboriginal Peoples, as well as by the international community through the UNDRIP.

Alan Cairns refuses both the assimilationist paradigm advocated by Trudeau's *White Paper* and by Flanagan, and the more recent parallelism based on the idea of a completely distinct society of Aboriginal peoples within Canada, so prominent in the *Report* of the RCAP. The problem of Alan Cairns' theory is that while he states that Native peoples should be integrated in Canadian society as "citizens plus", he does not explain how this would work in practice. He asserts that labels matter,[121] which is certainly true, but the feasibility of a theory based almost entirely on the importance of labeling raises questions.

Cairns keeps repeating the same arguments: they [Aboriginal peoples] are, therefore, […] both in Canada and of Canada. Their relationship to the state is best described as differentiated citizenship rather than partial citizenship. […] They are inextricably caught up in interdependent relations with Canadian society, of which they are an integral part."[122] Moreover, in the final chapter of his work, Cairns emphasizes that "[their] practical task […] is to enhance the compatibility between Aboriginal

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[120] A parallel can be seen in what happened after the Native American land was unilaterally allotted to non-Native Americans by the US Government which is considered as an example of Michael Heller's "tragedy of the anticommons".

[121] Cairns, "Citizens Plus", 7.

[122] Ibidem, 203-4.

nationhood and Canadian citizenship"[123]. Regrettably and in contrast to Flanagan, he does not further examine what concrete steps or legislative reforms should be done to achieve this goal in order to deal with actual Aboriginal socio-economic problems.

The analysis of the two opposing concepts of how Aboriginal self-determination and self-government should be addressed reveals problematic aspects that prevent their effective application in practice. Flanagan's suggestions influencing policies of the current government of Stephen Harper completely rejects Indigenous self-determination and self-government, and instead favors "undifferentiated citizenship". This is incompatible with gist of Aboriginal peoples. Cairns' concept of "citizens plus", which by contrast does include a special status for Indigenous peoples, only provides a theoretical, not practical way to streamline assimilationist paradigm and parallelism in practice.

3. The Harper Government and the Indian Act

"For the colonized just as for the colonizer, there is no way out other than a complete end to colonization. […] The mere existence of the colonizer creates oppression, and only the complete liquidation of colonization permits the colonized to be freed."[124] This quote from the 1965 book *The Colonizer and the Colonized* of a French writer and essayist Albert Memmi logically implies that the Indian Act of 1876 should be repealed, since this is the only true way to liberate First Nations from Euro-Canadian colonization once and for all. But, as I have already explained in the previous chapters, it is more easily said than done. How can be such a difficult task accomplished without worsening the situation of Aboriginal communities? This chapter will analyze what concrete steps has the Harper Government already taken.

Most scholars, as well as the general non-Aboriginal public,[125] agree on the inefficiency of pouring money into social support for Aboriginal peoples. Thomas Flanagan as a convinced conservative capitalist even calls this one of the biggest policy disasters in Canadian history, and he argues that those who do not need to work and still earn money, do not try.[126]

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[123] Cairns, "Citizens Plus", 213.
[124] Albert Memmi, *The Colonizer and the Colonized* (London: Beacon Press, 1965), 151.
[125] Jill Mahoney, "Canadians' Attitudes Hardening on Aboriginal Issues: New Poll", *The Globe and Mail*, January 16, 2013, http://www.theglobeandmail.com/news/national/canadians-attitudes-hardening-on-aboriginal-issues-new-poll/article7408516/ (accessed November 12, 2014).
[126] Flanagan, "First Nations", 174.

Large assistance programs were launched in the early 1950s and have been increased ever since. Spending on Canada's Aboriginal peoples increased from $79 million annually in 1946 to $7.7 billion in 2012. The Department of Indian Affairs and Northern Development gets substantial amounts of money from the federal budget. Indian Affairs spending rose from $922 per Status First Nation individual in 1949 to $9,056 in 2012. This constitutes an 882% rise in spending per First Nation person over 66 years.[127] In 2012, Aboriginal spending represented 2.78% of the federal budget.[128] Critics of social support of Indigenous peoples argue that the governmental support was not even decreased during economic recessions and add that public assistance became Indigenous peoples' very way of life – this can hardly change unless First Nations are educated, skilled, more competitive, and their work opportunities are more attractive than living on social support.[129]

On the other hand, it is the federal government and more specifically the Department of Aboriginal Affairs and Northern Development that is partially responsible for the management (or mismanagement) of the money First Nations receive – most First Nations have not concluded self-government agreements and under the Indian Act, the Ministry is still largely involved in decision making about the operation of First Nation communities.

The Harper Government's Current Legislation

Due to the pressing problems of Indigenous peoples, large fiscal burden that they generate, and the pre-election commitment of the Harper Government to streamline state financing, Stephen Harper and his party entered the election in 2006 with a program of gradual amendment of legislation concerning Aboriginal peoples, which relate to government priorities that are small involvement of the state, the maximum financial efficiency and transparency.

There have been some governmental initiatives, such as Bill C-27 concerning the accountability and transparency of Indigenous communities, or Bill S-2 regarding the

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[127] Mark Milke, "Ever Higher Government spending on Canada's Aboriginals since 1947", Centre for Aboriginal Policy Studies, Fraser Institut, December 2013, http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/Aboriginal-spending-2013.pdf.pdf (accessed November 2, 2014), 3.

[128] "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012", Tabled in the House of Commons by the Honorable James M. Flaherty, P.C., M.P. Minister of Finance, March 29, 2012, http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf (accessed October 29, 2014), 238.

[129] Flanagan, "First Nations", 175.

property rights of divorced First Nation women that focus on social benefits and unhealthy dependence of Aboriginal communities on federal support.

Bill C-27, which became the First Nations Financial Transparency Act, came into effect on March 27, 2013. It mandates the public disclosure of audited consolidated financial statements and the remuneration of First Nations, inclusive of their expenses and salaries. It obliges First Nations to publish the information on their official websites, as well as on the website of the Department of Aboriginal Affairs and Northern Development. Bill C-27 also allows the federal government to withhold funds from First Nation bands that do not comply.[130] Bill S-2, which became the Family Homes on Reserves and Matrimonial Interests or Rights Act, is to ensure that after a divorce or separation the family's matrimonial real property assets are distributed evenly.[131]

Although both pieces of legislation are, according to the government, designed to boost actual Aboriginal economic activity, I assume they will be mainly used for governmental control of First Nation communities. Moreover, even before the enactment of Bill C-27, each reserve had been required to file 168 reports annually.[132] It is likely that the substantial reporting burden will increase as a consequence of the First Nations Financial Transparency Act. In other words, the accountability laws concerning Aboriginal peoples do not represent a new policy. There had been high reporting requirements even before their enactment. It is just another colonial way to control First Nations known as a "principal-agent accountability relationship," in which the government is the principal and First Nations the agent.[133]

In 2012, the government announced the preparation of a controversial legislation known as the First Nations Property Ownership Act (FNPOA), which would allow private land ownership on Native reserves. The government maintains that, much like the previously mentioned laws, this legislation is crucial for the launch of economic activities on reserves. Critics, however, believe that the law would destroy traditional collective Native ownership, which represents a key element of traditional Indigenous

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[130] Tonina Simeone and Shauna Troniak, "Legislative Summary of Bill C-27: An Act to Enhance the Financial Accountability and Transparency of First Nations", Social Affairs Section of the Parliament of Canada, Ottawa, Canada, 2011, http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c27&Parl=41&Ses=1 (accessed November 4, 2014).

[131] Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c. 20, http://laws-lois.justice.gc.ca/eng/acts/F-1.2/ (accessed November 4, 2014).

[132] Schwartz, "7 Questions about First Nations".

[133] Ibidem.

cultures. Chances are that First Nations on reserves will not be able to adapt to individual ownership, and there is a risk that the land would fall into hands of non-Aboriginal population or that it would be used by mining companies[134] that have sufficient financial resources to gain the land and use it for profit.

Recently, Bill C-428, which would require band councils to publish by-laws and would actually repeal certain outdated provisions of the Indian Act, especially all references to residential schools, was introduced in the Parliament of Canada. This legislation would also require the Minister of Indian Affairs and Northern Development to report annually to the House of Commons committee responsible for Aboriginal affairs on the work undertaken by the department in collaboration with First Nations, in order to prepare a new legislation which would eventually replace the Indian Act.[135]

Former Minister of Aboriginal Affairs and Northern Development John Duncan commented on Bill C-428 as being "consistent with our Government's approach of taking concrete, but incremental, steps to create the conditions for healthier, more self-sufficient First Nation communities […]."[136] I assume, however, that the cooperation with First Nations on the preparation of new legislation replacing the Indian Act, which is one of the major points of the bill, will be quite complicated if one takes into account the different ideas of the government and the First Nation representatives about its content and objectives.

Bill C-38, Bill C-45, and the Right to "Free, Prior, and Informed Consent"

The omnibus Bill C-45, which was passed into law on December 14, 2012, under the title Jobs and Growth Act, 2012, sparked a wave of protests that eventually led to the formation of the Idle No More protest movement. First Nations[137] opposed this legislation in particular because it affected their rights in the environment such as to access, maintain and control fisheries, waterways, land, and because it unilaterally amended the Indian Act. After the adoption of this law, Canadian First Nations expressed their general dissatisfaction with the Harper Government's policies

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[134] Fiřtová, "Kanada a původní obyvatelé".

[135] House of Commons, "Indian Act Amendment and Replacement Act: An Act to Amend the Indian Act (publication of by-laws) and to Provide for Its Replacement", 2nd Session, 41st Parliament, Ottawa, Canada, http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6257075 (accessed October 11, 2014).

[136] Aboriginal Affairs and Northern Development Canada, "Harper Government Supports Bill C-428, the Indian Act Amendment and Replacement Act", Ottawa, Canada, October 18, 2012, https://www.aadnc-aandc.gc.ca/eng/1350586700997/1350586739766 (accessed November 4, 2014).

concerning Aboriginal peoples' rights, and they called for discussions between the federal government and representatives of their communities.[138]

In the following case study, through an analysis of Bill C-38, Bill C-45, and the Idle No More movement that emerged in response to the Harper Government's legislation, I will try to answer the main research question of this thesis, which is whether the Indigenous right to self-determination, the enforcement of which is a priority for Indigenous peoples, is compatible with the Harper Government's policies. Furthermore, the case study of Idle No More, as a microcosm of the more complex Aboriginal issue, will help me to determine whether the Indian Act as a "guarantor" of Aboriginal rights can be amended in the future to the satisfaction of all parties involved.

Bill C-38, formally known as the Jobs, Growth and Long-Term Prosperity Act, which received Royal Assent on June 29, 2012, replaced earlier environmental assessment procedures with the Canadian Environmental Assessment Act, 2012 (CEAA).[139] Environmental impact assessments (EIAs) had represented a functional way for Aboriginal peoples to protect their lands. The newly introduced CEAA imposed time limits of 12 months on EIAs. Thus, major resource development projects must henceforth be approved or rejected within 2 years at the maximum, compared to 6 years under the old arrangements. In addition, smaller projects do not need EIAs anymore.[140] This change leads to acceleration of the process of authorization of projects proposed by corporations that use Aboriginal environmental resources for profit and devastate Native land with which Native identity is inextricably linked. The reduced decision time helps the corporations and hurts Native resources.

Omnibus Bill C-45, similarly to Bill C-38, covers a variety of issues ranging from income tax, sales tax, shipping, customs, remuneration, pensions, and immigration, to the construction of a bridge over the Detroit River.[141] On its 400 pages,

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[137] Such as the Western Cree Tribal Council.

[138] Western Cree Tribal Council Press Release to Bill C-45, official website of the Western Cree Tribal Council, http://www.westerncree.ca/pdf/PRESS%20RELEASE%20C-45.pdf (accessed December 2, 2014).

[139] Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19, http://laws-lois.justice.gc.ca/eng/acts/J-0.8/ (accessed December 2, 2014).

[140] Dorothée Cambou, Derek Inman and Stefaan Smis, "We Will Remain Idle No More: The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples", *Goettingen Journal of International Law* 5, No. 1 (2013): 254-5.

[141] House of Commons, "A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures", 1st Session, 41st Parliament, December 14, 2012, http://laws-lois.justice.gc.ca/PDF/2012_31.pdf (accessed December 2, 2014), 206.

it changes the earlier legislation contained in 64 acts or regulations.[142] From the Aboriginal point of view, the three most controversial components of the bill are the amendment to the Navigable Waters Protection Act of 1882, the amendment to the Fisheries Act of 1985, and the amendment to the Indian Act of 1876.

Through Division XVIII of Bill C-45, the Navigable Waters Protection Act (NWPA) became the Navigation Protection Act (NPA), which removes a substantial number of lakes and streams from federal protection under the law. In total, only 3 oceans, 62 rivers, and 97 lakes listed under the so-called "Schedule 2" have remained protected.[143] However, Canada has some 32,000 lakes and 2.25 million rivers. While previously the NWPA protected virtually 100% of the country's water bodies,[144] the NPA no longer protects 99.7% of Canada's lakes and 99.9% of Canada's rivers.[145]

The federal government justified the amendment as being necessary to "facilitate trade and commerce by balancing the efficient movement of maritime traffic with the need to construct works (e.g. bridges) that might obstruct navigation, in order to encourage economic development."[146] First Nation communities, environmentalist and members of the Green Party of Canada, as well as for instance the former Canadian Prime Minister Paul Martin criticized this particular part of the legislation for easing the environmental controls over numerous Canadian precious lakes and rivers, which represent an important source of Aboriginal identity and pride,[147] and had been formerly protected from resource development and other industrial uses.[148]

I argue that this legislation, which had not been discussed with First Nations, enables the Harper Government to more easily carry out projects that threaten the environment, such as the Enbridge Northern Gateway Pipelines Project – a construction of a twin pipeline carrying tar sand carbon-intensive oil from western provinces to the Pacific Coast for overseas markets,[149] and other future pipelines. Moreover, the implementation of these projects represents an intervention in the environment in which

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[142] "9 Questions about Idle No More", *CBC News,* January 5, 2013, http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843 (accessed December 2, 2014).
[143] Hassan Arif, "How Harper's Neglect Suffocates Native Potential", *The Huffington Post Canada*, December 31, 2012, http://www.huffingtonpost.ca/hassan-arif/idle-no-more-environment_b_2387782.html (accessed December 2, 2014).
[144] Naomi Klein, *This Changes Everything: Capitalism vs. The Climate* (New York: Simon & Schuster, 2014), 381.
[145] Inman, Smis and Cambou, "We Will Remain Idle No More", 256.
[146] Department of Finance Canada, "Bill C-45 – 'Jobs and Growth Act, 2012' – Part 4", Ottawa, Canada, 2012, http://www.fin.gc.ca/pub/c45/4-eng.asp (accessed December 2, 2014).
[147] Arif, "How Harper's Neglect".
[148] Inman, Smis and Cambou, "We Will Remain Idle No More", 255-6.

First Nations live. These water bodies and the nature that surrounds them form part of First Nations' identity and the participation in decision making about them falls under their right to self-determination. The Harper Government's priority is commerce and economic development despite the consequences for the environment.

The other two controversial parts of this legislation are Division IV and VIII. The first amends the Fisheries Act so that fisheries, which have always been a traditional activity and privilege of Indigenous peoples, not captured within the definition of "Aboriginal", "commercial" or "recreational" fisheries, will no longer be protected under the Fisheries Act. The problem is that the definition of "Aboriginal" fisheries does not include all First Nation fisheries.[150] In other words, this means a reduction of the number of persons who have the right to fish based on "peace and friendship treaties", a stricter definition of the circumstances under which this right may be exercised, and a restriction of Indigenous fishing rights, a pillar of First Nations' self-definition. Since fishing forms part of First Nations' identity, they should at least be able to influence decisions on relevant legislation in order to uphold their right to self-determination, which was not the case of this legislation's drafting.

The former division unilaterally amends the Indian Act in that it modifies the voting and approval procedures in relation to the proposed land designations. First Nations do not need a majority of eligible voters, but only a majority of voters gathered at a meeting or referendum, in order to decide whether reserve lands will be leased. Furthermore, the Minister of Aboriginal Affairs and Northern Development can call a meeting or referendum to consider land surrender from the band's territory.[151] This may take control over land sales away from First Nations and result in a loss of Native land.

The Indian Act is the basic source of law for First Nations in Canada. Thus, its amendment without proper consultation with their representatives highlights the Harper Government's disregard of Indigenous Canadians' right to self-determination. Moreover, the simplification of the voting procedure can facilitate access to land on reserves for non-Aboriginal outside operators. This can result in the land belonging to First Nation communities getting into the hands of non-Native entities, along with the profit from it, and thus actually worsen the economic situation of First Nations. Last but

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[149] From Bruderheim in Alberta, to Kitimat in British Columbia.

[150] "Assembly of First Nations States Concerns on Bill C-45 to Senate Standing Committee", official website of the Assembly of First Nations, November 27, 2012, http://www.afn.ca/index.php/en/news-media/latest-news/assembly-of-first-nations-states-concerns-on-bill-c-45-to-senate-stand (accessed December 3, 2014).

not least, it will also allow for ministerial interference in band decision making, which is a clear infringement of the First Nations' right to self-determination.

In *R. v. Sparrow (1990)*, which was later confirmed by *Delgamuukw v. British Columbia (1997),*[152] the Supreme Court of Canada (SCC) was asked to decide on the constitutionality of federal fishing permits, and the banning of some methods of fishing. Fishing for salmon, which was affected by the regulations, plays a key role in the cultural identity of the Musqueam First Nation of British Columbia. In the landmark decision, the SCC ruled in favor of the Musqueam First Nation. It argued that Section 35 (1) of the Constitution of Canada, 1982 protected practices that were integral to an Aboriginal community's distinctive culture.[153] Furthermore, it laid out that policies and legislation, implemented by the federal government, restricting the exercise of a recognized and affirmed Aboriginal right, were required to be adequately consulted about in advance with the involved Aboriginal community.[154] This SCC ruling therefore established an obligation of the federal government to consult with First Nations about policies and legislation that directly affect them. This right to "free, prior, and informed consent" (FPIC)[155] forms a part of the Aboriginal rights to self-determination and self-government.

The concept of FPIC derives from the SCC's interpretation of the complex "fiduciary" relationship between the Crown and Canada's Aboriginal peoples, originating already with the Royal Proclamation of 1763. According to the *Sparrow* interpretation of the Section 35 (1), the Government is responsible for acting *in a fiduciary way* with respect to Indigenous peoples. "Fiduciary" is a person who holds a position of trust or confidence with respect to someone else.[156] Trust must be the first consideration in determining whether a governmental legislation or action can be justified. And it can be justified inter alia on the condition that the affected Aboriginal groups had been consulted.[157]

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[151] House of Commons, "A Second Act to Implement Certain Provisions", 203–206, 226–228.
[152] *Delgamuukw v. British Columbia*, 1997, 3 S.C.R. 1010.
[153] *R v. Sparrow*, Supreme Court of Canada, 1990, 1 S.C.R. 1075.
[154] Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult", *Canadian Bar Review* 79 (2000): 255.
[155] Inman, Smis and Cambou, "We Will Remain Idle No More", 266.
[156] Mary C. Hurley, "The Crown's Fiduciary Relationship with Aboriginal Peoples", Law and Government Division of the Parliament of Canada, Ottawa, Canada, December 18, 2002, http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0009-e.htm (accessed December 3, 2014).
[157] *R v. Sparrow*.

Based on these premises, in 2012, the Confederacy of Treaty No. 6 First Nations announced they did not recognize the legality of any laws passed by the Parliament of Canada, including but not being limited to, Bill C-45. They argued that such laws did not protect their constitutionally recognized Aboriginal rights and they did not fulfill the obligation of the Crown to consult with First Nations about Indigenous policy.[158] In a similar vein, Assembly of First Nations Ontario Regional Chief Stan Beardy pointed out that "at no time in the nine months that Bill C-45 was being considered did the Government of Canada discuss any matters related to it with First Nations—this bill breaches Canada's own laws on *the fiduciary legal duty to consult* and accommodate First Nations. The Canadian government just gave birth to a monster."[159]

A similar position towards the legislation was assumed by the Assembly of First Nations which is an officially recognized organization composed of chiefs of First Nation bands with a mandate to speak for First Nations. As a reaction to Bill C-45, these chiefs gathered under the theme of "The Unfulfilled Promise of Section 35"[160] and unanimously adopted the *Statement of Unity* at the AFN' conference in December 2012.

> "We, the original peoples […] are also bestowed with the responsibility by the Creator to defend our territories, including traditional and Treaty lands, We have maintained these principles despite the imposition of illegal government legislation and policies against our citizens, In solidarity, we categorically reject the assimilation and termination policies used by the government of Canada against our nations and our citizens and, We support the participation of all First Nations peoples in decision-making processes that impact our inherent and treaty rights, We unconditionally reject any Canadian or provincial legislation, policies, or processes that impact our lands, air, waters and resources which have not obtained our *free, prior, and informed consent* […]"[161]

In conclusion, I argue that the provisions of Bill C-38, Bill C-45, and other above mentioned Harper's bills and laws are not congruent with Indigenous peoples'

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158 "Canada's Senate Passes Bill C-45 as Aboriginals Vow Not to Honor It", *Indian Country Today Media Network.com*, December 14, 2012, http://indiancountrytodaymedianetwork.com/2012/12/14/canadas-senate-passes-bill-c-45-aboriginals-vow-not-honor-it-146328 (accessed December 3, 2014).

159 "Bill C-45, Jobs and Growth Act Not to Be Recognized or Enforced by First Nations in Ontario", official website of the Chiefs of Ontario, December 14, 2012, http://www.chiefs-of-ontario.org/node/453 (accessed December 3, 2014). Emphasis by the author.

160 Shawn Atleo, "Communiqué from National Chief Shawn Atleo, December 2012" (Communiqué presented at the AFN Special Chiefs Assembly in Gatineau, Quebec, December 4-6, 2012), http://www.afn.ca/uploads/files/12-12-07_nc_bulletin_fe2.pdf (accessed December 2, 2014).

161 Chiefs of the Assembly of First Nations, "Statement of Unity: In Honour of our Peoples and Our Land" (Statement adopted by Chiefs at the AFN Special Chiefs Assembly in Gatineau, Quebec, December 6, 2012), http://www.afn.ca/uploads/files/12-12-07_nc_bulletin_fe2.pdf (accessed

right to self-determination. Since it is certainly just to claim that "no fundamental change in governance can or should happen without the consent of the governed",[162] any prospective legislation replacing the Indian Act of 1876 ought to be written with the consent and in consultation with First Nations if not by First Nations themselves, and this seems not to be the Harper Government's course of action.[163]

The Government of Stephen Harper, whose former advisor on Aboriginal peoples was Thomas Flanagan, rejected the concept of equal negotiations with representatives of First Nations, and returned to traditional hierarchical negotiations in which the federal Minister of Aboriginal Affairs plays a key role. It did so despite the Conservative Party's previous promises to work with First Nation leaders on replacing the Indian Act with a modern legislative framework, which would entrust First Nations with legal responsibility for their own affairs within the confines of the Constitution.[164] Moreover, the Harper Government rejected all the financial obligations set by the Kelowna Accord. Demands of Indigenous peoples were not taken into account in the legislative proposals which proves the government's neglect of equal negotiations.

At the 2010 annual meeting of the Assembly of First Nations, the former National Chief Shawn Atleo called for the abolition of the Indian Act in the next five years. He proposed replacing the legislation with a new one that would resolve the most pressing issues such as land claims and resource sharing.[165] Yet through 2014 it seems unlikely that his ambitious plan will be accomplished in the near future. Moreover, in 2012, Prime Minister Stephen Harper said at the Crown – First Nations Gathering: "To be sure, our Government has no grand scheme to repeal or to unilaterally re-write the Indian Act: After 136 years, that tree has deep roots, blowing up the stump would just leave a big hole."[166] In consequence, representatives of First Nations called the

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December 2, 2014). Emphasis by the author.

[162] Den Tandt, "Indian Act, Racist Relic of 1876".

[163] One of the latest examples of Harper's ignorance to consult with Aboriginal peoples was the government's approval of the construction of the Enbridge Northern Gateway Pipelines to the Pacific coast.

[164] Conservative Party of Canada, "Stand up for Canada", *Conservative Party of Canada Federal Election Platform*, Ottawa, Canada, 2006, http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf (accessed October 21, 2014), 38.

[165] Montpetit, "Background: The Indian Act".

[166] Stephen Harper, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering", official website of Prime Minister of Canada Stephen Harper, http://pm.gc.ca/eng/node/24908 (accessed November 2, 2014).

gathering just another example of how the Harper Government evades their responsibilities.[167]

The lack of consultation with First Nations, which was confirmed as a government's obligation by the Supreme Court of Canada based on the interpretation of the "fiduciary relationship" between the Crown and Aboriginal peoples, and the lack of regard for identity elements of First Nations, such as environmental protection or the right to fish, that is reflected in policies and legislation of the Harper Government show how problematic, even impossible, any future negotiations on the further reform of laws concerning First Nations, especially the Indian Act, can be.

4. Idle No More

> "Beginning as political action against specific federal legislation, Idle No More added fuel to the ever-burning fires of Indigenous nationalism and its more fundamental demands for equal self-determination and the re-establishment of a nation-to-nation relationship with non-Indigenous Canadians."[168]

As Marc Woons outlined in his journal article *The "Idle No More" Movement and Global Indifference to Indigenous Nationalism,* Idle No More (INM) has as its main objective to enforce right to self-determination of Aboriginal peoples, which is the reason why I chose the movement for the case study. In the following chapter, by analyzing the visions, statements, and demands of INM, I will try to find out to what extent the ideas of Indigenous peoples on reforms and future legislation that are necessary to improve the plight of Native peoples are compatible with the priorities of Stephen Harper.

The Idle No More protest movement is the most pronounced resurgence of Indigenous nationalism since the Oka Crisis in 1990,[169] and is sometimes being compared to the Occupy movement.[170] Idle No More was launched in response to the enactment of the Jobs and Growth Act of 2012, to the 43-day hunger strike of Chief Theresa Spence of the Attawapiskat First Nation who had declared a state of emergency in the Attawapiskat community in northern Ontario in 2011 because of a housing crisis,

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[167] Christian Quequish, "Walking to Abolish the Indian Act", *Wawatay News*, July 19, 2012, http://www.wawataynews.ca/archive/all/2012/7/19/walking-abolish-indian-act_23154 (accessed October 28, 2014).

[168] Marc Woons, "The 'Idle No More' Movement and Global Indifference to Indigenous Nationalism", *AlterNative* 9, No. 2 (2013): 173.

[169] Ibidem, 172.

[170] The Occupy movement is a transnational movement against social and economic inequality.

and because its founders were concerned that the Harper Government's legislation would erode Indigenous rights.[171]

The movement's founders – three First Nation women and one non-Aboriginal woman, Sylvia McAdams, Nina Wilson, Jessica Gordon, and Sheelah McLean – held a conference in Saskatoon at the end of 2012 which they titled "Idle No More", encouraging both members of Aboriginal groups – First Nations, Métis and Inuits – and non-Aboriginal Canadians, to take action against the federal government's abuses of Native peoples. In order to express their discontent, they coordinated teach-ins, marches, rallies, demonstrations, railroad blockades, flash mobs at malls, and round dances through Facebook and Twitter. Protests also spread to the United States, Australia, New Zealand, and several European cities in solidarity with INM.[172]

Idle No More is a grassroots non-profit movement that has no political affiliation. The founders of the movement do not have the same mandate or identical goals as Indian band councils or the Assembly of First Nations. There is no formal connection between the AFN and the movement, even though Shawn Atleo expressed support for INM which had generated a "tremendous outpouring of energy, pride and determination by our peoples,"[173] according to him. Thus, INM neither represents an official Aboriginal body, nor does it speak for all Native peoples.

On the other hand, the movement has over 6.000 followers on Twitter,[174] it has obtained more than 135.000 "likes" on Facebook,[175] and it is estimated that in a certain period its Facebook page had about million readers a week.[176] Foreign newspapers describe the movement as "unprecedented mobilization"[177] of Indigenous peoples. Moreover, it increased public and media pressure on the federal government, and even forced an official meeting between Prime Minister Harper and a delegation of roughly

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171 "Timeline: Idle No More's rise Movement created out of opposition to measures in federal budget", *CBC News*, October 4, 2013, http://www.cbc.ca/news2/interactives/timeline-idle-no-more/ (accessed December 4, 2014).

172 Ibidem.

173 Andrea Nicoll, "Idle No More Movement Sweeping the Nation", *The Oxbow Herald*, January 26, 2013, http://www.oxbowherald.sk.ca/News/Regional/2013-01-26/article-3164612/Idle-No-More-movement-sweeping-the-nation/1 (accessed December 4, 2014).

174 "Idle No More", Twitter profile of Idle No More, https://twitter.com/idlenomore (accessed December 4, 2014).

175 "Idle No More", Facebook profile of Idle No More, https://www.facebook.com/IdleNoMoreCommunity (accessed December 4, 2014).

176 Joe Friesen, "What's behind the Explosion of Native Activism? Young People", *The Globe and Mail*, January 18, 2013, http://www.theglobeandmail.com/news/national/whats-behind-the-explosion-of-native-activism-young-people/article7552791/ (accessed December 20, 2014).

177 Martin Lukacs, "Indigenous rights Are the Best Defence against Canada's Resource Rush", *The Guardian*, April 26, 2013, http://www.theguardian.com/environment/true-

100 First Nation leaders, including Chief Theresa Spence, coordinated by the Assembly of First Nations held on January 11, 2013.[178] All these indicators suggest that the movement represents a powerful political voice of Indigenous peoples.

The Idle No More movement promotes environmental protection, Indigenous sovereignty, and strives to educate both Native and non-Native peoples on these issues. It also calls for regular triangular meetings between First Nation leaders, the Government of Canada, and industrial companies in order to involve Aboriginal peoples in negotiations and decision making concerning legislation affecting their communities.[179] More specifically, they

> "call for Canada, the provinces and the territories to repeal provisions of Bill C-45 (including changes to the Indian Act and Navigable Waters Act, which infringe on environmental protections, Aboriginal and Treaty rights), abandon all pending legislation which does the same, deepen democracy in Canada through […] *consultation* on all legislation concerning *collective rights* and environmental protections […], affirm Aboriginal Title and *Rights*, as set out in Section 35 of Canada's constitution, […] and honor the spirit and intent of historic Treaties."[180]

This "Call for Change" reflects the particular demands of First Nations, as they were described earlier in this thesis. First, it calls for *consultations* with Indigenous peoples on legislation that concerns them. This demand is based on the right to "free, prior, and informed consent" that Idle No More derives from the *United Nations Declaration on the Rights of Indigenous Peoples*, and, as I argued, also from the Canadian Supreme Court's rulings, such as *R v. Sparrow* or *Delgamuukw v. British Columbia*.

It also mentions *collective rights*. These form part of Indigenous peoples' identity with their holistic approach. It therefore seems unlikely that First Nations would yield these rights, and would embrace for example private property, as suggested in the First Nations Property Ownership Act, and favored by conservative scholars like Thomas Flanagan. Third, it invokes *rights* protected by Section 35 (1) of the Constitution of Canada, 1982, which include the right to self-determination. According

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north/2013/apr/26/indigenous-rights-defence-canadas-resource-rush (accessed December 4, 2014).

[178] Chris Hall, "Stephen Harper, First Nations and an Opportunity Lost", *CBC News*, January 11, 2013, http://www.cbc.ca/m/touch/news/story/1.1308543 (accessed December 10, 2014).

[179] Benjamin Shingler, "Idle No More: First Nations Activist Movement In Canada Revs Up For Week Of Rallies", *The Canadian Press*, December 16, 2012, http://www.huffingtonpost.ca/2012/12/16/idle-no-more_n_2312001.html (accessed December 10, 2014).

[180] "Calls for Change", official website of Idle No More, www.idlenomore.ca/calls_for_change (accessed December 10, 2014). Emphasis by the author.

to INM, the Harper Government's way of negotiating with Indigenous peoples does not reflect the vision of nation-to-nation, but it is rather "colonial".[181] For this reason, members of Idle No More call on

> "[…] all people to join in a peaceful revolution, to honor Indigenous sovereignty, and to protect the land and water. INM has continued and will continue to help build sovereignty & resurgence of *nationhood*. INM will continue to pressure government and industry to protect the environment. INM will continue to build allies in order to reframe *the nation to nation relationship*, this will be done by including grassroots perspectives, issues, and concern."[182]

Here the movement endorses the belief that Indigenous peoples are *nations*,[183] which is advocated by Kymlicka, and mainly by the RCAP, but is rejected by both Flanagan and Cairns. Such terminology indicates that for INM the rights to self-determination and self-government are of paramount importance.

The supporters of INM stress the resource-oriented approach to land and environment of the Harper Government. They argue that legislative changes of the Harper Government pursue predominantly priorities set out by the Conservatives such as the maximum financial efficiency and that the principle of protecting the ethnic and cultural diversity, not only in relation to Indigenous peoples, stands on the list of priorities below economic interests.[184]

Critics of the movement, such as Sadeq Rahimi and Mark Milke, liken the Idle No More movement to the Arab Spring. They argue that the movement does not have a strong and qualified leader who would be able to discuss legislative changes with Prime Minister Harper. More importantly, they deplore that supporters of Idle No More do not have a uniform opinion on how to reform the Indian Act and improve the plight of Aboriginal peoples.[185] Some even suggest that they misinterpret the relevant parts of the Harper Government's legislation. They claim for example that the amendment to the Navigable Waters Protection Act does not represent a threat to Aboriginal resources,

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[181] Russel Diabo, "Harper Launches Major First Nations Termination Plan: As Negotiating Tables Legitimize Canada's Colonialism", official website of Idle No More, June 16, 2013, www.idlenomore.ca/harper_launches_major_first_nations_termination_plan_as_negotiating_tables_legitimize_canada_s_colonialism (accessed December 20, 2014).

[182] "Vision", official website of Idle No More, http://www.idlenomore.ca/vision (accessed December 10, 2014). Emphasis by the author.

[183] See also the INM's Manifesto available at http://www.idlenomore.ca/manifesto.

[184] Diabo, "Harper Launches Major First Nations Termination".

[185] Sadeq Rahimi, "Canada Heading for Bloodshed, Warns Aboriginal Leader", *The World Post*, January 15, 2013, http://www.huffingtonpost.com/sadeq-rahimi/canada-heading-for-bloods_b_2474733.html (accessed December 10, 2014).

whereas they believe that leaving minor streams and other water surfaces to be handled by provinces and municipalities will lead to better local control over projects while eliminating the bureaucratic burden.[186]

Moreover, these critics of INM defend the Harper Government's legislation, asserting that it will not allow for reserve land to be sold off to non-Aboriginal buyers, but on the contrary – it will allow for First Nations to lease more land in order to create housing subdivisions and commercial complexes. Thus, Indian reserves and their residents will be able to benefit from the cash flow. They also criticize the corrupt governance of First Nation communities, where chiefs earn higher (and tax-free) salaries than politicians in similarly small municipalities.[187]

Their rhetoric is strikingly reminiscent of Flanagan's when they identify the rural nature of Aboriginal communities living on collectively owned land in the 21st century as a major problem.[188] This view is rather distorted, Eurocentric and urban. Arguing that the Harper's legislation enables First Nations to lease land, part of nature much prized for its purity not only by Aboriginal peoples but also by environmentalists and many non-Native Canadians, for the construction of modern industrial complexes and shopping centers, points to the one-sidedness of such line of reasoning. It addresses only the narrowly defined economic aspects of the recent legislation.

Flanagan and the federal government also use the corruption argument of First Nation communities and band councils outlined by these critics. For example, in response to the Attawapiskat crisis, Stephen Harper said that widespread corruption in band councils was to blame.[189] This is an evidence of how the Harper Government denies its own share of responsibility for the plight of First Nation communities, puts the blame on Aboriginal peoples, and justifies the need for carrying out its legislation. The Assembly of First Nations does not deny that corruption exists within First Nation communities but it argues that it does not represent a more serious problem there than in other sectors of society and government.[190]

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[186] Mark Milke, "What Idle No More Should Really Be Protesting", *The Huffington Post Canada*, January 9, 2013, http://www.huffingtonpost.ca/mark-milke/idlenomore_b_2428048.html (accessed December 11, 2014).
[187] Ibidem.
[188] Ibidem.
[189] James Mackay and James Sinclair, "Canada's First Nations: A Scandal Where the Victims Are Blamed", *The Guardian*, December 11, 2011, http://www.theguardian.com/commentisfree/2011/dec/11/canada-third-world-first-nation-attawapiskat (accessed December 20, 2014).
[190] Schwartz, "7 Questions about First Nations".

On December 28, 2012, in reaction to all these heated events and mainly as a response to an ongoing hunger strike by Chief Theresa Spence, Amnesty International sent an open letter to Stephen Harper. This international non-governmental organization fighting for human rights called on the Canadian Prime Minister to meet with Mrs. Spence and discuss how to improve the situation on reserves, which was the condition for the termination of her voluntary starvation. In the letter, it also argued that Bill C-45 "should only have been brought forward after good faith consultation with Indigenous peoples and only if their rights had been appropriately considered and protected,"[191] which, in its opinion, did not happen. Amnesty International concluded the letter by calling the Harper Government' attention to the UNDRIP requiring the protection of Aboriginal peoples' right to self-determination, while it pointed out that policy affecting the rights of Native peoples are to be made only with their full and effective participation in decision making.[192]

In January 2013, then Aboriginal Affairs Minister John Duncan and several other government officials invited a delegation of First Nation chiefs to Ottawa to discuss the demands raised by Idle No More. While Governor General David Johnston participated only in the ceremonial part of the meeting, Stephen Harper eventually attended the whole meeting, despite his original intention to attend only a part of it. The day of the meeting, promoters of the Idle No More movement organized happenings on Parliament Hill, and elsewhere in Canada, in order to express their support of the chiefs.[193]

Despite the promises that the meeting was only the beginning and would be followed by similar events, to this day it has remained the only official meeting of such scale between representatives of Canada's First Nations and Prime Minister Stephen Harper. Furthermore, regarding the Idle No More movement, Stephen Harper stated that "people have the right in our country to demonstrate and express their points of view peacefully as long as they obey the law, but I think the Canadian population expects everyone will obey the law in holding such protests."[194] His statement gives the

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[191] Alex Neve and Béatrice Vaugrante, "Open Letter Urging a Meeting with Chief Theresa Spence" (An open letter of Amnesty International to Prime Minister Stephen Harper, December 28, 2012), http://www.amnesty.ca/news/open-letters/open-letter-urging-a-meeting-with-chief-theresa-spence (accessed December 1, 2014).

[192] Ibidem.

[193] Hall, "Stephen Harper, First Nations".

[194] "9 Questions about Idle No More".

impression that the Aboriginal resistance expressed in Idle No More and the Indigenous resentment toward his policies did not significantly put Harper out of countenance.

After a series of nonviolent actions in support of the dissatisfied Aboriginal peoples that contributed to the realization of the official meeting between representatives of the federal government and the delegation of First Nation chiefs, the movement lost its momentum. The round dances stopped, the rallies were disbanded and the media moved on to other topics.[195] However, some representatives of Indigenous peoples like Federation of Saskatchewan Indian Nations Chief Jonathan Kimberly,[196] scholars like John Ralston Saul or even some federal officials[197] believe that similar projects may follow Idle No More in the future.

Saul is confident that the formation of the Idle No More movement means that there is a new elite of Indigenous peoples with college diplomas that is and will be gaining strength and increasing its influence. Most of the INM's activities such as flash mobs and teach-ins were peaceful. Saul argues that without a change in stances of non-Aboriginal Canadians who prevent Indigenous peoples from regaining their rights and returning to power this elite might instigate riots which could have more bitter consequences than those of the railroad blockades and demonstrations of INM.[198]

In conclusion, the Idle No More protest movement emerged mainly as a backlash against the Harper Government's legislation affecting the rights of Indigenous peoples, which it had passed with no previous consultation with Aboriginal peoples. Idle No More was able to mobilize thousands of people for action.[199] Despite Harper's seemingly little interest in these events, the movement also contributed greatly to the realization of an official meeting between representatives of Native peoples and the government. The movement did not accomplish big goals as Bills C-45 and C-38 are still applicable. It lost momentum in a relatively short period of time, however, the fact

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[195] Joe Friesen, "John Ralston Saul Calls for All Canadians to Be Idle No More", *The Globe and Mail*, October 31, 2014, http://www.theglobeandmail.com/news/national/john-ralstan-saul-calls-for-all-canadians-to-be-idle-no-more/article21415062/ (accessed December 20, 2014).

[196] Tyler Clarke, "Idle No More Was Only the Beginning", *West Coast Native News*, December 16, 2014, http://westcoastnativenews.com/idle-no-more-was-only-the-beginning/ (accessed December 20, 2014).

[197] Benjamin Shingler, "Emails Show Federal Officials Worried About Second Idle No More Movement", *The Canadian Press*, August 17, 2014, http://www.ctvnews.ca/politics/emails-show-federal-officials-worried-about-second-idle-no-more-movement-1.1963194 (accessed December 20, 2014).

[198] Saul, "The Resurgence of Indigenous Power".

[199] "Cree Walkers Meet Minister at End of Idle No More Trek", *CBC News*, March 25, 2014, http://www.cbc.ca/news/canada/ottawa/cree-walkers-meet-minister-at-end-of-idle-no-more-trek-1.1392239 (accessed December 20, 2014.)

that Aboriginal issues got into the forefront of public and media interest may be taken as a success on which Indigenous peoples can built in the future.

The analysis of the Idle No More's rhetoric as compared to the rhetoric of the federal government showed that the two opinion groups diverged. While representatives of Aboriginal peoples are calling for the enforcement of their collective rights, their right to free, prior, and informed consent, and more generally of their right to self-determination and self-government, the Harper Government has been assuming greater control over the Indigenous communities and lands, and has been promoting their economic development on non-Native terms.

Conclusion

First Nations live on the margins of Canadian society. The socio-economic conditions of their communities are, despite the extensive financial support that they receive from the State, still very poor (poverty, high unemployment rates, high suicide rates, alcoholism, drug addiction, etc.). The Indian Act of 1876 along with the Constitution of Canada, 1982, is the basic legal codification of the rights of First Nations in Canada. In its relatively unchanged form, it has provided for a special status of First Nations within Canada and guaranteed the preservation of their distinctiveness, in particular through their collective rights, for almost 140 years. On the other hand, it has also isolated First Nations in a vicious circle of the dysfunctional system of reserves and a detrimental dependence on social welfare. Thus, to a certain extent, there is a consensus that reform and an eventual replacement of the Indian Act of 1876 are needed. However, the Harper Government and First Nations have very different ideas of what direction this legislative change should take.

Woons' claim that "Canada clearly has a long way to go in restoring a just relationship with Indigenous peoples and carry out their justifiable claims for greater self-determination"[200] indicate the complexity of modifying the legal status of First Nations in Canada. As I tried to demonstrate on the discourse analysis of the Idle No More protest movement, and as it is also apparent from the official statements of the AFN, First Nation communities believe that the government has to introduce a new legislation in which the Aboriginal rights to self-determination will be guaranteed, *before* the Indian Act can be replaced.

[200] Woons, "The 'Idle No More' movement", 176.

First Nations base their right to self-determination, defined as the right to freely determine one's political status and pursue one's social, economic, and cultural development, on several assumptions. First, they believe it is one of the rights that are legally guaranteed to Aboriginal peoples by Section 35 (1) of the Constitution of Canada, 1982, and by the *United Nations Declaration on the Rights of Indigenous Peoples* endorsed by Canada in 2010.

Second, First Nations consider themselves to be nations, and the right of nations to self-determination is one of the key principles enshrined in the Charter of the United Nations' *jus cogens.*[201] It should be noted that although First Nations are generally referred to as "nations", as the name suggests, opinions differ in this respect. The Assembly of First Nations and Idle No More declare that Native peoples are nations in all statements and manifestos. The RCAP also supported the idea of Aboriginal nationhood. Similarly, Will Kymlicka sees Indigenous peoples as "national minorities" based on criteria such as common culture, language, traditions, etc. On the other side, conservative scholars like Thomas Flanagan reject the nationhood of Native peoples, and rather follow on the idea of "undifferentiated citizenship" articulated in the *White Paper* while Alan Cairns rather uses the designation "citizens plus" from the *Hawthorn Report*.

Considering themselves to be nations, First Nations claim their right to self-government, which represents an integral part of self-determination. One of the possible ways in which this can be put into practice is through the self-government agreements. More than twenty self-government agreements have already been concluded between First Nation bands and the federal government.

How effective these agreements will be in the long term is impossible to know as of now. The problem is that the process of submission and negotiation of the SGA is lengthy. Furthermore, important policy areas remain under federal jurisdiction exclusively. Nevertheless, I contend they could certainly have potential. They both meet the First Nations' claim for self-government and they also transfer responsibility for the functioning of these Native communities into the hands of their own members, and thus ease the burden of the federal government.

The catch lies in the fact that the Harper Government is currently moving away from self-government to "governance" which implies that it is replacing negotiations of

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[201] *Jus cogens* is a peremptory norm accepted by the international community, from which derogation is not permitted.

self-government agreements understood despite all their shortcomings as a practical assertion of Aboriginal inherent rights with "sector-specific agreements".[202] This shows how incompatible the perspectives of the Harper Government and Canadian Aboriginal peoples on the transformation of Indigenous-state relations are.

Third, First Nations base their right to self-determination on the interpretation of the "fiduciary" relationship between the Crown and Aboriginal peoples and the doctrine of "free, prior, and informed consent". According to recent rulings of the Supreme Court of Canada, the fiduciary relationship is enshrined in Section 35 (1) of the Constitution of Canada, 1982. Such interpretation, which implies the Aboriginal right to "free, prior, and informed consent" of Aboriginal peoples about their own affairs, should in practice ensure participation of First Nations in the preparation of legislative changes that directly affect them. However, the Canadian Conservative government of Stephen Harper seems to simply disregard this legal doctrine – in effect violating the law of the land that they swore to uphold.

In contrast to the previous approach of the Liberal governments of equal negotiations, since 2006, when the Conservative Party came to power, Prime Minister Stephen Harper has personally met with representatives of Indigenous peoples only a few times. Concerning most of the current legislative proposals, representatives of Indigenous peoples were not consulted. Bill C-38 and Bill C-45 are the most visible examples of the Harper Government's circumvention of First Nations consent when creating policies regarding their communities. Furthermore, the emergence of the Idle No More protest movement as a response to the enactment of Bill C-45 showed how far from Aboriginal people perspective Harper's policy of indifference of Indigenous peoples' demands had gone.

In contrast to the Aboriginal community, the Harper Government prefers reforms of the Indian Act in order to achieve economic sustainability of the First Nation communities, and the capability of managing their own affairs. Harper's policies are based on a similar approach to the one proposed by Thomas Flanagan, who has been in the past Harper's advisor on Aboriginal issues. They believe that, instead of living on state aid, which annually forms a large part of the government's budget, Indigenous peoples should adopt market based economy with all its aspects. In their opinion, it is necessary to eliminate collective ownership on reserves and introduce private

[202] Papillon, "The Rise (and Fall?)", 126.

ownership. Indigenous communities should also be financed from taxes collected from their own people. Finally, Aboriginal land should be opened up for industrial companies, especially for the extraction and transportation of oil, which is on the rise in Canada.

In conclusion, the visions of the two sides – the Canadian First Nations and the Harper Government – for the future legislative anchoring of First Nations, and more generally for all Aboriginal peoples in Canada, do not have much in common. While one side speaks about collective rights, the right to self-determination, the right to self-government, the right to free, prior, and informed consent, and the distinctiveness of Indigenous peoples, the other side stresses the importance of economic principles of market based economy focusing on self-sufficiency, private ownership, and further natural resources exploitation which requires a substantial decrease of protection of the environment. The Harper Government promotes the integration of Native peoples into non-Aboriginal society.

In my opinion, the reform of the Indian Act of 1876 and the improvement of the dismal situation of First Nations in Canada can be successfully carried out only under the condition that the two sides cooperate. Such cooperation, however, seems impossible due to their completely different views on the matter. In addition, for such cooperation it would be necessary that the Harper Government showed signs of efforts to involve First Nations in negotiations on policies that affect them – which it has not yet shown. This basic problem of the future status of First Nations in Canada in relation to the Harper Government was perfectly expressed by Derek Inman, Stefaan Smis, and Dorothée Cambou:

> "[…] in an effort to accommodate Aboriginal peoples, to reconcile past injustices, and to respect the honor of the Crown, the Canadian government should have at least consulted with the Aboriginal peoples prior to rushing through Bill C-38 and Bill C-45. Maybe this is why the Aboriginal peoples of Canada stood up and refused to be *Idle No More*."[203]

[203] Inman, Smis and Cambou, "We Will Remain Idle No More", 285.

Souhrn

Zvláštní postavení kanadských prvních národů zaručuje Indiánský zákon z roku 1876, který však tuto skupinu původních obyvatel zároveň izoluje v bludném kruhu generujícím socio-ekonomické problémy. V posledních letech se začíná stále častěji hovořit o nutnosti změnit nejen Indiánský zákon, ale obecně přenastavit status původních obyvatel v rámci kanadské společnosti. Cílem této diplomové práce je představit jednotlivé pohledy na to, jakým způsobem lze tuto změnu provést. Zároveň si autorka vytyčila za cíl zjistit míru kompatibility mezi reformami současné vlády Stephena Harpera a požadavky původních obyvatel na uplatnění jejich práva na sebeurčení.

V první části byli nejprve stručně představeni původní obyvatelé Kanady, přičemž hlavní důraz byl kladen na první národy a jejich organizaci, protože právě na ně se vztahuje Indiánský zákon z roku 1876. Dále byl analyzován tento zákon, který je základním předpisem určujícím vztah mezi komunitami prvních národů a státem. Na jednu stranu představuje nenáviděný koloniální nástroj pro ovládání prvních národů federální vládou, na druhou stranu ale zaručuje ochranu jejich zvláštního postavení v rámci kanadské společnosti a brání tak jejich asimilaci.

Ve druhé kapitole byly rozebrány jednotlivé přístupy k tomu, jak by měl být řešen status původních obyvatel v Kanadě. Ve vztahu k uplatňování práva na sebeurčení původních obyvatel byly porovnány dva základní koncepty. První předkládá bývalý blízký poradce Stephena Harpera Thomas Flanagan inspirovaný Trudeauovým Bílým dokumentem (*White Paper*), druhý navrhuje Alan Cairns ovlivněný Hawthornovým reportem. Flanagan podporuje tzv. nediferencované občanství (*undifferentiated citizenship*), což by prakticky znamenalo zrušení zvláštního postavení původních obyvatel a jejich začlenění do většinové společnosti. Cairns preferuje jejich označení za tzv. občany plus (*citizens plus*), tedy kanadské občany mající určitá specifická práva.

Druhá část práce byla věnována diskurzivní analýze prohlášení původních obyvatel vyjádřených představiteli hnutí Idle No More na jedné straně a rétoriky a návrhů vlády Stephena Harpera na straně druhé. Třetí kapitola načrtla významné legislativní kroky Harperovy vlády týkající se původních obyvatel a jejich praktické dopady na jejich komunity. Nejdůležitějšími vládními iniciativami jsou zákon o vlastnictví nemovitostí prvních národů (*FNPOA*), zákon o finanční transparentnosti prvních národů (*C-27*), zákon o pracovních místech, růstu a dlouhodobé prosperitě (*C-*

38) či zákon o pracovních místech a růstu (*C-45*). Poslední dva jmenované vyvolaly silnou vlnu nevole původních obyvatel, jež vedla až ke vzniku protestního hnutí Idle No More.

Ve čtvrté kapitole byly rozebrány prohlášení a výroky zástupců hnutí Idle No More ostře kritizující vládu Stephena Harpera a její legislativní kroky. Představitelé hnutí se domnívají, že vláda nerespektuje právo původních obyvatel na sebeurčení, jejich zvláštní identitu a ochranu přírody, a místo toho sleduje pouze vlastní cíle založené na principech tržní ekonomiky. V neposlední řadě kritizují to, že vláda nekonzultuje své kroky týkající se těchto komunit s jejich členy.

Z analýzy jednotlivých představ o tom, jak by měla být řešena otázka sebeurčení a samosprávy původních obyvatel a celkové zakotvení původních obyvatel v rámci kanadské společnosti autorka práce vyvozuje, že se obě strany shodují, že současný stav je nevyhovující a že v případě prvních národů je třeba změnit Indiánský zákon. Nicméně názory Harperovy vlády a původních obyvatel na způsob provedení takových změn jsou vzájemně prakticky neslučitelné.

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