Exploring Concepts of Treaty Federalism
A Comparative Perspective

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It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a Scheme for such a Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble, and yet a like Union should be impracticable for ten or a dozen English colonies.

Benjamin Franklin to James Parker, 1751*

Everything runs smoothly without soldiers, gendarmes, or police, without nobles, kings, governors, prefects or judges; without prisons, without trials. All quarrels and disputes are settled by the whole body of those concerned... the land is tribal property, only the small gardens being temporarily assigned to the households ─ still, not a bit of our extensive and complicated machinery of administration is required... There are no poor and needy... All are free and equal ─ including the women.

Friedrich Engels on the Iroquois, 1884*

Executive Summary

The current problems of Aboriginal-Canadian relations stem not only from a long history of imperial subordination and repression but also from fundamental differences in the understanding of the meaning of federalism.

Canadian federalism on the basis of the *British North America Act* is essentially state federalism. It emphasizes individualistic and legalistic values, and it operates through majority rule and concurrent powers. Federal partnership is vertical and aims at the final allocation of resources as well as regulation of conflicts of interest.

Treaty federalism in the Aboriginal understanding emphasizes mutualist and holistic values, and it operates through a process of co-ordination and compromise on the basis of consensus. It is meant to be an open-ended, horizontal and renewable partnership aiming at the autonomy and reciprocity of all participants. Its purpose is at the same time an acknowledgment of, and commitment to, something that is held in common and cannot be repudiated by one side alone. Treaty federalism establishes a common bond of mutual obligations as well as organized self-determination.

The main purpose of this study is to build bridges between these two views. Its main argument is that there is a rich heritage of European federalist thought that is far more akin and sympathetic to Aboriginal notions of self-government than the peculiar and parochial theory and practice of the centralized federal state and of BNA federalism in particular.

Going back to the origins of modern political thought from the sixteenth century onward, that is, precisely before the rise of the absolutist state and capitalist market ideologies, it can be shown that indigenous North American *and* European concepts of political culture and organization share surprising similarities. In other words, there is underneath the modern dominant ideologies of state and market organization a basic universality of social thought about living together in peace and harmony that seems to transcend continental borders and cultures. These similarities ought to be recognized in the search for common ground.

The central part of this study is a comparative analysis of the main Aboriginal concepts and metaphors guiding Aboriginal thought on treaty federalism, and early-modern political thought as exemplified by the political theory of Johannes Althusius (1557-1638). It can be

demonstrated that Aboriginal concepts and metaphors like the *tree*, the *circle*, the *two rows*, and the *chain* do indeed show extraordinary similarity to the central concepts in Althusius' theory of federalism, *symbiosis*, *communication*, *autarchy*, and *confederation*.

What Althusius describes as the social background of a confederal system of political organization was for the most part nothing other than the practice of the time. European societies departed from traditional and universal forms of social organization when a new form of economic production, market capitalism, required a new and corresponding form of political organization, the centralized nation-state. However, some of these early-modern beginnings of European confederal thinking can be rediscovered today in all kinds of federal and quasi-federal political arrangements seeking to break away from the practice of exclusive and centralized state authority. It is precisely here that the Aboriginal quest for self-determination can find alliances of support.

The battle to be fought is a political one, not a legal one. The courts can perhaps be used to restore some of the blatant material injustices committed against Aboriginal peoples in the past, but they cannot generate a political will to reach lasting accommodation and reconciliation. And further, the starting point of court proceedings will always be Canadian law, drawing Aboriginal peoples into an orbit of property-related legal thinking that is not theirs. Instead, both peoples ought to focus on their common sociopolitical heritage.

The comparison of the European and Aboriginal foundations of that heritage suggests three main directions for possible solutions: First, the process of *communication* between the two peoples and their societies must be intensified. The most common cause of mutual misunderstanding is ignorance. Second, there must be a new commitment to *institutional flexibility*. There is no reason why political institutions in a complex and interdependent world need to remain restricted to the simplistic model of federal state and provincial jurisdictions. Third, the inherent right of Aboriginal self-government notwithstanding, there must be a commitment to some form of *shared union* on the basis of a common political language. It can perhaps be enshrined in a common charter and a dispute settling mechanism in which both peoples have equal rights and status.

The basic forms of human interaction in modern Canadian society are not communication and sharing. This is what ultimately stands in the way of Aboriginal self-government on the basis of a treaty relationship among equals. Western society is dominated at present by a state of mind

that cannot `jointly occupy a territory'. It wants to buy that territory, parcel it out and sell it to the highest bidder. The first and foremost task of any Commission trying to make suggestions for the re-establishment of the rights and principles of Aboriginal self-government therefore is probably not to find political formulae of institutionalized autonomy and co-operation, but to convince Canadians, at the level of political-economic elites as much as at the grassroots level, to withdraw from Aboriginal space, physically as well as spiritually.

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Introductory Considerations

Purpose of this Paper

I have not been asked to provide an expert interpretation of the Aboriginal peoples' legacy, understanding and interpretation of treaty federalism ─ which I could not do ─ but to add to such interpretations a comparative perspective based on similar concepts and practices in European federalist thought from the early-modern period onward. The purpose of such an undertaking is to build bridges between Aboriginal and European ways of federalist thinking. There are many and startling similarities and affinities. In fact, the main claim of this paper is that there is a rich heritage of European federalist thought that is far more akin and sympathetic to Aboriginal notions of self-government than the peculiar and parochial theory and practice of the centralized federal state and of *British North America Act* federalism in particular.

This paper therefore explores existing concepts, metaphors and interpretations of Aboriginal treaty federalism and compares them with European-centred foundations of federalist thought such as symbiosis, communication, autarchy and confederation. The paper tries to argue three main points: First, there is a startling similarity between traditional concepts of Aboriginal federalism and self-government on the one hand and, on the other, the early-modern development of European federal thought, as especially in the political theory of Johannes Althusius (1557-1638). Second, these early-modern beginnings of European federal thinking not only provided in their time a full-fledged practical alternative to the rise of state absolutism but can be rediscovered today in all kinds of federal and quasi-federal political arrangements seeking to break away from the practice of exclusive and centralized state authority. Third, the classical modern federal state today appears far more based on principles of centralized statehood than committed to the original principles of federal political organization.

The federalist theory of Althusius will be used as an *example* of the kind of European federal tradition that is society- instead of state-centred. There can be no doubt, of course, that Althusian federalism is not currently part of mainstream theory or practice. Nevertheless, it has gained some recognition more recently, most notably in the shaping of the future European Community. The point is, however, that this paper wants to provide evidence that there *can* be more common ground between Aboriginal and European concepts of political organization, that such common ground *has been* part of the European tradition, and that recourse to that alternative tradition *can* help mutual understanding.

This paper does not join in the chorus of legal treaty interpretation. Constitutional gamesmanship has been played to the fringes of sanity by Euro-Canadian legal and academic experts and, as is now well known, with few or no results. It does not strike me as a game very much akin to the Aboriginal nature and spirit. As long as Aboriginal peoples explore their quest of self-determination primarily in legal terms, I fear that the issue will remain much under Euro-Canadian control. Further, and in a more substantive perspective, I fear that the legal-constitutional game deflects from the real issues standing in the way of Aboriginal self-government, such as land, money and power in a capitalist and market-driven society. To regulate these issues has been at least part of the rationale for and history of the federal state. The driving force of this paper is instead an exploration of basic concepts and models of federal co-existence among autonomous societies inherent in both European and Aboriginal federal thought.

The modern federal state has essentially been the product of a nineteenth-century conflict between older aristocracies seeking to retain territorial privileges and modernizing liberal bourgeoisies adamant about building national-states and markets. In some countries, of course, such as England, this conflict had been resolved in favour of the new liberal elites much earlier, and a centralized and unitary parliamentary system was already firmly in place. In other countries, however ─ Germany and Switzerland, for example ─ a federalist compromise finally had to be struck because neither camp could win entirely over the other. But in all cases, that compromise was soon to be skewed in favour of the new forces of political and commercial centralization and, if necessary, by force: modern Switzerland emerged only after a secessionist war in 1847, and Bismarck Germany was forged under Prussian ─ military ─ hegemony on the battlefields of the 1870-71 war against France.

In the colonial world of North America, similar conflicts of modernization took place at exactly the same time. In the United States, modern federal supremacy could begin to assert itself successfully only after the defeat of the feudal south in the Civil War. In Canada, the conflict between the old order, as represented by Francophone society in Quebec, and the modernizing forces of the Anglophone Empire of the St. Lawrence led to the federalist compromise of the *British North America Act* (now the *Constitution Act, 1867*). War was avoided, probably not because of Canada's counter-revolutionary cultural difference, as legions of social scientists from Louis Hartz to Seymour Martin Lipset have alleged again and again,[i] but more likely because the thrust of modernization was not directed primarily at the commercial penetration of the other camp, i.e., Quebec, but at the conquest of the open western space. There, war did occur, with Louis Riel's Métis, for example, but it was obviously not a war that Canadian colonialist historiography would usually want to recognize as in the same league with the American Civil War.

An additional and particular problem of the Canadian federal state is its atypical path to capitalist modernization. As is well known enough, the commercial elites of the St. Lawrence failed, for whatever reasons, to transform Canada into a fully developed political economy of industrial manufacturing. Much of the wealth of the nation remained linked to the exploitation of natural resources, and these had been given into provincial ownership by the federalist compromise of 1867. One consequence has been that, contrary to the constitutional intentions of its founding fathers, the Canadian federal state has been moved toward more decentralization rather than centralization, at least in comparison with other federal states. Another consequence that pertains directly to the plight of Aboriginal peoples in Canada is that much of what their quest for self-government aspires to ─ self-control over space, resources and culture ─ is already firmly occupied by provincial interests. Therefore, a federal solution to Aboriginal self-government is particularly problematic because it is particularly incompatible with existing patterns of Canadian federalism.

The overall point to be made here, however, is that the classical federal state is a rather recent and rather isolated phenomenon in the history of European political thought and organization, that its federalist quality is based on a minimum compromise on the whole subservient to the requirements of a modern centralized nation-state and market, and that it can hardly serve as a useful model when fundamental principles of socio-cultural and/or regional

self-determination on the basis of mutuality and peaceful consensus building are at stake.

At the same time, federalism appears to me as the most promising concept for the peaceful allocation of powers of self-determination in fragmented, multicultural, or multi-ethnic societies. In fact, I am convinced that it is the only one because, in a world of steadily growing interdependence *and* increasing frustration with the kind of modernization and progress from above that the modern nation-state provided, the federalist formula of power sharing among decentralized autonomous units appears to me as the most logical recourse.

Yet, not too many share this conviction. For the advocates of centralized statehood, and especially within the political left, the nation-state has been the result of a revolutionary struggle against local fiefdoms and feudal tyrannies. In this perspective, only central democratic control over the living conditions of all can provide freedom and equality of opportunity. For the advocates of regional and socio-cultural self-determination, on the other hand, that very same nation-state, if not any form of central control, has become a symbol not only of oppressive standardization and conformity, but moreover of peripheral subordination to, and exploitation by, centrally dominant elites. As both views are partially correct in historical perspective, it is difficult to strike the kind of mutually agreeable compromise that lies at the heart of federal theory and practice.

In the resulting tug-of-war, the federalist principle of balanced power sharing on the basis of mutual consent has often been forgotten. The purpose of this paper, once again, is to rediscover that principle as a neglected part of the European heritage of political thought and to show its affinities with the political and social thought of Aboriginal peoples. If such an exercise is of any constructive value at all, then it must lie in a bridge-building effect: it can teach Euro-Canadians[ii] some flexibility in thinking about federalism when they become aware that BNA Act federalism is only one strand in a much larger heritage of European federalist thought and practice. And it can encourage Aboriginal people to test this flexibility by pointing out that their visions of self-government are in fact not so incompatible at all with a broader understanding of that heritage.

Cultural Appropriation and Comparative Social Science

As in all projects of a comparative nature, some delicate questions arise about the appropriateness of venturing into other peoples' cultural, philosophical and social property

without, intentionally or unintentionally, misjudging or misinterpreting that property from a condescending and self-centred vantage point. I have the greatest respect for Aboriginal fears and resentment in this regard. Theirs is a sad history of centuries of Eurocentric domination, prescription and interpretation that lies at the heart of their renewed quest for self-government. It is probably fair to say that any attempt to tell Aboriginal people from an outsider's perspective what it good for them is particularly delicate at the present conjuncture because, after centuries of enforced social engineering by white society, they may themselves be unsure about their own heritage and in need of autonomous processes of self-finding and self-healing.

Nevertheless, it seems to me that the comparative perspective is uniquely appropriate at the same time. Again, after centuries of colonial subordination, Aboriginal peoples in Canada today do not live any more in self-determined isolation. Their lives and thoughts have become intermingled with, if not drowned out by, white society. One must even fear that some of the best of a mostly oral and ceremonial tradition has been lost or at least buried under the avalanche of white statutes and regulations. A comparative perspective can simply help to identify similarities and dissimilarities between Aboriginal and European federal thought. By doing this, it can help to clarify what Aboriginal people today would want to consider genuinely as their own heritage.

A comparative perspective can also provide a healthy safeguard against parochialism. Take, for example, the Canadian obsession with federal symmetry on the basis of individual liberal rights. With regard to the Aboriginal issue, Trudeau's infamous White Paper of 1969 probably went further in denying any degree of inherent and special right, and it was probably this denial of asymmetrical self-government that led later to the Aboriginal outrage over the proposed distinct society clause for Quebec in the Meech Lake Accord.[iii] One glance beyond the narrow confines of *British North America Act* (and U.S.) federalism can serve as a healthy reminder that asymmetrical federal arrangements have remained at the core of federal theory and practice elsewhere.

But the Aboriginal community itself surely is not immune to lapses into self-centred parochialism. As I will try to show, the venerable Two Row Wampum treaty metaphor may be in some need of comparative reconsideration and reinterpretation as well. Or, to put it differently, its validity as a starting point for Aboriginal concepts of self-government can only gain if it can be demonstrated that similar concepts and metaphors of societal co-existence have existed and do in fact still exist elsewhere. At the core of the comparative method lies a commitment to

search for universal yardsticks. These yardsticks are not meant to replace all specificities, but to serve as analytical tools for the discovery of generalizable common ground. Without a commitment to such common ground, Aboriginal social thought would have to congeal into rigid parochialism as well. However, it seems safe to assume, on the basis of overwhelming historical evidence, that Aboriginal thought and practice have proven far more flexible overall than the linear and legally fixed kind of modern European and Canadian political thought and practice have been over time. Again and again, Aboriginal peoples had to make the adjustments. It is surely time for Canadian society in the first place to recognize its obligation to move toward more flexibility.

As in all comparative ventures into socio-cultural territory that is not one's own, there is the problem of political correctness. Can I, a European-trained individual of white, Hessian-Alemannic origin, legitimately investigate Aboriginal treaty federalism in Canada? Am I even qualified to research or teach Canadian federalism or, indeed, anything but Hessian-Alemannic federalism? My firm answer to these and all similar questions is yes, as long as I try as hard as I can to do it correctly.

Political correctness taken to its logical end would mean the death of comparative social science. It is from the comparative vantage point that the general yardsticks of all social science are derived. Outsiders are often capable of providing the freshest and most innovative insights, even though their knowledge of the inside must inevitably remain limited. This belief does not exonerate all those Euro-Canadian social scientists, social engineers and social therapists who have tried erroneously to impose their views and prescriptions on Aboriginal peoples. But what disqualifies these appropriators, in my view, is not the act of appropriation, but the fact that it was self-centred instead of comparative, prescriptive instead of suggestive.

Whatever mistakes I make, they are not meant to offend or belittle the substance of Aboriginal thinking and practice. Whatever opinions I put forward, they are not intended to be prescriptions and ultimate truths. What I am putting forward in this paper is merely how I see Aboriginal and European political thinking connected. It is for others to judge whether my comparative methodology is sound and whether my conclusions are of any help.

On the Metaphor of the Two Row Wampum: Toward a Modern Interpretation

All political cultures have their cherished origins, such as the Solonian Reforms in ancient Greece, *Magna Charta* in England, or the American *Declaration of Independence*. For North

America's First Nations, these origins can be found in a multitude of mythological founding stories and metaphors of peaceful living together. Among these, the Great Law of the ancient Iroquois Confederacy deserves particular attention for various reasons.

The most obvious of these reasons is the prominent role the Confederacy played in early Euro-American history, not only influencing prominently the views that Europeans formed about Indigenous peoples early on, but also essentially shaping in turn the development of social and political life of Euro-Americans themselves. There can be no doubt, for example, about the profound impact the Confederacy had on the genesis and development of American federalism. Another reason is that the Great Law of the Five Nations does exist in written form, even though some doubts must now be raised about the authenticity of its nineteenth-century written record with regard to centuries of evolving and changing political practice.

These are Eurocentrist reasons, to be sure. They are important ones, nevertheless, because they can help to find connecting common ground. Euro-Americans have denied for centuries and to date the profound influence Aboriginal thinking and practice have had on the evolution of their own political institutions. Likewise, however, it is my contention that a good deal of Aboriginal socio-political development occurred precisely in the same context. From the sixteenth century onward, indigenous societies perpetually had to rethink both their internal way of life and external relations with their colonizers. It would be absurd and condescending to assume that their forms and practices of social and political life had not been in a perpetual flux similar to that of the colonizing immigrant societies.

What is obvious, of course, is that communications between the two camps were riddled with misunderstandings arising from cultural differences and that this was one of the major reasons why Euro-American society could eventually establish colonial supremacy over Indigenous peoples who, at least initially, outnumbered them. Hundreds of treaties were concluded over more than three centuries. Even though these treaties are the ultimate testimony to how Aboriginal peoples were slowly but steadily deprived of land, resources and autonomy over the land they had once occupied in its entirety, they have become one of the fundaments for the renewed quest for an inherent right to Aboriginal self-government. Much common ground needs to be recovered to find a resolution.

It is not that Aboriginal peoples had not tried to make their views known to the other side as clearly as possible. But their European counterparts would not or could not understand the

kind of relationship Aboriginal peoples were prepared to enter in good faith. In the case of the Iroquois Confederacy, a particularly impressive record of such communication exists in the form of so-called wampum belts, typically consisting of patterned arrangements of beads sown between strips of hide, symbolizing the nature of internal as well as external relations. And once again, these wampum belts were not static symbols of unchanging traditional life worlds, but dynamic tools of cultural evolution and communication as well. There is some indication that the Iroquois in fact increased the use of such belts midway through the eighteenth century because it had dawned on them that the English were generally dense about remembering "things precisely without the aid of specific references."[iv]

Symbolic and communicative exchanges of beads and other precious artifacts were by no means confined to the practice of the Confederacy. It is not singled out to give it any pre-eminence in the Aboriginal quest for self-government; instead, a first and simply practical reason is that the well documented and researched history of Iroquois-European treaty relationships has been easily available to me. Time constraints have not allowed me to expand this admittedly narrow scope. However, there are indications that the basic socio-philosophical principles underlying the Iroquois use of wampum belts are indeed part of a more universal indigenous voice in North America. The *magna charta* of Iroquois political culture, for example, the so-called Circle Covenant Wampum, appears very similar indeed to basic metaphors and symbolisms of co-ordinated yet autonomous social life as described in Haida mythology at the other end of the continent.[v] This may allow me to generalize from an otherwise overly limited point of view.

In fact, it is one of the basic contentions of this paper that, when going back to the origins of modern political thought from the sixteenth century onward, that is, precisely before the rise of the absolutist state and capitalist market ideologies, indigenous North American *and* European concepts of political culture and organization show surprising similarities. In other words, beneath the modern dominant ideologies of state and market organization, there is a basic universality of social thought about living together in peace and harmony that seems to transcend continental borders and cultures.

The metaphors of the Iroquois wampum belts, for better or worse, will therefore be treated simply as representative of Aboriginal social and political thinking in general. In the context of Aboriginal and Euro-Canadian treaty relations, it is the so-called Two Row Wampum

Belt that seems to occupy centre stage. Accounts of when this belt was introduced to treaty negotiations during the seventeenth century vary between 1645 and 1664.[vi] More important, there seems to be considerable difference of opinion on whether its use originates from treaties with the Dutch, the English, or both.[vii] This latter point appears quite important to me because, as I will explain later, the Dutch republic of the seventeenth century was still based on principles of confederation itself, whereas the post-Civil War English monarchy was already poised for centralized parliamentary absolutism. In other words, the federalist message of the Two Row Wampum may have rung with more understanding in Dutch than in English ears, nor can it be either proven or ruled out that the Two Row Wampum itself was influenced by the socio-political thought carried to the New World by the earliest groups of settlers.

The Two Row Wampum shows two parallel lines of dark beads in a bed of white, symbolizing two vessels navigating down a river, one Aboriginal and one European. Both proceed according to their own sets of rules, never trying to impose one on the other, never interfering with each other's separate courses, both following the natural flow of the river. With this basic symbol of parallel peace and independence, the Iroquois obviously meant to demonstrate to Europeans their rights to an independent existence from time immemorial and to deny any abrogation of this right to Euro-American sovereignty. It still is a powerful symbol of their inherent right to self-government. That Europeans would not hear or understand that message cannot be surprising. Especially during the eighteenth century, the purpose of political organization in Lockean England had become focused almost exclusively on the protection of private property, a concept nearly unknown to Aboriginal North Americans. For Euro-Americans, treaties increasingly meant the acquisition of land titles and their protection by one supreme authority of sovereign law.[viii] For Aboriginal peoples, they meant the peaceful use of land, water and forests, some set aside for each nation, including the Europeans, and some also common to all.

This is all fairly well known by now, and it has contributed regrettably little to the final recognition of Aboriginal self-government. North America has become the prime locus of Lockean liberalism on the basis of individual property rights and market relations, and to insist on the continued validity of the Two Row Wampum as a logical starting point for establishing full Aboriginal sovereignty has proven rather futile. Yet, it seems to me that the two row metaphor still is a powerful reminder that Aboriginal peoples have never relinquished their status

as peoples. How can common ground be gained?

The question leads me back to the original one concerning the overall purpose of this paper. If it is to connect Aboriginal and Euro-Canadian visions of federalism and legitimate self-government, the reading and understanding of the Two Row Wampum metaphor can perhaps be reformulated in a way that would finally allow the Canadian state and society to recognize it as a symbolic expression of mutual respect and independence among sovereign peoples within a common larger territory. I can see several such ways.

One is nothing but the trivial recognition that the Two Row Wampum must be translated into late twentieth-century terms. One reason why the Iroquois could construct such a simple symbol of parallel non-interference was that the continent at the time appeared to them as a limitless space in which there was place for everyone ─ which is not to say that they were not painfully aware of the limitedness of resources sustaining their lives. But North America has become an overcrowded continent, just as the European continent had already become at the time of early North American settlement. The river to be travelled together now is jammed with thousands of vessels, and each movement by any single vessel one requires adjusting movements by all others. This obviously requires far more regulation, co-ordination and, yes, common ground for reliable joint jurisdiction than the original parties to the wampum could ever have envisioned. What this means is that any reformulation of the Two Row Wampum will have to include provisions that secure Aboriginal autonomy by way of carefully regulated interaction with the Euro-Canadian vessel rather than the maintenance of complete non-interference.

Another way of thinking about the Two Row Wampum constructively in the current world is one that Aboriginal people have always insisted on, and one that has been particularly neglected by Euro-Americans from the very beginning. It has to do with the fact that the Two Row Wampum is not a separate principle of Iroquois diplomacy in itself, but must be placed in the context of other basic laws governing the Confederacy. A fuller understanding of the plural and communal organization of Aboriginal governance, as expressed in two other wampum symbols ─ the Hiawatha wampum belt of the Confederacy and the Circle Covenant Wampum of confederate governance ─ might not only enlighten Euro-Canadians about the nature of the Two Row Wampum but also lead to a reconsideration of their own forms of governance. Early on, Europeans had recognized this plurality quite well, and they had quickly learned to exploit existing splits and conflicts. But as their own traditional plurality began to congeal into the

monistic form of the centralized nation-state, so did their treatment of Aboriginal peoples come to be based more and more on the assumption of *one* `Indian question'. Recognizing the plural nature of the Two Row Wampum metaphor, therefore, which is in fact a multi-row wampum of internal as well as external relations, Canadians might begin to appreciate important elements of their own plural and multicultural tradition. Such a recognition can lead to important discussions of asymmetrical federalism and plural political organization.

Learning to respect the rich heritage of Aboriginal social philosophy and political practice may prepare for some common ground indeed. The European heritage of federal theory and practice is far more varied and rich than the dull insistence on BNA Act federalism as the only path might commonly suggest. Perhaps it will be possible, in the not too distant future, to realize that federalism as practised and defended by most Euro-Canadians at the moment is only one among many options within their own heritage, that owes its dominance to nineteenth-century configurations of state and market dominance that begin to appear obsolete, and that a search for alternatives within the European heritage can go a long way in uncovering common ground with Aboriginal traditions and expectations.

Treaty Federalism: A Historical Re-evaluation

Definitions

Treaties between the Aboriginal peoples of North America and Europeans go back to the earliest time of European conquest and settlement. It is important to note, in the first place, that `treaties' were not *invented* by Aboriginal people just and only to deal with European intruders. Rather, and in a most general sense, the conclusion of "treaties" constitutes the *normal* way of conducting business with other tribes, nations or peoples among Aboriginal peoples. Therefore, when the Europeans arrived, they were simply receiving the same treatment that had already and for a long time characterized intertribal relationships among Aboriginal peoples themselves.

Second, these `treaties' are expressions of the Aboriginal understanding that tribes, bands, nations, peoples or, indeed, individual family-clans are autonomous social units and that their interrelationships are based on diplomatic communication, not legalized codes of central and unitary authority. In this more specific sense, `treaties' can be qualified as `federal', because `federalism' in the most general sense stands for the recognition and organization of autonomous social life within various sub-units of a larger collectivity. Federalism in this sense includes both

a recognition of a right to self-determination *and* the acceptance of necessary co-ordination and regulation on the basis of mutual consent.

This is indeed a most important point: contrary to `treaties' in a purely international or merely contractual sense, `federal treaties' imply a *balance* between autonomy and mutual obligation among the participants. Their primary purpose is to organize social and political life on the basis of self-determination, but that purpose includes at the same time an acknowledgment of, and commitment to, something that is held in common and cannot simply be repudiated by one side alone. Treaty federalism therefore establishes a common bond of mutual obligations as well as organized self-determination.

Third, in its most specific sense as elaborated in particular by Sakej Henderson,[ix] treaty federalism in the Canadian context pertains to the affirmation of a two row organization of Canadian federalism from its very first inception. One row, based originally on the *Constitution Act, 1867* and perhaps best called `provincial federalism', establishes the relationship between the central government of Canada and the provinces; the other and in fact older row establishes a parallel relationship between the Crown and Aboriginal peoples. This is what Henderson calls treaty federalism. It is now based on section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the "treaty rights" that were originally established between the Aboriginal peoples and the Imperial Crown.

From this point on, the term treaty federalism will be used concomitantly with all three usages and interpretations. This paper does not deal with the legal problem arising from the fact that most treaties were in fact concluded with the Imperial Crown and not with the government of Canada and therefore that technically, no formalized relationship exists between most `treaty Indians' and the government. Euro-Canadians also were not asked, in 1867, whether they wished to transfer allegiance from the Imperial Crown to a government that would only eventually become responsible government in more than a formal sense. It happened and can no longer be undone. The point is, however, that it does not really matter[x] as long as an inherent right of self-government on the basis of treaty federalism is affirmed and upheld as the basis of the Canadian-Aboriginal relationship. As the Royal Commission on Aboriginal Peoples has rightly affirmed, such an inherent right exists, on the basis of the nature of treaties concluded in the past *and* on the basis of its recognition in section 35(1) of the *Constitution Act, 1982*.[xi]

Finally, it seems appropriate in the context of this comparative exploration to distinguish

between `federal' and `confederal' forms of political organization and practice. In a `federation', the component units are direct subjects of state law on the basis of a constitution, and the `residual power' ─ that is, the power to create new powers and responsibilities ─ typically lies with the sovereign federal/national order of government. Member units can be overruled by majority vote. In a `confederation', the component units are direct subjects of the law of nations. The basis of union is an international treaty, and the residual powers typically remain with the component units or member states. Changes to the treaty require unanimity.

In political practice, both forms can overlap to some extent. The United States Constitution, for example, originally left the residual powers with the states, but it was nevertheless the federal government that evolved into the supreme source of sovereign authority. The European Community, on the other hand, constitutes a confederation in which major treaty changes still require the unanimous consent of all members. Increasingly, however, Community members are subjected directly to Community law and regulations, and treaty revisions such as the Single European Act and the Maastricht Treaty are pushing toward more application of majority voting and hence to a qualitative transformation of the Community from confederation to federation. In Canada, finally, the *Constitution Act, 1867* sought to establish a classical federation through the allocation of residual powers to the central government, but the evolution of provincial political powers, especially on the basis of their ownership of land and resources, has resulted in a quasi-confederal arrangement whereby constitutional changes as well as the allocation of new powers require de facto unanimity.

The affirmation of treaties as the most important if not the sole basis of Aboriginal-Canadian relations ─ by Aboriginal peoples themselves, indirectly by the way the *Royal Proclamation of 1763* recognized Aboriginal peoples as "Nations", and by section 35(1) of the *Constitution Act, 1982* ─ clearly places these relations in a confederal perspective and context. The insistence on an existing right of self-government stems from the view that the Aboriginal-Canadian relationship was never transformed from a confederal one among sovereign nations to a federal one under centralized constitutional authority with residual powers.

But again, while this is the most important starting point for a re-examination leading to a just solution to Aboriginal self-government, the existing relationships seem to have transcended the purely confederal form of organization ─ whether with or without the consent of Aboriginal peoples. The affirmation of a dual and parallel federalism in Canada, provincial and treaty-based,

may at least indicate that solutions must be found today on a continuum of federal and confederal arrangements. This does not rule out the inherent right of self-government with regard to possible placements on that continuum. The retention of treaty federalism as the basis of analysis therefore comprises an understanding of `federal' that is in reality a combination of federal and confederal principles.

Historical Overview

Various attempts have been made to divide the long history of Aboriginal-European treaty relationships into distinct periods.[xii] The most common distinction is between pre- and post-1850 treaties. Before 1850, treaties typically pertained to the surrender of small parcels of land for white settlement, included small one-time payments, and/or emphasized general principles of friendship and peace rather than detailed rights and duties. After 1850, treaties focused increasingly on the surrender of vast territorial space, typically included the provision of annual payments and/or services in return, established reserves, and were narrowly contractualist in character.

A similar approach distinguishes between Georgian and Victorian treaty periods. During the Georgian period in the eighteenth century, treaties can be characterized as friendship compacts based primarily on traditional Aboriginal protocol. They established shared and renewable obligations rather than final allocations of power and territory, and they referred to "nations and tribes of Indians". In other words, Georgian treaties were confederal compacts recognizing mutual rights and autonomies among sovereign signatories. The Victorian treaties after 1871, on the other hand, addressed Aboriginal people as "Her Majesty's Subjects" and enforced English protocol with the ultimate goal of the surrender of most of British North America to Euro-Canadian society. They were in fact gigantic real estate deals even though the Aboriginal side may not have understood them as that. In other words, Victorian treaties in the British understanding presupposed the unity of law and the contractual subordination of Aboriginal people under that law as subjects. Not only was this a far cry from confederal compact practice, but it must seem doubtful whether it established something even remotely `federal'. Rather, it opened the path toward Aboriginal peoples' treatment as dependent and inferior wards of the Crown.

It is probably possible and useful to break down this history into a few more phases of

changing Aboriginal-European treaty relations.

1600-1664

During this early phase, Aboriginal people had to cope with the devastating effects of European contact. Imported diseases decimated their peoples to the point that the Iroquois, for example, resorted increasingly to raids upon neighbouring tribes to replenish their population base. At the same time, they were drawn into the fur trade competition among the French, Dutch and British and, increasingly dependent on European goods and arms in particular, they began to engage in ever quickening rounds of intertribal war. These wars in turn decimated them even further. The result was that

> a seemingly endless cycle of death from disease, wars to find captives to replace the losses, pillaging furs to trade for guns, new wars, and more deaths in battle transformed the Great League of Peace into a Great League for War.[xiii]

Rather than establishing lasting diplomatic relations, treaties during this phase more likely constituted short-lived alliances, truces and trade arrangements following the evolving dynamic of European rivalries and conquest.

1664-1763

In 1664, the English replaced the Dutch as the major trading partner at Fort Orange (Albany). While the European wars were far from over, a certain consolidation of intertribal and Aboriginal-European relations may have resulted from the rising British hegemony in the area as well as from the peace treaty between the Iroquois and French in 1665-66. This consolidation pertained not only to the revival of organized peaceful relations within the Confederacy, but also to the extension of Confederacy principles to Iroquois-European relations.[xiv] It is during this period that a renewal of Iroquois adherence to the virtues of the circle wampum of Confederacy relations can be discerned and likewise its analogous translation into the Two Row Wampum of Iroquois-English relations. As has been half-jokingly suggested,[xv] the Iroquois might have realized that as the linear legal minds of their European counterparts could not comprehend the complex message of the circle wampum, the linear symbol of the two rows had to be introduced. Evidence of the increased use of wampum as mnemonic aids during the eighteenth century may point out more the need of the British than of the Iroquois for such assistance.[xvi]

The period leading up to the British defeat of New France and the *Royal Proclamation of*

1763 obviously was not just one of consolidation, though. With the British aiming at, and increasingly achieving, sovereignty over the entire expanse of northeastern North America, it was their ambition to regulate relations with the Iroquois in a far more systematic and durable way than the metaphor of two independent vessels sailing down a river might suggest. A colonial empire was to be built, and Anglo-Indian relations were to be consolidated in "a multiple alliance binding on tribes and colonies."[xvii] A "covenant chain" or "silver covenant chain" came to be the expression of this alliance.[xviii] But if the British intention was to interpret the covenant chain as a tool both to bring the Iroquois into complicity to establish shared rule over other Indigenous peoples of the northeast and, eventually, to subject the Confederacy to British sovereignty, this was hardly the understanding of the Iroquois themselves. They continued to see the chain not only as a loose arrangement ─ consisting in fact of several distinct chains ─ but also as a confederal arrangement maintaining the Confederacy's independence.

Nevertheless, it cannot be ignored that, leading up to the Royal Proclamation, Anglo-Iroquois relations underwent considerable transformation, at least from a British perspective. What may have originated as an iron chain ─ a pragmatic trading arrangement between the Mohawks and Dutch of Fort Orange ─ was being converted into a silver chain:

> The change in metaphorical material not only reflected the English sense of a new arrangement of longer duration, but also an alliance that systematized Iroquois-English relations into a multicultural entity in which the two sides agreed to share power over the Northeast, and to do so with a decidedly anti-French bias.[xix]

For the Iroquois, on the other hand, the silver chain metaphor appeared consistent with their philosophy and practice of confederal links among autonomous peoples and tribes. They never perceived of themselves, or consented to, being subjected to one common legal (British) authority, and they continued to conduct their own business in a plural rather than a unified fashion. The seeds were sown for a historical cultural misunderstanding that could lead only to a unilateral declaration of European sovereignty over North America, spelling disaster for Indigenous peoples and cultures.[xx]

1763-1871

Opinions diverge widely on what the *Royal Proclamation of 1763* actually meant, and given how the fate of Aboriginal peoples in North America enfolded in the nineteenth and twentieth centuries, the American Declaration of Independence only thirteen years later was probably of

far greater consequence for them. However, in terms of Aboriginal-European legal history, the Royal Proclamation no doubt constituted a milestone even though opinions widely differ even here.

For some, its meaning lies in the formal recognition by the British Crown of the inherent right of Aboriginal self-government on the basis of confederal "sovereignty-association or 'treaty federalism'."[xxi] For others, it constitutes a "villainous doctrine" of Aboriginal subordination to British sovereignty and dominion, introducing the concept of "proprietary title" unknown and "invisible" to Aboriginal people. Following the evidence of the most recent jurisprudence, such as the 1990 *Sparrow* case, even if the Royal Proclamation granted an abstract concession of the *existence* of inherent Aboriginal rights, then these must be considered wiped out in practice by the subjection of their *exercise* to Crown legislation.[xxii]

The Proclamation did seem to protect Indian rights to live "unmolested" on land in their possession, and expansion into that land by colonial governments was halted. But at the same time, unmolested possession of Indian lands now fell under Royal protection, and was positioned within Royal "Dominions and Territories." Moreover, Indian "possession" seemed narrowed to the use or *exercise* as "Hunting Grounds", and it existed as a concession from British sovereignty only until "further Pleasure be known". Protection meant for the most part that the Crown had become the exclusively licensed real estate agent.[xxiii]

Was this an honest effort to come to a confederal form of co-existence between Aboriginal peoples and Europeans, or was it villainous fraud? The truth probably lies somewhere in the middle, as the white colonizers would typically speak with forked tongues. However, there can be little doubt about the Crown's intensified attempts from the Royal Proclamation onward to make Aboriginal-British relations more and more consistent with European concepts of undivided sovereignty and property rights. As long as Aboriginal people still constituted a formidable majority in British North America, these concepts may have been applied in a concealed way, perhaps even with a genuine intent to protect the "Nations or Tribes of Indians" from rampant local land purchase practices. But there can be little doubt about the overall intention. The Iroquois Confederacy was omitted from participation or even consideration in the 1783 Treaty of Paris when their hereditary lands were ceded to the United States ─ with a claim that this would constitute a pre-emptive and temporary move only. The subsequent establishment of the Grand River reserve for the Confederacy, in any case, was a unilateral grant, not an act of

confederal accommodation.

From then on, Aboriginal-European treaty relations deteriorated more and more into real estate deals. Under the duress of rapidly deteriorating living conditions, Aboriginal people traded land for government handouts. Each deal worsened their social conditions and made the next one more urgent. If they resisted, they were forced off the land.

1871-1924

Section 91(24) of the *Constitution Act, 1867* subjected "Indians, and Lands reserved for the Indians" wholly to federal legislation. Parallel to the huge land surrenders in the prairie west (the numbered treaties) from 1871 onward, the government of Canada passed the *Indian Act* of 1876 on the basis of which increasingly racist and genocidal policies of assimilation would be carried out into the twentieth century. Step by step, Aboriginal people in Canada would be deprived of land, culture, and means of subsistence. Particularly perfidious were efforts to prevent, always under the guise of official assimilation doctrine, precisely such assimilation by relegating Aboriginal people to inferior human status on the basis of arbitrarily concocted theories of Darwinist evolution.[xxiv]

1924-1982

Various Indian Acts had already foreseen the establishment of western-style band council elections on Indian reserves, but their introduction had been resisted, especially by the Six Nations Confederacy. There, the issue was forced by a 1923 Royal Commission intent on exploiting the continuing conflict between traditionalists and acculturalists on the reserve.[xxv] The first election was held in 1924, and the system was reaffirmed with few modifications by the revised *Indian Act* of 1951.

Political stability was undermined by the divide-and-rule tactics of enforcing an electoral council system parallel to the traditional authority of the Confederacy chiefs. Elsewhere, Aboriginal communities might resort to the tactic of simply electing their traditional chiefs to the band councils, but this would lead only to similar alienation between Aboriginal leadership and the community at large. Inevitable processes of acculturation had already begun to divide Aboriginal peoples. The "great game" for money under the *Indian Act* had created acculturated bridgeheads of acquiescence and accommodation on Indian reserves.[xxvi]

Aboriginal concepts and practices of self-governance were never linear, and the authority of the Confederacy chiefs never exclusive. This no doubt made the Confederacy particularly vulnerable to conflicts arising from the forced intrusion of extraneous forms of political organization. The result has been counter-productive even from a Canadian point of view. For example, mutual distrust between band council and Confederacy chiefs of the Six Nations Reserve resulted in a stalemate with regard to the takeover of reserve education from federal government by April 1994.[xxvii]

In the North, treaties increasingly became deals, huge deals over land and resources. Only in one case, however ─ the 1975 deal with the James Bay Cree in northern Quebec ─ did such a deal result in political arrangements worthy of the word treaty. Limited self-government was offered as a first legislated act of liberation from the *Indian Act* in return for some ninety-nine per cent of extinguished Cree land. Whether that extinguishment can be revoked because it was attained under undue political pressure and social duress remains to be seen. Self-government, however, was merely promised and was granted only by 1984, when the centralized vision of nationhood had departed with Trudeau, and the *Constitution Act, 1982* had propelled the Aboriginal quest for the recognition and establishment of an inherent right of self-government to a new and entirely unforeseen level of political salience.

1982─

The recognition of existing treaty rights in section 35 (1) of the *Constitution Act, 1982* may well have been intended as yet another incidence of the white man speaking with forked tongue. In legal terms, it settled nothing because it simply deferred the legal battle to the question of the meaning of "existing". Politically, however, it provided Aboriginal peoples with a much needed and long awaited rallying point, just as Trudeau's charter of individual liberal rights and freedoms had, quite ironically, served as a political rallying point for countless social collectivities such as women, people with disabilities, the elderly and so on. While the sequence of events, from the signing of the Act, through the Oka crisis to Elijah Harper's act of defiance in the Manitoba legislature, need not be retold here, one of its significant side-effects ─ the increasingly prominent role of national Aboriginal organizations such as the Assembly of First Nations (AFN) ─ in Aboriginal-Canadian relations, deserves special mention.

The AFN and its leadership, for example, derive their formal legitimacy from the elected

band councils established under the *Indian Act*. In one sense, then, the AFN represents the acculturated faction of Aboriginal people, and for some the business-suit presence of AFN leaders in Ottawa is hard to reconcile with the quest for Aboriginal self-determination in the name of cultural tradition and sovereignty. In another sense, however, the AFN performs a badly required task of bridge building. It constitutes an indispensable watchdog against any further legal encroachment on Aboriginal rights. For centuries, Aboriginal peoples suffered defeat under a system of treaty relations in which Europeans could outsmart them because they had intermediaries straddling both worlds. In the AFN, First Nations now have achieved parity in this regard.

The clock cannot be turned back. The division of Canada's Aboriginal communities into traditionalist and acculturated factions is a fact. Some form of accommodation on both sides, rather than a unilateral and forced move entirely to one side or the other, seems an indispensable part of any future solution.

Legal Interpretations

As already stated, I do not believe that a continued legal battle over how to interpret the various documents of British North American sovereignty, from the *Royal Proclamation of 1763* to the *Constitution Act, 1982*, is very helpful. The main prevailing juridical questions clearly reveal that the battle is a political, not a legal one:

- Did Aboriginal people ever surrender their ancestral land when the concept of proprietary title was unknown and incomprehensible to them? Were Aboriginal people aware of the gradual shift in emphasis the British gave their interpretation and formulation of treaty stipulations (as indicated by the distinction between a pre- and a post-1850 period)? Did undue duress of living conditions and political pressure replace intentional misrepresentation and fraud in the process leading to the James Bay and Northern Quebec Agreement of 1975, and can the Aboriginal party therefore revoke it? (These are the questions of land title extinguishment.)
- Does the Aboriginal right of self-government include full sovereignty according to the law of nations or extend merely to internal rights of self-governance? (This is the question about whether treaties established limited confederal or fully federal relationships.)

- Do Aboriginal titles to the land include proprietary rights (on the land, below and above its surface), or do they extend only to the exercise of traditional fishing and hunting rights? And how could the latter view be reconciled with other, conflicting, uses of the land by Euro-Canadians? (This is the broad question about reconciling different social systems and philosophies in a world that no longer allows a clean separation of one living sphere from another.)

The point is that the courts can perhaps be used to restore some of the blatant material injustices committed against Aboriginal people in the past, but they cannot generate a political will to reach lasting accommodation and reconciliation. And further, the starting point of court proceedings will always be Canadian law, drawing Aboriginal peoples into an orbit of property-related legal thinking that is not theirs.

The final affirmation of this pessimism about a lasting juridical solution can be found in section 35(1) of the *Constitution Act, 1982*, with its opaque affirmation of "existing" treaty rights.[xxviii] What it comes down to is that, after some four hundred years of Aboriginal-European treaty relations in North America, one word signals not only that the ambiguity of Aboriginal status in Canada is not one inch closer to a satisfactory solution, but also that the Canadian side may have spoken once again with deliberately forked tongue, placing

> the onus on Indians to prove to the court that any aboriginal right they may claim continues to exist ─ that it hasn't already been extinguished by the Crown.[xxix]

A case in point is the 1990 *Sparrow* decision,[xxx] in which the Supreme Court of Canada upheld the existence of Aboriginal rights prior to the Royal Proclamation or any other legal provision, but limited their exercise to specific traditional usages. In Boldt's view, there is little reason to celebrate *Sparrow* as a legal break-through for Aboriginal peoples, because it denies any proprietary rights over land and resources, and because it further restricts usufructuary rights to traditional fishing and hunting only. In other words, the *Sparrow* decision once again confines Aboriginal status to traditional forms of a limited legal existence, and efforts to see it otherwise, however desirable, may be misleading wishful thinking.[xxxi]

It is not surprising in this context that the Royal Commission on Aboriginal Peoples, in its effort to forge a legal foundation for confederal self-government from the Royal Proclamation, quotes all passages allowing for a favourable interpretation ─ leaving out, however, the crucial passage where the Proclamation states clearly that the guarantees for

unmolested and undisturbed possession of Hunting Grounds extend only until the Crown's "further Pleasure be known".[xxxii] The rationale for issuing the Proclamation was political appeasement, not legal clarification, and how much mileage Aboriginal peoples in Canada can get out of that today also remains a political, not a legal issue.

It seems to me that what Aboriginal peoples in Canada today need and want first and foremost are existential rights, not historical or juridical ones. The legal history of treaty federalism will obviously continue to serve as an important reminder of the past, and present denial of such existential rights and satisfactory juridical recognition of those rights will no doubt form the basis of any future settlement. The first step toward gaining such recognition, however, will have to come from creating a political will in its favour. If the events of recent years are an indication, this will require further domestic and international political action. Elijah Harper in the Manitoba legislature, the Haida in the Queen Charlotte Islands, Temagami and, ironically, even the Oka crisis have possibly done more to create a political will in favour of Aboriginal rights than all the court cases and constitutional efforts taken together.

Recognition will also require the reaffirmation of first principles of Aboriginal self-determination and governance, of Aboriginal traditions and practices of community building and co-operation. In Aboriginal-Canadian relations, they have to be introduced and affirmed as part of a viable political agenda. One particularly promising way of doing that may be to point out that Aboriginal concepts of social life and governance are not so entirely different from European ones, and especially not from those that have sustained European society in the past and may become more relevant again in the future. The remainder of this paper is dedicated to a preliminary exploration of such possible common ground in comparative perspective.

Concepts and Metaphors

To understand the basic Aboriginal concepts behind their treaty relations with the Europeans, one must go back to the early treaty period, when Indian protocol was still being followed, and when in fact the symbols and metaphors used by Indians were well understood and appreciated by the Crown's representatives, who were often adopted into the clans and bands they were dealing with. Later, when British protocol took over, Aboriginal concepts often became invisible, even though the Aboriginal side never tired of repeating its basic and unwavering understanding of treaty relations.[xxxiii]

Another point of clarification pertains to the fact that European concepts of treaty relations appear to have been in constant evolutionary flux (see my attempt at dividing the history of treaty relations into various periods), whereas Aboriginal concepts seem unchanging over time. When a representative of the Six Nations Confederacy explained to the Parliamentary Committee on Indian Affairs in 1960 (!) that the basis of the treaty between the Confederacy and the United States was the Two Row Wampum Belt of 1664,[xxxiv] for example, the response was utter incredulity. Ignorance about the nature and meaning of these wampum belts can therefore easily reinforce stereotypes about Aboriginal society as stagnant and out of touch with reality.

The comparison is misleading. What appears as the European evolutionary dynamic in treaty relations is in fact a contractualist focus on the regulation of details under the impact of changes in time and circumstances. What appears as stagnant insistence on Aboriginal wampum symbols is in fact adherence to basic principles and structures of treaty relations, not the regulation of detail. Within the parameters of those principles, Aboriginal societies have changed as much over time as, say, English society has changed without renouncing the heritage of *Magna Charta*. Everything else is a terribly misleading falsification of fact, probably begun by misguided but well-meaning nineteenth-century ethnologists comparing apples and oranges,[xxxv] yet conveniently picked up by modern colonialist and racist ideologies.

A final clarification of a more general comparative nature pertains to the distinction between internal and external (treaty) relations. From a Eurocentrist perspective, such a distinction seems plausible, because nation-states were constructed as exclusive and unique legal entities and, consequently, a differentiation of national and international law (and political conduct) became paramount. A contradiction between the internal organization of peace and harmony and the pursuit of aggressive imperialist foreign policies was either not recognized or conveniently overlooked. [xxxvi]

Traditional Aboriginal thinking does not see a distinction between domestic and foreign policy conduct. `Internal' intertribal relations are guided by exactly the same principles as `external' relations with European or any other peoples. The reason is that Aboriginal peoples see themselves `internally' as a confederacy of autonomous units ─ families, clans, bands, tribes, etc. ─ as much as they perceive Aboriginal-European treaty relations as conducted among autonomous partners. The morality and integrity that guide relations among peoples are the same as those tradition has established within clans, tribes or families.

Only a few European philosophers have developed similarly holistic concepts. Immanuel Kant, for example, in his late treatise on "Perpetual Peace" (1795), not only postulated the equality of national and international law, but furthermore affirmed that all internal principles of civil society are in vain if they become constantly corrupted by the immorality of foreign policy conduct. And the reverse logic is apparent, at least implicitly: that international immorality and aggressiveness are an indication of a society's internal corruption.

One might think that such an understanding of human relations would be more conducive to the reorganization of a modern world of global interdependence among plural collective actors than continued insistence that the *reason of state* in foreign policy must be different from the one that guides internal group life. In this sense, Aboriginal thought appears to be an even more appropriate foundation for a peaceful reorganization of the world than Kant's, because the great German bourgeois philosopher could conceptualize morality only as rooted in the autonomy of the individual. He no longer had a sense of the traditional and `natural' group life and morality that had sustained European society before the rise of the centralized state in which society existed legally only as a collectivity of individuals.[xxxvii]

This difference between an integrated and a segregated concept of national and international law is important, first, because it lends credence and plausibility to the Aboriginal claim that self-government is a pre-condition for a renewed relationship with Canadian society. It may be even more important, second, because it strongly underscores the legitimacy of Aboriginal claims that the restoration of their integrated way of life requires recognition under national *and* international law.

The basic concepts, metaphors and first principles inherent in the Aboriginal view of treaty relations, then, are in reality nothing other than the basic concepts of how Aboriginal people understand themselves and their life worlds. As first principles in European societies, they pertain to matters of justice, stability, and basic models of social organization. For purposes of this paper, it is sufficient to focus on four of the most fundamental of these concepts: the *tree*, the *circle*, the *two rows*, and the *chain*. Once again, while these concepts are taken mainly if not exclusively from the records of Anglo-Iroquois treaty relations, it can be assumed that, as basic principles of social organization, they are shared within the entire Aboriginal community of the Americas. In fact, it is my contention that they are universal.

The Tree

In its simplest form the symbol of the tree expresses two notions: coming together in peace and open-endedness toward newcomers.[xxxviii] The four white roots, symbolizing the four directions, lead to the council fire of peaceful communication and union. The tree is ever-growing. This symbolizes not only that peace is to last forever, but also that it is not restricted to the original Confederacy members. It allows for alliances with other peoples as well.

More important, perhaps, the tree symbolizes a holistic concept of human life and nature. Both are given by the Creator, and neither is supposed to dominate the other. Human beings, animals, plants and the earth itself are to live in balanced harmony. Such a view excludes notions of individual maximization of advantage, unfettered accumulation of private property, and the differentiation of hierarchical status. Everything and everyone is connected to all others. Under the great Tree of Peace greed and exploitation cannot be tolerated. It is an ideal state of harmony that Aboriginal peoples achieved only periodically. If it is their paramount ambition today to recreate autonomy under this Great Law of Peace, hard questions about the intrusion of alien concepts such as competition and private property in a modern and market-driven world cannot be avoided.

In fact, it seems that here lies the most fundamental root of Aboriginal peoples' external as well as internal predicament: externally, in relation to the Euro-Canadian world of trade and commerce, the conflict is, for the most part, not so much one of Canadian sovereignty versus Aboriginal self-government, but one of national and multinational capital versus traditional Aboriginal land use, precluding its exclusive and irreparable exploitation by that capital. Internally, it is one between tradition and acculturation.

From the holistic notion of common responsibility for and sharing of nature emerges a mutualist principle of human relations. Communal property, mutual sharing, and collective decision making on the basis of consensus: this is what so much impressed Karl Marx's life-long collaborator Friedrich Engels in the nineteenth century. His knowledge of the Iroquois stemmed from Lewis H. Morgan's *Ancient Society*. The aging Marx had excerpted from it extensively, and after his death these notes were passed on to Engels, who was so impressed that he made Morgan's observations the basis for his *The Origin of the Family, Private Property and the State*.

Morgan was a nineteenth-century scholar who probably saw in the Iroquois Confederacy what he had wanted to find: an alternative form of government.[xxxix] He probably idealized if not

romanticized its council proceedings in the same way the nineteenth century romanticized all previous history, from Greek democracy to Mozart's music, and it has been pointed out that he presented his findings in a rather static and ahistorical way. However, while council procedures certainly evolved and changed over time, one can safely assume that guiding first principles did not. Mutual sharing among participants who are nevertheless different and autonomous is such a principle. Morgan observed it in the nineteenth century, but it can be found throughout the Confederacy's existence. The Three Sisters Wampum, for example, explains how three women from different clans, living in the same village, with different interests and performing different tasks, can get along in harmony and through mutual help, like

> the corn, beans and squash are very different, but...grow together in the same place, compatibly, each using its strengths to support the other.[xl]

This appears as a social principle of living together quite different from the European and Hobbesian concept of a mighty Leviathan legally restraining the antagonistic and competitive aspirations of atomized individuals. But it would be a mistake to insist on this difference in an absolutely dichotomous and mutually exclusive way.

On the Aboriginal side, it would be equally romanticizing and ahistorical to presume that the Great Law of Peace always worked or was adhered to. Its very beginning in the Hiawatha mythology indicates that Aboriginal people were struggling with destructive factionalism and war and that the Great Law was meant as a critical yardstick of how things *should* work. Like other peoples and their internal as well as external relations, the Aboriginal peoples of North America were perpetually torn between war and peace and, as elsewhere, their unity was further threatened by the divide-and-rule tactics of a colonial usurper, as well as enhanced by the presence of a common enemy. But these are questions of theory and practice. With regard to both, there can be no doubt that the Aboriginal peoples of North America had already established strong principles and mechanisms of conflict regulation when the Europeans appeared on their shores.

On the European side, mutual sharing and co-operation remained strong principles of social organization alongside ─ and often against ─ the rising powers of the omnipotent state and individualized market competition. Compact or covenant theories survived in many theories of social collectivity. Today, one can easily detect similarities to Aboriginal social thought in many of the concepts rediscovered rather than newly invented by environmentalists and social

movements in general. Post-modern feminism, for example, with its emphasis on relativism (all women are not one homogeneous social category) and its critique of subject-object relations (one social entity as defined through another), shows spiritual affinity with the simple and beautiful Three Sister Wampum. It is worth noting that feminists generally acknowledge Engels' work on the origin of family, property and state as an important starting point.

The Circle

Even though it is the Two Row Wampum that is cited most often when Aboriginal people explain their understanding of treaty relations, the Circle or Covenant circle wampum is probably the most fundamental expression of Aboriginal political thought. In simplest form, once again,[xli] the circle wampum combines two principles of organization: on the outside, there is a circle of two intertwined strings of beads, symbolizing the Great Law and the Great Peace. Neither can exist without the other. Inside the circle, fifty strands of equal length point toward the centre, each representing one of the fifty members of the Grand Council.[xlii] They are all interlinked by the Great Law of Peace, depending upon one another in counsel and decision making.

Circle and strands point to the necessity of organizing contact and communication.[xliii] Participants at the Grand Council are not simply the `political' leaders of the Five Nations.[xliv] They are first and foremost the heads of fifty family clans and, traditionally, they are chosen by the clan's women. The Confederacy's principle of representation emphasizes close contacts between popular base and leadership rather than autonomous agency of a leadership elite. The chiefs' role and importance does not simply exhaust itself in official political acts and the like but is present in their moral and cultural leadership, "as mentors" and "examples" whose "power lay in their humility."[xlv] Thus, if there is historical evidence that other important leaders such as war chiefs or simply well respected elders were often present in the conduct of foreign relations, for example,[xlvi] this does not mean that the overall leadership of the Confederacy chiefs was reduced or challenged. It does mean, however, that leadership and representation as symbolized by the Circle embodied a far more complex and interconnected process of communication than in European types of formally elected leadership representation.

In other words, the principles of interlinked co-operation and co-ordination appear to remain unchanged, but the rules of actual participation are flexible. Authority is based on a popular leadership mandate rather than institutionalized (elected) leadership status. The purpose

of the councils is the organization of like-mindedness, not the allocation of final powers of decision making. Consensus is the fundamental principle behind the circle symbol. The entire understanding of legitimacy is based on process rather than institution. A clan leader does not derive his authority from his hereditary status but from his ability to contribute to a process of mutual communication. The goal is reached when the council speaks with one mind. What the circle symbol ultimately implies is that the purpose of treaty politics is to provide channels of communication that establish and preserve unity and consensus on the basis of a common cultural heritage, especially when dealing with outsiders. There is no abstract concept of sovereignty. Sovereignty exists only when the process of consensus building works.

Because the process of consensus building is based in simple and universal principles of sharing, the social organization of the Confederacy can be asymmetrical. Not only do the five nations have different numbers of representatives at the council,[xlvii] they also have different roles in the process. The Mohawks and Senecas propose issues and ideas; the Cayugas and Oneidas then speak to the possibilities of consensus building and compromise; the Onondagas finally "reaffirm the one-mindedness of the council."[xlviii] Everyone is heard without interruption. Since agreements are typically over general principles and not about concrete material details, numerical issues of representation and power are irrelevant. Consensus *can* be reached if and as long as the spirit of the Great Law of Peace is maintained both at the council circle *and* among the family clans. This is the double task of the council chiefs.

It is a difficult and time-consuming process. But in comparison to modern parliamentary practice, it is not necessarily a less efficient one. Majority decisions can be made more quickly, and they establish legal clarity with more linear precision. The implementation of the law, however, can be a lengthy and conflictual political process when societal one-mindedness has not been reached. Government and opposition, as well as societal factions such as business and labour, will then obstruct each other in wasteful and costly ways. It is the other way 'round with the consensus-oriented council model. Here, the process of decision making is often cumbersome, and non-decision making often leads to a stagnant political process. However again, once consensus is reached, implementation is often easier and more straightforward because the decision is carried and supported by all.

The council tradition is by no means alien to European political practice. The imperial councils of the Holy Roman Empire during the early-modern period could be described and

characterized in ways almost identical to the Iroquois Grand Council. In the so-called consociational democracies of modern Europe, such as Belgium, the Netherlands and Switzerland, non-majoritarian forms of decision making are still practised today. The European Community as well as Canadian first ministers conferences rely on lengthy council processes to reach agreement.

The same examples point to a significant structural weakness of the consensus model and council process, though. When, in the process of modernization, the gravity of political power shifted gradually to national centres of production and commerce, the imperial councils of the Holy Roman Empire degenerated into a permanent convocation of powerlessness. The participating estates no longer represented the land. The modern examples of consociational politics, on the other hand, are examples of economic, political or bureaucratic elite accommodation that often lack legitimacy because the deals accomplished at the leadership level are poorly connected to the popular base. It seems to me that this is a problem for modern Aboriginal peoples as well. Sucked into the maelstrom of modern statist politics and elite accommodation, Aboriginal leaders in Canada may have lost some of their connectedness with their people. Either they participate in the great game dictated by Ottawa and the *Indian Act*, or they simply fall silent. As the comparison with the Holy Roman Empire suggests, however, this silence is one imposed upon the grand chiefs ─ precisely because the band council system under the *Indian Act* makes it impossible to exercise leadership as mentors and through an informal process of giving examples.

The Two Rows

The essence and possible purpose of this metaphor have already been discussed. The purpose of the Two Row Wampum in Aboriginal-European treaty relations seems to be mainly a reaffirmation of the kind of autonomy already well established in the circle wampum. In both cases, the basic organizational principle revolves around "autonomy and joint sovereign occupation of a territory".[xlix] However, two further considerations appear appropriate.

The first has to do with the nature of `autonomy' in a covenanted and compound social system. The two row symbol seems to suggest that there be complete independence between those sailing down the river together. And indeed, some interpreters have held that the "Covenant Chain does not affect the internal affairs of any nation within it."[l]

To my mind, this formulation can be read as contradicting the essential message of the circle wampum. To speak with one mind requires a perpetual process of communication and adjustment. Aboriginal societies never lived in a static and isolated world, and certainly not after the Europeans arrived. If it was the purpose of wampum in treaty procedures to recall principles that were not to be violated, business arising from these principles certainly had to be adjusted to changing times and circumstances.

The autonomy principle expressed in the Two Row Wampum therefore means only that no external force could impose internal changes unilaterally, but it does not mean that factual interdependence could not lead to mutually agreed obligations to a common code of behaviour that would ultimately affect the internal affairs of both sides. Other than in a contractual relationship that extends only to the precisely stipulated conditions of the contract itself, leaving out entirely how one side or the other might want to fulfil it, the Two Row Wampum symbol of autonomy seeks to establish a social compact of a more lasting kind. It contains a mutual obligation to adjust and reorganize internal affairs in such a way as to ensure that the council can come to one mind. Indirectly, therefore, it does have an impact on the autonomy of each side.

Second, and in much the same sense, the Two Row Wampum does not seek to circumscribe a final and legally defined state of Aboriginal-European relations. As an aid to remember first principles, it is meant to do just that ─ remind treaty participants of the first principles upon which their relations were based, even though these relations have to be renewed and adjusted periodically. Treaties certainly were first and foremost tools to establish and maintain the Great Peace and were therefore meant to be the basis for a lasting relationship, but they did not establish some superior authority that could no longer be resisted. A right of secession in a confederal sense therefore remained part of the agreement. This is a very difficult issue because, if treaty relations established mutual linkages and obligations, secession cannot be regarded as a unilateral right that would not affect the other side's autonomy. The constitution of the Soviet Union, for example, always included a right of secession for individual republics, but prevailing constitutional doctrine held that such a right could be exercised only on the basis of consensus with all other republics ─ which the right to secession perfectly useless. Quebec certainly could not secede without a mutual agreement about joint responsibility for the national deficit. Aboriginal people in my view certainly have a right to withdraw from unjust land claim settlements of the past in so far as they obviously violate principles of reciprocity, but it can

hardly be argued that the situation can be rolled back entirely and unilaterally to the status quo ante.

The issue is one of reciprocity. In contractual relations, reciprocity typically extends only to the mutual obligations as stipulated, regardless of whether the deal is fair. In compact relations, fairness on the basis of political justice is required. The canoe must not be constantly tossed around by the bow wave of the larger European vessel. Both sides are obliged to adjust the internal management of their affairs in such a way as to ensure that reciprocity of living conditions is preserved.

The Chain

The literature makes much of the establishment of a `silver chain' between the Iroquois and the British as the culminating point of conceptualized treaty relations.[li] For the British, the goal may indeed have been to forge a lasting imperial-colonial connection through a chain of treaties in which the Iroquois formed the crucial link. For the Iroquois, the chain symbol in all likelihood did not stand for a concrete type of organization, let alone one that they would have perceived as establishing a system of firm interdependence throughout the American northwest. Once again, the chain symbolized a general principle underlying all kinds of alliances, even though the `silvery' character of the Anglo-Iroquois relationship may have been accepted as a symbol of particular friendship. Certainly, however, there was nothing in the silver chain that would have contradicted all the other principles laid down by the Great Law. In this respect, it can be regarded as the ultimate expression of a world of Anglo-Aboriginal relations based on treaty federalism.

Whatever there was that was special in the silver chain covenant between the British and the Iroquois, it eventually drew the latter into the mounting land disputes between Crown and colonists, and it was destroyed by the events of the American Revolution. When consensus was no longer possible, the chiefs `covered the fire' at Onondaga, in January 1777.[lii] For Aboriginal peoples, the chain metaphor had originally meant nothing other than a linking of arms beyond the inner circle around the council fire. As they were drawn into European affairs, the chain increasingly became a suffocating experience of being pulled in the leading-strings of forces over which they had less and less control.

Main Differences from BNA Act Federalism

The purpose of this paper is bridge building between Aboriginal and European political thought. The main argument is that although the essential principles derived from the Aboriginal understanding of treaty federalism, and guiding Aboriginal quests for self-government on that basis, appear highly incompatible with Canadian principles of federal statehood, affinities can be found by looking more broadly at the entire heritage of European federal thought. To demonstrate this, a comparative examination of one of the most important early-modern theories of federalism is undertaken in the next section. To make the point more clearly, however, a brief overview of the incompatibilities between Aboriginal and British North American concepts of federalism is presented first (see table presented later in this paper).

The tree symbol emphasizes holistic concepts of nature and society. The *Constitution Act, 1867* focuses mainly on the division of powers within a hierarchical system of legal authority. The provinces, for example, `own' natural resources. Land ownership and private property further stand as an expression of individualistic entitlement against the communal and covenanted exercise of collective land use among Aboriginal peoples. The *Canadian Charter of Rights and Freedoms* of 1982 particularly reinforces Aboriginal suspicions that claims of individual protection within and outside Aboriginal communities might undermine any possibility of returning to ─ however modified ─ forms of traditional self-government.

The circle symbol emphasizes process-oriented and co-ordinated political decision making with the overriding goal of achieving consensus. Canadian parliamentary principles are based on majority rule and party competition. Status legitimacy (on the basis of elected office) appears more important than process legitimacy (on the basis of communicated like-mindedness between constituency and elected member). In the federal-provincial as well as the inter-provincial arena, the political process is characterized by the assertion of concurrent powers. First ministers conferences, on the other hand, do in fact represent some form of a circle of communication, and they also operate largely on the basis of consensus. Again, however, this consensus requirement is driven more by legal constraints and considerations of political expediency than by a common will to come to one mind. The outcome typically is a deal at the level of the lowest common denominator. First minsters conferences have therefore lost much of their legitimacy in recent years. Increasingly, they fail to connect people with the issues at stake. They are also seen as representative only of some interests but not others.

The two row symbol emphasizes autonomy and reciprocity within a social compact that has to be renewed through a perpetual process of consensus building. Members of the compact are regarded as complete social entities with a full range of powers and responsibilities, even though the necessity and usefulness of mutually agreed limitations to the exercise of these powers are recognized. The Canadian Constitution focuses far more on the supremacy and unity of the sovereign state and on the final regulation of general citizenship. Compact theories, acknowledging provincial consensus requirements in changing the conditions of federation, generally are not recognized as having any legal foundation.

Provinces have been constructed as only partially autonomous legal entities with constitutionally enumerated powers and responsibilities. Legal interpretation and political practice may have given them *de facto* sovereign status within their respective jurisdictional spheres, but that status is still far away from a renewable compact among equal partners. Efforts to rewrite Canadian constitutional history as originating in such a compact[liii] are possible only on the basis of very limited evidence. In the interests and understanding of Aboriginal-Canadian relations, they are perhaps possible and surely desirable, but they are hardly in line with dominant constitutional thinking.

The chain, finally, in summing up all these principles of confederated community, may have represented to Aboriginal peoples the open-endedness of their plural life worlds. What appears linked by the chain are horizontal partnerships on the basis of equality and autonomy. Contrary to English perceptions, the silver chain probably did not symbolize to the Iroquois Confederacy, or to any other Aboriginal community, a need to distinguish between qualitatively different types of relationships. The Great Law is therefore not different qualitatively from the law of nations. Canadian federalism, on the other hand, recognizes federal-provincial relations at least in part as a vertical partnership with a final chain of command defined exclusively by state law.

Early-Modern Concepts of Federalism

Historical Context

There is a decidedly differentiated development of political theory and institutional practice between the Anglo-Saxon and continental European worlds that is often overlooked by efforts to describe and interpret this development in linear and universal terms. At the danger of gross

simplification, yet for the sake of instructive clarification, two developmental lines can be drawn.

On one hand, there is a *corporativist* tradition, in fact an older line of development, from the Diets and Estates in early-modern continental Europe and their need to arrive at political decisions through consensus and coalition, down to the modern practice of multi-party government and proportional parliamentary representation. On the other hand, there is an *individualist* tradition, and in fact a later line of development, from the nascent English parliamentary system and its reflection of society organized on the basis of contractual utility, down to the modern practice of government and opposition in majoritarian parliamentary democracy.

In a modern world characterized by increasingly universal social and political value systems, the clear distinction between these two traditions obviously has become blurred, but it can still be recognized: the relative weakness of regionalist and issue movements in England and in English-speaking North America may find at least partial explanation in a more deeply rooted political culture of liberal individualism. That individualist culture may in turn explain the often dumbfounded reactions of English Canada to the emotionally charged collectivist sentiments of Francophone Quebec.[liv]

A revival of such sentiments ─ communitarian, regionalist and/or ethno-nationalist ─ can be observed almost everywhere today. These particularisms may be inspired not all by a desire to renew traditional forms of community life. More typically, they may constitute collective outbursts of frustrated protest, of banding together individual aspirations in a world where the universal promise of individual liberty and opportunity sounds increasingly hollow. But the fact remains that the collective memory of belonging together has somehow spawned their protest and action.

The dividing lines between the individualist and corporativist traditions thus remain inevitably blurred in the transitional world at the end of the twentieth century. In the transitional world of early-modern Europe, however, they can be discerned with much more clarity, and it is therefore here that a historical as well as a conceptual clarification can be more successful. Looking at France, England and Germany as cases of early-modern state and society formation, it will become clear that the European tradition of social and political organization has been far from linear and universal.

France

At the end of the sixteenth century, French political institutions remained characterized by a plurality of powers and institutions.[lv]

The three estates ─ clergy, nobles and propertied commoners ─ could be convoked upon royal summons as the Estates-Generals. When the last Estates-General was dissolved in 1614, it seemed clear that the French monarchy had begun to assert its central authority over all others but at the same time could not revoke existing privileges and rights. The regional *parliaments* held extensive judicial and regulatory powers. The some eleven hundred members of these parliaments, the so-called *noblesse de robe*, constituted a powerful counterforce to the king. Then, there were still some autonomous provincial assemblies or *états provinciaux* endowed with important governmental functions even though declining in numbers and importance. Finally, there was a maze of contractual arrangements between the monarchy and its various component units, provinces, cities, guilds and other groupings, all receiving certain liberties and privileges in exchange for faithful submission to the king.

Religion was a particularly dividing factor among rival factions of aristocratic families. These families wanted to exercise a dominant influence on king and court. They did not, however, fight primarily for fundamental changes in society or politics. In fact it has been argued that the traditions of aristocratic and monarchical society emerged unbroken, even confirmed, at the end of the century of the Renaissance and the Reformation.[lvi] The new individualism and its economic dynamic had not ─ yet ─ reached the political process. Political power remained divided. The outcome of half a century of religious warfare (1562-1598) was not a new order, but reaffirmation of the status quo.

Bodin's theory of indivisible sovereignty[lvii] was therefore bold, in that it anticipated a degree of centralization that did not yet exist in reality, but it also failed to explain that reality. Bodin sought to subordinate the plural feudal and aristocratic forces ─ which could not be ignored ─ as merely administrative branches under a centralized system of sovereign rule ─ which clearly they were not. His famous postulate of indivisible, perpetual and absolute sovereign power remained, for the time being, a theoretical construct only.

In other words, there existed in France not only a basic duality between the monarchy and its ruling elites, but also and more important, a plurality of rule among its various territorial as well as social units. Not until the reign of Louis XIV (1643-1715) would this maze of power

configurations shift significantly toward royal power and central administration alone, but even then it seems evident that such administration was rather incomplete and in fact remained so until the Jacobin reorganization of the state in the wake of the French Revolution.

England

Across the Channel, the institutional set-up was markedly different. In political conflict and economic competition with the dominant Catholic powers, France and Spain, the English Reformation and Elizabethan foreign policy combined to forge the growth of national unity. Religion, at this point at least, was not a dividing force but a unifying one, with the monarch as the sovereign of both the country and the church. At the same time, opposition to royal supremacy was growing in Parliament, already the only significant and central institution of representation.

The singular importance of Parliament is significant for further institutional development. Those sitting in it were not representatives of social factions and groupings, estates, guilds or classes, but "leading notables from the shires and boroughs who claim...to represent the interests of the queen's realm" and who were "united by their common religious persuasion, legal doctrines, and opposition to the court and the king."[lviii] Such unity of class, ideology and strategy, particularly alongside religious toleration and strengthened notions of individualism, favoured the introduction of the majority principle, which by the mid-seventeenth century became the dominant mode of decision making in Parliament.[lix] A devastating civil war (1642-1646) broke out nonetheless, but the underlying causes were not the same as those of the religious wars in France.

Religion had become the rallying point for a much more fundamental transformation of politics and society. The Puritan revolution was carried forward in the name of "religion, liberty and property."[lx] Economic modernization and the first stirrings of industrial capitalism divided old and new interests. In the civil war, Parliament was supported mainly by the economically advanced south and east, while the king's support was based mainly on economically backward areas in the north and west. Social standing and traditional family rivalry as the primary causes of instability were replaced by `political alignment'. In seventeenth-century England, the socio-economic transformation had caught up with the political system.

Under the Puritan banner, the forces of a more individualized economic dynamic fought

against the king and his party as the representatives of the old order. Instead of being disputed as illegitimate within a fragmented and dual society, the claim for royal absolutism was transferred eventually to Parliament as the new carrier of sovereign power. The majority principle became the stabilizing device of organization among economic and political interests that no longer saw themselves as fundamentally divided in traditional circles of kinship, community allegiance and power.

These were nonetheless times of terrible insecurity, instability and socio-economic hardship, and it was the civil war that inspired Thomas Hobbes' theory of absolute and unlimited power.[lxi] His theory was not nearly as bold an anticipation of political history as Bodin's, but it was a rational deduction of the signs of the time as they must have appeared to him. Consequently, and indeed in anticipation of the new kind of party strife no longer restrained by traditional allegiances, Hobbes did not build the old units of social organization into his system as decentralized and subordinate units of administration. Instead, he wanted to see them eradicated altogether, dissolved into a society of radically autonomous individuals.

Hobbes defined the liberal space left to the individual under the governance of the Leviathan, as well as what that space was mainly for from that point on: in all actions not regulated or "praetermitted" by the law, men have the "Liberty, of doing what their own reasons shall suggest, for the most profitable to themselves." What needs to be understood, though, is why he could assert, in the same breath, that this liberty was not inconsistent at all with the "unlimited power of the sovereign" and that, moreover, it was not "the Libertie of Particular men; but the Libertie of the Common-wealth."[lxii]

That commonwealth, from then on and increasingly, was conceptualized as a realm of homogenized bourgeois interests. What the Leviathan established was a dominant ideology of market relations. And because all those whose interests the liberal state would now protect wanted the same, thought the same, and acted in the name of the same interests, majority decisions by a body of representatives with absolute powers became acceptable.

Germany

The case of Germany is different and instructive yet again. As part of the Holy Roman Empire, the German territories had remained a loosely connected plurality of principalities, duchies, bishoprics and fiefdoms with multiple and overlapping powers and competencies. The

overarching powers of the Empire were too weak and fragmented to achieve territorial consolidation when this began to happen in France or England. Instead, the idea of territorial sovereignty became internalized by the smaller units, principalities and duchies. The Reformation confirmed and consolidated this formation of parcellized territorial absolutism when the Treaty of Augsburg (1555) gave each ruler the power to determine the official religion in his territory as well (*cuius regio, eius religio*). Until Napoleon finally dissolved it formally in 1804, the Empire remained a loose confederation of highly autonomous territorial units. While this strengthened the variety and richness of German culture, it also led to political instability and conflict.

A particularly revealing case may be that of Emden, the northern German city and sea port. Located in the German province of Eastern Frisia, at the very edge of the Empire but in close proximity to the Netherlands, Emden was fighting a vivacious battle against the absolutist aspirations of its provincial rulers during the early decades of the seventeenth century. This fight was motivated and driven by two principal factors, religion and the economy.

On one hand, Emden was a Calvinist town, whereas the ruling house of Eastern Frisia was Lutheran. The conflict was therefore one between the count of Eastern Frisia and his right, according to the Augsburg peace treaty, to determine the religious question in his province, and the Calvinist city council of Emden.[lxiii] On the other hand, Emden was at the time one of the richest ports in all of Europe. The conflict here was about taxation. To transform his province into a modern territorial state, the count of Eastern Frisia wanted and needed the taxes of his wealthiest subjects. The burghers, however, wanted to establish Emden as a free imperial city with fiscal, economic and political autonomy.

At the height of this conflict, the city council of Emden hired a radical political Calvinist as the new city syndic. He was a professor of law who had just published a voluminous book on politics. Having barely arrived in Emden, he led the city into various battles with its provincial rulers, including the storming of the provincial chancellery, the imprisonment of the count in his own residence, and finally the city's refusal to pay homage to its provincial lord until the oath of allegiance was changed from a unilateral promise of obedience to a mutual contract in which the city's obligations only followed those of the count. The name of this combative defender of city rights was Johannes Althusius, and his book on politics was the famous *Politica Methodice Digesta*, one of the most widely read books of the time, with numerous revised and enlarged

editions between 1603 and 1617.[lxiv]

A Political Theory of Societal Federalism

In his book, Althusius defended the old order of overlapping and multiple political autonomy against the rise of territorial absolutism, and especially against Bodin's definition of sovereignty as absolute, indivisible and perpetual. This defence would not be particularly remarkable, and would hardly explain the tremendous success of Althusius' book at the time, had it been only a conservative defence of old privileges and particular structures. What made Althusius a true revolutionary, however, was the way he defended this old order: in a radical postulation of local and regional, religious and socio-economic autonomy, he constructed a political system in which the essence of politics is social co-ordination, not the hierarchical exercise of power, and sovereignty belongs collectively to the organized body of the entire people.

It is not surprising that Althusius was welcomed eagerly by all those engaged in battles of survival against the new territorial forces of absolutism. It is also not surprising that Althusius' book was received with unrestrained disdain by the new territorial rulers during the age of absolutism.[lxv] Althusius was soon forgotten and only `rediscovered', toward the end of the nineteenth century, by a German professor of corporativist law, Otto von Gierke, who presented Althusius' theory as a federalist alternative to the centralism of German state law. In the twentieth century, Althusius has remained for the most part an obscure point of reference, mostly among scholars of federalism. In the English language, Carl Joachim Friedrich provided an excellent introduction to his 1932 edition of the original Latin text of Althusius' *Politica*, and Fred Carney translated the text into English.[lxvi]

In an age still defined as a Hobbesian world of individualism, hierarchy, the commercial war of all against all, and, above all, the reduction of the `political' to `power', Althusius provided an important alternative in social and political thought. It is an alternative that has never been removed entirely from European social thought, and it is this alternative that can link European to Aboriginal concepts of social organization and governance.

Johannes Althusius (1557-1638) was a professor of law and a political Calvinist. He taught at the University of Herborn in Germany, a school founded for the education of reformed `federal theologists'. The main idea behind federal theology was the survival and protection of Calvinist minorities within the universal Christian church. Other than in the hierarchical and

unitary construction of Catholicism, Christian unity was seen as based on co-equal pluralism of different sects and groupings.

The conceptual starting point was a reciprocal `covenant' established between God and the twelve tribes of Israel in the Old Testament. Political Calvinists deduced from it a second covenant between people and rulers: because both ruler and people are directly responsible to their common Creator, both have to control each other's allegiance to the laws and spirit of the covenant. This in turn requires that the people, in order to perform their part of the task, have to be organized appropriately, and this organization is seen as based on a federal compact similar to that among the Jewish tribes.

At Herborn, Althusius taught and defended political Calvinism. Because the Second Table of the Decalogue (Commandments 6-10) pertains to social justice, he not only reiterated the conventional Reformed doctrine that a just social organization is part of the divine plan, but essentially affirmed that people are responsible themselves for establishing and maintaining such organization. Therefore, that part of theology and the Decalogue pertaining to social justice had to be secularized in a new doctrine of politics establishing the inherent popular right of self-organization and control over legitimate governance. In 1603 Althusius published the first edition of his political theory; a year later he was hired as syndic by the city of Emden.

The *Politica Methodice Digesta* of Althusius is a normative political theory based on secular political law yet firmly grounded in a realistic analysis of its time.[lxvii] It is grounded in the ethical concept of `living together' in social groups that Althusius literally calls *symbiosis* (I.1).[lxviii] These social groups are called "consociations", and they are held together by a social "pact" (*pactum, foedus, confederatio*; I.2; XVII.41-42; XXVIII.23). This pact is not a Hobbesian social contract establishing legitimate government; instead it establishes the fundamental principles of organized social life in autonomous political communities and the co-ordinated relationship among these communities. It is, in other words, the federal bond of a compound polity.

The composition of that polity is characterized by consecutive steps of confederation, proceeding from the smallest units ─ families and professional guilds ─ to cities and provinces and, finally, to the universal consociation or realm. As a system of multi-tiered confederation, the universal consociation comprises both territorial and functional/social units. Professional-occupational interests are represented in the councils of cities and provinces, and

the latter are the representative members of the universal councils of the realm. The organizational link is that each unity is governed by the elected and delegated representatives of all lower units in a consecutive chain of indirect council representation. It is indirect and confederal because, contrary to federal practice, there is no direct popular representation. Only the lower units are represented at each level of consociation, not the individuals themselves.

This confederal construction of the body politic went far beyond medieval or contemporary practice. Participants in the old order were only those guilds and estates that constituted the `weightier' part of society or had been granted privileged status by the emperor. Althusius, on the other hand, systematically included all groups and consociations of social life whose productive contributions appear "necessary and useful" for society as a whole (I.7-8). For example, explicitly and against the common practice of the time, he included peasants as a separate political order (IV.24-30), and he insisted that all members of the universal consociation must have seat and voice in the universal councils (XXXIII.4-14). He could therefore rightly call this universal realm a "commonwealth or "united body of the entire people" (*republica et populus in corpus unum*, IX.3).

The most important characteristic of this construction was the limit placed upon the purposes of the universal `state' by the interests of its parts. Althusius was aware, of course, that the expansion of trade and commerce required large-scale territorial regulations, and that this was the new task that the universal consociation now had to take on (XXXII.1). But in his theory this task always remain tied to the "necessary and useful" in the organized social life of symbiotic communities. The smaller consociations always retained residual powers and relinquished to the larger consociation what they considered necessary. The `state' could never become the central focus of politics. It always remained a limited end-point of autonomous community life.

The autonomy of groups in a confederated polity can be maintained only if the process of policy formation is based on consensus. Althusius emphasized that majority decisions can be taken only when all are affected in the same way, and that mutual consent must prevail otherwise.

Principles of Social Organization

The life and work of Althusius were positioned at a critical time of transition from the old

medieval plurality of rule to the modern territorial state. For this new state, Bodin and Hobbes wrote theories of absolute sovereignty. Half a century before Althusius, Bodin still tried to incorporate the existing plural world of guilds and estates into the new scheme of centralized supreme authority, by stripping them of all autonomous rights of self-governance but assigning to them the role of intermediate carriers of delegated administrative power. Half a century after Althusius, Hobbes would theoretically dissolve all intermediate group existence altogether. Nothing would stand between radically atomized individuals and the constraining authority of the sovereign state. In between, Althusius could no longer ignore the rising powers of territorial statehood, but his theoretical attempt was to preserve the autonomy of the smaller social and territorial entities, by constitutionalizing them into a confederal system of co-operation and co-ordination.

He did so by conceptualizing essential elements of the old order into a modernized context:

- The idea of a *symbiosis* of all natural, civil, public and political group life became the foundation for a confederal organization of society.
- The main operational principle of that organization was a permanent process of *mutual communication* or *communion*, not to be understood in the modern sense of exchanging news and messages, but as a social process of sharing and consensus building.
- Against nascent notions of competitive individual accumulation and maximization of self-interest, he defined the ultimate goal of community life as a state of self-sufficiency or *autarchy*.
- And in recognition of the new complexity of relations in large territorial contexts of social, commercial and political interdependence, he formulated principles of *confederation* as the organizational linkage between all social entities, from family and kinship to professional colleges and guilds, cities, provinces, and finally even among various universal realms.

Symbiosis

Althusius characterized social life at all levels of a political community as symbiotic. Symbiosis in the first place means simply `living together', but Althusius went much further than that. By defining politics as the "art of consociating men for the purpose of establishing, cultivating and

conserving social life among them" (I.1), he in fact postulated the conceptual identity of politics and symbiosis. In other words, symbiosis does not circumscribe simply a natural or even an accidental form of living together, but a far more specific political quality of living together. Similar to the natural symbiosis in animal and plant life, this quality can be defined as a form of political organization that recognizes the mutual dependency of those living together without, however, denying or abrogating their individual integrity and autonomy.

Like other thinkers of the time, Althusius began by reflecting on the state of nature. Because man is born destitute and helpless (I.4), some form of social organization is necessary for the establishment and maintenance of a good and useful existence. Other than in the later Hobbesian construction, however, the observation of this necessity does not lead to the pessimistic formulation of social life as a war of all against all that has to be contained hierarchically by a powerful Leviathan. Instead, Althusius postulated the necessity of symbiosis, a natural inclination to live together in social harmony and with shared obligations.

The organization of that symbiosis was not to be based simply on traditional forms of social life, nor could it be sustained by a simple act of faith in some higher, god-given order. Althusius stated explicitly that "God willed to train and teach men not by angels, but by men."[lxix] In the first place, this is an obvious reference to his insistence on the right to interpret the Second Table of the Decalogue, pertaining to social justice, as a political scientist. In the same vein, it is an assertion of the secularized nature of social organization. That organization is part of the divine plan, to be sure, but as an obligation to self-organization among men, not as a plan simply handed down. Hence there can also be no ruler with a divine right to interpret what the people's social plan should be. It is a task that the people must accomplish themselves.

The question that then arises, of course, is who `the people' are. In the older literature and practice, it was generally assumed that `the people' included, as dual counterpart to the ruler, only those who had *de facto* status as the weightier part. People's political rights in medieval cities, for example, typically extended only to the major guilds, important patrician families, etc. By contrast, Althusius included all orders of social life because they all contribute to the common good, even if they are of different social status and their contributions of varying quality:

> God distributed his gifts unevenly among men. He did not give all things to one person, but some to one and some to others, so that you have need for my gifts, and I for yours. And so was born, as it were, the need for communicating necessary and useful things, which communication was not possible except in

> social and political life... For if each did not need the aid of others, what would society be? What would reason and humanity be?...
>
> These causes have built villages, established cities, founded academic institutions, and united by civil unity and society a diversity of farmers, craftsmen, labourers, builders, soldiers, merchants, learned and unlearned men as so many members of the same body. Consequently, while some persons provided for others, and some received from others what they themselves lacked, all came together into a certain public body that we call the commonwealth, and by mutual aid devoted themselves to the general good and welfare of this body. (I.26-27)

The Aristotelian spirit of this passage is undeniable. But once again, Althusius went much further than simply affirming the social and political rights of those who happened to have them on the basis of existing citizen status and privileges. Everyone is systematically included because everyone's contributions are needed. The next question is, therefore, how can everyone be included when the old order would be determined by the power of those alone possessing citizen status?

Althusius logically concluded that "the efficient cause of political association is consent and agreement among the communicating citizens."[lxx] Symbiosis emerges from this covenanted social life because everyone's participation is assured on the basis of principles of what is equal and fair.[lxxi]

This celebration of the theory and practice of communal social life did not lead Althusius to the assumption that self-determination on the basis of consent renders governance superfluous. On the contrary, he insisted from the very beginning that governance is a necessary part of living together in harmony, and that "all government is held together by imperium and subjection" (I.12). Nor can it be denied that he held rather traditional views about who is destined to rule and who is destined to be ruled, and that these views were affirmed in particular by a "natural" distinction between men and women (I.12). Further, he asserted that the happiest state of affairs is when "the consensus and will of the rulers and subjects is the same" (I.12), and this might well be seen as a traditional and conservative recourse to the social status quo.

However, this last conclusion turns out to be deceiving. Consensus about traditional subordination had been based on the unquestioned acceptance of the institutionalized status quo. What Althusius suggested instead is that it has to be based on a political process of consensus building. What he was talking about is the creation of political legitimacy through that process, not political legitimacy based on unquestioned acceptance of the institutionalized (or

constitutionalized!) status quo. The medium of that process is perpetual communication.

Communication

What makes Althusius so different from most other political theorists of the time, and especially from Bodin and Hobbes, is precisely his emphasis on politics as a process of community building. For Hobbes, the cause of civil war was insecurity about who possessed ultimate power, king or parliament. His institutional solution was to advocate that the ultimate power be concentrated in one hand. Political process played only a momentary and transient role in his construction of social stability: when atomized individuals somehow agree to a social contract that transfers their individual powers to that one sovereign, once and for all. Hence, social compact and government contract are collapsed into one.

For Althusius, that is not the essence of politics at all. The primary purpose of political organization is not the creation of governance but of civil society. By the "bond of a consociating and uniting pact", the symbiotic members of a society "communicate among themselves whatever is appropriate...".[lxxii] This communication is circumscribed more precisely as a "common enterprise" that

> involves things, services, and common rights by which the numerous and various needs of each and every symbiote are supplied, the self-sufficiency and mutuality of life and human society are achieved, and social life is established and conserved. (I.7)

Althusius goes on to describe at length the communication of things and services as the common and mutual sharing of whatever is necessary and useful. Especially at the level of the city, which appeared to him as a microcosm of social order, Althusius elaborated on the common use of fields, forests and water as well as on the collective operation of granaries, mines, etc., as the communication of things. The communication of services includes all public duties as well as private obligations. While public duties include more or less all administrative tasks in the community, private obligations extend to all those industrial, commercial and agricultural occupations that are necessary and useful for social life and that are therefore subject to communal regulation. In all cases, however, such regulation is based on "consent and covenant" (VI.17-35).

In other words, what Althusius meant by "communication of things and services" was neither just a moral appeal to social sharing nor a residual category of public welfare functions. It

was an all-encompassing system of social organization because, as he never tired of explaining, even the most private task, from education in the family to ploughing the field, contains at least some element of public relevance, is therefore *political*, and must therefore be, at least potentially, open to public regulation.

This encompassing vision of social organization, with its emphasis of common property and mutual obligation, has sometimes been seen as the foundation of a `collectivist' or `corporativist' state and society.[lxxiii] This is a misunderstanding. First, Althusius did not know about the distinction between private and public in modern states and markets. Precisely because there was no omnipotent sovereign state (yet), communal property could not be constructed as a regime of centrally planned and administered *state* collectivism. Perhaps, and in line with the overall character of social life at the time, one could see the communication of things and service as co-operative self-management of natural and human resources.

Second, from a modern perspective, looking back it would appear that Althusius in fact came much closer to a description ─ and prescription ─ of reality than the modern myth of a strict separation of public and private. The ideological quarrel about regulated versus free markets, for example, is in reality far more a quarrel about different regimes of market regulation, social or private. And it can hardly be denied any longer that even the private sphere of family life and child rearing requires some degree of political control in the common public interest.

From this follows that the communication of rights is primarily a horizontal process of self-organization as well. For Althusius, the establishment of lawful government and a civil code of legally binding behaviour did not immediately require the creation of some higher order of authority. Rightful governance instead was simply the regulatory part of the general process of communication, sharing and social self-organization.

This was a significant departure from that main current in western political thought that tends to separate social life and political rule in hierarchical fashion. This separation begins with Plato's creation of a guardian class, which is first introduced as merely part of a functional division of labour but is then suddenly elevated to a higher and qualitatively different status of rulership. And it is nowhere more pronounced than in Hegel's postulation of the state as a superimposed and superelevated entity comprising the "whole truth" of social existence.

For Althusius, the communication and administration of rights were not only generically

equal to the communication of things and services, they were in fact the dependent servant of these latter and primary societal functions. Their main purpose was precisely to regulate the communication of things and services (I.10) among the members of each consociation and among the various consociations within a compound polity.

The specific rules of administration differ from consociation to consociation "according as the nature of each consociation is seen to require, or as may be agreed upon and established among the members."[lxxiv] In other words, while there is obviously a general commitment to order and governance among all members of a commonwealth, the specifics are left to internal self-regulation within each consociation. Similarly, when Althusius discussed the character of governance and law at the universal level of consociation, he likewise distinguished between the general right of sovereignty,[lxxv] which is accepted as the universal "bond that holds the commonwealth together", and the specific "civil law" establishing rules for the procurement of life's necessities. In the modernizing world that Althusius recognized as the challenge of his time, such rules pertained mainly to trade and commerce (XI.1-4). However, and in line with his earlier assertion of the principle of self-regulation, the universal authority to establish such rules extended only to whatever the members of the commonwealth have agreed upon. "Such is the nature of the contractual mandate."[lxxvi]

Particularly in his exemplary discussion and description of the "universal councils of the realm" (XXXIII), Althusius gave an account of the nature of the political process: all organized groups of social life participate, all have seat and vote at the council, the primary purpose is the mutual communication of opinion and preference, all consociational groups establish their opinion through prior meetings among themselves, and their combined votes at the council always prevail over that of the presiding officer or supreme magistrate of the realm, "for greater is the power and authority in the many than in the one who has been constituted by the many and is less than they are."[lxxvii]

This is only one of many passages in which Althusius affirmed, mainly against the political theory of Bodin,[lxxviii] that the right of sovereignty belongs to the organized body of the people. *How* the people are organized is discussed below. In the context of the process of communication, however, the question arises of how the sovereign will of the people can manifest itself in such a way as to leave intact the integrity and the right of self-determination of each group or consociation. This is the question of consensus versus majority rule.

In pre-modern or traditional societies, decisions were typically made on the basis of unanimity and consensus. Or, if consensus could not be reached, the participant parties either agreed not to agree or war broke out. At the beginning of the modern epoch, the majority principle gradually began to dominate as the main decision-making mode. But when society was deeply divided, as in the case of the parliamentary and court factions during the English Civil War, majority voting did not result in political stability. It was mainly for that reason that Thomas Hobbes created the image of a Leviathan. Decisions could be made with final authority. More important, the Leviathan would provide and enforce a civil religion or dominant ideology whose purpose was to reduce the degree of segmentation in society. From then on, as the new dominant bourgeois classes began to develop their self-understanding as one of equality based on individual liberalism, liberal ideology would increasingly accept the majority principle as the legitimate mode of political decision making.

In his attempt to preserve and constitutionally balance the old segmented order of social group life, Althusius obviously had to go the other way. Consensus had to remain the essential mode of making decisions. Nevertheless, he could not overlook the fact that within the new complexity of social and especially commercial life, an increasing reliance on majority voting had become inevitable. How would he attempt to reconcile these two opposing principles of political organization?

His solution is as ingenious as it is simple. At the lower level of consociational life, he insists that consensus must prevail. In the professional guild or college, unanimity is required in all matters common to all "one by one" or as individuals. "What touches all, ought also to be approved by all."[lxxix] Decision making in city councils is based generally on the majority principle.[lxxx] However, Althusius provides three qualifications. First, a majority should decide only after a full process of consultation. Second, if a matter is of particular concern for a dissenting minority, a second round of hearings, discussion and voting should be provided. And third, once again, in matters affecting all as individuals, consensus must prevail. The same set of provisions is repeated for the provincial level (VIII. 65-70). Finally, at the level of the universal consociation, Althusius once again cites the venerable Roman Law principle, but he reinterprets it in a somewhat different way: "What touches all, ought to acted upon by all."[lxxxi] What this means here is that all should have access to universal councils as the ultimate decision-making authority, but not that unanimity must prevail. Decisions are regularly made by the majority.

Thus, while the principle of consensus and unanimity is upheld as the first requirement of establishing and maintaining community or consociation, it appears that the majority principle becomes more and more acceptable as society progresses from simple and small communities to larger territorial organizations. The rationale for this acceptance lies in Althusius' organization of political society as a federal progression from the small and specific to the large and general. In other words, on the basis of such organization, decisions at the lower consociational level indeed pertain more likely to the material regulation of what affects individual members "one by one". At the upper levels of consociation, on the other hand, decisions typically pertain to the general regulation of principles of communication common to all as a collectivity.

Legislation at the level of the universal consociation or commonwealth is framework legislation that does not infringe upon the specific rights retained by each lower-level consociation according to its needs and preferences. In fact, the basis for that general legislation or "fundamental law of the realm" is "nothing other than certain covenants by which many cities and provinces come together and agree to establish and defend one and the same commonwealth...".[lxxxii] This means that all *residual powers* are retained by the members of a commonwealth or confederation. According to a principle of *subsidiarity*, the regulation of social life is always in the hands of the lowest possible level of organization. The universal or central government enacts only such legislation as serves the purpose of general peace, security and welfare, which are common to all as a collectivity and can therefore be decided by majority vote.

Before taking a final look at the overall construction of the Althusian commonwealth as a confederation, the quality and purpose of community life must be outlined. What ultimate principle allows a peaceful living together in horizontal partnership rather than in a system of hierarchically organized supremacy and subordination? Althusius suggests self-sufficiency or *autarchy* instead of aggrandizement and greed and the wisdom of political negotiation rather than constitutional rigidity.

Autarchy

The communion or communication of rights is established as the "law of consociation and symbiosis."[lxxxiii] It consists of a common and mutual pledge to "self-sufficiency or autarchy, good order and discipline."[lxxxiv] The principle of self-sufficiency is not an ecological commitment to scarce resources, even though scarcity was a well-known condition of life in the early modern

epoch. Instead, self-sufficiency or autarchy is first a principle that establishes the mutual right of existence under scarce conditions. Second, it is the guarantor of communal autonomy.

Since mutual peace and harmony require a certain degree of social fairness[lxxxv] among all, one obviously cannot achieve these goals while at the same raiding one's neighbour's supplies or even while legitimately amassing more than one's own needs to the detriment of others. Hence it is clear for Althusius that only a regime of self-sufficiency can lead to autonomy or self-determination. In the city, the general communication of rights as a regime of self-sufficiency becomes the precondition for the autonomous establishment of its own statutes and "administration of its own matters" (VI.43). Similar arguments are repeated for all levels of consociation.

The question arises once again of how it is possible for various communities, cities and provinces to retain their statutory autonomy and at the same time be engaged in the perpetual process of mutual sharing that is the basis of all symbiosis and consociation (IX.30). First of all, Althusius points out that while different legal regulations may indeed be adopted under varying circumstances, they should nevertheless always be consistent with a basic moral code inherent in natural law (X.8). This means that even the most complete set of communal autonomies cannot be detached entirely from some common and binding code, because this would destroy the very fundament on which that autonomy depends nevertheless. Autonomy, in other words, is a dialectical relationship, not an absolute given.

Once again, of course, the establishment of good order, discipline and governance arises from the common consent that constitutes the content and interpretation of the common code of conduct. In a passage that is truly singular within the history of western political thought, and long before Rousseau or other modern champions of popular sovereignty, Althusius establishes, once and for all, the principles of popular self-determination:

> ...the use and ownership of [the right of sovereignty] belong...to the members of the realm jointly. By their common consent, they are able to establish and set in order matters pertaining to it. And what they have once set in order is to be maintained and followed, *unless something else pleases the common will*.[lxxxvi] For as the whole body is related to the individual citizen...so the people rules each citizen. (IX.18)

This right of sovereignty is not absolute or supreme, because the organized body of the people is itself bound by the moral limits of natural law. And those limits are determined through the very

process of communication among autonomous members. In another exemplary formulation, Althusius anticipates the Kantian categorical imperative of reciprocal moral conduct in a civil society:

> ...it should be the judgment of the supreme legislator that whatever we wish men to do to us, we should do those things to them.[lxxxvii]

Such judgement is not written in constitutional stone. As the reference to the changing common or general will indicates (IX.18), it can be found and preserved only through a permanent process of review and renewal. This is the purpose of the councils to be held periodically. Althusius calls this the communication of counsel (XVII.55-60).

Confederation

It should be clear by now that the universal consociation is a compound political organization. In this consociation,

> many cities and provinces obligate themselves to hold, organize, use, and defend...the right of realm in the mutual communication of things and services...
>
> Whence this mixed society, constituted partly from private, natural, necessary, and voluntary societies, partly from public societies, is called a universal consociation. It is a polity in the fullest sense, ...[the] people united in one body by the agreement of many symbiotic consociations and particular bodies, and brought together under one right. For families, cities, and provinces existed by nature prior to realms, and gave birth to them. (IX.1-3)

The process of `bringing together' the many member units in one body and under one right is accomplished by a progression of similar steps. Family heads go out and establish professional guilds by common consent. Guild representatives constitute city councils (Althusius also explicitly includes towns and rural areas). The orders and estates of the land (which include cities, but also noble, ecclesiastical and peasant orders) represent provinces. Finally, cities and provinces, represented by those estates of the realm entrusted with their mandate, make up the universal consociation. This is an indirect chain of representation, with the representatives of each lower level of consociation constituting the legislative body of the next higher level. What this means is that there is no direct individual representation at the universal level of confederation. In modern terminology, federal government would be a monocameral council of the provinces, not a parliament.

Since that supreme legislature is held by the "fundamental law of the realm" (XIX.49) to

observe and maintain those pacts and agreements that led to confederation in the first place, it is clear that central or confederal legislation is limited to a general framework of regulation facilitating universal communication but leaving most material regulation to the residual powers of lower-level consociations. In this sense, Althusius can say that "the less the power of those who rule, the more secure and stable the imperium remains."[lxxxviii] The point here is not that Althusius would not recognize how a modernizing world of increasing interdependence requires increasingly regulated channels of interaction; it is that he is attempting to square the old world with the new one by retaining as much social life as possible as horizontal partnership instead of dissolving it into vertical lines of power.

In the same vein, Althusius insists on a provincial right of secession (VIII.92 and XXXVIII.76). Having very much in mind the current Dutch revolt against Spain, he affirms that one part of the realm can abandon the remaining one when the fundamental laws under which it agreed to confederation in the first place are constantly violated.

The idea of confederation in the political theory of Althusius departs significantly from the modern theory of federalism, even though the Althusian construction of universal consociation is also more than just a league of nations with limited purpose of interaction and commitment.

On one hand, Althusius insists that the civil law of a commonwealth is distinct from the law of nations, as something specific that establishes the bond of living together (XI.2). On the other hand, he affirms that the law of nations is one of the authorities superior to even the highest authority in the commonwealth (XVIII.96).

Clearly, Althusius sees the project of universal civil society as one that does not stop at borders or boundaries of nation and nationality. The process of communication is open-ended. One particular commonwealth can enter into a symbiotic relationship with another (XVII.24-31), by forming a complete or partial confederation. It is true that all this is conceptualized within a world that Althusius still sees as united by a Christian bond ─ even though the conflicts between the new Christian factions are precisely one of the reasons leading to the entire idea of symbiosis through communication among autonomous members. But in principle, an extension to that world is at least implicitly thinkable, if only the general fundamental laws of consociation can be found that allow for the mutual exchange of things, services and rights for the benefit of all.

Relevance to and Main Affinities with Aboriginal Concepts

What Althusius describes as the social background of a confederal system of political organization is for the most part nothing other than the practice of the time. This alone leads to the perhaps surprising realization that there are indeed striking similarities between traditional Aboriginal and pre-modern European forms of social life and political organization. This realization may indeed allow the conclusion that traditional forms of social organization are in fact universal or natural, and that departure from these forms is based on historically specific modes of socio-economic production as well as political organization. More concretely, it is my suggestion that European societies departed from traditional and universal forms of social organization when a new form of economic production, market capitalism, required a new and corresponding form of political organization, the centralized nation-state.

What establishes Althusius as a social philosopher of timeless importance and magnitude, however, is that he succeeded in transforming the described practice of time into a general theory of society and politics that constitutes a timeless alternative to market capitalism and the nation-state. Or, at least, that is the yardstick by which his theory must be judged: can we get from his theory more than just a systematized view of a time long gone? Can we indeed gain a better understanding of our own time? Can we even be led to the conceptualization of some alternatives capable of reforming our social and political organizations that are more compatible with Aboriginal visions of community and more consistent with the Aboriginal right of self-government?

In my view, all these questions can be answered in the affirmative, albeit with due caution: the purpose of this comparative inquiry is not a linear attempt to resurrect models of the past as solutions for the future. I do believe, however, that the political theory of Althusius provides a reservoir of ideas and models, far from having "exhausted their critical and constructive potential." The recourse to the history of political ideas in this sense serves to "enlist... alliance"[lxxxix] for a project of socio-political rethinking. Such rethinking has become a paramount task in accommodating the legitimate Aboriginal quest for autonomy and self-government. It may well also be a task that is generally becoming inevitable in a world characterized increasingly by global interdependence, multicultural segmentation, a secular trend toward worldwide migration and displacement, and a similar secular trend toward decline in the legitimacy attached to the venerable eighteenth- and nineteenth-century models of state and

market.

Concepts and Metaphors

Aboriginal People	**Althusius**	***Constitution Act, 1867***
1. The Tree	**Symbiosis** holistic mutualist covenanted	**The State** individualistic legalistic
2. The Circle	**Communication** co-ordinated process-oriented consensus-based	**Administration** majority rule concurrent powers
3. The Two Rows	**Autarchy** autonomy reciprocity renewal	**Supremacy** sovereignty final regulation
4. The Chain	**Confederation** open-ended horizontal partnership law of nations	**Federalism** vertical partnership state law

Even a cursory and schematic overview will establish the major affinities between basic Aboriginal concepts of social organization and the Althusian model.

The relevance of that affinity for the present efforts of Aboriginal peoples to overcome their status of dependence and relative deprivation lies first in the fact that the Althusian model is not just some distant theory. Rather it is the conceptualization of a theoretical and practical alternative that still existed at the beginning of the modern epoch. As an alternative, elements of the Althusian model remained relevant in European society far into the nineteenth century. Theoretically, perhaps, the importance and relevance of communitarian, decentralized and autonomous social organization had become first neglected and then denied, early on by the age of absolutism and later by the `enlightened' rationality of those who set out to build large territorial states and markets. In practice, however, near-complete societal absorption into modern states and markets could succeed only in the wake of the Industrial Revolution and its technological innovations, mass communication, mass production and mass transportation. Only then, as is sadly known, in the latter part of the nineteenth century, did the Canadian state begin

its final and most devastating onslaught against Aboriginal peoples.

The relevance of the Althusian model lies, secondly, in the fact that although the communitarian tradition of de-centred social organization has nearly been forgotten, it has by no means been lost entirely. Theoretically, the ideas of social organization on the basis of socio-economic co-operation and mutual help have lived on in the works of theorists like Pierre-Joseph Proudhon and Peter Kropotkin.[xc] In practice, co-operative and self-help organizations have always accompanied state and market organization as a social corrective and necessary corollary. Today, there seems to be a renewed interest in communitarian forms of organized social solidarity that reach far beyond the Aboriginal agenda. Here, in my view, lies the greatest potential of societal transformation, through a historical chance of forming alliances with like-minded social groups and constituencies. Affinities and practical co-operation between Aboriginal peoples and ecological movements hardly need mentioning any longer. Another potential ally can be discerned in many feminist groups that emphasize a holistic rather than a linear understanding of the self and society. More generally, there seems to be a growing reservoir of people who for various reasons appear alienated by the established political process. In Canada as elsewhere, these people constitute a huge potential membership for movements and alliances for social renewal.

Third, the Althusian model can help to remind us of the fact that the Aboriginal idea of `treaty federalism' is not at all alien to the European tradition from which Canadian federalism emerged. Translated into the jargon of modern political science, a `treaty' relationship means essentially that the political, social and economic relations among sovereign nations are based on diplomatic agreements between the governments of these nations, not on majority decisions based on the demographic weight that each nation possesses. There is no central government but only negotiated and contractual agreement *among* governments.

But the use of the term `treaty federalism' appears to indicate that something more is at stake than purely diplomatic relations among sovereign nations. The existence of a particular type of political union, confederation or alliance seems to be acknowledged, perhaps simply out of the pragmatic recognition of living within the confines of essentially the same land and resources. Within such a union, then, `treaty federalism' may indicate that decisions affecting the vital interests of one particular member of that union cannot be made without the consent of that member, and that such a member has a right to withdraw from that union if such decisions are

made nevertheless. In this sense, the Aboriginal peoples' insistence on `treaty federalism' as the sole basis of their relationship with Canada might aim at something that is not entirely different from the *de facto* relationship between Ottawa and the provinces, which has also been characterized as quasi-diplomatic in nature.[xci]

However, the crucial difference would be that the political status of Aboriginal peoples within such a union or `confederacy' would not be defined by a central constitution ─ let alone a constitution written and implemented without Aboriginal consent. Instead, it would have to be redefined and rewritten as some form of `sovereignty-association', acknowledging both the autonomy of Aboriginal peoples in determining their own affairs and the unique historical, geographical and, probably, socio-economic relationship with Canadian society.

These efforts to come to a more operational understanding what treaty federalism could actually mean in the future relations of Aboriginal peoples and Canada still sound excruciatingly vague. However, they may help at least to begin a search for common ground.

Canada and Aboriginal Self-Government: Is There Common Ground?

Althusius in the Context of the Western Federal Tradition

Before proceeding to assess more practically the common ground that may exist between Aboriginal and Canadian visions of co-existence, it is necessary to point out how deeply the Althusian model of federalism has been buried under modern federalism in theory and practice. Althusius has remained a somewhat obscure figure in the history of federalist thought to date. In early modern Europe, before the rise of the centralized territorial nation-state, his observations may have been almost self-evident. Today, the suggestion that the world of federal states in general, and Canada in particular, is ready to adopt Althusian principles of federal (or rather, con-federal) reorganization would elicit only silvery laughter among the currently dominant experts and practitioners of federalism. It is nevertheless my suggestion that although Althusian principles appear to be buried deep indeed, they may not have been thrown out or dismissed entirely.

There is a wide gap between theory and practice in modern federalism. Most scholarly definitions, and even some constitutional documents, continue to insist that federalism is based on `mutual sharing' of what is common, that the member units of federations have a right to decide autonomously everything they consider to be in their own best interests, and that the

central or federal government cannot in fact legislate anything affecting these interests without members' consent. In practice, federal states have developed quite differently. The best example is the United States of America. There, the Tenth Amendment established early on that the states would retain all powers not given explicitly to the federal government (*residual* or *states' rights*). Nevertheless, constitutional practice and especially Supreme Court decisions gradually gave more and more importance to the *supremacy clause* (Article 6, 2) of the Constitution, which basically empowers the federal government to legislate in whatever area it may define as in the national interest. As a result, and for all practical purposes, states' rights exist today only by the federal government's `permissiveness', that is, when it does not want to legislate in a particular area and therefore leaves it, or gives it back, to the states.[xcii] Mostly and more recently, this has been the case when the issue at hand is controversial (e.g., abortion) or costs too much money (e.g., welfare).

The same erosion of states' rights has happened in most other modern federal states. In Germany, for example, the provinces or Laender have a constitutionally guaranteed right to co-determination of all important legislation affecting their interests. Representatives of the Laender governments sit in the upper chamber of the federal legislature (the Bundesrat, or Federal Council), and all important legislation has to be passed by that chamber as well as by the lower and parliamentary one (the Bundestag). Constitutional changes require a two-thirds majority in both houses. One would think that this provision would ensure that existential Laender interests could not be overruled. Reality and practice are a different story once again, however. Germany has a very centralized party system, and there are few highly conflictual regional issues because of the relative homogeneity of German society;[xciii] as a result, members of the Bundesrat have typically voted along party lines rather than what might have been real Laender interests. The Bundesrat has become a second chamber of national party competition instead of a chamber defending regional interests. In other words, a process of `federal encroachment' has taken place, again leaving to the Laender parliaments little of substance.[xciv]

Or take a look at Switzerland, which is usually regarded as an exemplary model of decentralized federalism and democracy. The constitution of 1848, modelled closely on the American one, does indeed grant considerable autonomous rights to the provinces, or cantons, and municipalities. Perhaps best known is the fact that it is municipalities, not the federal government, that first grant citizenship to newcomers and immigrants. Moreover, practically all

important legislative decisions in the federal legislature have to be put before the people in referendums in which approval depends on a considerable cantonal majority (50 per cent of the votes in at least half the cantons in the case of constitutional change, for example). Legislation can also be initiated, altered or repealed when a sufficient number of people sign up to demand a referendum on a particular issue. Again, what looks like a formidable model of democratic confederation does not quite hold up in practice. One reason is that Swiss legislators do not receive substantial remuneration for their public service, which is considered honourary. As a consequence, they typically accept multiple and well paid memberships on the boards of the country's large and powerful corporations as soon as they get elected. Therefore, they often represent the same corporate interests, not the people's interests, at both levels of government. (Swiss politicians are also allowed to serve simultaneously at two or even all three levels of government.) Finally, there is also considerable evidence that the financial power of large organized business interests dominates and manipulates the referendums as well.[xcv]

Canada is different at least in one significant way. By contrast with the U.S. Constitution, the *Constitution Act, 1867* originally went the opposite way, by giving the residual powers to the federal government, not the provinces. In other words, the provinces received only those powers enumerated and granted explicitly to them; all others, and especially all new ones, would fall automatically to the federal government. Nevertheless, Canada appears to be the only one among the classical federal states that has become more decentralized than centralized over time. This has to do with the peculiar quality of the powers given to the provinces, especially with regard to the ownership of natural resources. Because the extraction and the export of natural resources have remained among Canada's most important economic activities, these powers have not diminished over time, as the fathers of Confederation may have assumed, but increased instead. This has posed a particular problem for Aboriginal peoples because the political space that is most important to their quest for self-government ─ land and resources ─ is already and firmly occupied by the provincial order of government and jealously defended against all intrusions from whatever direction. More than anywhere else, therefore, it seems that Aboriginal peoples in Canada are caught between a rock and a hard place. The infamous first ministers conferences that have so aroused the ire of all those they leave out, including Aboriginal peoples, are in fact and to a large degree attempts to reach compromises among governments and their vested interests, not among people and their communities.

The Althusian model of organized politics, with its emphasis on mutual sharing, respect for local autonomy, and a political process of communication and compromise rather than formalized procedures of majority rule, obviously has not been a very dominant or lasting influence on federalism in practice. There is generally a huge discrepancy between federalism as a social philosophy and federalism as politics. Althusius' concern was first and foremost the establishment of federalism as a socio-political process of living together in peace and harmony. The delegates he envisaged sitting at the councils of the various levels of government represented their communities, not their governments. There was little or no notion of a superior state order with abstract goals and strategies (*reason of state*), only a strong sense of organized co-operation among highly autonomous communities for the limited purpose of jointly providing the necessities of life ─ goods, services, rights, stability and security ─ that small communities could not provide alone. Politics was not a constitutionally formalized routine that, once established, could hardly be altered, but a perpetual process of consideration, compromise and reconsideration. Such a process is not very far from the Aboriginal insistence on treaty federalism and its perpetual renewal through negotiations among autonomous peoples.

But it would seem that an appeal to Althusian principles of political co-existence among autonomous peoples cannot not carry very far in today's political reality. There is generally a rather conspicuous void in federalist theory. To most political scientists, as well as practitioners, federalism today has come to mean not much more than `intergovernmental relations', a mechanism of organizing the political process under a given constitutional order, or of changing that order according to the requirements of political expediency and conflict regulation, but it rarely means a quest for principles and visions of a good life that still would have to be found ─ or rediscovered. The field is dominated, in other words, mostly by a conformist and status quo-oriented rather than a critical or utopian understanding of federalism. However, there are several reasons why an appeal to give critical or Althusian federalism more room for consideration in theory and practice might be successful.

First of all, as demonstrated not least by the outcome of the Charlottetown referendum, Aboriginal peoples are by no means the only ones who are tired of conformist federalism the usual way. Pointing loudly to the discrepancies between lofty federalist principles that everyone would want to agree to and the political realities of Canadian federalism, and pointing further to the affinities between Aboriginal notions of treaty federalism and the former, might go a long

way toward creating a more constructive debate. It might also lead to strategic alliances among all kinds of frustrated Canadian constituents perhaps unaware of these discrepancies. Other than the populist rhetoric of the Reform Party and the like, which attempts to confuse the critical distance between Canada the good and Canada the real, such a strategy might result in something quite different: a popular rather than populist appeal to reason and compromise over the heads and vested interests of governments and parties. Existing alliances over ecological issues between Aboriginal peoples and environmental groups, for example, might build broader momentum for political change, instead of remaining fragmented from issue to issue, forest to forest.

Second, any attempt to recover the more general and socio-philosophical principles of federalism from beneath their rather narrow and unimaginative application within the confines of BNA Act federalism, U.S. federalism, or any of the other established federalisms might also broaden a debate often driven by considerable degrees of parochialism. This may even be particularly so in Canada, where the only reference point is often the United States.[xcvi] There is a wide world of quasi-federal political arrangements outside the classical federal states and their bureaucratically entrenched intergovernmental routines, a world that can be appreciated only when federalism is understood as a broad principle of socio-political organization, not just as a narrow constitutional model. In the European Community, for example, the recent Maastricht Treaty created a new level of political `union' among member states, which surely continue to see themselves as fully sovereign nations nevertheless.[xcvii] Or consider Spain, where a new and democratic constitution was adopted in 1978 that allowed for different and asymmetrical political status among the seventeen newly created Autonomous Communities. Moreover, these communities or provinces could decide for themselves, at least in principle and up to certain practical limits, what kind of autonomy packages they wanted to obtain.[xcviii]

In light of all this, the narrow comparative focus on Althusius in this study has been deliberate for two reasons: on one hand, I wanted to point out that the major obstacle to satisfactory accommodation of inherent Aboriginal rights to self-government in Canada may not be so much federalism as a broad socio-philosophical principle, but its narrow practical organization within the Canadian state. On the other hand, I wanted to show more generally how the history of the modern nation-state stands as the main obstacle between Aboriginal and earlier western concepts of political organization. At the beginning of the seventeenth century, Althusius

could still point credibly to the viability of alternative models that the modern state had already begun to destroy. The recourse to Althusius may be justified in so far as we may be now, at the close of the twentieth century, at a point when the nation-state is showing signs of fatigue and such alternatives are beginning to appear more credible and attractive once again. Since Aboriginal peoples never developed, nor would have been allowed to develop had they ever wanted to, such modern concepts of statehood, their thinking is obviously closer to the alternatives Althusius suggested.

As a student of comparative politics in theory and practice, I cannot end this study without at least attempting to show where I see common ground for practical solutions. But I want to repeat what I stated at the outset, that under no circumstances do I intend to prescribe how Aboriginal peoples should organize their forms of self-government once they have gained full autonomy to do so. It is the obligation of the Canadian state and society to provide for that autonomy. It will be the privilege of Aboriginal peoples to organize or rather re-establish those forms of self-government they alone consider appropriate. Mine are merely suggestions.

However, these suggestions do contain several presumptions: that it will not be possible to bring about peaceful and co-operative co-existence among Aboriginal peoples and the Canadian people without taking into consideration that they now have to live together in a rather crowded space; that this is product of a colonial history that can and must be criticized as unjust for Aboriginal peoples but cannot be undone entirely; that it may be impossible, therefore, to reconstruct a fully sovereign form of Aboriginal self-government ─ no government in the world is fully sovereign any more; and that, finally, because of this inescapable interdependence, the need for mutual agreements on certain common universal standards of social and political conduct may be inevitable.

Communication

It seems to me that what Althusius and Aboriginal peoples have in common more than anything else is that they both emphasize sovereignty as a political process rather than a legal end product. In my limited understanding of the history of Aboriginal peoples it appears to me that they were always willing to make compromises among themselves and with other peoples as long as their sovereignty and pride as a people were not compromised in the process. In other words, they were always willing to enter the dialogue and to open themselves generously to the point of view

of the other side, so long as they did not have to do so from an inferior position of domination and dependency. It is up to the Canadian state once again to provide for conditions of equality in all future treaty relations with Aboriginal peoples. Those conditions can be obtained only when and if all Canadian governments acknowledge unconditionally the inherent right to self-government of Aboriginal peoples. The treaties concluded between Aboriginal peoples and the Crown or its successor, the Canadian state, to my mind constitute a powerful *political* reminder that Aboriginal peoples have a right of self-determination like any other people. It is less important whether they also contain a *legal* basis for Aboriginal sovereignty. As Althusius said at the outset of his inquiry into the nature of politics, it is a matter of *politics* to determine the sources and ownership of sovereignty. The task of *jurisprudence* is only to interpret the laws following from this political act.

As far the future of treaty relations between Aboriginal peoples and Canadian governments are concerned, it would be helpful to understand them not as final contractual settlements but as a continuing process of communication. In Anglo-Saxon law, there is a tendency to see every legal settlement as a precedent for all settlements to follow. In Roman law, on the other hand, there is a tendency to prescribe everything in universal codes regardless of circumstances. In dealing with a plurality of Aboriginal peoples, the Canadian state has to come to the recognition that both models fail to accommodate the diversity of paths leading to Aboriginal self-determination. Again, as Althusius suggested, each political community ought to be governed by the specific laws and customs addressing its needs for what is necessary and useful.

Communication also means listening. The politics of states has always been conducted by secret diplomacy and deals behind closed doors. That the Canadian political process has become too secretive and distant from the people it is supposed to serve has been recognized increasingly by large segments of the population. It seems absolutely paramount that the chosen representatives of Aboriginal peoples gain access to that process ─ not through a few token seats in a Canadian Senate, no matter how revamped, but through regular and automatic access to all political processes that may result in decisions affecting Aboriginal interests. The point here once again is not to include formal Aboriginal representation with seats and votes in the Canadian political process. As sovereign peoples, Aboriginal peoples have no need and, for the most part, no desire to meddle in Canadian affairs. The point is primarily one of communication,

information and openness. As long as the scope and dimension of Aboriginal self-government have not been determined satisfactorily, however, an Aboriginal veto over all decisions concerning land and resources ought to be recognized.

The greatest obstacle to a satisfactory settlement of Aboriginal issues in Canada in my view is ignorance. To be sure, there are powerful corporate interests that do not want to leave the last bits of land and resources to Aboriginal self-determination, and there are, at least in part of the country, segments of the working population supporting these corporate interests because they are worried about their jobs and incomes. On the whole, however, it seems that a majority of Canadians has never been more supportive of the Aboriginal cause than now. What is needed, it seems, is a massive public relations and education campaign extending and solidifying that support.

A whole new generation of school children has begun to teach their parents about recycling and environmental protection in general. But these same school children are rarely if ever taught about the holistic principles of Aboriginal life and its environmentalist approach to nature. Canadians in general seem to get media exposure to Aboriginal issues only when the situation has become confrontational, as at Oka or on the logging roads of British Columbia. One of the reasons for this surely is the domination of Canadian media by dominant socio-economic interests. Another is perhaps that Aboriginal peoples and their leaders have traditionally been silent about their way of life.[xcix] Maybe there is a historic chance to promote the Aboriginal way of life more aggressively now, when so many Canadians seem prepared to look for alternatives themselves. In Europe, nothing has contributed more to overcoming the traditional ignorance and hatred between the German and French nations than the city partnerships and exchanges of school classes set up after the Second World War. Communication is primarily a matter among people, not their politicians.

However, Canadian politicians have to change as well. Perhaps they should be invited to visit and observe Aboriginal council meetings. As far back as 1758, witnesses to such meetings were impressed by the fact that Aboriginal leaders "did not, nor I suppose never do speak, two at a time, nor interfere in the least one with another that way in all their Councils, as has been observed."[c] Canadians would surely welcome politicians' exposure to an alternative style of political communication at a time when they appear increasingly frustrated and turned off by self-serving and grandstanding performances in Canadian legislatures. At the same time,

information about the Aboriginal style of conducting political business would also disseminate knowledge about and understanding of its content.

Institutional Flexibility

The current Minister of Indian and Northern Affairs, Ron Irwin, said recently that full Aboriginal self-government would probably have to be negotiated individually with every single band across the country. Recognition of the plurality of Aboriginal life has come a long way indeed. What I cannot see as yet, however, is a recognition that such negotiations also would have to go beyond the traditional institutional models of state and society. It seems feasible that Aboriginal peoples could eventually obtain full provincial status, if they so desired, and perhaps a con-federal arrangement acknowledging Aboriginal peoples as sovereign communities is no longer entirely out of reach either. What is far from clear, on the other hand, is what kind of institutional links might accommodate and secure Aboriginal rights within what obviously will remain a Canadian state and society.

What I have in mind here is not to question that Aboriginal peoples would have every right to become as sovereign as they want to be. It is to raise the question of what kinds of institutional arrangements might serve best their material and existential needs and aspirations, as territorial and demographic minorities in an interdependent socio-economic context. Take the experience of the European Community, for example. At its inception in the 1950s, there was considerable resistance in the smaller countries, such as Belgium, Luxembourg and the Netherlands, to establishing supranational or common political institutions. These countries feared that their vital interests would be drowned under the majority power of the large states and their populations. For much the same reason, countries like Britain, Ireland and Norway did not join at the time. Now, some thirty-five years later, most in those smaller countries would agree that EC membership has been beneficial overall. On one hand, participation in a large and open market has promoted growth, even if most of that growth may have gone to countries and regions already advantaged to begin with. On the other hand, the most persuasive argument has been that smaller countries cannot avoid being influenced by neighbouring larger ones in any case, and that it is better to have at least some formalized right of co-determination over the affairs of the Community than to remain in splendid isolation. One country after another joined the Community for that reason.

The quest for Aboriginal self-government, of course, points in the opposite direction, aiming at release from centuries of colonial domination and oppression. The European nation-states by contrast decided on the basis of self-determination to give up some their sovereignty for the sake of other, predominantly economic, goals. By the same token, Aboriginal peoples must first be released into a status of complete political freedom before they can choose, on the basis of self-determination, what kinds of political arrangements, treaties or federal unions they might want to conclude with Canada. However, as the Kantian saying goes, "what may be true in theory does not necessarily apply in practice". In practice, it seems that the processes of gaining Aboriginal sovereignty and self-government and organizing modes of political accommodation and, inevitably, co-operation with Canada can hardly be disentangled cleanly into a sequence of two separate steps. Consequently, some consideration must be given to the possible scope and dimensions of such accommodation and co-operation early in the process.

The European tradition knows only two alternatives for organizing institutional links between two sovereign entities in theory: a federal state in which all sovereign powers are transferred to a new central authority; and a league of nations in which all powers remain with the member states and joint policies are developed for limited purposes only and on the basis of treaties and other contractual arrangements. Reality once again belies this either/or scenario. The European Community is neither a federal state ─ because member states have retained most of what they consider to be crucial political powers ─ nor a league of nations ─ because central institutions with far-reaching regulatory powers have been created on the basis of common standards of political, economic and social conduct. The new complexity and interdependence of the post-war European reality instead created a new type of political union, confederation, or community in which traditional boundaries of sovereignty and power allocation can hardly be discerned any longer.

This is once again a practical political development that Althusius' theory foreshadowed ─ mainly because it was simply still within the range of practical experience at the beginning of the seventeenth century. Althusius not only held firmly that any kind of commonwealth had to be constructed from self-sufficient smaller communities that would retain their autonomy and consent to common policies, he also suggested that several such commonwealths could eventually join in a larger confederation and that such a confederation could be either complete or partial according to the types of joint policies its members saw as necessary or useful. In this

sense, Althusius would have seen the relationship among Aboriginal and Canadian peoples as a kind of double confederation: Canada would continue its existence as a federal state, of course, even though Quebec might one day have a different and more autonomous relationship with the rest of the country; Aboriginal peoples might organize somewhere along the lines of the old Iroquois Confederacy, even though some might choose to remain outside such a confederacy and deal with Canada directly. Between these two major polities, treaties or accords would begin to be concluded for the joint regulation and administration of what is in the common interest of some or all.

Institutional arrangements would obviously have to be more complex than those in the two-tier federal state. The plurality of Aboriginal peoples would have to be accommodated by a plurality of political settings. On one hand, there might be a Canada-Aboriginal Council where both sides negotiate the overall guidelines of their relationship on the basis of mutual consent. On the other hand, one might think of a second tier of regional councils. There, particular regional issues would be negotiated among those directly involved: the federal government, one or several provinces, and Aboriginal communities in the area. A third tier could be established as well, focusing on direct interaction and collaboration among individual Aboriginal territories and neighbouring municipalities.

One particularly difficult issue is a satisfactory solution for `non-status Indians', Métis and Inuit. It is difficult because these Aboriginal groups are caught in no-man's land, so to speak. But the suggestion has already been made to allow for the creation of some sort of non-territorial Aboriginal status. They could be offered a choice of either becoming part of the Canadian political system, voting in local, provincial and national elections, for example, or registering for Aboriginal status on a voluntary basis. Thus non-territorial Aboriginal communities could be formed that would be able to govern themselves on the same basis as territorial ones. The idea is not as outlandish as it may sound. It was first developed in the context of the multicultural Austro-Hungarian monarchy around the turn of the century, it was tried out in practice for the German and Jewish minorities in Estonia between 1920 and 1945, and it was reintroduced in the 1970s in the Canadian debate about multilingual societies by the German-American political scientist and Althusius scholar Carl Joachim Friedrich.[ci] What he called "corporate federalism" ─ the creation of autonomous political constituencies on the basis of language, culture, or professional occupation rather than territory, co-operating within a federal system of government

with several levels ─ was of course nothing other than a modernized version of Althusius' political theory.

A final problem of institutional flexibility that needs mention at least ─ although its eventual resolution will be entirely up to Aboriginal peoples ─ is how Aboriginal self-government itself needs to be reinstituted and reorganized so that it can deal successfully with the ever more complex and interdependent issues of the future.

Without any prescriptive ambitions on my part, it seems to me that this will be a problem of traditionalism versus acculturation. According to a few conversations I was able to conduct with Aboriginal experts,[cii] the Aboriginal community is rather sharply divided today between those who insist that the elected band council administrations imposed on Aboriginal peoples under the *Indian Act* have no legitimacy and relevance to Aboriginal self-determination and those who have somehow come to accept it pragmatically as the way to get ahead under the circumstances. In some communities, it seems that pragmatism has led simply to the practice of routinely electing hereditary chiefs to band councils. In other communities, such as the Six Nations in particular, the division seems to have remained sharp and unreconciled. When full self-government comes, as it must, and the *Indian Act* has finally ceased to exist, it seems to me that the potential for conflict will remain between two sources of authority, one emerging from Aboriginal tradition, the other imposed through outside intervention, but both a reality nonetheless.

Perhaps I am wrong; perhaps the band councils will disappear effortlessly on the day the *Indian Act* is rescinded. If not, some reflections on how conflict can be avoided and Aboriginal self-government established in the most efficient and least divisive way possible may be in order. As a student of federalism and Althusius, what I have seen at Six Nations[ciii] has certainly struck me as containing possibilities for some kind of bicameral arrangement. This means that one might see the relationship between a band council and the chiefs' grand council as one that resembles the two legislative chambers in many federal systems. One would be a lower house, on the basis of the band council system, carrying out the day-to-day administrative work that has become inevitable in the modern world. The other would be an upper house, consisting of the chiefs' grand council.[civ] It would not only formulate and uphold the broad guidelines and traditional laws under which band council administration had to operate, it would also and in particular have a veto over all band council decisions affecting matters of culture and tradition.

And it would obviously be the grand council that concluded all further treaties and accords with Canadian governments.

Such an arrangement would be very much in line with Althusius, who distinguished clearly between a community's general and fundamental laws, which require the consent and support of all, and the special laws of practical administration, which can be left to majority decisions. At least some accounts of political practice in the Iroquois Confederacy seem to indicate that a division of labour, in internal as well as external matters, between the traditional circle of League sachems and other distinguished leaders was not uncommon in the past.[cv]

Autonomy and Universality

At the beginning of the seventeenth century, Althusius realized that the world he lived in had become too complex to oppose entirely the new universalism of trade and commerce and social and political interdependence. At the same time, he wanted to retain the local and regional autonomy of people living and working together in cities and rural communities. He therefore suggested a federal system of political organization in which the smaller communities would retain as much autonomy as possible and the larger union would be given as much power of universal regulation as had become necessary. However, this supreme power was not in the hands of a central state, but shared by all participants on the basis of mutual consent and exercised through the periodic convocation of "universal councils of the realm."[cvi]

It seems to me, and has been the underlying rationale for much of this comparative exercise, that Aboriginal peoples have in the past thought about autonomy and universality in a very similar way. The ancient Iroquois Confederacy certainly appears to provide historical evidence that its clan members realized that some sort of union on the basis of mutually agreeable principles of conduct was beneficial and necessary to all, and they seem to have been prepared, in principle, to construct similar types of unions with the European intruders. However, just as the Althusian communities soon began to fall under the hierarchical domination of the rising absolutist states, so did Aboriginal peoples suffer domination and oppression under the colonial administrations of those same states. The question is whether there is a way to construct a type of union or confederacy ─ or simply organized socio-political interaction ─ that does not diminish and erode the essential elements of Aboriginal sovereignty, yet provides a meaningful and efficient way of dealing with the problems of interdependent and overlapping

spheres of interest.

The fundamental principles of how to get there have already been outlined: recognition of Aboriginal sovereignty requires a flexible system of negotiation among autonomous and equal partners. In particular, the vital interests of Aboriginal communities cannot be out-voted by non-Aboriginal majorities. On this base of mutual agreement among equal partners, however, *some* commonalities and universal principles of conduct need to be established. Some of these principles would be of a very practical nature, concerning the free movement of persons and goods, for example, the joint construction of public infrastructure such as roads, border control, crime prevention and the like. These do not appear to be areas where agreement would be difficult to find.

A far more contentious issue is that of individual rights and freedoms. Canada is a very individualistic society. Aboriginal life appears far more embedded in a communitarian culture. The *Canadian Charter of Rights and Freedoms* is therefore and rightly rejected by many Aboriginal people for two reasons. One is that they were not participants ─ let alone equal participants ─ in its formulation. The other is that the Charter enshrines individualistic rights that obviously violate some of the basic principles of Aboriginal community life. Nevertheless, it is my contention that some binding principles of common rights have to be found. Otherwise the peaceful relationship between the two societies, living in close proximity on essentially the same land, would be permanently jeopardized by conflict, misunderstanding and mistrust. But such principles would have to go beyond the narrow formulation of individual rights, including, for example, social and community rights as well. Canada, in other words, would have to accept that liberal individualism is not the only way of constructing free, equitable and just societies.

Once more, a comparative look at the European Community may be instructive. There, a social charter and a so-called subsidiarity principle were adopted in the recent Maastricht Treaty.[cvii] The social charter basically establishes minimum standards of individual as well as regional living conditions. This might be an important consideration for Aboriginal peoples when it comes to the question of whether they want to join in some sort of union with Canada (which in my view is inevitable). The *Constitution Act, 1982* contains a clause committing all governments and legislatures in Canada to promoting equal opportunities, reducing social disparity and providing essential public services to all Canadians. A social charter negotiated between Canada and Aboriginal peoples certainly should extend a similar commitment to

Aboriginal peoples. At the same time, the subsidiarity principle as enshrined in the Maastricht Treaty stipulates that the regulation and administration of Community policy should be allocated at the lowest possible level. A similar provision in a future agreement on Aboriginal-Canadian relations would leave wide open the question of how to apply the general commitment to common principles of individual and social well-being to the customs and traditional practices of different communities.

Again, it seems to me that there is common ground for a satisfactory resolution of differences. What appears different to me is not the general acknowledgement that there should be minimum standards of individual dignity and social existence, equality of men and women, and the access of all to due process under the law. Instead it seems to be the particular and special ways in which each society may wish to realize and maintain such principles under different sets of laws that lead to conflict and misunderstanding. A political process of communication would once again help to develop mutual understanding of how the same ends can often be achieved by different means.

Obviously, even the most generous spirit of communication ─ one that the Canadian side would still have to develop ─ will not eradicate disagreement and conflict overnight. Some form of arbitration therefore needs to be found. The Supreme Court of Canada as the ultimate arbitrator between Canadian and Aboriginal interests would not be acceptable to Aboriginal peoples. But it could perhaps be extended by a confederal or union chamber with equal representation from both societies, not unlike the dispute settlement mechanism adopted in the North American Free Trade Agreement. Its basis for rendering judgements would not be the Canadian Constitution, of course, but the treaties and accords agreed upon and signed by Aboriginal peoples and Canada.

A Final Consideration

In the view of one competent observer, the idea of treaty federalism is really very simple:

> It means two sovereigns jointly occupying a territory. Each, being sovereign, is autonomous from the other. However, if action or undertaking by one is going to affect the other, then they `treat' about it. They negotiate a settlement or an understanding. In other words, the on-going relationship between the two is [based on] treaties and agreements. Both are equal. Neither dominates the other.[cviii]

All that is required, in this view, is for Canada to change its position from a federal to a con-federal one. It is a view very much in line with the political system Althusius set out to

describe at the beginning of the seventeenth century: based on the autonomy of its participants, on a perpetual political process, on communication, and on agreement on the basis of consent. As this paper tried to demonstrate, the Althusian view is not only very similar to Aboriginal thinking, it is also a European tradition, albeit an alternative one that became buried under an avalanche of statist and hierarchical political practice in the modern world of nation-states. As this paper also tried to show, significant segments within Canadian society today might be ready to rediscover this alternative European tradition. So what stands in the way of a truly con-federal reorganization of Canadian-Aboriginal relations?

The mandate for this paper was limited to a comparative exploration of principles of federalism and especially treaty federalism. Basic philosophical differences between Canadian society and Aboriginal peoples could be discussed, therefore, only in so far as they have a more or less direct impact on issues of federal/confederal political organization. But some consideration must be given to these differences because, in my view, they are the root cause standing in the way of a satisfactory solution.

As stated at the outset, modern federal states such as the United States, Switzerland, Germany and Canada are a product of nineteenth-century attempts to create national economies and markets. The creation of modern federalism in practice was for the most part a political compromise when resistance to a unitary organization of trade and commerce was too strong. The resulting federal states were not built upon Althusian principles of autonomy and self-sufficiency, but on expansion, unlimited economic growth and individual accumulation of wealth. That organization of trade and commerce is known as modern market capitalism: everything is up for individual grabs, nothing is whole or sacred,[cix] everything has a price (is `commodified'). The basic forms of human interaction are not communication and agreement but individual greed and contractual deals. To be sure, on this basis, a modern world has been built that has provided a better standard of (material!) living for more people than ever before. But in its relentless drive for ever more growth and accumulation, this modern world has also been mercilessly disrespectful of all alternative life worlds, to the point of ecological and social destruction, and it has defined all those who cannot or do not want to participate in this relentless drive as losers.

This is, in my opinion, what ultimately stands in the way of Aboriginal self-government on the basis of a treaty relationship among equals. Western society is dominated by a state of

mind that cannot "jointly occupy a territory". It wants to buy that territory, parcel it out and sell it to the highest bidder. The first and foremost task of any Commission trying to make suggestions for re-establishing the rights and principles of Aboriginal self-government, therefore, is probably not to find political formulae for institutionalized autonomy and co-operation, but to convince Canadians, at the level of political-economic elites as much as at the grassroots level, to withdraw from Aboriginal space, physically as well as spiritually.

In my view, Aboriginal self-government can happen only if an ideological transformation takes place in Canada. Canadian society and its leadership must be brought to realize that a plurality of autonomous social life forms is not impossible to organize and that it is not necessarily detrimental to Canadian interests. The purpose of this paper, in this sense, has been twofold: to show, first, that this ideological change would not mean accepting principles that are totally alien to western social thought and organization, but principles that have an old and venerable tradition in western society as well and, second, that Aboriginal peoples can count on more support today than ever before, because major segments of Canadian society are also tired of stereotypical political thinking in black and white, either/or, good or bad. The paper does not suggest that it is up to Aboriginal peoples to take the first step and once again accommodate their lives to a `Canadian way' ─ even a substantially revised one. For once, the process surely ought to be the other way 'round. But it seems to me that if Aboriginal peoples press the right kind of buttons now, by exploiting in their communications with Canadian governments arguments that underscore affinities and common ground, they might trigger the kind of reactions from the other side that they would like ─ and are entitled ─ to see.

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[i] See the latest version in Seymour Martin Lipset, *Continental Divide* (New York: Routledge, 1990).

[ii] I am of course cognizant of the fact that there are also Asian and African Canadians. However, for the sake of simplicity, I am taking for granted that the quest for self-government by Aboriginal peoples in Canada is confronted primarily with a dominant Euro-Canadian mode of political and constitutional thinking.

[iii] See Dan Smith, *The Seventh Fire* (Toronto: Key Porter, 1993), 62-63 and 88-89.

[iv] Mary A. Druke, "Iroquois Treaties", in *The History and Culture of Iroquois Diplomacy*, ed. Francis Jennings (Syracuse, New York: University of Syracuse Press, 1985), 89.

[v] See James Tully, "Multirow Federalism and the Charter", in *The Charter — Ten Years After*, ed. Phil Bryden, Stephen Davis and John Russell (Toronto: University of Toronto Press, 1992).

[vi] See Sharon Venne, "Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze", *Constitutional Forum* (1992); and Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination", *University of Toronto Faculty of Law Review* 44/1 (1986).

[vii] See the annotated treaty chronology in Jennings, *The History and Culture of Iroquois Diplomacy*, 158-208.

[viii] The practice of acquiring Aboriginal land through treaties as `real estate deals' may have developed only later. The colonial conviction about `possessing' the land as a divine right existed much earlier. Already in 1634, John Winthrop, leader of the New England Puritans, wrote to a friend in England: "[the local Aboriginal inhabitants] are neere all dead of the small Poxe, so as the Lord hathe cleared our title to what we possess." Quoted in Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Berkeley: University of California Press, 1988), 19.

[ix] See his submission to the Royal Commission on Aboriginal Peoples, "Affirming Treaty Federalism", 5 March 1993.

[x] It does matter, of course, as a point of historical accuracy: since their relationship was originally concluded with the Crown, Aboriginal peoples can justly claim that they had no part in the creation of the Canadian state. Technically, therefore, their immediate counterpart in treaty relations still is the Crown. Politically, however, they will have to wrestle self-government from the Canadian state, and the Crown will carefully abstain from interfering in that process.

[xi] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993).

[xii] See, among others, Henderson, "Affirming Treaty Federalism"; Purich, *Our Land*; Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (see bibliography).

[xiii] Daniel K. Richter, "Ordeals of the Longhouse: The Five Nations in Early American History", in *Beyond the Covenant Chain*, ed. Daniel K. Richter and James H. Merrell (Syracuse, New York: University of Syracuse Press, 1987), 21.

[xiv] See Richter, "Ordeals of the Longhouse", 22.

[xv] Conversation with Paul Williams, 23 August 1993.

[xvi] See Druke, "Iroquois Treaties".

[xvii] Francis Jennings, *The Ambiguous Iroquois Empire* (New York: Norton, 1984), 149.

[xviii] On this and the following, see Richard L. Haan, "Covenant and Consensus", in *Beyond the Covenant Chain*, ed. Daniel K. Richter and James H. Merrell (Syracuse, New York: University of Syracuse Press, 1987), 41-57.

[xix] Haan, "Covenant and Consensus", 43.

[xx] As Paul Williams has pointed out (conversation, 23 August 1993), the British dealing with the Iroquois were perfectly aware of the Iroquois understanding of the silver chain. In fact, many of them had been adopted into Iroquois culture. This understanding may have been enhanced by the fact that many of them were Irish or Scottish, not English, at a time when Britain's behaviour toward these cultural minorities was rather nasty. But, not only did these colonial intermediaries report to London, where their different interpretations then would dominate, but also, and in order to stabilize their own position in the colony, they would not hesitate to exploit their familiarity with Aboriginal thinking for personal gains of power and influence.

[xxi] See Tully, "Multirow Federalism and the Charter".

[xxii] Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993), 3-7 and 32-34.

[xxiii] *Royal Proclamation of 1763* as reprinted in *Documents of the Canadian Constitution 1759-1915* (Toronto: Oxford University Press, 1918), 20.

[xxiv] See Sarah Carter, *Lost Harvests* (Montreal: McGill-Queen's University Press, 1990).

[xxv] Johnston, "The Quest of the Six Nations Confederacy".

[xxvi] See in particular Smith, *The Seventh Fire*.

[xxvii] *Tekawennake* (11 August 1993), 1-2.

[xxviii] This discussion, as well as the following ones on the *Sparrow* case and the Royal Proclamation, follow largely from Boldt, *Surviving as Indians*, 30-39.

[xxix] Boldt, *Surviving as Indians*, 30-31.

[xxx] *The Queen* v. *Sparrow*, 3 May 1990.

[xxxi] For similar legal considerations, see also Boldt, *Surviving as Indians*, 71. Compare a somewhat different view in Delia Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada* (Kingston: Institute of Intergovernmental Relations, 1987), 26.

[xxxii] Royal Commission on Aboriginal Peoples, *Partners in Confederation*, 16-17.

[xxxiii] This and the following owe a lot to a study prepared for the Royal Commission research program by Paul Williams and Curtis Nelson, "The Kaswentha". References in this paper are to the August 1993 draft of that study.

[xxxiv] See Williams and Nelson, "The Kaswentha".

[xxxv] See Richter, "Ordeals of the Longhouse", 12.

[xxxvi] The reverse observation is of course possible as well. Consider, for example, how the government of Canada championed the worldwide battle against apartheid in South Africa while turning a blind eye to the often very similar conditions created for Aboriginal peoples under the reserve system and the *Indian Act*.

[xxxvii] Consider in this context the absurdity of neoconservative social positions today, demanding that individualized private market relations be the only guideline of social organization, yet deploring at the same time the decline of `traditional' family and group life.

[xxxviii] See William N. Fenton, "Structure, Continuity, and Change in the Process of Iroquois Treaty Making", in *The History and Culture of Iroquois Diplomacy*, ed. Francis Jennings (Syracuse, New York: University of Syracuse Press, 1985), 16-17; and Williams and Nelson, "The Kaswentha".

[xxxix] See Richter, "Ordeals of the Longhouse", 12-13.

[xl] See Williams and Nelson, "The Kaswentha".

[xli] For the following see Williams and Nelson, "The Kaswentha"; Johnston, "The Quest of the Six Nations Confederacy"; and Fenton, "Structure, Continuity, and Change in the Process of Iroquois Treaty Making", especially 13-16.

[xlii] One string is in fact longer, representing the special role of one of the Onondaga chiefs as firekeeper.

[xliii] See also Michael K. Foster, "Another Look at the Function of Wampum in Iroquois-White Councils", in *The History and Culture of Iroquois Diplomacy*, ed. Francis Jennings (Syracuse, New York: University of Syracuse Press, 1985), especially 103.

[xliv] The sixth nation, the Tuscarora, joined later and is not represented at the council.

[xlv] Paul Williams, in his review of the first draft of this paper.

[xlvi] Indeed, composition seems to have varied continuously from council to council. At one point, in early 1690, when a council was held about peace with the Ottawas and peace proposals by New France, as many as eighty chiefs were present, none of them apparently one of the traditional clan chiefs, and a delegation from Albany was treated as co-equal at the council. See Richter, "Ordeals of the Longhouse", 25-26.

[xlvii] Mohawks and Oneidas, nine; Onondagas, fourteen; Cayugas, eight; and Senecas, ten.

[xlviii] Williams and Nelson, "The Kaswentha".

[xlix] Leroy Little Bear, in his review of the first draft of this paper.

[l] Williams and Nelson, "The Kaswentha".

[li] On this whole issue, compare Druke, "Iroquois Treaties".

[lii] See Jennings, "Iroquois Alliances in American History", 58.

[liii] See Royal Commission, *Partners in Confederation*, 22-26.

[liv]This argument is not contradicted by the fact that large contingents of continental European immigrants make up `English Canada' today. These immigrants often came as victims of collectivist structures and regimes in Europe and therefore often endorsed individualist values with particular vigour and conviction.

[lv]The following section closely follows Reinhard Bendix, *Kings or People* (Berkeley: University of California Press, 1978), 290-330.

[lvi]H.R. Trevor-Roper, "The General Crisis of the Seventeenth Century", in *Crisis in Europe 1560-1660*, ed. Trevor Aston (London: Routledge & Kegan Paul, 1965), 62.

[lvii]Jean Bodin, *Six Livres de la République* (1576).

[lviii]Bodin, *Six Livres*, 326, 303.

[lix]See Christopher Hill, *The Century of Revolution 1603-1714* (New York: Norton, 1980), 150.

[lx]On this and the following see Hill, *The Century of Revolution*, 89-91 and 101-103.

[lxi]Thomas Hobbes, *Leviathan* (1651).

[lxii]Leviathan, XXI, 109-110 (original pagination).

[lxiii]The account of these events and conflicts in Emden is owed to Heinz Antholz, *Die politische Wirksamkeit des Johannes Althusius in Emden* (Cologne: Leer, 1954). Generally speaking, historical research on Althusius remains scarce. The few reliable sources and data available have been summarized in my own *Sozietaler Foederalismus: Die politische Theorie des Johannes Althusius* (Berlin: De Gruyter, 1991).

[lxiv]Johannes Althusius, *Politica Methodice Digesta atque exemplis sacris & profanis illustrata* (Herborn/Leiden: 1603, 1614, 1617). The most widely used edition is the one of 1614. An abbreviated English translation is available as Frederick S. Carney, *The Politics of Johannes Althusius* (London: Eyre & Spottiswoode, 1964). Following that translation, subsequent references are identified by Althusius' own enumeration in chapters (Roman numerals) and paragraphs (Arabic numerals).

[lxv]Otto von Gierke, *Althusius* (Aalen: Scientia, 1880/1958), 6-8.

[lxvi]Carl Joachim Friedrich, ed., *Politica Methodice Digesta of Johannes Althusius* (Cambridge, Massachusetts: Harvard University Press, 1932); Frederick S. Carney, ed., *The Politics of Johannes Althusius* (London: Eyre and Spottiswoode, 1964; Liberty Fund, 1993). For an English summary of the main arguments of my *Sozietaler Foederalismus* (Berlin: De Gruyter, 1991), see Thomas O. Hueglin, "Have We Studied the Wrong Authors? On the Relevance of Johannes Althusius", *Studies in Political Thought* 1/1 (1992), 75-93. The article also contains bibliographic references to other important discussions of Althusius.

[lxvii]The following is extracted from my "Have We Studied the Wrong Authors?", 81-87.

[lxviii]All citations are given in Althusius' own enumeration in chapters and paragraphs; translation from the Latin text usually follows that of Carney. Note, however, that Carney translates *consociatio* by `association'. I find this misleading because it suggests a liberal meaning of free associational life, which appears inconsistent with Althusius' notion of consociation as a political community form. Roughly, the difference is similar to Toennies' distinction between *Gemeinschaft* (consociation) and *Gesellschaft* (association).

[lxix]*Deus homines, non per Angelos, sed per homines instituere & docere voluit* (I.26).

[lxx]*[C]aussam efficientem consociationis politicae esse consensum & pactum civium communicantium* (I.29).

[lxxi]*[E]x aequo & bobo* (I.31).

[lxxii]*[V]inculo pacti conjuncti & consociati communicant de suis, quae...commode* (I.6).

[lxxiii]See especially Carl Joachim Friedrich's introduction to his 1932 edition of *Politica Methodice Digesta*.

[lxxiv]*[P]rout natura cujusque consociationis postulare videtur, vel inter symbioticos est conventum & constitutum* (I.21).

[lxxv]*[J]us majestatis* (see X.1-4).

[lxxvi]*[I]dque ex natura contractus mandati* (XIX.7).

[lxxvii]*[N]am major autoritas & potestas in multis, quam in uno, qui a multis illis est constitutus, issique minor* (XXXIII.20).

[lxxviii]See especially IX.12-27.

[lxxix]*[Q]uod omnes tangit, ab omnibus quoque approbari debet* (IV.20). This classical sentence from Roman law goes squarely against Lockean liberalism; see the discussion in III.4.

[lxxx]See V.62-64.

[lxxxi]*[Q]uod omnes tangit, ab omnibus etiam peragi aequm est* (XVII.60).

lxxxii*[Lex fundamentalis regni]...nihil aliud, quam pacta quaedam, sub quibus plures civitates & provinciae coierunt & consenserunt in unam eandemque Rempubl. habendam & defendam...* (XIX.49).

lxxxiii*[L]ex consociationis & symbiosis* (I.10).

lxxxivI.10.

lxxxv*[A]equabilitas* (VI. 47). What Althusius means here is similar to the Aristotelian notion of social stability *in the middle*, i.e., without too much wealth or poverty.

lxxxviEmphasis added: *nisi communi voluntate aliud placeat*.

lxxxvii*[Q]uaecunque volumus ut faciant nobis homines, haec & nos iisdem facere teneri ex summi legislatoris sententia* (IX.21, with a reference to Matthew 7:12).

lxxxviii*[Q]uo minor autem est potestas eorum qui imperant, eo dutius stabiliusque stat imperium* (XIX.8).

lxxxixThese formulations are borrowed from Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Massachusetts: MIT Press, 1992), 116.

xcSee Proudhon, *Du Principe Fédératif* (1863); and Kropotkin, *Mutual Aid* (1902). See also, albeit from a conservative perspective, Robert Nisbet, *The Social Philosophers* (New York: Washington Square Books, 1973), 179-206, where Althusius is lined up with Proudhon and Kropotkin as representatives of a social philosophy of "ecological community".

xciSee Richard Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1972).

xciiSee Michael D. Reagan and John G. Sanzone, *The New Federalism* (New York: Oxford University Press, 1981), especially 157-179.

xciiiThis has changed somewhat since reunification, when six former East German and largely impoverished Laender were added to the system.

xcivSee Tony Burkett, "The Ambivalent Role of the Bundesrat in the West German Federation", in *Federalism and Federation*, ed. Michael Burgess (London: Croom Helm, 1986), 205-219.

xcvThe literature on the Swiss political system is very scarce. See for example Hans Tschaeni, *Wer regiert die Schweiz?* (Munich: Piper, 1987).

xcviI am talking here about general political perceptions and levels of education/information, not about the Canadian scholarship in the field, which has made many excellent and lasting contributions.

xcviiSee Robert O. Keohane and Stanley Hoffmann, ed., *The New European Community* (Boulder, Colorado: Westview Press, 1991).

xcviiiSee Peter J. Donaghy and Michael T. Newton, *Spain: A Guide to Political and Economic Institutions* (Cambridge: Cambridge University Press, 1987).

xcixThis is the impression I got from a conversation with Delia Opekokew and from several visits to the Six Nations Reserve.

cQuoted from *An Account of the Life of That Ancient Servant of Jesus Christ, John Richardson* [London, 1758], in Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Berkeley: University of California Press, 1988), 37.

ciSee Carl J. Friedrich, "The Politics of Language and Corporate Federalism", in *Les États Multilingues, problèmes et solutions*, ed. Jean G. Savard and Richard Vigneault (Quebec City: Les Presses de l'Université Laval), 227-237.

ciiPaul Williams, Delia Opekokew, and various people at the Royal Commission on Aboriginal Peoples in Ottawa and the Six Nations Grand River Territory near Brantford in southern Ontario.

ciiiOne member of the band council administration told me that whatever the council decides is first passed on to the chiefs; if they do not object, mostly through their silence, the matter is then considered passed. Unfortunately, I did not have the opportunity to speak to one of the chiefs about this as well.

civTo avoid any misunderstanding here, it should be noted that the Canadian bicameral system is an anomaly among the major federations. In most federations, both chambers have equal powers; in the United States, the upper chamber or Senate is even more powerful. Only in Canada does the Senate as the upper chamber suffer from a chronic legitimacy and power deficit.

cvSee Richter, "Ordeals of the Longhouse", 16-24.

cviSee chapter XXXIII.

cviiFor a brief introduction and overview see G. Bruce Doern, *Europe Uniting: The EC Model and Canada's Constitutional Debate* (Toronto: C.D. Howe Institute, 1992).

[cviii] Leroy Little Bear, in his review of the first draft of this paper.

[cix] At the time, and with accurate powers of observation and anticipation, Karl Marx described that emerging modern society as one that would be characterized by "uninterrupted disturbance of all social conditions." The "need of a constantly expanding market" would lead to a human condition in which "all that is solid melts into air, all that is holy is profaned" (*Communist Manifesto*, 1848).