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Only if "je est un autre" Can I Recognise You: Reflections on Canada's Process of Constitutional Recognition of the "Pre-existence of Distinctive Aborignial Societies"

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How we might lay out a Canadian point of view that matches our reality is complicated. […] Either we stumble on, ever more frustrated that our society doesn't function as it should, or we start to rethink our history, to re-examine it. If we look, we will discover the First Nations, the Métis and the Inuit at its core. […] I am not talking about a passive projection of our past, but rather about all of us learning how to imagine ourselves differently. And this is not something that we must do- we, the people who don't think of ourselves as Aboriginal. It's something we have to do with Aboriginals. Otherwise, it will be just another romantic delusion.[1]

1. Introduction[2]

The existence of Aboriginal societies on this continent prior to European colonization and settlement by people from all around the world challenges a conception of Canadian State and law inherited only from Western traditions. Much like the way *de facto* control of this territory by the British and later the Canadian Crown is given *de jure* content in the form of *sovereignty*, the predating presence of peoples self-identifying as distinct has progressively made its way into our legal order. In 1982, executive heads of State entrenched this state of affairs, in response to a movement initiated by the Courts, by rededicating themselves to respect Aboriginal societies as they "recognized and affirmed" their Aboriginal and treaty rights by enacting section 35 of the *Constitution Act, 1982*[3]. This essay is a reflection on what they attempted to achieve.

This political and legal process of recognition represents much more than another example of translation from fact to law. It is also a translation from law to law. The inseparability of fact and law in this context is well exemplified by the conversation between Chief Delgam Uukw, in his opening statements before the Supreme Court of British Columbia, on May 11th, 1987 and Chief Justice Lamer in his decision rendered on December 11th, 1997. The first stated:

The purpose of this case then, is to find a process to place Gitskan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue.[4]

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[1] John Ralston Saul, *A Fair Country Telling Truths About Canada*, (Toronto: Penguin Group Canada, 2008), at 35. [Saul]

[2] My most sincere thanks go to professor Richard Janda, for accepting to supervise me throughout this essay and for his guidance, as well as to professors Kirsten Anker and Mark Antaki, for their observations on this project in the context of the McGill Law Student Scholarly Paper Workshop 2009, to Pierrot Ross-Tremblay (PhD Candidate/Essex), for taking the time to share his thoughts with me, to Peter W. Hutchins and the team at *Hutchins Caron & Associés*, for the confidence and generosity they have shown towards me, Richard Lehun, for his comments, and to all those who have supported me.

[3] *Constitution Act, 1982*, Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11. [*Constitution*]

[4] Gisday Wa and Delgam Uukw, *The Spirit in the Land : The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia*, May 11, 1987, in John J. Borrows, Leonard I. Rotman, *Aboriginal Legal Issues*, 3rd ed., (Markham: Lexis Nexis Canada Inc. 2007), at 62. [Borrows]

The second responded in his closing words:

> *Let us face it, we are all here to stay*.[5]

This exchange, resulting in the elaboration of the concept of Aboriginal title on the basis of both Aboriginal and non-Aboriginal presence and law, reflects the purpose of this essay: to gain a new perspective to Canada's attempts at judicial recognition.

In Part II, we underline the challenges of judicial consideration of uncertainty in the face of culturally differing sources of facts and law. In Part III, we detail a theoretical framework applicable to the Canadian context in order to acquire a critical perspective. We start by examining certain methodological considerations, especially appropriate in the field of Aboriginal law. We then describe Theodor Adorno's "negative dialectics", as a reflection on how to establish the conditions for relationship not imposing the *other* a monolithic description. To avoid such a result, Adorno argues that the subject should question his or her accepted concept of self and refrain from attempting to define the other. In Part IV, we argue that Canada, in its struggle to attain consensus, inherits from a legacy of mixed *disagreements*. Whether in its current jurisprudence or throughout the historic treaty process, competing visions of the world have not always been resolved in accordance with Adorno's ethic. This realisation, in view of the current power imbalance between parties and of the pressing nature of Aboriginal needs, would demand that positive steps be taken to move beyond disagreement and *status quo*, to respond to Aboriginal needs.

Finally, in Part V, we argue that adopting an Adornian ethic aimed at the creation of conditions for unforced consensus has deep implications. The notion of fiduciary duty appears best adapted to represent what an attention by the State to the needs of Aboriginal peoples, in view of the particulars of the situation, could look like from an Adornian perspective, although it remains imperfect.

We conclude that there is a pressing need for the Aboriginal-Crown and Aboriginal-non-Aboriginal relationships to be maintained. However, as long as we are not ready to redefine how we live together based on terms that we do not know yet, and as we seek to attain certainty in adopting frameworks that describe what Aboriginals can do and cannot do in a definite manner, these efforts will present the risk of repeating colonial abuse. Humility and self-transparency thus emerge as guiding attitudes.

2. Judicial Consideration of Uncertainty

Exactly what was recognised through the adoption of section 35 of the Constitution remains uncertain. For some, "Aboriginal rights" protect the right to continue exercising specific and rather narrow practices, whereas for others, they establish inherent spheres of governance over this territory. For some they create unfair rights by creating various classes of citizens,

[5] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 186 [Delgamuukw].

whereas for others they are interim ways to build capacity and establish broader spheres of Aboriginal jurisdiction. This uncertainty results from the fact that such constitutional expressions carry a variety of meaning and will be subject to evolutive interpretation and balancing –that is, if our fundamental law is still a living tree.[6]

Introducing such uncertainty might cause uneasiness, for both judges and parties, especially in view of the fact that one of the generally accepted purposes of law is to guide individual and collective action with predictable rules. Without certainty, the object of our study, as Oliver Wendell Holmes has put it, could no longer be "*the prediction of the incidence of the public force through the instrumentality of the courts*."[7] A concern for fair adjudication should thus always put jurists on guard of advocating for the existence of improbable branches.

Moreover, recognition by the Supreme Court of the open texture of the guiding legal principles of our society demands more effort than to always analyse constitutional principles and provisions in the same way. It implies actualising, in a transparent manner, the definition we give to the normative environment within which it operates. It implies recognising that this environment evolves and that reaching a consensus on how it does so is not easy. Deference towards Parliament's democratic responsibility to legislate should also restrain jurists from exaggeratedly organic interpretations.

Canada's dislike of uncertainty in Aboriginal matters is patent. It is a leitmotiv aspect in recent governance agreements. This was made clear by the statement of Ambassador John McNee, Permanent Representative of Canada to the United Nations, on his vote against the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*[8], adopted by General Assembly Resolution 61/295 on 13 September 2007.[9]

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[6] Lord Sankey coined the famous expression in *Edwards v. Canada (Attorney General)* [1930] A.C. 124, stating: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." The same idea was further developed by Dickson J. in both *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, para. 16: "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind." and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 16, where this position was restated and nuanced.

[7] Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harvard Law Review 160 at 160.

[8] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 61st Sess., 107th Mtg., A/61/PV.107 (2007) [*UNDRIP*]

[9] "The recognition of indigenous rights to lands, territories and resources is important to Canada. […] Unfortunately, the provisions in the Declaration on lands, territories and resources are overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have already been settled by treaty in Canada." *Idem*. We underline.

However, an international human rights instrument document of this nature must obviously remain "broad and unclear", or framed alternately, uncertain, if it aims to apply to all the Aboriginal peoples around the world. There is no way that the multiplicity of Aboriginal claims from peoples often sharing nothing more than the fact of having been colonised, could be fitted under one definition or that this should be attempted at a given point in time, given that cultures and contexts evolve. Even attempts at defining the notion of "indigenous people" refrain from describing in any detail the substance of their legal claims.[10] But the *UNDRIP*, while it contains a certain number of them, does not aim at establishing only general substantive rights. It contains an engagement by member States to establish new *processes* for rights determination. While it would have been impossible to predetermine the result of negotiations between Aboriginal peoples and States, Article 27 makes it clear that member States must incorporate Aboriginal visions of the world in these processes.[11]

Since Aboriginal "laws, traditions, customs" may differ from those of States, the emerging customary international norms contained in the *UNDRIP*[12] necessarily entail cross-cultural dialogue and agreement. Identifying Aboriginal rights within this framework demands an admission by State systems that their law may not take into account Aboriginal ways of being in the world and an engagement to recognise initially foreign concepts into their law. As we will argue, taking seriously this new international body of law entails entering into a process of reconfiguration of State law itself on the basis of Aboriginal concepts.

John Ralston Saul, quoted at the outset of this paper and invited at the 2009 McGill Law Journal Annual Lecture, praises our Courts for their leadership in introducing Aboriginal perspectives into how we see ourselves. In "A Fair Country", he does not hesitate to press

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[10] "A "working definition" of indigenous peoples, which continues to serve as an important reference point in United Nations debates, was formulated by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and on Protection of Minorities, José Martinez Cobo, in his Study of the Problem of Discrimination against Indigenous Populations. He wrote:
"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."
M. van Walt & O. Seroo (Ed.) The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, UNESCO Division of Human Rights Democracy and Peace & Centre UNESCO de Catalunya., 1999, online: UNESCO Center in Catalunya <http://www.unescocat.org/pubang.html>. Commission on Human Rights, 2004, E/CN.4/2004/WG.23/CRP.3. [UNESCO]

[11] "States shall establish […] a fair […] process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, […]" *UNDRIP*, *supra* note 8, art. 27.

[12] Raidza Torres, "The Rights of Indigenous Populations: The Emerging International Norm", 16 Yale J. Int'l L. 127, 158–64 (1991), Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv. Hum. Rts. J. 57-128, S. James Anaya, *Indigenous Peoples in International Law*, Second edition, (London: Oxford University Press, 2004).

Canadians to acknowledge the Aboriginal peoples' contribution to the way our society has evolved and ultimately, to their own sense of collective identity.[13]

However, engaging in cross-cultural dialogue between Aboriginal and common law legal traditions is certainly not an easy task. Should these legal views be given equal weight? Is the construction of intermediary legal concepts, as the result of dialectic between both positions, a fair result? What should be done in case of fundamental incompatibility between both systems? Such concerns will be addressed in the following section.

3. Theoretical framework

In this section, we present Adorno's reflection on the relationship to otherness and to self as a framework to discuss the Supreme Court's attempt to recognise Aboriginal legal claims presented in the previous section. Before we do so, it will be important to take account of certain methodological considerations and cautions. The work of Gordon Christie and Jean Leclair propels the author of these lines to the surface of his reflection, by obliging him to be transparent about his own perspective and motivation. As we will see, Christie's argument invites us to identify the epistemology within which we operate and to acknowledge the potential impact of retaining it rather than another. Leclair insists in a similar way on the non-absoluteness of concepts, in a way analogous to Adorno's anti-idealism which we will present further on. The result is an invitation to be mindful of the sources of knowledge referred to and of the way different concepts interact with one another. We will attempt to meet this onerous standard throughout this essay, although we pretend in no way to do so.

Following these theoretical cautions, we will describe Adorno's negative dialectics, present four critiques addressed to it and attempt to engage with them. This will then allow us to conclude that Adorno's invitation to consider the other through the prism of a constellation that must be permanently reconceived could prove extremely relevant in an evolving intercultural context.

a) Cautions

A first question is put to the non-indigenous researcher by Gordon Christie, in "Making Use of Non-Indigenous Theory", as he draws attention to the fact that by making reference to non-indigenous sources of knowledge, one risks "*downgrading or overlooking the key political aspect of Indigenous struggles, tied to the vast and complex history of interactions between the*

[13] Saul, *supra* note 1 at 102:

> It is disgraceful in a democracy built around egalitarianism that so much of our historically and ethically based leadership has to come from our courts, while most politicians, civil servants and academics drag their feet. On the other hand, the considered and philosophical judgments coming out of the courts are establishing an approach to justice that goes beyond the European idea of what is fair. It is an approach that opens us up to our deep-rooted reality.

Crown/state and Indigenous peoples."[14] Using the example of Social Darwinism, a theory of truth potentially legitimating oppression of stronger individuals and groups over others in the name of natural selection, Christie argues that the researcher must beware that he or she is not having recourse to conceptual tools merely created by others to achieve political goals. Another example, as we shall address later, would be to dismiss group moral claims as a matter of principle and to analyse Aboriginal claims from the perspective of individual rights only. Christie's warning dispels an absolutist vision of truth, according to which theories would not be conditioned by their context and influenced by political interests. Rather, it demands awareness that the theories of truth to which we refer are essentially inter-subjective, pragmatic and representational.[15] Adopting common words such as sovereignty, people, other, self, recognition, reconciliation, reality, etc. as we are naturally led to in a legal environment may have implications that go beyond our comprehension. Asking ourselves a second time: "what does it mean?" may limit such negative effects, but only until someone else raises this question again.

We adopt such a critical understanding of truth, recognising that one's relationship to the world necessarily varies according to individual constructions of reality on the basis of one's frameworks of reference. As a result, one must consider if the epistemology one refers to actually speaks to the "concerns and understandings" of the communities one is directing efforts to.[16] It is quite intuitive in fact that attempting to describe a given situation, in the Aboriginal context, will lead to very different strategies depending on whether the issue is qualified of democratic deficit, spiritual isolation from the land, insufficient capacity to invest, individual and collective lack of self-esteem –all often heard- or many other qualifications that one could not think of in English, let alone in other languages.

The implications of this exhortation for a "reality check" for the non-Aboriginal legal researcher are important, given the risk that he or she could simply ignore Aboriginal approaches to knowledge and normativity. As Robert Cover has brilliantly put it, law as a set of norms rendering communication possible must be sustained by a community of shared interpretive commitments.[17] Myths, language, and a legal system's work of interpretation are constitutive elements of what Cover calls *nomos*, or a community's normative universe. What contribution can be done to create the conditions for the self-determination of Aboriginal communities if one can only treat of the situation from outside a community's *nomos*, on the terms originating from alien *mythoi*, languages and jurisprudences? Christie's epistemological caution, married to Cover's rich vision of normativity, remind us that researchers must be more than cautious when discussing what is just for an Aboriginal community. Also of importance, if law is at least in great part *nomos*-specific, it reminds us that it is improbable that we could formulate recommendations applicable to more than one Aboriginal people at a time.

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[14] Gordon Christie, "Making Use of Non-Indigenous Theory" unpublished section drawn from "Indigenous Legal Theory: Some Initial Considerations", presented at the Indigenous Peoples and Governance Workshop, Montreal, October 10-11, 2008. [Christie]
[15] *Ibid.*, at 6.
[16] *Ibid.*, at 4.
[17] Robert Cover, "Nomos and Narrative", (1983) 97 Harvard Law Review 4-68, at 7.

This postmodern approach to knowledge is also disturbing in the sense that it renders explicit the possibility of *choosing* one's intellectual tools. As clearly stated by Christie, "*Over-swift adoption of a theory with roots in another context may lead to numerous implications not as immediately obvious to the eye as those of an overtly political nature.*"[18] While we have summarised above the dangers of politically damaging a given position inadvertently by adopting conceptions of knowledge which are antithetical with a certain set of results, this also suggests the existence of the opposite risk of self-serving use of research. Christie argues that the researcher should have the humility of aiming at merely describing and modeling the world, and that although traces of the researcher's subjectivity might transpire, he or she should not attempt at *creating* it. While the world must certainly be changed –at least in the sense that many rights violations must find redress- and while legislative drafting and judicial interpretation contribute to creating it, we agree that the credibility of the researcher rests in his or her rigour in acknowledging the origins and implications of the concepts and frameworks selected. This does not necessarily preclude Aboriginal researchers from making use of non-Aboriginal theory or non-Aboriginal researchers engaging with Aboriginal theory and Aboriginal rights. In no case would they lack authenticity or legitimacy on the mere basis of their identity.

Jean Leclair, in "Les périls de l'absolutisation conceptuelle"[19], quotes Raymond Aron for concrete indication as to the sense of equity that should guide the legal researcher in his or her choice of sources and epistemologies. These principles are most useful in a domain of necessary pluralism such as ours.[20]

Leclair also formulated strong methodological cautions that resonate with Christie's call for more rigorous legal research, as he discussed the growing recourse by legal experts to descriptive sciences. In response to those having recourse to law as a pure instrument to further their ends and in view of the totalizing effect which legal concepts and norms often occupy in their description of reality, Leclair argues that jurists have a responsibility to be attentive to the modes of production of the knowledge to which they refer and which they propose to institutionalise as law.[21] In the context of identity claims based on culture, this forewarning is all the more appropriate, since the risk of generalising and essentialising identities is pervasive. The context of opposition between subject and State naturally tends to push the former to hyperbolise his or her difference, and bring it to the level of absolute, whereas commonalities risk being set aside.[22] This, unfortunately, encourages a binary and Manichean vision of reality, which is

[18] Christie, *supra* note 14 at 3.
[19] Jean Leclair, "Les périls de l'absolutisation conceptuelle" unpublished, presented at the Indigenous Peoples and Governance Workshop, Montreal, October 10-11, 2008. [Leclair]
[20] « n'avoir pas sélectionné arbitrairement les faits; de n'avoir pas déterminé arbitrairement ce qui est important ou essentiel et, surtout, de nous être assurés de n'avoir pas « prétend[u] connaître avec précision et certitude des phénomènes qui, par leur nature même, sont équivoques. » "Science et conscience de la société" in Raymond Aron, *Les sociétés modernes*, (Paris : Presses Universitaires de France, 2006) at 49-76, in Leclair at 14.
[21] Leclair, *supra* note 19 at 6.
[22] An argument also made in the international human rights context in David Kennedy, "The International human rights movement, part of the problem?" (2002) 15 Harv. Hum. Rts. J. 102.

necessarily simplistic and conceals some of its facets. Claims based on culture or pre-colonial origins, such as Aboriginal rights claims which we will discuss later, are not illegitimate. Rather, as noted by Leclair, these claims avoid such dangers when rooted in more profound differences, such as at the axiological level, rather than at the superficial one of cultural practices.[23] This perspective challenges our use of the Aboriginal-non-Aboriginal or self-other dichotomies and puts us on guard against overly emphasising the differences in both cases.

Unfortunately, it seems that the often confrontational setting of negotiation tables or courtrooms discourages anyone engaged in these issues to accept this level of complexity and uncertainty. Nonetheless, Christie and Leclair offer a convincing argument that a truer depiction of the world demands acknowledging the contingency and the incompleteness of our propositions. In the following section, we describe how such an approach is possibly more ethical.

b) Theodor Adorno's Negative Dialectics

In the present section, we start by briefly presenting Adorno himself, along with Drucilla Cornell, through the writing of which we have accessed the *Negative Dialectics*. We also state the two reasons for which we have selected Adorno's ethic to inform our reflection on the relationship with alterity at a theoretical level, in the hope of arriving at a renewed approach to Canada's attempts at legal recognition of the right of Aboriginal societies and individuals to govern themselves on this territory.

We continue by describing his theory of negative dialectics, two premises on which it relies, and the ethical implications that have been drawn from it. Adorno's first premise is the absence of ontological unity between meaning and being, which would also demand a new attitude towards what is considered as "truth". The second is that adopting the first premise will allow establishing a more ethical relationship with the other.

Thirdly, we will present the importance of materialism and of attention to self for Adorno's anti-idealism and for his ethic. Both come in support of the assumption according to which meaning and being are disjoined. Fourthly, we will underline the importance of the other in the paradigm of negative dialectics, as holder of truth and well-being for oneself. Finally, we present a series of four critiques of the Adornian ethic. These concern the danger of falling into false compassion, the risk of causing the abandonment of moral engagement of any kind at all, the possibility that there may be an inescapable regress because of the infinite insufficiency of concepts and an argument according to which the classical dialectic did not intend to give a definitive result.

i) Presentation

[23] Leclair, *supra* note 19 at 17.

We have accessed Adorno's work through the commentaries of Drucilla Cornell, professor of law, women's studies and political science at Rutgers University, New Jersey, in *The Philosophy of the Limit*.[24] The first chapter of this book on postmodernism is dedicated to Adorno's negative dialectics. She places him at the outset of an effort to show that the existence of *otherness* beyond our system of thought includes an ethical aspiration.[25] Ultimately, she argues that by reformulating the juridical recognition of the limit of idealism we will be able to incorporate what is other to our system of thought and go beyond its contradictions. In her own words, deconstructing the limits of the way we think the world is meant to halt the "collapse [of] justice into positive law" and permit the halt of a process setting limits to how we think things out to be.[26]

We have retained Adorno's contribution for the purpose of our reflection for two reasons. The first is to benefit from the richness of the notion of constellation which he has proposed. The constellation is constructed from without by the astrologer, and as a metaphor it allows for the rendering of a relationship to an object without imposing an outside definition upon it.[27] It intimates an inspiring potential for relation between object and concept, but also between self and other. More than a metaphor, it suggests an alternative to the aporia and alienation felt when the affirmation of the relationship of identity between concept and object is abandoned. Secondly, the negative dialectics is worth our attention because of its strong ethical dimension. In Cornell's words, the "*emphasis on the limit and […] on the portrayal of justice as aporia is crucial to these marginalized groups whose well-being and very lives may depend on legal transformation*."[28] Put otherwise, Adorno's negative dialectic allows imagining the ethical disputes at "*the limits of the words justice, truth and rightness, long-elaborated by modernity*" and to "*depict the limit of institutionalized meaning and established communitarian norms*."[29] For example, it can serve to rebut a teleological and linear vision of History, according to which our societies have progressed from premodernity to postmodernity. Following closely the shock of the Holocaust, Adorno's questioning of actions made in the name of the Enlightenment's search for truth or goodness is profound. It is particularly appropriate in the colonial context, where the West's encounter with other peoples of the world was the source of profound horrors committed in the name of civilisation. Obviously, many other philosophers of great relevance to law have reflected upon alterity, including Hannah Arendt in her similar argument for nonfoundational politics and the renunciation of traditional "guarantees of stability, legitimacy, and authority"[30]. However, the notion of negative dialectics appears particularly adapted to our reflection of Canada's attempt at judicial recognition of the existence of Aboriginal societies as

[24] Drucilla Cornell, *The Philosophy of the Limit*, (New York: Routledge, Chapman & Hall, 1992). [Cornell]
[25] *Ibid*. at 2.
[26] *Idem*.
[27] *Ibid*. at 9.
[28] *Ibid*. at 11.
[29] *Ibid*. at 11.
[30] Hannah Arendt, in B. Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic" (1991) 85 American Political Science Review 97-113, at 98. Other notable examples include Derrida, Levinas, and Habermas, whom are mentioned by Cornell.

sources of law for the Canadian state, both because of their marginalised status and because of their claim to specificity.

ii) The Negative Dialectics

Adorno's reflection is rooted in two fundamental premises operating at different levels. The first is that there is no ontological unity between meaning and being. Reacting to the classical Hegelian dialectic, Adorno argues that "*the […] reconciliation of the dichotomies in a totalizing system turns against the mutual codetermination Hegel purports to show as the truth of all reality*."[31] This illustrates the anti-idealism at the root of Adorno's thought. He argues that within the negative dialectical tension surrounding the non-identical, other forms of "truth" become possible. It is in this sense that the adjective negative designates his dialectics, and underscores the inadequacy of conceptual ordering to legitimately reflect the object (including ourselves) and material reality.[32] A dialectic resulting in identity between meaning and being, from such a position, could only result in a false conceptualisation of the world.

The metaphor of the constellation of concepts constitutes an alternative to monolithical descriptions of reality, sometimes referred to in feminist literature to describe the experience of women differently than in their traditionally unequal relationship to men.[33] The constellation is the sum of multiple stars, all necessary to constitute the whole. Each star, or facet of the concept, is situated at a different location. As a result, taking one or several stars and observing them in the absence of the others could never reveal the complete image of the concept referred to. On the contrary, each star has something particular and unique to bring to the ensemble. It is in this sense that Cornell argues that this approach attempts at unleashing "*the fullest possible perspective on what the object has come to be in its particular context*."[34] This way of thinking results in relational and contextual interpretation, which takes account of the viewpoint of the observer within the constellation, of his or her subjective capacity to select multiple perspectives and of his or her agency in the attribution of meaning to the resulting vision. Indeed such an approach acknowledges what we must do every time we think, but often without realising it, and would constitute a satisfactory response to Christie and Leclair's invitation to be cautious in the choices of theoretical frameworks and of concepts we make.

The notion of subject which we have just introduced, engaged in a constellational relationship with the world, leads us to the second premise at the basis of Adorno's argument. It is that negative dialectics, contrarily to the Hegelian model, allow reaching towards ethical relationships, or at least to disavow those which we wrongly pretend to be so. This premise operates ultimately at the level of the relationship between self and other, rather than at the abstract level of concept and object, although both are interconnected, in so far as my relation with the other depends of my readiness to interact with him or her as an indefinable object. Adorno argues that an exchange between two parties resulting in identity -selfsame rather than

[31] Cornell, *supra* note 24 at 15.
[32] *Ibid*. at 20.
[33] *Ibid*. at 9.
[34] *Ibid*. at 23.

mutually codeterminative- is violent and oppressive. Real communicative freedom, on the contrary, would only be attained by maintaining the possibility of sustaining the difference with the other. For example, describing the other "as [one's] own image or as [one's] mirror opposite."[35] does not achieve this new relationship because it excludes categories of description originating in the other and, more fundamentally, because it presumes that conceptualisation is possible.

When Cornell writes: "*knowledge through constellation does not privilege the subject's purpose over the object's "right" to be what it has become*.", she highlights the difference between identifying *with* the other as opposed to identifying *the* other.[36] Whereas the first approach acknowledges the subjectivity of the observer and elements of sympathy and appreciation (Cornell proposes the notion of *mimesis*), defining the other would correspond to instrumental logic, or in other words, would allow placing the other in a well circumscribed conceptual category for the purposes of our discourse. Pretending to express fully "*the sedimented potential of the object*", is what warrants Adorno's qualification of Hegel's "move to totality" of violative, nonethical and assimilationits.[37] Even worse, defining the other in an instrumental logic could lead to subjecting him or her to our ends, in a more concrete form of violence. Put simply, to tell the other who she or he is would be to do her or him wrong, by imposing her or him a univocal description and thus limiting her or his potential.

Cornell's argument about oppression is intimately tied to the notion of freedom. There seems to be a presumption in the negative dialectics that everyone will want to contribute to describing the world from his or her own viewpoint and would suffer from being deprived from doing so. However the Adornian argument about the oppressive potential of the dialectic goes further, and suggests that any attempt to reach a finite description, negating the existence of everything that is left out of the result, is ultimately illegitimate.

iii) Shaking Off Idealism Through Empathy

Materialism and an attention to self are fundamental to Adorno's rejection of idealism and to his ethic. They serve as proof of the first assumption discussed, namely that meaning and being are disjoined. The opposition between desire for sensual happiness and suffering raises questions regarding our conception of the world. The emergency felt when one is faced with one's own or one's neighbour's suffering prevents full acceptation of any form of justification. As a result, any explanation tending to qualify suffering as a natural or historical necessity can be overturned. Regardless of the way we consider the cold felt by the homeless, the fright of the HIV positive or the pain of the soldier's widower, we would want these wrongs to stop. As Cornell puts it: "*The physical moment tells our knowledge that the suffering is not to be, that*

[35] *Ibid*. at 34.
[36] *Ibid*. at 23.
[37] *Ibid*. at 23.

things should be different."[38] Compassion with the suffering other is thus the starting point to question the way we see and think about the world.

Adorno's materialism also raises doubt about the way we see ourselves. Sympathy for the suffering other reminds us of our longing for our own sensual ease. Cornell describes this inner longing quite eloquently as the "promise of happiness"[39], which is also the occasion for a vigorous critique of the Kantian ethic and command to live and act in all circumstances as pure rational beings.[40] From such a perspective, the Kantian subject's vision of self would lead to a slave-master relationship with one's body, the later being seen as a force which must be dominated and not reconciled with. A distinction, refused by Adorno, is thus made between the noumenal and empirical worlds, or between reason and desire.[41] The strife of the will to dominate passions and abide by reason is wholly rejected by the philosophy of the limit, according to which the will is neither free nor unfree, but rather always both.

Cornell argues that a Kantian conception of the self would lead to our physicality being forgotten and denied, because it is inseparable from our vulnerability. One can easily guess what fate the suffering other, being also a reminder of our own weakness, can expect within the paradigm of a quest for self-preservation, certainty and control over ourselves. This impetus in favour of "limitation and control rather than [of] the desire for fulfillment."[42] risks translating into manipulative and dominative relationships with others. To summarise, Adorno's materialism and sensualism are at the source of two critiques of conceptual exhaustivity. Firstly, such an attitude may translate into oppressive and unethical relationships with our environment. Secondly, it may paradoxically cost the subject, whose true nature is considered to be sensuous, the loss of his or her own ease, through efforts aimed at self-protection but culminating in alienation. It is thus when I think that I know myself sufficiently well that I risk misunderstanding the others and being a danger to them, as well as to myself.

iv) The Importance of the Other

One can easily see the ethical importance of the other for the self, as holder of truth, pleasure and freedom, in the paradigm of negative dialectics. Contact with one's neighbour allows acknowledging one's desire for sensual happiness and drawing a more accurate portrait of one's own nature. But the relevance of the presence of the other goes further since it allows us to "*see the untruth of idealism, [of] the identification of the real with a concept.*"[43] If the other is *another* because of an erroneous and univocal description, then I may very well be *another* to

[38] *Ibid*. at 25.
[39] *Ibid*. at 26.
[40] Immanuel Kant, *Grounding for the Metaphysics of Morals: With on a Supposed Right to Lie Because of Philanthropic Concerns*, 3rd ed., , trans. by James W. Ellington, (Indianapolis/Cambridge: Hackett Publishing Company, 1993), at 425.
[41] Cornell, *supra* note 24 at 31.
[42] *Ibid*. at 14.
[43] *Ibid*. at 35.

myself too.[44] Such materialism thus leads to the realisation of the eventual untruth of ourselves. This newfound "mindfulness of nature" opens the subject to the recognition of her or his own non-identity and negated multidimensional character.[45]

Adorno's ethic also finds application at the collective level, where the abstract "we" who supposedly share certain common attributes, often at the basis of political projects, can also be questioned.[46] The summon to know oneself as other[47] questions any effort to essentialise shared attributes at the basis of group identities, other than the will to associate in a given way or, as referred to by Leclair, on the basis of shared commitments to certain principles rather than practices. The result hoped for by Cornell's reading of Adorno, a truly "self-transparent" solidarity within mass societies, where "critical subjectivity" could survive, is certainly demanding.[48] It operates a rupture with deontological ethics and a demand to universalise "one particular behavioural mode of morality", for the benefit of "an attitude of tenderness toward otherness and gentleness toward oneself as a sensual creature."[49] This attitude of reconfiguration of oneself and openness to difference seems particularly appropriate in the Canadian context, where Aboriginal peoples have consistently demanded respect for their continued existence. Along with critical subjectivity and self-transparent solidarity, the negative dialectics is thus an invitation to respect group demands and to accept legal pluralism.

v) Critique of the Negative Dialectics

Critiques from four different fronts can be formulated against Adorno's ethic of compassion. Firstly, it seems to provoke a happy coincidence, between, on the one hand, the ethical command not to treat the other as self and impose on him or her a conceptual categorization, and, on the other hand, the suggestion that attempting to control the other in order to protect oneself will only cause alienation from oneself and from one's need for sensuous ease. This apparently ideal scenario, where the pleasant accompanies the ethical, unfortunately blurs

[44] We can only think of Arthur Rimbaud's (1854-1891) letter to Paul Demeny, dated May 15th, 1871, where he famously exclaimed : "Car Je est un autre. Si le cuivre s'éveille clairon, il n'y a rien de sa faute. Cela m'est évident : j'assiste à l'éclosion de ma pensée : je la regarde, je l'écoute : je lance un coup d'archet : la symphonie fait son remuement dans les profondeurs, ou vient d'un bond sur la scène." This romantic outcry of the artist not fully controlling his or her artistic potential parallels Cornell's invitation to take *the limit* into account, online: Rimbaud et Nietzsche, contre Descartes et les moralistes classiques <http://www.philophil.com/dissertation/autrui/Je_est_un_autre.htm>.

[45] Cornell, *supra* note 24 at 34.

[46] The most famous of these is certainly the American Declaration of Independence, at the basis of which the resounding "we" can only be questioned, as did Derrida in his excellent article underlining the aporia inherent to any moment of foundation. See Jacques Derrida, "Declarations of Independence", New Political Science (1986) 15 : 7-15

[47] Rather than simply "*Gnôthi Seauton*" ("Know Thyself"), as the classical Greek philosopher Socrates had adopted as principal line of conduct and as appears on the porch of Apollo's Temple in Delphi. Dictionnaire Larousse, s.v. "*Gnôthi Seauton*", online: Dictionnaire Larousse <http://test.larousse.fr/encyclopedie/divers/gnothi-seauton/121630>.

[48] Cornell, *supra* note 24 at 36.

[49] *Ibid*. at 37.

the line between both. We can well imagine a self-serving use of the other, with whom the encounter is sought only sufficiently for the subject to "reconnect" with his or her true nature, but not enough for a reciprocal and truer contact to be established.

A concrete materialisation of the risk of such forms of compassion is the ongoing phenomenon of the enthusiasm for "humanitarian trips" among people of all ages from wealthy countries, who can face for a limited period of time people living very precariously in poorer countries and feel that their lives were changed, while the effect on the host communities is at best a temporary benefit and at worse negative. Similarly in the post-colonial context, Anita Heiss' poem reminds us how easily compassion expressed in the form of an apology can become a one-way process, providing no support or true redress to the suffering one, while providing relief and an occasion to explain oneself to the other. In a context where apology has often been demanded as reparation for the wrongs of colonization and has been adopted by various countries in the specific context of displacement of Aboriginal children from their families[50], her powerful reminder that guilt may drive people to act more to relieve themselves than for the other is all the more pertinent:

> *You're sorry ! You're sorry !! You're sorry !!!*
>
> Well not half as fucking sorry
> as I am
> at having to listen to you […]
> anywhere you feel like talking
> to me. […]
>
> Please don't see my brown skin
> and smile
> as an invitation for you
> to explain away
> your life of privilege
> and complacency
> in allowing
> the ongoing oppression
> of Indigenous peoples in this country.[51]

Contrarily to Adorno, a critique based on Schopenhauer's view of compassion would argue that the subject, after living the disenchantment of witnessing the suffering of others, would be led to realise that his or her own endeavours have no superior moral value.[52] The result

[50] While Canada's Prime Minister offered an apology on June 11th, 2008, for the countries residential school programme, which was accompanied by a Settlement Agreement on compensation and the establishment of a Truth and Reconciliation Commission (online: Residential School Settlement <http://www.residentialschoolsettlement.ca/>), Australia has set up a *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* which lead to multiple recommendations, including that to offer acknowledgement and apology, which was implemented in part through the establishment of a National Sorry Day on May 26th, online: National Sorry Day Committee <http://www.nsdc.org.au/>.

[51] Anita Heiss, "Apologies" (2005) 65 *Meanjin* 175.

[52] Cornell, *supra* note 24 at 29.

of the abandonment of our allegedly narcissist attitude towards our own suffering and of an admission that everyone lies equally near to us would, from this perspective, result in apathy and silence the desire to end any suffering at all. This miserabilist scenario is all the more plausible in the case of complex situations that have their roots in the past, such as that which interests us, since guilt and powerlessness can easily become paralysing both regarding oneself and one's context. On the contrary, having recourse to specific ways of describing the world to address the problem -psychology, law, economy, history, etc.- and taking account of positive developments, instead of only the pain of those surrounding us, can allow identifying concrete possibilities for action and transcending the Schopenhauerian feeling of abatement and despair that may enwrap us. We do not pretend to make any empirical claim as to whether taking account of the suffering of others actually provokes on average a renewal of self-perception or a genuine attention towards others. However, the possibility that empathy would become self-destructive rather than profitable must be born in mind, and Schopenhaur's contribution helpfully describes such a scenario.

Similarly to the previously discussed risk of seeing the negative dialectic's ethical potential being crushed by overwhelming humility, a final critique would be to argue that negativity itself risks being overwhelming. If concepts are never sufficient to express the full potential of the other and of what has been left out, it may be argued that either conversation with or about the other is impossible, or that one must resolve oneself to have recourse to the violence and oppression of the Hegelian dialectic for lack of another way of describing what is beyond *the limit*. Either we are trapped in a *regressio ad infinitum* of negativity, or we accept to take the risk of an imperfect image. Cornell's answer lies in her confidence in the constellation, as a methodology that would allow taking into account a satisfactory degree of different perspectives, open to those brought forth by others, and acknowledging the limitations of the observer and of the final result.

A first way to answer this radical challenge of an endeavour to respect what is beyond the limit would be to argue that the process of *constellationising* is meant to be continuously actualised and that as such, it does not purport to result in a durable representation of reality. When at every instant a new image of the constellation is attempted, the possible collapse of potential into a limited concept may be limited to one instant, if the observer is ready to take into account any new perspective which presents itself and to acknowledge her or his role in the process. A second answer would be to attempt to restate Adorno's project and to give it fuller meaning. While we have used verbs such as "to describe" or "to conceptualise" to characterise the *constellationising* process, its aims are different. It does not try to capture "reality" or "the world" in a way that can be *known*, but rather is focused on entering into relationships with others in a truly different way; one that relies on a more inter-subjective approach to knowledge, as Christie has advanced, and that is more concerned with the process of the encounter than with reaching a definite result. This last response offers the strongest argument as to why Adorno's thought, by definition, does not risk leading one to achieve totality without realising it.

To conclude, Adorno's thought is powerful and compelling because it provides strong moments for reimagining the relationship between self and other. Its strength derives from its very intimate foundations: it is through a reflection one oneself, resulting in the recognition of limitations of self and one's dependency on one's sentient and sensual contextualization, that one is filled by the moral consciousness to prevent harm to the other. Engaging with the other becomes an occasion to reconfigure oneself. This approach also provides a certain methodology to approach both oneself and the other: the constellation. This can be summarised as a demand for the acknowledgment of multiple perspectives and of the necessity to be aware of one's involvement in the production of these perspectives. As a result of the critiques mentioned above, it could be added to this methodology that the constellation must be permanently reconceived, since the object not only has multiple facets, but is ever-changing. In an intercultural context where legal theorizing is evolving rapidly, such a methodology could prove extremely relevant, especially in view its objective of establishing a non-oppressive relationships.

4. A Legacy of Mixed Disagreement

Looking into history and the jurisprudence reveals that value and concept-based disagreements between Aboriginal nations and European settlers are continually intertwined. This must be taken into account in contemporary processes, both at the legal and political levels. To illustrate this point, we discuss in this part the forms of such mixed disagreement that arose during the Numbered Treaty process, notably on the issue of the role of the oral and of consensus. Secondly, we address the issue of persisting disagreement and its various possible implications in light of the general power imbalance between Aboriginal peoples and the Crowns. We conclude by noting that, along with having been pervasive in the past centuries, disagreement is more than ever present today and, from the perspective of the negative dialectics, must be addressed in a way going beyond the *status quo*.

a) The Treaty Process: Between Voluntarism and Duress

The Treaty Process, at the outcome of which 11 "Numbered Treaties" were signed between 1871 and 1921, is a good example of an attempt by Aboriginals and Government officials to reconcile their coexistence on this territory. Both parties mobilised efforts and diplomatic skills to spell out orally and put down on paper how they would arrange their coexistence on the land, as the rights initially guaranteed in the Royal Proclamation of 1763 to the "*several Nations or Tribes of Indians with whom [the United-Kingdom is] connected, and who live under [its] Protection"*, beneficiaries of rights to lands "*reserved to them, or any of them, as their Hunting Grounds*"[53], were ceded, released and surrendered to the Crown in exchange of monetary and other compensation. While this encounter could be described as an ongoing misunderstanding between parties sharing profoundly different cultural codes and different political objectives, Saul identifies two particular sources of lasting disagreement which are linked to our general argument: the oral dimension of the treaty process and the

[53] *Royal Proclamation of 7 October, 1763*, R.S.C. 1985, App. II, No. 1.

representations, on both sides, as to the search for consensus. While this dichotomy shouldn't be overemphasized, the first can be characterised as a formal source of disagreement, or concept-based, and the second as substantive, or value-based. The two are deeply enmeshed, and persist to this day.

Talking as a way to resolve problems by reaching consensus as "*a spatial rather than a linear concept, [to foster a] place for continuing differences*"[54] is a process consistently observed by Saul among Aboriginal negotiators. This has led him to retain the image of the "*inclusive circle that can be enlarged*"[55], an approach not aimed at reaching definitive and potentially exclusionary results, as at the heart of the position of many Aboriginal representatives. For example, Plains Cree chiefs such as Big Bear, Poundmaker and Sweetgrass have repeatedly exposed their relationship to the land, the importance of coalitions between First Nations, and the incompatibility of both aspects with the definition of ownership presented by Crown negotiators during the negotiation of Treaty 6.[56] Yet, although the lengthy speeches made by Aboriginal representatives at the treaty conferences became famous, what they communicated was not incorporated in the written text of the treaties, is not often remembered today and was certainly not acted upon otherwise than superficially at the time. This disagreement at the heart of the relationship between Aboriginal Nations and the British Crown's imperial policy was made manifest by the adoption of the *Act to Encourage the Gradual Civilization of Indian Tribes in this Province*[57] at the very same period during which the Numbered Treaties were concluded across the country. Such a scheme was described by the *Royal Commission on Aboriginal Peoples* as "*based unashamedly on the notion that Indian cultures and societies were clearly inferior to settler society*"[58], thus abandoning the procedural ideal of inclusion and the substantive concepts of relationship to the land demanded by the Aboriginal representatives.

The adoption process of the ancestor of the *Indian Act*[59] and of an important part of the ensuing modifications was all but consensual. As noted by Peter W. Hutchins, its enactment came in particular contradiction with the representations made by the Crown negotiators in the process leading to the conclusion of Treaty 6. Lieutenant Governor Alexander Morris had made multiple reassurances to the Cree Nations to the effect that they could continue their living in the Plains as they had done before, stating eloquently: "*the country is very wide and there is room for all.*"[60] Furthermore, with the destruction of their traditional economies, whether the depletion

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[54] Saul, *supra* note 1 at 71.
[55] *Ibid*, at 59.
[56] *Ibid*, at 28-29.
[57] *Act to Encourage the Gradual Civilization of Indian Tribes in this Province*, 3rd session, 5th Parliament, 1857.
[58] Government of Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, Vol. 1 (Ottawa: Supply and Services Canada, 1996) at 277-278. The Commission added: "It is almost as if Canada deliberately allowed itself to forget the principal constitutional mechanism by which the nation status of Indian communities is recognized in domestic law."
[59] *Indian Act*,R.S., 1985, c. I-5.
[60] Lieutenant Governor Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which They were Based and Other Information Relating Thereto* (Toronto:

of buffalo herds or of other species, the ensuing disruption of their lifestyles and the threat of starvation, the question of free consent to such agreements of land cessions in exchange of which monetary compensation was available can be raised.[61]

Furthermore, the substance of the ancestor of the *Indian Act* was all but inclusive. The 19th century policy of enfranchisement instituted classification between Indians and non-Indians, and the later were presumed to renounce to their status in exchange of access to a "civilised" lifestyle on the basis of criteria applied by the Indian Agent (morality, education, solvability, etc.) This implied, as noted by Bonita Lawrence, the grant of some money and fee-simple title to a tract of land often cut out of the reserve they belonged to.[62] As a consequence, this discursive regime of classification, regulation, and control of identity has profoundly marked the way Aboriginals and non-Aboriginals think.[63] Furthermore, the *Indian Act* still distributes the "Indian status" along radicalised lines and contains an arbitrary second generation cut-off rule.[64] Maya Cousineau-Mollen's words, in *Blues du 6.1*, illustrate how artificial and oppressive such a status originating in an act of Parliament from racist and sexist times can be to bare today:

> Jour de semaine, tic tac du quotidien
> L'Indien veut bien faire
> Bourrasque du préjugé
> Lève la chevelure
> Un poil rasé qui n'ondule plus
> À l'identité numérotée […]
> Job à temps plein
> Pour porter un statut d'indien

Belfords, Clarke & Co., 1991) at 231, quoted in Peter. W. Hutchins, *The Quest to Slay the Indian Act: An Impossible Dream?* Prepared for an address respecting the Alternatives to the Indian Act at the Pacific Business & Law Institute Conference Canadian Aboriginal Law 2001, Toronto, Ontario, October 25 and 26, 2001 and revised for the Pacific Business and Law Institute Conference Beyond the *Indian Act*, Ottawa, Ontario, April 17, 18, 2002. The negotiator also added: "Now the whole burden of my message from the Queen is that we wish to help you in the days that are to come, we do not want to take away the means of living that you have now, we do not want to tie you down" Lieutenant Governor Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which They were Based and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co., 1991) at 233. [Morris]

[61] For instance, in private law, it is considered that: "Consent may be given only in a free and enlightened manner. It may be vitiated by error, fear or lesion." C.c.Q. s. 1399.

[62] Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18 (2) *Hypatia* 3, 3-15, at 10. [Lawrence]

[63] *Ibid*., at 4.

[64] The "second generation cut-off" rule was judicially challenged in *Perron v. Canada (Attorney General of)* (2003), 105 C.R.R. (2d) 92, but subject to a successful motion to strike. On the theme see Kent McNeil, *The Inherent Right of Self-Government: Emerging Directions for Legal Research*, research report prepared for the First Nations Governance Centre, Osgood Hall Law School, Toronto, Canada, November, 2004, at 23, Anne Skarsgard, Indian Status and Band Membership: Update 1986, Legal Information Service Report No. 23 (Saskatoon: University of Saskatchewan Native Law Centre, 1986), at 6-7, and Megan Furi, Jill Wherrett, Political and Social Affairs Division, Indian Status and Band Membership Issues, Parliamentary Information and Research Service, February 1996, *Revised February 2003*, online: Library of Parliament <http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm#bcorbieretx. >

> Moi, femme
> Est un Indien inscrit
> Au féminin prohibé[65]

Moreover, to say that in Canada Aboriginal means "the Indian, Inuit and Métis peoples"[66], or that Quebec counts 11 First Nations and 56 communities is to suggest categories that may very well not render how people think about themselves.[67] The reserve system divided Aboriginal groups that had constantly interacted, as they also interacted with the first Europeans throughout their exploration of the continent.

We are obviously not in a position to argue that all Aboriginal peoples sought consensus as they negotiated with newcomers on this territory. However, there is voluminous evidence to support that a discourse of acceptation, sharing, respect and agreement was held in many instances from the first contacts to this day. The following words from Sweetgrass to Lieutenant Governor Morris in August 1876 at Fort Pitt, in the context of the signature of Treaty 6, illustrate such attitude:

> I thank you for this day, and also thank you for what I have seen and heard, I also thank the Queen for sending you to act for our good. I am glad to have a brother and a friend in you, which undoubtedly will raise us above our present condition. I am glad for your offers, and thank you from my heart.[68]

We must thus conclude that, below the surface of the treaties which aim at providing us with legal certainty as to the state of the relationship between Aboriginal Nations and the Crown, there lies a legacy of mixed disagreements. Despite initial indications of goodwill on both sides, such disagreement often resulted not in respect but in duress. The logic of equal-footing bargaining present in the discourse of the negotiators on all sides was rapidly replaced by a scheme of administrative control overtly aimed at assimilation. Even at the time of their conclusion, the tremendous pressure under which Aboriginal peoples were placed could be argued to vitiate the consent they expressed in these treaties. What is certain is that the ideal of inclusion initially invoked, somewhat akin to what Cornell has described in Adorno's thought as tenderness toward others and that could have led to deep respect by settlers for the way in which Aboriginal peoples wished to pursue their existence, appears to have been completely abandoned.

b) Considering Disagreement

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[65] Maya Cousineau-Mollen, *Blues du 6.1*, inédit, online : Terre en vue – Landsights <http://www.nativelynx.qc.ca/fr/litterature/cousineau.html.>

[66] *Constitution*, s. 35(2)

[67] A point made by professor Val Napoleon in her oral presentation at the Indigenous Peoples and Governance Workshop, Montreal, October 10-11, 2008.

[68] Morris, *supra* note 60 at 236. On the theme more generally, see Peter W. Hutchins, *"Cede, Release and Surrender": Treaty-Making, The Aboriginal Perspective and the Great Juridical Oxymoron or Let's Face It – It Didn't Happen Here, Hutchins Caron et Associés*, to be published, 2008.

The general overview of the Numbered Treaty process presented in the last section raises the question of respect for the given word (commonly referred to as the principle of *pacta sunt servanda*) after doubt is raised as to the quality of the consent given or after significant changes of circumstances. It has been argued very convincingly that, in the name of the principle of *pacta sunt servanda*, the provisions of cession, release and surrender of rights by Aboriginal peoples should simply be read out of these treaties.[69] We invoke this past example of profound disagreement resulting in misunderstanding and violence to reflect on what should be done today in a similar situation. After all, the much criticised *Indian Act* remains in vigour and the principal policy aimed at the implementation of an "inherent right of self-government" through negotiated agreements[70] is under fundamental challenge by Aboriginal peoples across the country.

The Assembly of First Nation's analysis of the implementation of this policy has reported "failure of negotiations" and "frustration with existing federal and provincial policies and processes"[71]. It challenged its avoidance of fully defining the substantive scope of the inherent right of self-government and of the limited categories of law-making powers unilaterally proposed[72] and questions why while First Nations must prove their title and rights before negotiations can begin, "*the legitimacy of the Crown assertion of sovereignty […] go unquestioned*"[73]. One of the main recommendations of the report is the abandonment of the policy and its replacement by an "*inter-First Nation designed mechanism or protocol that sets-out the criteria and procedures for recognition.*"[74] This is precisely what the Assembly of the First Nations of Quebec and Labrador recently announced that it would proceed to do, when it adopted in November 2008 a *Declaration on a First Nations of Quebec and Labrador Sovereignty Affirmation Process*, considering that "*the governments of Quebec and Canada deny, through their actions and/or their inactions, the fundamental rights of First Nations*".[75]

It must be remembered that various agreements have been concluded under this policy or similar ones, including the *James Bay and Northern Quebec Agreement* and the *Northeastern*

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[69] *Ibid*., at 37.

[70] Aboriginal Self-Government, Federal Policy Guide, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Minister of Public Works and Government, Services Canada, 1995, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.

[71] Assembly of First Nations, *Our Nations Our Governments: Choosing Our Own Paths*, Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, March 2005. [Assembly of First Nations, "Our Nations Our Governments"] See also: Assembly of First Nations, *Royal Commission on Aboriginal People at 10 Years: a Report Card*, November 2006.

[72] *Ibid*. at 44.

[73] *Ibid*. at 43.

[74] Assembly of First Nations, "Our Nations Our Governments", *supra* note 71 at 52. For a fuller commentary on approaches to self-government, see Christopher Campbell-Duruflé, "The Agreement-in-principle with Betsiamites, Essipit, Mashteuiatsh and Nutashkuan: Reviving the Dream of Self-Determination", unpublished, January 2009.

[75] The mechanism to be developed, "based on legal orders specific to First Nations (customs, treaties, Aboriginal common law, etc.), as well as on the rights recognized in Canada and in the International Law" is expected to contain "Concrete implementation measures for the right of First Nations Peoples to self-determination". Assembly of First Nations of Quebec and Labrador, News Release, 2, "Declaration on a First Nations of Quebec and Labrador Sovereignty Affirmation Process", (27 November 2008).

Quebec Agreement and the agreements that followed[76], the agreement leading to the creation of Nunavut[77], the agreements emerging from the British Columbia Treaty Commission[78], the previously mentioned AIP signed with Innu communities and others.[79] It can nonetheless be enlightening to wonder, in light of the approach discussed so far, how any disagreements were taken into account by the parties in the reaching of such agreements and how they should be treated were they to arise in the coming negotiations for the majority of First Nation still governed by the *Indian Act*. What should be done, in light of the present discontent with Canadian policies, if conditions of unforced consensus cannot be established?[80] Adorno's ethic would imply that the other's decision to refuse to engage in a relationship should itself be respected. Sometimes, the only option is that of agreeing to disagree.

The implications of such a disagreement, for instance on the terms of a contemplated land claims and self-government agreement, must be explored. Does it mean that the Crowns can act as if they were sole proprietors of lands claimed as ancestral by an Aboriginal people and sole holder of jurisdiction over them, or on the contrary should they refrain from any use that could be prejudicial to them without their consent? Opinions differ as to where the *status quo* lies. The Supreme Court affirmed in *Haida* an intermediary position, according to which good faith consultation and accommodation may be necessary to uphold the Honour of the Crown, "where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. "[81] The Inter-American Court on Human Rights has adopted the second view in the *Case of the Saramaka People. v. Suriname*[82]. The Court ruled that the consent of the indigenous people concerned, expressed through their own procedures, must be obtained in cases where large-scale development projects would have a major impact on their ancestral territory.[83]

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[76] The *JBNQA* has been followed by 18 Complementary Agreements, including the famous 2002 *Agreement Concerning A New Relationship Between Le Gouvernement du Québec and The Crees of Québec*, or "Paix des Braves", and the recent 2008 *Agreement Concerning a New Relationship between the Government of Canada and the Crees of Eeyou Istchee*. The 2007 *Agreement-in-principle on the creation of the Nunavik Regional Government* also relies on the framework laid out in the *JBNQA*.

[77] *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (1993).

[78] The *Nisga'a Final Agreement* (1999) and *Westbank First Nation Self-Government Agreement* (2003) only have resulted from this process, while various other First Nations are in negotiations.

[79] Examples from the North include the *Inuvialuit Final Agreement* (1984), the *Gwich'in Comprehensive Land Claim Agreement* (1992), the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* (1993), the *Champagne and Aishihik First Nations Final Agreement* (1993), the *Vuntut Gwitchin First Nation Final Agreement* (1993), the *First Nation of Nacho Nyak Dun Final Agreement* (1993) or the *Teslin Tingit Council Final Agreement* (1993).

[80] See Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" in Joanne R. Bauer & Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 124, see also an earlier argument in Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

[81] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at 27.

[82] Saramaka People Case (Suriname), (2007) Inter-Am. Ct. H.R. (Ser. C) No. 172.

[83] "Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions." *Ibid*, at para. 134.

While the notions of "large-scale" projects and "major" impact are yet to define, this approach invites the signatories of the 1978 *American Convention of Human Rights*, which Canada is still not party to, to seek a higher standard of relationship –closer to consensus- with Aboriginal peoples. Some First Nations argue that their right to self-determination is inherent, has never been renounced, and that it must be taken into account. This would thus place Canadian and Aboriginal governments in direct competition over finite resources, how they should be used, and jurisdiction, in the case of incompatibility between different laws. The tension between Aboriginal and State visions of the law is thus far from resolved.

Acknowledging such a tension and considering the possibility of agreeing to disagree demands to take into account the notion of duress, discussed above. As was the case during the 19th century, pressing social needs may displace the possibility for free and enlightened consent and cast doubt on the possibility of reaching consensus even today. As a single example of the difficult social conditions experienced by Aboriginal peoples in Canada and across the world, the *Indigenous Children's Health Report* recently revealed that infant mortality and other illness rates of children under twelve were many times higher for Aboriginal peoples than those of non-Indigenous infants in Canada, Australia, New Zealand, and the United States.[84] Adorno's standard of gentleness could not be met by an agreement to disagree where the coveted resources could not be used by either parties, or where a deadlock in the division of powers would prevent the development by Aboriginal communities of much needed control over, for instance, education, health, or economic development. To put it otherwise, in light of these communities' historically inherited pressing needs, neither the *status quo* nor a respectful *immobilism* would be sufficient to meet the standard of respectful relationship proposed by Adorno. To paraphrase Antoine de Saint-Exupéry, one would become responsible, by entering into a relationship with them, for those whom one has adopted.[85]

[84] Indigenous Children's Health Report: Health Assessment in Action, (Eds.) Janet Smylie, MD MPH; Paul Adomako, MSc, Centre for Research on Inner City Health, 2009, online: Keenan Research Centre - Research Programs <http://www.stmichaelshospital.com/crich/indigenous_childrens_health_report.php>.

[85] "Les hommes ont oublié cette vérité, dit le renard. Mais tu ne dois pas l'oublier. Tu deviens responsable pour toujours de ce que tu as apprivoisé. Tu es responsable de ta rose..." Antoine de Saint-Exupéry, *Le Petit Prince* (San Diego, New York, London: Harcourt Brace & Company, 1943), at 71.

5. Societal Implications

In this last section, we address what going beyond disagreement, as appears to be prescribed by a commitment to negativity in an Adornian way, would imply for the relationship between Aboriginals and non-Aboriginals and their governments today. Facilitating access to Aboriginal knowledge can be done through a variety of ways. Already proposed examples include the addition of general education about the contemporary history, cultures and struggles of Aboriginal peoples to the public curricula thought to students across the country. Official recognition could be given to Aboriginal language, and their learning could be made available to non-Aboriginals. Contribution could be made to the enlargement of an Aboriginal academic community and academic engagement between Aboriginal and non-Aboriginal scholars, which implies the training of Aboriginal teachers at all levels.[86] The appointment of Aboriginal judges at various levels, including at the Supreme Court, was also suggested in the *Report of the Royal Commission on Aboriginal Peoples*[87]. These are only a selection of the numerous concrete and sensible proposals made by well-informed people across the country.

The negative dialectics also points to the conduct of our governments, whether in administrative process, at the negotiation table or during litigation involving Aboriginal parties. Sensitivity to their claims and suffering, Cornell reminds us, would demand an immediate attention from public authorities. Such standard of conduct, in the Aboriginal context, brings us to the notions of fiduciary duty and Honour of the Crown, as developed by the Supreme Court in this context. Like other constitutional obligations, they shield vulnerable constituents from the democratic control of the government by the majority. In Saul's words, they impose on "*those with authority to do as little damage as possible to people and to rights when exercising that authority*"[88] and place on the fiduciary the obligation of holding the interest of the beneficiary before its own. This powerful common law concept could thus be the vehicle for a reconfiguration by the Canadian government of its agenda and priorities, by compelling it to consider Aboriginal needs, aspirations, and perspectives. Furthermore, this approach abandons the effort to categorise and define criticised throughout this essay, since the other remains the source of his or her priority and is allowed to make them evolve through time.

The current effect of these principles should not be overstated, since the possibilities for infringement of Aboriginal rights were clearly stated by the Supreme Court in *Sparrow* in a balancing test which resembles that of s. 1 of the *Canadian Charter of Rights and Freedoms*.[89]

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[86] The First Nations Education Council submitted on April 1st, 2009, a petition containing 23,000 signatures on the funding of First Nations post-secondary education to the House of Commons. First Nations Education Council, online: Submission of a petition concerning post-secondary education <http://www.cepn-fnec.com/interfaces_e/actualites_e.aspx?act=0>.

[87] Assembly of First Nations, Annual General Assembly, Resolution no. 67/2004, July 20, 21 & 22, 2004, Charlottetown, online: Assembly of First Nations <http://www.afn.ca/resolutions/2004/res67.htm>.

[88] Saul, *supra* note 1 at 55.

[89] "While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and

Furthermore, as noted above, the standard of consultation and accommodation in case of risk of impact on an Aboriginal right does not amount to granting consent for this right to be violated. Nonetheless, in this particular intercultural universe and in view of the Supreme Court's acknowledgment that the sole European and written perspective of the common law is not sufficient to achieve reconciliation, the objective of s. 35 of the *Constitution*[90], the principle of fiduciary obligation seems to be the most promising avenue to prioritise process over results and relationships over certainty.

6. Conclusion

Through attention to the Aboriginal perspective and intention at the moment of signing historic treaties and consideration of oral history evidence in title and rights claims, the Court has acknowledged that our law is the product of competing and diverse worldviews. In Adornian terms, this might suggest a readiness on its behalf and an invitation to question fundamental assumptions about who *we* are – or about what Canadian sovereignty means- and about who *the others* are – certainly not peoples that can be defined in an act voted in Ottawa.

The Court's encouragement to negotiate, reconcile and settle can be seen as a recognition that developments in terms of Aboriginal governance can no longer be dictated unilaterally, but must rather use of Adorno's identification with the other. Our government is thus invited to prefer process to result, relationship to certainty, and inclusion and gentleness over finality.

Renewing Aboriginal forms of governance in view of achieving greater self-determination, through the negotiation of modern treaties for example, seems to be the most effective way to move beyond the *Indian Act* framework, criticised from all sides. This is certainly an exciting topic for an optimistic legal researcher such as the author of these words. But if we take Adorno's message seriously, a non-oppressive outcome would demand that non-Aboriginals enter into these constitutional agreements, both individually and collectively, with an intention to know the others as multidimensional –their language, their law and their history for example- and without the expectation to be able to predict what will come out of these agreements and of Aboriginal empowerment.

The fiduciary duty, discussed in Part IV, offers grounding in the common law to think about how, in light of Adorno's writing, an engagement to respond to the other's needs can be imposed to –or undertaken by- the government in a country such as Canada. While not reflecting the principles of non-identical recognition or unforced consensus in its current form, it presents a powerful way to bring back the importance of maintaining the relationship in the Aboriginal-Crown contemporary relationship.

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management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)." *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 13.

[90] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, para. 1.

Moreover, this approach seems to be the most appropriate to surmount the historical and ongoing disagreements, based on culture and differing interests, that have often divided the parties to this situation. In a context of power imbalance and of emergency in terms of the daily needs of Aboriginal individuals, agreeing to disagree and maintenance of the *status quo* is not sufficient. Developments, in a situation where the *Indian Act* still institutionalises numerous facets of what it is to be "Indian" for so many, must be achieved.

On the other hand, the importance of listening to Aboriginal needs could not be more emphasised. Entering into negotiation processes or other forms of interaction without having chased preconceptions about self and the other risks jeopardizing these efforts and reproducing past forms of colonial oppression despite good intentions. In light of all the above, Hippocratic Oaths to "Above all, do no harm", inviting to humility and self-transparency, should thus be sworn and thoroughly respected by everyone intervening in the field if any reconciliation is to be attained.

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