Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination

Brenda L. Gunn
University of Manitoba

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The settlement of the residential school system class action and the creation of the Truth and Reconciliation Commission of Canada have renewed discussions on the relationship between Indigenous peoples and the Crown as part of achieving reconciliation. This article argues that promoting reconciliation in Canada requires addressing the underlying issue that led to the residential school system: the unilateral imposition of colonial law with the goal of assimilating Indigenous peoples. The best way to prevent such actions in the future requires realizing Indigenous peoples right to self-determination. The U.N. Declaration, with its recognition of Indigenous peoples' right to self-determination, provides a framework that can be used to work toward reconciliation and reset the relationship between Indigenous peoples and the Crown.

Le règlement du recours collectif dans le dossier des pensionnats indiens et la création de la Commission de vérité et de réconciliation relative aux pensionnats indiens (CVR) du Canada ont ranimé les discussions sur la relation entre les peuples autochtones et l'État en vue d'une réconciliation. L'auteure avance que la promotion de la réconciliation au Canada exige la résolution des problèmes sous-jacents qui ont mené à la création du système de pensionnats indiens: l'imposition unilatérale par l'État de la loi coloniale dans le but d'assimilier les peuples autochtones. La meilleure façon d'empêcher que de telles situations se reproduisent est de comprendre le droit des peuples autochtones à l'autodétermination. La Déclaration des Nations Unies et sa reconnaissance du droit à l'autodétermination des peuples autochtones offre un cadre qui peut être utilisé pour arriver à la réconciliation et pour renouer la relation entre les peuples autochtones et l'État.
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Introduction

The settlement of the residential school system class action and the work of the Truth and Reconciliation Commission (TRC) have created another opportunity to have national conversations about reconciliation between Indigenous peoples and Canada. The TRC's work was to be "forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians" and thus opened space for dialogue (and, it was hoped, action) on resetting the relationship between Indigenous peoples and Canada. The promise of the TRC has yet to come to fruition as their work focused mostly on the telling of truth. This article argues that to move beyond the mere rhetoric of reconciliation, the underlying issue that led to the residential school system must be addressed: the unilateral imposition of colonial law which asserted control over Indigenous peoples against their will. This article argues that the process of realizing self-determination is a critical component of the path toward reconciliation because it addresses the

1. See the Residential School settlement website: <www.residentialschoolsettlement.ca/english_index.html>.
underlying causes of the residential school system by ensuring space for Indigenous peoples to regain control of and determine their own futures.

The TRC was not the first attempt at reconciliation in Canada’s history. Previous attempts have failed to undo the damage caused by colonial laws. For example, the recognition of Aboriginal and treaty rights in the Constitution failed to reset the relationship between Indigenous peoples and the Crown. The mandated negotiations to flesh out Indigenous peoples’ right to self-government failed to achieve clarity or consensus on the matter, leaving the courts great latitude to determine the extent of Indigenous peoples’ right to self-government.

Another widely known lost opportunity was the Report of the Royal Commission on Aboriginal Peoples, which made many recommendations to restructure the relationship between Indigenous peoples and the Crown. Despite the failure to implement the recommendations, the report remains an important resource for addressing foundational questions on the relationship between Indigenous peoples and Canada if considered in light of developments in international law in the last few decades regarding Indigenous peoples’ rights.

To move beyond rhetoric, we must take advantage of the opening for dialogue and action on reconciliation provided by the TRC to address the foundational questions of the relationship between Indigenous peoples and Canada. This article argues that reconciliation is not about integrating Indigenous people into the Canadian mainstream, but rather is an ongoing process: “the coming together of things that once were united but have been torn apart; a return to or recreation of the status quo ante, whether real or imagined.” Reconciliation in Canada should focus on enhancing a harmonious and cooperative relationship “based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.”

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This understanding of reconciliation requires returning to a relationship between Indigenous peoples and the Canadian state where Indigenous peoples determine their own futures. Realizing Indigenous peoples’ right to self-determination should be pursued in the spirit of partnership and mutual respect, not through unilateral state action.9

This article outlines key issues that should be addressed to work toward reconciliation using a framework of self-determination. The relationship between Indigenous peoples and Canada must be determined with reference not only to domestic law, but also international human rights law such as the U.N. Declaration on the Rights of Indigenous Peoples and the right to self-determination. The Declaration is an important instrument to understand the current state of international law on the inherent rights of Indigenous peoples because it is the result of a 30-year negotiation process between Indigenous peoples and U.N. member states. The Declaration became part of the body of international law when the U.N. General Assembly passed Resolution 61/295 in September 2007.10 Thus, the Declaration has legal effect in Canada, even if it is not binding in and of itself.11 The Declaration was necessary because existing general human rights instruments failed to protect Indigenous peoples’ rights. It recognizes the historic injustices Indigenous peoples have experienced, including colonization and dispossession. It also emphasizes the need for states and Indigenous peoples to work together to achieve these rights. Working together to realize Indigenous peoples’ rights is a critical step toward reconciliation in Canada.

Self-determination has long been contentious in the international arena, including during negotiations of the Declaration. Discussions

9. Ibid.
10. Ibid.
of self-determination often get caught up in debates about the right to secession or are limited to ideas of self-government. During negotiations on self-determination in the Declaration some states, including Canada, expressed concerns about territorial integrity and political unity. The underlying concern was that recognizing Indigenous peoples’ right to self-determination would deteriorate peaceful democratic states, such as Canada. Canada seemed to believe that recognizing Indigenous peoples’ right to self-determination will lead to conflict. However, grassroots movements such as Idle No More and protests over the murdered and missing Indigenous women illustrate the fallacy of harmony in Canada and demonstrate the ongoing strife that exists in Canada which needs to be resolved. Only fulfilling Indigenous peoples’ right to self-determination will resolve the root causes of this ongoing conflict and promote peace and reconciliation in Canada.

Given its significance and purpose, the Declaration is an important tool for realizing reconciliation in Canada. The Declaration did not create new rights for Indigenous peoples; rather, it clarified the application of existing human rights law to Indigenous peoples, including the right to self-determination. To fully appreciate Canada’s obligations under the Declaration, the scope of the rights must be understood within the broader context of international human rights. This is why this article argues that only by implementing the Declaration and the right to self-determination will we live together differently in peaceful coexistence where the fundamental human rights of all peoples are respected. Only this would achieve true reconciliation.

The self-determination approach to reconciliation advocated in this article is antithetical to the assimilative approach routinely invoked by the government and courts. In doing so, the government and courts hesitate to fully remedy the ongoing effects of colonialism. Reconciliation must bring together the two sides, restoring the previous relationship where Indigenous peoples controlled their own affairs, albeit in the modern

13. Declaration, supra note 8, Preamble, art 1 recognizes that Indigenous peoples are entitled to all human rights recognized in international human rights law.
15. See, e.g., policies such as the 1969 White Paper (Canada, Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen’s Printer, 1969) [1969 White Paper] as well as SCC jurisprudence on s 35(1) discussed below.
Canadian federal context. Reconciliation cannot be achieved through mere apologies and truth-telling. Instead, the reconciliation process must involve working together to decolonize Canada and reset the relationship between Indigenous peoples and the Crown. This article argues that to move forward in the process of reconciliation, the colonial legal legacy in Canada must be rectified. Self-determination, most recently articulated in the Declaration, provides a framework for such a process. For Indigenous peoples, “self-determination was the central pillar upon which the Declaration should be constructed” because it provides a framework to build harmonious relations based on human rights and equality.

This article begins with an overview of the right to self-determination as recognized in international law with a particular focus on its application to Indigenous peoples, including as expressed in the Declaration. This will demonstrate that Indigenous peoples’ right to self-determination must include both internal and external aspects of self-determination as recognized in international law. The next section describes Canada’s violations of Indigenous peoples’ right to self-determination and indicates issues which must be addressed to promote reconciliation. The section demonstrates that the residential school system was only one symptom of the larger problem of a colonial relationship where the Canadian government made decisions for Indigenous peoples. This system continues today. The final section identifies key aspects to realizing Indigenous peoples’ right to self-determination in Canada that must be considered in order to work meaningfully toward reconciliation. It is the process of fulfilling Indigenous peoples’ right to self-determination that promotes reconciliation in Canada. The section considers political arrangements and economic, social, and cultural development, as well as general guidelines for these conversations to occur at the local, regional and national level. Because the specific exercise of self-determination will vary depending on the needs, aspirations and capacities of specific Indigenous peoples, this paper offers a general meta-level framework for both parties to understand self-determination in the broader legal context and to set the agenda going forward.

18. Given the meta-level focus of the paper, the recommendations put forward do not aim to predetermine outcomes.
I. The evolution of Indigenous peoples' right to self-determination

The TRC created an opportunity to reset the relationship between Indigenous peoples and the Crown by realizing Indigenous peoples’ right to self-determination. Despite an initially limited understanding of the right to self-determination, today the international community and Canadian courts recognize self-determination as one of the essential principles of contemporary international law, including its application to Indigenous peoples. An overview of the development of Indigenous peoples’ right to self-determination is provided to counter arguments that Indigenous peoples’ either do not have a right to self-determination, or that their right to self-determination is limited to self-government and autonomy as set out in article 4 of the Declaration. This section argues that by placing its recognition of Indigenous peoples' right to self-determination within the broader context of international law, the Declaration does not limit Indigenous peoples’ right to self-determination to internal aspects.

Self-determination was a particularly contentious issue during negotiations on the Declaration. Regardless, Indigenous peoples and their allies pushed for agreement because Indigenous peoples' rights flow from the right to self-determination, including the right to lands, territories and resources; the right to culture; and the right to participate in decision-making based on free, prior and informed consent. When Canada voted in the General Assembly, it expressed concerns with several provisions, including those related to lands, territories and resources; free, prior and informed consent; and self-government—all of which strongly relate to self-determination. When Canada endorsed the Declaration, it attempted to limit its application by reference to an aspirational document that would be interpreted consistently with Canada’s constitutional and legal framework.

The attempt to undermine the Declaration by limiting its application to existing domestic law does not accord with Canada’s broader obligations to uphold Indigenous peoples’ right to self-determination as found in international law. Self-determination is not new to international law. The
right to self-determination is one of the most controversial international norms,\(^{24}\) and has been for at least 100 years.\(^{25}\) Including the right to self-determination in the U.N. Charter universalized and internationalized the concept of self-determination as a duty owed by all governments to their peoples and to the wider international community.\(^{26}\) The Supreme Court of Canada has also recognized that the right to self-determination extends beyond any positive articulation and held the right to self-determination to be a general principle of international law.\(^{27}\) The right to self-determination is now further grounded in the international human rights framework,\(^{28}\) recognizing that self-determination is critical for the full and effective enjoyment of other human rights.\(^{29}\)

Early International Court of Justice (ICJ) decisions limited self-determination to non-self-governing territories.\(^{30}\) Some invoke these early understandings to limit Indigenous peoples’ right to self-determination. Today, the right of self-determination is recognized to apply outside the traditional African colonial context;\(^{31}\) it is now recognized as a collective right of “peoples.”\(^{32}\) For many years, the Working Group on Indigenous Populations debated whether Indigenous peoples were in fact “peoples” who would have a right to self-determination recognized by international law. The final text of the Declaration settled the debate by recognizing

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31. For examples, the ICJ applied the principles in the Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep 136.
Indigenous peoples as “peoples” with a right to self-determination, recognizing that all States are implicated in ensuring Indigenous peoples’ right to self-determination is realized. With the acknowledgment of Indigenous peoples’ right to self-determination, the remaining issue is the scope of this right. The internal aspect of self-determination relates to a people freely pursuing “their economic, social and cultural development without outside interference.” The external aspect relates to people freely determining “their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.” Occasionally, self-determination and secession are conflated. Fulfilling the right to self-determination does not automatically equate to a right to secede, nor does fulfilling the right to self-determination require a particular political arrangement within the state. Self-determination can be achieved through better integration or recognition within an established state if that is the will of the people. International law generally limits the right to secede and other external expressions of self-determination by the principles of territorial integrity, political unity and uti possidetis juris. However, there are exceptions “where a people is subject to alien subjugation, domination or exploitation outside a colonial context.” International law may condone external expressions of international law “when a people is blocked from the meaningful exercise of its right to self-determination internally.”

33. Declaration, supra note 8, art 3.
36. Ibid at para 4.
40. Secession Reference, supra note 27 at para 133.
41. Ibid at para 134.
Some have argued that the *Declaration* limits self-determination to self-government and autonomy by reading only articles 3 and 4 together. Such commentators support their interpretation by citing the inclusion of article 46(1) in the final text of the *Declaration*, which states:

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

Commentators argue that this provision prohibits external expressions by reference to “territorial integrity or political unity.” A more accurate interpretation is that the *Declaration* recognizes Indigenous peoples’ right to self-determination as substantially (and perhaps preferably) achieved through forms of autonomy, not limited to self-government and autonomy. The preamble supports this position when it states “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law.” As international law recognizes an internal and external aspect to self-determination, Indigenous peoples’ right to self-determination also must include both aspects.

Furthermore, the wording of article 3 mirrors article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), highlighting the connection between the *Declaration*’s recognition of self-determination and the ICCPR and ICESCR. While an early decision of the UN Human Rights Committee (HRC) limited Indigenous peoples’ right to self-determination under the ICCPR, this decision no longer represents the HRC’s current understanding of Indigenous peoples’ right to self-determination. The HRC and the Committee on Economic, Social and Cultural Rights are now of the opinion that Indigenous peoples have the full right to self-determination as articulated in the ICCPR.

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43. *Ibid*.
45. *Declaration, supra* note 8, preambular para 17.
46. *Ibid*, art 3 provides: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”
47. UNHRC, *Decision on admissibility, supra* note 32.
and ICESCR. For states such as Canada that have ratified the ICCPR and the ICESCR, Indigenous peoples would have the full right to self-determination recognized within those treaties. The Declaration cannot recognize a lesser right than would be recognized for other peoples under the human rights treaties. Denying Indigenous peoples’ right to self-determination as recognized in international law would undermine the purpose of recognizing self-determination as a human right, empowering peoples against oppression. The next section describes the ways in which Canadian law violates Indigenous peoples’ right to self-determination, in order to demonstrate the underlying issues that need to be addressed to work toward reconciliation.

II. Violations of Indigenous peoples’ right to self-determination

This section reviews key violations of Indigenous peoples’ right to self-determination to illustrate that the residential school system was not an isolated policy. Canada has a long history of paternalistic and colonial policies regulating Indigenous people in Canada, which violates Indigenous peoples’ right to self-determination. These violations occur through legislative and policy initiatives of the federal and provincial governments, but also through decisions of the courts. Self-determination provides a framework to analyze the problem, and can be used to develop a process for reconciliation that addresses these root causes.

When Europeans first arrived, initial interactions took place on a nation-to-nation basis, following Indigenous customary diplomatic protocols. The various nations lived (and continue to live) in organized societies, with sophisticated legal, political and economic systems. This relationship changed as England’s interest in Canada changed from trade to settlement. The relationship shifted from nation-to-nation interactions


49. McCorquodale, supra note 28 at 872.


as sovereign equals, to a colonial context where England (later Canada) assumed sovereignty and jurisdiction over Indigenous peoples. This colonial process violated and continues to violate Indigenous peoples' right to self-determination.

The Royal Proclamation of 1763 and the Treaty of Niagara of 1764 confirmed a nation-to-nation relationship where each nation retained its sovereignty. Unfortunately, subsequent colonial settlement processes in Canada did not fully adhere to the Royal Proclamation. Rather, Britain adopted assimilation and civilization approaches to Indigenous-Crown relations, violating Indigenous peoples' right to freely determine their relationship with the Canadian state. Even though the Royal Proclamation process was somewhat followed in the negotiation of Treaties 1-11, most of these promises have not been kept. Further, the Crown used these treaties to justify assuming jurisdiction over Indigenous peoples and their lands, violating Indigenous peoples' right to self-determination.

The British government first began regulating "Indians" in Canada through specific legislation in 1850, imposing a system of government overseen by the federal government, regulating membership and registration, banning cultural activities, and sending children to residential schools. Imposing a governance system overseen by the federal executive exemplifies the use of colonial policy to diminish Indigenous peoples' autonomy and powers of self-governance. Banning cultural activities and undermining Indigenous peoples' cultural development was a key aspect to achieving the colonial assimilation goals. The Indian Act had no regard to traditional membership laws of First Nations, undermining Indigenous peoples' political development according to their own laws and legal systems.

The 1969 White Paper proposed to repeal the Indian Act, eliminate Indian status and the reserve system, and terminate treaties. The National Indian Brotherhood opposed the White Paper because of the federal government's unilateral action to extinguish rights without consultation. Canada's imposition of political and governmental structures, as well as interfering with the cultural and social development of Indigenous peoples, violates Indigenous peoples' right to self-determination.

56. Ibid.
58. Canada, Royal Commission Reports, supra note 6.
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When Canada began the process of patriating the constitution, Indigenous peoples rallied to ensure that patriation would not occur without some recognition of the place of Indigenous peoples. Many Indigenous advocates had hoped that section 35(1) would be a turning point away from colonialism for Indigenous-government relations. These hopes were quickly dashed when the mandated constitutional negotiations on self-government failed to produce consensus and the Supreme Court of Canada gave a limited interpretation to the scope of section 35(1), allowing governments to justify infringements. Processes to negotiate self-government agreements have been slow to achieve results.

The Supreme Court, as part of the Canadian state apparatus, contributes to the violations of Indigenous peoples’ right to self-determination. Section 35(1) only protects those activities that are central and integral to the distinctive Aboriginal people pre-contact. This test enables the courts to decide what is central and integral to an Aboriginal community. Rather than an opportunity to realize self-determination and achieve reconciliation, section 35(1) has reinforced colonialism and violations of Indigenous peoples’ right to self-determination.

The Supreme Court’s approach to section 35(1) emphasizes national interest, rather than rebuilding a partnership between Indigenous peoples and Canada. In Mitchell v. M.N.R., Binnie J. opined that section 35(1) ought to focus on “national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.” This focus on commonalities rings similar to the 1969 White Paper approach of assimilating Indigenous peoples into the Canadian mainstream. This approach violates Indigenous peoples’ right to freely determine their own future by granting the Canadian government the authority to manage Aboriginal rights.

The right to self-government also has been limited under section 35(1) in part through court decisions. Applying the Van der Peet test, self-government is limited to those specific jurisdictional aspects the court finds

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60. James Youngblood Henderson, First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 34.
61. Schwartz, supra note 4 at 353.
to be central and integral to the Aboriginal peoples’ distinctive culture.\textsuperscript{65} This approach limits the role of the court as a neutral arbiter in the oft-contentious self-government claims to level the power between the federal government and Indigenous peoples.

Under the approach of Lamer C.J., section 35(1) has not effectively protected Indigenous peoples’ right to economic development, in part due to stereotypical notions of “Indianness.” In \textit{Lax Kw’alaams Indian Band v. Canada (A.G.)}, the Court rejected the Lax Kw’alaams’ claim to commercial fishing and sale of fish within their traditional waters.\textsuperscript{66} Explaining his decision, Binnie J. said that “[t]he Lax Kw’alaams live in the twenty-first century, not the eighteenth, and are entitled to the benefits (as well as the burdens) of changing times. However, allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right.”\textsuperscript{67} Justice Binnie does not allow for section 35(1) to protect present-day expressions of economic development if those expressions are not similar to economic activities undertaken pre-contact. This is a violation of Indigenous peoples’ right to freely determine their economic future.

Under the \textit{Van der Peet} test, the Court positioned itself to define Indigeneity—again violating Indigenous peoples’ right to determine their own social and cultural future. As stated in L’Heureux-Dubé J.’s dissent, such an approach is problematic because “an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.”\textsuperscript{68} Such an approach fails to protect “those practices which allow them to survive as a contemporary community.”\textsuperscript{69} According to the Court, “[a]boriginal means a long time ago; pre-contact.”\textsuperscript{70} This understanding of Indigenous culture seriously undermines the right to determine their cultural development. The underlying assumption in \textit{Van der Peet} is that section 35(1) protects practices, customs and traditions of Indigenous peoples as historical and stereotypical “Indians.” The application of the \textit{Van der Peet} test does not protect Indigenous peoples’
right to determine their political, economic, social and cultural status as a modern people.

The colonial process targeted Indigenous peoples’ political, economic, social and cultural systems. This section demonstrates that these violations have continued to the present. Constitutional protection of Indigenous peoples’ rights could, and should be, a strong movement toward realizing Indigenous peoples’ right to self-determination and achieving reconciliation. For this to occur, interpretations of section 35(1) must not “blindly endorse the tenets of colonial legal regimes” and allow section 35(1) “to be interpreted in a manner that simply perpetuates historical injustices.”71 To move toward reconciliation, a new approach that allows Indigenous peoples to determine their own futures is needed.

The Canadian state, including both levels of government and the court system, cannot hamper Indigenous peoples’ assertion of their right to self-determination when the expressed right conforms with international law.72 In fact, Canada is obligated to work with Indigenous peoples to realize their right to self-determination. The next section overviews considerations that must be addressed to realize Indigenous peoples’ right to self-determination and promote reconciliation.

III. Realizing Indigenous peoples’ right to self-determination in Canada

Thus far, this paper has illustrated the multiple violations of self-determination through the Canadian state’s ongoing control over Indigenous peoples. These violations undermine a reconciliation process that promotes a cooperative relationship based on mutual respect. These violations can only be addressed by realizing Indigenous peoples’ right to self-determination, including the right to determine their own political status and economic, social and cultural development. Self-determination is more than a question of Indigenous peoples having their own governing institutions—it is about choice and the freedom to make decisions on their way of life.73 This section outlines some considerations that must be addressed to realize Indigenous peoples’ right to self-determination. The considerations directly respond to the underlying causes of the current conflict between Indigenous peoples and Canada outlined above. As self-determination includes the right to determine one’s own political,

72. Declaration, supra note 8, preambular para 17.
economic and social status, this section considers each of these aspects in turn. While much of the literature discusses the political status element of self-determination, few researchers consider all aspects of self-determination and their specific application in Canada, often focusing on political arrangements and ignoring economic, social and cultural aspects. Each aspect is important individually, but because they are interrelated, they all must be considered for self-determination to be fully realized. For example, economic development is critical for successfully achieving culturally appropriate and sustainable self-government.\(^{74}\)

As the colonial process in Canada was a gendered enterprise,\(^{75}\) efforts to realize self-determination must address the ways in which colonization has impacted gender roles and gendered violence in order for self-determination to benefit Indigenous men and women equally.\(^{76}\) While some argue that self-determination should occur first, and gender issues later, such an approach fails to fully address the full extent of the colonial impact within communities. Concerns over gender equality must be explicitly addressed regarding each aspect to exercising self-determination: political, economic, social and cultural status.

1. **Political status**

The first aspect of the right to self-determination is the right to freely determine one’s own political status. Self-determination is more than achieving an end result of a particular political arrangement; it is about process and the political legitimacy of the state.\(^{77}\) There are several considerations for Indigenous peoples’ political status: continuation of Indigenous peoples’ political and legal institutions, inclusion within Canadian body politic, and participation in decision-making.

S. James Anaya’s definition of Indigenous peoples’ right to self-determination highlights ongoing equal participation “in the constitution and development of the governing institutional order under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis.”\(^{78}\) This includes determining

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\(^{78}\) Anaya, “Post-Declaration,” supra note 37 at 189.
their relationship with the state and their representation within that state. The ability to effectively participate within the democratic state is a key component of fulfilling the political status aspect of self-determination. Erica-Irene Daes describes this aspect of self-determination as “a kind of belated state-building, through which indigenous peoples are able to join with all the other peoples that comprise the state on mutually agreed-upon and just terms after many years of isolation and exclusion.”

Clearly, any state-building process is not easy and may be contentious, particularly when talking about ending years of isolation and exclusion. While this nation-building process can be daunting, there are resources to draw upon. A noteworthy starting point for understanding the intended Indigenous-Crown relationship is the Royal Proclamation of 1763, which confirmed the nation-to-nation relationship whereby each nation retained its sovereignty. There was tension between the British government wanting to assert jurisdiction over First Nations, while assuring First Nations that their independence would be preserved. The Royal Proclamation set out a process respecting the nation-to-nation relationship between the Crown and Indigenous peoples. Since the Treaty of Niagara has never been repealed, it, the Royal Proclamation, and the nation-to-nation relationship they confirmed remain the foundation for Indigenous-Crown relations today. These founding documents should lay the groundwork for realizing Indigenous peoples’ right to self-determination today.

Likewise, in much of Canada treaties are the foundational legal instruments setting out the terms of the relationship between Indigenous peoples and the Crown. Treaties continue to provide the basis for the Indigenous-Crown relationship today and provide a framework for reconciliation. The entrenchment of treaty rights in the Constitution Act, 1982 further incorporates treaties into the constitutional fabric of Canada and acknowledges their foundational nature.

80. Franck, supra note 26 at 52.
83. Ibid at 161.
84. Ibid at 168.
Treaties are an exercise of Indigenous peoples' right to self-determination. Treaties must be implemented in light of modern day realities without diminishing their original spirit and intent, given their constitutional status to fulfill self-determination and promote reconciliation. This requires moving beyond the written text of the treaties to consider the oral history on the scope of the treaties. Where treaties are silent on issues of political status or economic, social and cultural development, further negotiations need to occur in line with the original relationship envisioned. The sections below provide additional guidance for these negotiations and also provide guidance in areas where there are no treaties, following the framework provided in the right to self-determination recognized in international law. Throughout the following sections, I illustrate that self-determination is a framework that can guide us through a reconciliation process.

a. Indigenous peoples' political and legal institutions
When fulfilling Indigenous peoples' right to self-determination to promote reconciliation, the first consideration is the recognition and revitalization of Indigenous peoples' own political and legal institutions. This recognizes that an underlying cause of the residential school system was the imposition of a colonial governance structure and legal system. To achieve this recognition, Canadian legal and political systems must make space for Indigenous institutions and reduce the control exercised by Canadian institutions. The specific aspects of the new arrangements must be negotiated (or litigated) between Indigenous peoples and Canada, not unilaterally determined by Canada.

As part of the internal aspect to self-determination, the Declaration recognizes Indigenous peoples' right to their own political institutions. Article 4 confirms Indigenous peoples’ right to autonomy or self-government over internal and local affairs, and the means for financing these activities. The Declaration identifies some areas where Indigenous institutions have continuing jurisdiction: articles 20, 33, 34 and 35 include the right to have their own institutions, including legal systems; the right to pursue economic activities; the right to determine their own identity or membership according to their own membership laws; and the right to determine the responsibilities of members. Indigenous peoples' also have the right to maintain their political systems. 88

These rights have not been realized in Canada. Many Indigenous peoples in Canada are not recognized as autonomous and are not fully

88. Declaration, supra note 8, art 5.
self-governing; for example, many First Nations still operate under the Indian Act, with significant powers remaining with the executive. Very few Métis communities have recognized self-government powers. The Royal Commission on Aboriginal Peoples provided three potential models implementing Aboriginal orders of government in Canada: the nation model in which Aboriginal people are substantially autonomous nations within Canada; the public government model in which government represents all people (Aboriginal and non-Aboriginal) within a territory; and the community interest model in which focus is placed on gaining authority over areas such as education, health and social services. These models contemplated a flexible system of self-government to accommodate the different needs, aspirations and capacities of different Indigenous peoples, including urban or non-land based Indigenous peoples. Today, there are several examples where these different models have been employed, such as Nunavut, the Nisga’a self-government, Alberta Métis Settlements and, more recently, Sioux Valley in Manitoba. However, much work remains to fulfill the right to self-government for all Indigenous peoples in Canada, and these models can provide guidance.

To realize Indigenous peoples’ right to determine their own political status, the constitutional division of powers may need to be reconsidered to explicitly recognize Indigenous peoples as a third order of government to ensure constitutional space for those Indigenous peoples who so desire it. There ought to be explicit recognition for Indigenous peoples’ self-government, where such autonomy is the will of the people. Such explicit protection could protect against court challenges to self-government agreements based on division of powers arguments. The challenge to amending the Canadian constitution does not excuse the failure to properly account for Indigenous peoples’ inherent jurisdiction. Even if constitutional recognition within the division of powers in the Constitution Act, 1867 is not feasible, there should be reconsideration of the scope of self-government under section 35(1) of the Constitution Act, 1982.

Another set of Indigenous institutions that needs greater recognition within Canada are Indigenous legal traditions and the corresponding

89. Canada, Royal Commission Reports, supra note 6.
92. One such challenge was brought in British Columbia, see: Campbell v British Columbia (AG), 2000 BCSC 1123, 189 DLR (4th) 333. See also Chief Mountain v British Columbia (AG), 2011 BCSC 1394, [2012] 3 WWR 120.
institutions, as they have not been fully recognized as authoritative and relevant sources of law in Canada. The government and the courts must acknowledge explicitly the role of Indigenous legal traditions within Canada to fulfill Indigenous peoples’ right to self-determination and complete Canada’s legal system. Indigenous legal traditions are the basis for Indigenous peoples’ jurisdiction. Indigenous peoples must maintain authority to define and apply their own legal traditions as part of the broader Canadian legal system. Allowing Indigenous legal traditions to continue developing is important for realizing self-determination as it supports and acknowledges Indigenous peoples’ continued existence as distinct people within Canada.

Interestingly, the Supreme Court has acknowledged the significance of Indigenous legal traditions. In McLachlin J.’s (as she then was) dissenting opinion in Van der Peet, she grounded Indigenous peoples’ rights within their own legal traditions. In Mitchell, McLachlin C.J. noted “the doctrine of continuity, which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region.” This approach recognizes the continued relevance of Indigenous legal traditions, especially to fulfill the right to self-determination. In Van der Peet, Lamer C.J. referenced (though did not apply) Indigenous legal systems, reorienting Canadian constitutional jurisprudence. Despite recognizing that Aboriginal and treaty rights must be identified by referencing both Indigenous and common law, the Court did not refer to Indigenous legal traditions to determine the scope of Indigenous peoples’ rights. This may be in part because the Court realized that “Aboriginal legal traditions and jurisprudence were beyond their legal training.” Canadian jurists need a better understanding of Indigenous legal traditions as part of the recognition and revitalization of the Indigenous legal traditions. However, there also needs to be a role for Indigenous legal institutions.

94. Ibid at 6.
95. Ibid at 7.
96. Van der Peet, supra note 62 at para 230.
The operation of Indigenous legal traditions should be recognized as legitimate legal systems where such systems continue to operate or where communities desire to revitalize these systems. Despite significant interference, “Indigenous legal principles have great consistency over time, while being implemented in adaptive and responsive ways” and continue to be used “on an informal or implicit level within communities.”\(^{101}\) It is critical that we recognize that, like all traditions, Indigenous legal traditions are not static. Indigenous legal traditions in particular have been “comprehensively denied, disregarded and damaged through the concerted efforts and willful blindness of colonialism,” which presents “real challenges to accessing, understanding and applying them today.”\(^{102}\) While there may be some challenges to recognizing Indigenous legal systems in Canada, including intelligibility, accessibility, equality, applicability and legitimacy, these concerns are not sufficient to prevent their recognition.\(^{103}\) John Borrows argues that “the implementation of Indigenous law could be facilitated if Elders, politicians, judges, lawyers, and academics from each of our communities drew analogies from bi-juridicalism and recognized our country’s multi-juridical character.”\(^{104}\)

The Federal Court of Canada has begun to consider Indigenous legal traditions in the resolution of disputes. Through the work of the Aboriginal Bar Liaison Committee, the Federal Court has developed a practice note for the use of alternative dispute resolution processes in disputes that arise between First Nations. The practice note is premised on the idea that the Federal Court rules are sufficiently flexible to use the resources within a First Nation, such as Elders and Indigenous legal traditions, to resolve election and governance disputes.\(^{105}\) The Committee also developed practice guidelines on Elder testimony and oral history, which are now Part IV of the Federal Court’s Aboriginal Litigation Practice Guidelines.\(^{106}\) These guidelines were specifically developed to offer a procedure to facilitate Aboriginal Elders’ evidence that balanced Court requirements


\(^{102}\) Ibid at 4.

\(^{103}\) Borrows, Indigenous Constitution, supra note 93 at 137-176.

\(^{104}\) Ibid at 177.


and Aboriginal sensibilities. This demonstrates how space can be made for Indigenous legal traditions within the Canadian legal system. The revitalization of Indigenous peoples’ legal and political systems is an important aspect of undoing the ongoing violation of Indigenous peoples’ right to self-determination through the imposition of colonial political and legal systems.

b. Inclusion within Canadian body politic

The unilateral imposition of the Canadian constitutional and government structure violates Indigenous peoples’ right to self-determination. Canadian courts have found that Quebec’s right to self-determination is not denied because Quebeccers are not “denied access to government. Quebeccers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions.” Indigenous peoples have not had the same experience with mainstream legal and political institutions. Therefore, this issue must be addressed to fulfill Indigenous peoples’ right to self-determination in the context of political status within Canada.

Indigenous peoples are not equitably represented in the judiciary, particularly in the Supreme Court of Canada. As stated above, there is limited recognition of the role of Indigenous legal traditions. Indigenous peoples do not occupy prominent positions within the Government of Canada or within Canadian political parties. They are not equitably represented in the House of Commons. Realizing Indigenous peoples’ right to self-determination may require changes to the Canadian electoral system to ensure equitable participation of Indigenous peoples in federal and provincial politics, where they wish to be part of the body politic of Canada. One oft-cited example is the dedicated Maori seats in Aotearoa/

107. Ibid at 11.
111. Anna Hunter, “Exploring the Issues of Aboriginal Representation in Federal Elections” (November 2003) Electoral Insight 27 at 33, n 2, online: Elections Canada <www.elections.ca/res/eim/insight_2003.11e.pdf>. Her research found that “since Confederation, only 17 self-identified Aboriginal people have been elected to the House of Commons. Currently, there are only four Aboriginal members of Parliament out of 301.”
112. Turpel, supra note 91 at 593.
New Zealand in order to guarantee political representation.\textsuperscript{113} Several organizations have called for an Indigenous person to be appointed to the Supreme Court of Canada to recognize Indigenous legal traditions as a founding legal system in Canada, similar to the civil law.\textsuperscript{114} Given the failure of the existing legal and political system to include Indigenous peoples, steps need to be taken to rectify this violation of Indigenous peoples’ right to self-determination.

c. Participation in decision-making

The third consideration for political status is the right to participate in decision-making, which is a procedural right of Indigenous peoples to “take part in decisions affecting their future.”\textsuperscript{115} The right to self-determination includes a right to be included within the Canadian body politic.\textsuperscript{116} This is the ongoing aspect to self-determination, which “requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis.”\textsuperscript{117} This requires a more meaningful way for Indigenous peoples to participate in decisions that potentially impact them and their rights than currently exists.\textsuperscript{118} Article 18 of the Declaration requires state governments to work with Indigenous peoples to establish mechanisms for them to participate in deciding on issues that affect them. Cooperative measures must be developed to ensure Indigenous peoples are actively involved in developing and potentially administering economic and social programs.\textsuperscript{119} It also requires that Indigenous peoples be consulted through their own institutional mechanisms and processes. Decision-making processes must allow Indigenous peoples sufficient time to engage their own decision-making processes and allow for decision-making consistent


\textsuperscript{114} For example, the Canadian Bar Association, the Indigenous Bar Association and the Canadian Association of Law Teachers all have called for an Indigenous person to be appointed to the SCC. The now defunct Law Commission of Canada also made the recommendation in the discussion paper “Justice Within” (Law Commission of Canada, “Justice Within: Indigenous Legal Traditions,” (Ottawa: LCC, August 2006), online: Government of Canada <publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf>.

\textsuperscript{115} Klabbers, supra note 24 at 189.

\textsuperscript{116} Franck, supra note 26 at 59.


\textsuperscript{119} Declaration, supra note 8, arts 18, 19, 23.
with their own cultural and social practices. This right to participate in decision-making applies to Indigenous men and women equally.

The right to participate in decisions that affect their lives is set based on the standard of free, prior and informed consent:

The element of “free” implies no coercion, intimidation or manipulation; “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision making processes; “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

Participating in decision-making based on free, prior and informed consent is “a requirement, prerequisite and manifestation of the exercise of their right to self-determination, as defined in international human rights law.” This standard for participation in decision-making is critical to ensuring Indigenous peoples’ participation in the Canadian body politic on non-colonial terms.

Unfortunately, Canadian law currently does not meet the international standard. The Supreme Court has recognized that the honour of the Crown includes an obligation to consult and accommodate Indigenous peoples’ concerns when contemplating conduct that may adversely affect their rights. It also requires consultation to justify infringements of recognized rights. While this underlying legal principle accords with international standards of participation in decision-making, the Court’s interpretation of consultation does not meet the standard of free, prior and informed consent. In particular, the low end of the consultation spectrum only requires the government to give notice, disclose information, and discuss any issues raised in response to the notice. Consent is a higher standard, which emphasizes engaging in a process to reach agreement between the

120. HRC, Final Report, supra note 118 at annex, para 9.
121. See Declaration, supra note 8, arts 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, 41.
122. HRC, Final Report, supra note 118 at para 25.
126. Haida Nation, supra note 124 at para 43.
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parties.\textsuperscript{127} Domestic jurisprudence indicates that consent is only relevant to established rights, and perhaps only when the infringement is severe.\textsuperscript{128} The lack of a more robust understanding of consent in Canadian law has allowed Canadian courts to dismiss Indigenous peoples’ own articulation of the degree of impact on their rights.\textsuperscript{129}

The right to participate in decision-making is not limited to federal and provincial decision-making, but also applies to decision-making at the community level. Local participation is important because “[m]eaningful and sustainable forms of self-determination must be worked out and realized by indigenous peoples themselves at the local level in their own communities through and by active community involvement and citizen participation, not by indigenous representatives attending national or international meetings.”\textsuperscript{130} Canada should not interfere or undermine the local or community level decision-making processes.

Consistent with the external aspects of the right to self-determination, the right to participate in decision-making includes participation in international law and policymaking forums, where Indigenous peoples’ rights and interests are potentially affected.\textsuperscript{131} It is important for Canada to facilitate Indigenous peoples’ participation in international meetings. Canada should also work with Indigenous peoples when developing positions on international matters that impact their rights.

2. Economic development

Economic development is important for self-determination to be sustainable; therefore, self-determination includes the right to economic development. Indigenous peoples have faced many problems in the improvement of their economic conditions, reinforcing dependency on colonial governments, thereby undermining self-determination. Successful economic self-determination is related to culturally appropriate government institutions. When assertions of self-determination are backed up “with effective and culturally congruent governing institutions,” Indigenous communities have seen improvements such as “reduced

\begin{itemize}
\item \textsuperscript{128} Haida Nation, supra note 124 at para 48. See also Delgamuukw v British Columbia, [1997] 3 SCR 1010 [Delgamuukw] and Tsilhqot’in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 256 [Tsilhqot’in Nation].
\item \textsuperscript{130} Rauna Kuokkanen, “Self-Determination and Indigenous Women’s Rights at the Intersection of International Human Rights” (2012) 34:1 Hum Rts Q 225 at 243.
\end{itemize}
unemployment, reduced welfare rolls, the emergence of viable and diverse economic enterprises—both tribal and private—on reservation lands, more effective administration of social services and programs, including those addressing language and cultural concerns, and improved management of natural resources." The interplay between economic development and culturally appropriate political institutions highlights the need for all aspects of self-determination to be considered when developing a process that realizes the right to self-determination to promote reconciliation.

It is critical that Indigenous peoples set their own economic priorities without state interference because all too often "even where national policies are targeted for the benefit of indigenous peoples, they often operate in a non-inclusive, top-down manner," which perpetuates economic dependence and a colonial relationship. Processes should start with, or at a minimum include, community input in deciding development priorities and plans. Development priorities "which take into account the identity and culture of indigenous peoples through amongst others the application of free, prior and informed consent, have a higher probability of sustainability and success." Economic aspects of self-determination should address concerns such as "evolving indigenous livelihoods, food security, community governance, relationships to homelands and the natural world, and ceremonial life" at the local and regional level to enable "the transmission of these traditions and practices to future generations."

The Declaration identifies several components to the right to economic development, key to realizing self-determination. The right includes traditional economic activities and new means of economic development. The Declaration recognizes Indigenous peoples’ right to "maintain and develop their political, economic and social systems or institutions." It continues to recognize a need for Indigenous peoples to "be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." Indigenous peoples have the right to improve their economic conditions "in the areas of education, employment, vocational training and retraining."

132. Cornell, supra note 74 at 18.
134. Ibid at 38-39.
136. Declaration, supra note 8, art 20(1).
137. Ibid.
138. Ibid, art 21(1).
Achieving these improvements in economic conditions may require that the state take special measures. A final aspect of economic rights is “the right to determine and develop priorities and strategies for exercising their right to development.” This includes the right of Indigenous peoples to be involved in setting up and administering such programs. The economic aspect of the right to self-determination is intricately connected to Indigenous peoples’ rights to their lands, territories and resources, as much economic development is connected to the sustainable use of natural resources.

To promote economic self-determination, legal impediments to economic development must be removed, including those under section 35(1) and the Indian Act. Traditional economies as well as new forms of economic development must be protected to ensure Indigenous peoples are free to pursue their economic development given the modern realities of the economy. To be in line with international standards, Canadian law must respect Indigenous peoples’ chosen methods of economic development, which could include gaming or other new commercial enterprises. The limitation on evolving rights to new commercial enterprises articulated in Lax Kw’alaams must be removed to promote Indigenous peoples’ chosen methods of economic development. The Van der Peet “central and integral to the distinctive community pre-contact test” must be reinterpreted to allow for new commercial activities. Reinterpreting section 35(1) would better promote economic self-determination.

In addition to broadening the scope of section 35(1), laws meant to recognize and protect Indigenous peoples’ land rights must be improved. Given the significant connection between Indigenous peoples’ land rights and economic development, outstanding land claims must be resolved. The Inter-American Commission of Human Rights has recognized that the British Columbia Treaty Commission treaty negotiation process is “not an effective mechanism to protect the rights claimed by the petitioners.”

The effective protection of land rights requires improvements to modern land claims and self-government processes, including under the British Columbia Treaty Process, comprehensive claims processes, specific claims processes, Treaty Land Entitlement Process and Métis land claims.
processes. The creation of the Specific Claims Tribunal may provide some assistance; however, the government’s commitment to the process is questionable given their application for judicial review of the Tribunal’s first decision: 

*Williams Lake Indian Band v. Canada.*

While negotiation is the preferred means to resolve these land claims, the courts must be available as a neutral arbiter when land issues, such as Aboriginal title claims, come to court. In 2009, the Inter-American Commission of Human Rights (IACHR) concluded that judicial considerations of Aboriginal title “do not seem to provide any reasonable expectations of success, because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples,” and thus do not provide an effective remedy for outstanding land claims. Since this determination there has been one case, *Tsilhqot'in Nation v. British Columbia,* where Aboriginal title has been recognized since the test was established in 1997. While post-*Tsilhqot'in Nation* the finding of the IACHR may be overstated, it is still important that courts promote actual recognition, demarcation and legal title to Indigenous peoples’ lands.

There have been several concerns related to “Reserved” lands that must be addressed as well. There have also been several calls to remove the legal restrictions under the *Indian Act* to ensure that First Nations’ economic development is not hampered. However, simple privatization and increased taxation powers may be of limited value to the majority of First Nations in Canada because they may remove the protection of the collective property right. The federal policy on additions to reserves may need modification in order to allow for newly acquired lands to be

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145. *Hul’qumi’num’, supra note 128, applying the test set out in Delgamuukw, supra note 128.

146. *Tsilhqot’in Nation, supra note 128, applying the test set out in Delgamuukw, supra note 128.

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designated as reserve lands without undue delays and costs caused by municipalities or other third parties.148

Removing barriers to Indigenous peoples’ economic development, including commercial-economic rights and land rights is a critical component to realizing self-determination that promotes reconciliation. Economic development provides the financial basis to remove the dependence on (and the associated control by) the Canadian government.

3. Social and cultural development

The final aspect of Indigenous peoples’ right to self-determination is social and cultural development. Canada has a long history of assimilationist laws and policies. Hundreds of years of targeting Indigenous culture has had negative ramifications on many Indigenous peoples’ cultures. The primary aim of the residential school system was to “kill the Indian in the child.”149 Any process whose aim is reconciliation must also protect against the recreation of such assimilationist policies. There also needs to be positive action taken to promote Indigenous peoples’ culture and cultural development to undo the damage caused by years of colonial interference.

There is a strong interconnection between the success of any political, legal or economic endeavour and the continuation of Indigenous cultures because “[s]trategies that invoke existing human rights norms and that solely seek political and legal recognition of indigenous self-determination will not lead to a self-determination process that is sustainable for the survival of future generations of indigenous peoples” as distinct peoples.150 Culturally appropriate political structures and economic development necessarily require an understanding of one’s culture, values and teachings. As Holder and Corntassel elaborate “collective rights claims are not just about protecting cultural attachment; they are also about political voice and gaining access to the processes which affect the physical and economic conditions under which one lives.”151

150. Corntassel, supra note 135 at 108.
The Declaration includes provisions on social and cultural development. It recognizes the right of Indigenous peoples to practice and revitalize their cultural traditions and customs, including protection of archeological and historical sites, artifacts, designs, ceremonies, visual and performing arts, literature, spiritual and religious traditions, customs, and ceremonies. These cultural protections include the rights to maintain, protect and have access in private to religious and cultural sites and to use and control ceremonial objects. Further, the state is obligated to enable access to and/or repatriation of ceremonial objects and human remains.

Cultural protections also extend to traditional medicines, cultural heritage, traditional knowledge and traditional cultural expressions including human and genetic resources, knowledge of flora and fauna, and sports and traditional games. Canadian law does not meet these standards, though a positive development occurred when an Ontario Court recognized an Aboriginal right to traditional medicine. As yet, there is no national legislation in Canada for the repatriation of Indigenous objects and remains, as there is in the United States.

Given the attack on Indigenous cultures, special measures to ensure protection and revitalization of Indigenous peoples' cultures are particularly important to prevent future assimilation policies. Here again there is a need to modify the test for rights under section 35(1), which currently freezes Indigenous cultures, practices and traditions to those existing pre-contact. Indigenous peoples must decide for themselves the significant and important cultural activities necessary for their survival as distinct people within Canada.

By extension, a vital aspect of Indigenous peoples' social and cultural development is the protection and promotion of Indigenous peoples' languages. There is concern for the survival of Indigenous peoples' languages because "fewer children are learning indigenous languages in the traditional way, from their parents and elders....In an increasing number of cases, indigenous languages are used only by elders." The protection of Indigenous languages is critical for the realization of other aspects of self-
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determination. For example “customary laws of indigenous communities are often in their languages, and if the language is lost the community may not fully understand its laws and system of governance. Loss of language also undermines the identity and spirituality of the community and the individual.”\textsuperscript{160} Some Indigenous peoples have developed programs for children and adults to learn their Indigenous language, which may provide a model upon which other Indigenous peoples can build. For example, the Kanien'kehá:ka Onkwawén:na Raotitióhkwa Language and Cultural Center developed a Haudenosaunee language immersion program, including an adult immersion program which includes traditional cultural knowledge.\textsuperscript{161} Other Indigenous peoples have used modern technology to develop online language dictionaries and translation programs in order to promote and protect their languages.\textsuperscript{162}

Part of Indigenous peoples’ cultural development must include new and more appropriate educational opportunities because “[e]ducation is also an empowerment right, through which economically and socially marginalized individuals can obtain means to participate fully in their communities and economies, and in the society at large.”\textsuperscript{163} Education can be “the primary means ensuring indigenous peoples’ individual and collective development.”\textsuperscript{164} It can promote the “enjoyment, maintenance and respect of their cultures, languages, traditions and knowledge,”\textsuperscript{165} especially given the \textit{Declaration}'s recognition of the right of Indigenous peoples to be educated in their mother tongue.\textsuperscript{166} The right to education in the \textit{Declaration} is broad and includes “education through their traditional methods of teaching and learning, and the right to integrate their own perspectives, cultures, beliefs, values and languages in mainstream education systems and institutions.”\textsuperscript{167} Proposals such as the federal \textit{First


\textsuperscript{161} For more information, see Kanien'Keha:ka Onkwawen:na Raotitióhkwa Language & Cultural Center, online: <www.korkahnawake.org/programs/community-programs-and-services>.

\textsuperscript{162} See, e.g., \textit{Online Cree Dictionary}, online: <www.creedictionary.com/> or \textit{Ojibwe Peoples Dictionary}, online: <ojibwe.lib.unm.edu/>. There is also an Inuktitut language app, “Tusaalanga,” available on iTunes.


\textsuperscript{164} Ibid at para 2.


\textsuperscript{166} \textit{Declaration, supra} note 8, art 14.

\textsuperscript{167} HRC, \textit{Advice No 1, supra} note 163 at para 3.
Nations Education Act or even the revamped First Nations Control Over Education Act are problematic because they are again a unilaterally created, top-down paternalistic approach increasing government discretionary powers over First Nations' education.

To ensure that education positively impacts Indigenous peoples’ cultural development, changes must be made in curricula and public information to better reflect Indigenous peoples and their aspirations.\(^{168}\) Again, some positive examples can provide a model for others to consider, such as the Treaty Relations Commission of Manitoba (TRCM) Treaty Education Initiative, which has developed curriculum resources for teachers on treaties and the treaty relationship.\(^{169}\) The goal of the Treaty Education Initiative is that “all Manitoba students should be expected to demonstrate knowledge of the topics, concepts and understandings of the Treaties and the Treaty Relationship by the end of grade 12.”\(^{170}\) The TRCM has been training educators across the province on using the curriculum since 2011.\(^{171}\) Educators must attend a two-day training session before they can access the curriculum toolkit.\(^{172}\)

Indigenous peoples regaining control over their cultural development will contribute to reconciliation because the underlying cause of colonial domination emphasizing assimilation will be addressed, thus promoting a relationship based on mutual respect and equality. The process of fulfilling Indigenous peoples’ right to self-determination, including political, economic, social and cultural aspects, promotes reconciliation by addressing the root causes of the problem.

\textit{Conclusion}

While the right to self-determination has long been contentious in international law, there is increasing clarity over the application and scope of the right—it is a right of people to freely determine their political, economic, social and cultural futures generally within the frames of existing nation-states, but not exclusively. As recognized by the U.N. Charter, the ICCPR and the Declaration, Indigenous peoples have a full right to self-determination, including internal and external, aspects, and Canada is obligated to respect and promote the realization of this right.

\(^{168}\) Declaration, supra note 8, art 15.

\(^{169}\) For more information, see Treaty Relations Commission of Manitoba, \textit{What is the Treaty Education Initiative}, (Manitoba: TRCM), online: TRCM <www.trcm.ca/treaty-education-initiative/what-is-the-treaty-education-initiative/> [TRCM, Education Initiative].


\(^{171}\) TRCM, Education Initiative, supra note 169.

\(^{172}\) Ibid.
Unfortunately, Indigenous peoples’ right to self-determination has not
been realized in Canada. As this paper has argued, reconciliation cannot
occur until the underlying causes of colonial domination are addressed.
The residential school system is only one example where colonial law
intended to break down Indigenous peoples, their families, communities,
cultures, social structures and legal systems. While the treaties were an
initial exercise of Indigenous peoples’ right to self-determination, Canada’s
failure to uphold these agreements means that Indigenous peoples’
expressed free will is not being respected; rather, they remain subject to
colonial control. There are other examples where Indigenous peoples have
been denied the right to freely determine their political, economic, social
and cultural development. This paper has argued that the framework of
self-determination is a critical component in promoting reconciliation by
addressing the root causes of the problem.

The length and scope of this paper demonstrates the large nature of
the problem to be addressed through the reconciliation process. Realizing
self-determination of Indigenous peoples may require reconsideration of
the Canadian political and legal framework. Canada’s current electoral
and political system may need modification to ensure Indigenous peoples
and their issues are equally represented. The constitution may need
amendment to ensure room for Indigenous peoples’ jurisdiction is properly
protected. Indigenous legal traditions and their role within the Canadian
legal landscape must be recognized and accepted. Measures will need to
be put in place to ensure Indigenous peoples can effectively participate
in decisions that affect their lives, including at the local, national and
international levels. Indigenous peoples must have room to develop their
own economies and remove the reliance on and control by the Canadian
government. Particular attention must be paid to the social and cultural
revitalization of Indigenous peoples, including language education.

By taking action to address the ongoing violation of Indigenous
peoples’ right to self-determination, the original relationship of peace
and friendship, with each retaining their sovereignty, will be restored,
thus contributing to reconciliation. This process will be long and
difficult. However, the Declaration, including its articulation of self-
determination and the rights flowing from it, provides a solid framework
to work toward reconciliation. Through this reconciliation process,

173. *Turpel, supra* note 91 at 593.
harmonious and cooperative relations between Indigenous people and the broader Canadian society can be attained.