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Introduction

This terminology booklet was first developed by the Assembly of First Nations (AFN) for the Constitution Working Group in 1985.[1] AFN's original document was drafted to help First Nations leaders and attendees understand terminology used at the First Ministers' Conference on Aboriginal Constitutional Matters held in Ottawa of that year. I have received AFN's permission to revise and update the original document. I have added other terms and concepts as well. *A Citizen's Guide to Rights* in Appendix A is included to inform students of their rights if and when they ever encounter the police.

One purpose of this terminology handbook is to inform First Nations students on the technical language involved whenever our rights and existence are discussed by politicians, lawyers, or bureaucrats. First Nations students need to understand how our adversaries and our opponents use language to undermine our rights and responsibilities to exist on our own lands. Students also need to better equip themselves in legal language and concepts so they don't surrender their right to think for themselves. In short, we need to know how our opponents think.

1 Assembly of First Nations, *Terminology: Based on Facts, Terms, Theories and Practices,* Prepared for Constitution Working Group, April 30, 1985.

A Citizen's Guide to Rights will enable students to know the limits of police powers in Canada. Far too often the civil and human rights of First Nations are violated by the civil authorities of the state. Racial profiling is still a common experience too many of our people undergo. This handbook is not meant to replace legal advice, but it should serve as a reference and guide outlining the duties and responsibilities inherent in delegated power.

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Terminology and Rights

Aboriginal right: An inherent and original right possessed individually by an Aboriginal person or collectively by Aboriginal peoples in their capacity as Aboriginals.

Since it is inherent and original, it is not granted by any government, but may be recognized.

Subsection s. 35(1) of the Constitution Act, 1982[2] recognizes and affirms existing Aboriginal rights. The problems lie in a lack of consensus as to exactly which rights are Aboriginal and which of them still exist. (*see also* inherent right)

Aboriginal title: The Aboriginal right to ownership of property (with or without possession) possessed individually by an Aboriginal person or collectively by an Aboriginal people (in their capacity as Aboriginals). (*see also* Aboriginal right)

The nature of Aboriginal title has been described in many Supreme Court of Canada cases. First Nations often do not agree with the legal position of Canada regarding Aboriginal title. First Nations see Aboriginal title as being the right to ownership and jurisdiction of all their land and resources. (*see also* land)

2 The Constitution Act, 1982, being Schedule B to the Canada Act (UK), 1982, c 11.

accord: An agreement between parties to settle claims or differences.

act: Legislation approved by Parliament (or legislatures) and assented to by the Governor-General (or lieutenant-governors).

An act becomes part of the law and is passed and amended by simple majority vote. Therefore, it is not entrenched. Also known as statute.

aggression: Use of force by one state against another, especially when intended to dominate. The United Nations recognizes the concepts of cultural and economic aggression as well as aggression by military might. The aggression may be one act or may be an ongoing situation.

amendment: A change or revision to delete or clarify. All laws, including those set out in the Constitution, are susceptible to amendment. Part V of the Constitution Act, 1982 sets out the procedure for amending the Constitution. Generally, under section 38, only the federal government plus 7 governments of provinces with at least 50% of the population of Canada (the "7/50" formula) can amend the Constitution. An amendment to subsection 91(24) of the Constitution Act, 1867 (formally known as the British North American Act, 1867) can be made only by use of section 38. Section 91(24) provides that the federal government has the legislative jurisdiction

over "Indians and lands reserved for the Indians." An amendment cannot be made by the federal government alone except insofar as it is related to the executive Government of Canada or Parliament, i.e., the Senate, House of Commons or federal government departments such as Indigenous and Northern Affairs Canada (INAC).

Any amendment of the amending procedure requires the consent of the federal government and all of the provincial governments. Every amendment is automatically an entrenchment.

America: The word America comes from an Italian explorer, financier, navigator and cartographer named Amerigo Vespucci. He travelled to the New World in 1499 and again in 1502. Vespucci's accounts of his travels were published in 1502 and 1504 and were widely read in Europe. Vespucci was the first to determine the western hemisphere as a "New World" or *Novus Mundus.*[3]

assimilation: Absorption of a distinct group into a national society majority. Assimilation requires a numerical preponderance of the assimilating society and involves compromise on the part of the group being assimilated.

First Nations continue to resist and reject assimilation.

3 "Why is it called America, not Columbusia?" Dictionary.com, accessed November 3, 2016, http://blog.dictionary.com/USA-names.

associated state: A geographically separate state that has full internal self-government, but is linked with another state that takes care of the associate state's defense and international relations or any other matters agreed upon. (*see also* protectorate and protected state)

bilateral: Between two parties.

First Nations maintain a distinct relationship between themselves and Canada by virtue of the treaties with the Crown (for all practical purposes the federal government), the Royal Proclamation, 1763, section 35 of the Constitution Act 1982, and subsection 91(24) of the Constitution, 1867.

In this bilateral relationship, the provincial governments have no part.

Bill C-31: This act eliminated certain discriminatory provisions of the Indian Act, including the section that resulted in First Nations women losing their Treaty-Indian Status and membership when they married non-Indian or non-status men. Bill C-31 made changes to Canada's Indian Act on June 28, 1985. Parliament passed Bill C-31, an *Act to Amend the Indian Act*. Bill C-31 brought the Indian Act into line with the provisions of the Canadian Charter of Rights and Freedoms.

The three principles that guided the amendments to the Indian Act were:

Removal of discrimination

Restoring status and membership rights

Increasing control of Indian Bands over their own affairs

According to Bill C-31, there is a formula set up that specifies which category, or "status" Indians currently fit into. For example, 6(1) indicates full status while 6(2) has status, but can only pass it on to their children in specific instances:

6(1) + 6(1) = 6(1)

6(1) + 6(2) = 6(1)

6(2) + 6(2) = 6(1)

6(1) + non-status = 6(2)

6(2) + non-status = non-status

Non-status + non-status = non-status

According to some, The Indian Register has been criticized for only deferring the termination of Indian status; such deferment is otherwise known as "second-generation cutoff."[4]

4 Katrina Harry, "The *Indian Act* & Aboriginal Women's Empowerment: What Frontline Workers Need to Know," Battered Women's Support Services (2009), accessed March 11, 2016, http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomensempowerment.pdf.

Blue Water Thesis: The Blue Water Thesis, or Salt Water Thesis, was a limited decolonization approach arising from UN Resolution 637, which linked self-determination with non-self-governing territories. General Assembly resolution 637(VII), adopted on 16 December 1952, recognized that "every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination." Belgium, which had given up its own colonial possessions under the new decolonization mandates, then further attempted to secure human rights and self-determination for Native peoples, specifying the Native American peoples within the United States as a prominent example. In response, nations including the United States pushed through the idea that, in order to be eligible for decolonization, the presence of "blue water" between the colony and the colonizing country—or, at minimum, a geographically discrete set of boundaries—was needed.[5]

civilization: In historical terms, a civilization was a so-called "advanced" culture in contrast to more supposedly "primitive" or land-based cultures. In its broadest sense, a civilization contrasts with non-centralized Indigenous societies, including the cultures of nomadic pastoralists, horticulturalists, or hunter-gatherers.

5 "Blue Water Thesis," Wikipedia, last modified December 27, 2013, https://en.wikipedia.org/wiki/Blue_water_thesis.

The concept of civilization has been used as a euphemism and a pretext for colonization, missionization, assimilation, genocide, and land expropriation. Civilization has been used to justify and rationalize the forced imposition of a particular worldview and culture onto other peoples' culture or ways of being.[6] (*see also* dominion, genocide, colonialism)

colonialism: Colonialism is the acquisition and control by a foreign political power of lands, territories and peoples. Colonialism is an unequal relationship in which settler states extend control over Indigenous peoples, including economic exploitation of natural resources; creation of new markets for the colonizing nation; and the geographical expansion of the colonizing nation's ideas, language, and way of life.

Colonialism came about in various ways—especially

a. By colony or settlement of citizens in territory that was geographically separate from the colonizing (or parent) state

b. By conquest

c. By treaty of cession of land

The term colony comes from the Latin word *colonus*, meaning farmer. Colonies were entirely subject to the rule—but did not form an integral part—of the

6 "Civilization," Wikipedia, last modified November 4, 2016, https://en.wikipedia.org/wiki/Civilization.

colonizing state. However, as colonies progressed through internal self-government to full independence, the colonizing state retained the power to disallow colonial legislation.

First Nations were never conquered by either France or Britain. In fact, they allowed citizens of France and Britain to settle in parts of Canada. Some First Nations entered into a relationship of mutual friendship and protection with the British Crown as evidenced by the Royal Proclamation, 1763 and various treaties.

As history shows, however, the Crown ignored the spirit and intent of the Royal Proclamation and the treaties and attempted cultural genocide and assimilation of First Nations, so that today, a situation of neo-colonialism exists between First Nations and the federal and provincial governments. (*see also* assimilation, genocide, neo-colonialism)

common law: Broadly, that body of law that consists of the ancient oral tradition and customs of Britain, and the judgments of the courts (precedence) enforcing customs and interpreting statutes or acts.

With the exception of Quebec (civil law), the British colonizers brought with them at the time of settlement English common and statute law. Later, the provincial and federal assemblies passed their own statutes and Canadian courts built upon the English common law.

It is arguable that the common law should not have been extended to the First Nations.

consensus: General agreement in the best interest for all, to which there is no strong objection, i.e., all parties can "live with" the agreement.

constitution/constitutional law: The supreme law that sets out the framework and the principal functions of the organs of government of a state and declares the law governing the operation of those organs. A constitution consists of a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority.

The Constitution has a special legal sanctity. Some constitutions are written, others are not.

Under the current Canadian Constitution, the Supreme Court of Canada has the ultimate power to interpret the contents of the Constitution and constitutional law, and to invalidate any acts or parts of acts of the federal Parliament and provincial legislatures that are inconsistent with the Constitution.

To that extent, parliamentary supremacy is limited by constitutional law.

Under the Constitution, the federal government alone can pass laws dealing with "Indians and lands reserved for the Indians," s. 91(24).

The Constitution also recognizes and affirms "existing aboriginal and treaty rights" (s. 35). This means treaty rights are now constitutionalized.

convention: An agreement, particularly an international agreement, such as the Geneva Convention. The Geneva Conventions are a series of treaties on the treatment of civilians, prisoners of war (POWs) and soldiers who are considered "outside the fight," or incapable of fighting.

covenant: A covenant is an agreement between two or more persons, entered into in writing and under seal, whereby either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things. In international law, a covenant is a multilateral treaty (or convention) among independent states. Once in force, it legally binds the parties, but there is no practical means of enforcing compliance.

Crown: The Crown is a term used to mean, in effect, the state. It is a symbol of the power of the state, which was formerly vested in the monarch. In Canada, the Crown is our concept of the state. All sovereign authority in and of Canada (be it legislative, executive, or judicial) flows from the Crown, and what we call Canada is understood to be the "body politic" of Her Majesty in right of Canada. In addition, Her Majesty in right of Canada is a fictional legal person. This

means that the state in Canada is a legal person, which explains how the Canadian state holds property and contracts, employs civil servants, and commissions military officers. The term is also found in expressions such as Crown land, which some countries refer to as public land or state land, as well as in some offices, such as minister of the crown, crown attorney, and crown prosecutor.[7]

Crown land: The majority of all lands in Canada is held by governments in the name of the monarch and are called Crown lands. There is the right to hunt and fish for food, which has been accepted as integral to First Nations treaty rights in Canada. The rights of Canadian First Nations and their members to hunt and fish domestically for subsistence have been long accepted on unoccupied Crown lands.[8]

cultural appropriation: The theft or wrongful use of another people's cultural expression, ceremony, identity, or manner of dress. Cultural appropriation is part of the colonial legacy whereby, what is intrinsically First Nations now is claimed by the settler society.[9]

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7 Philippe Lagassé, "Citizenship and the Hollowed Canadian Crown," Policy Options Politiques, March 2, 2015, http://policyoptions.irpp.org/2015/03/02/citizenship-and-the-hollowed-canadian-crown/.

8 "Land Ownership in Canada," Wikipedia, last modified January 27, 2016, https://en.wikipedia.org/wiki/Land_ownership_in_Canada.

9 "Cultural Appropriation," Wikipedia, last modified on November 2, 2016, https://en.wikipedia.org/wiki/Cultural_appropriation.

customary law: Essentially, unwritten law based within ancient and traditional rules, customs, obligations, and practices. Some customary law is recorded.

For Indigenous peoples, customary law is an important source of identity.

Self-government should allow for the restoration of customary law where First Nations so desire.

In societies that are colonized by conquest or cession, the general rule was the customary law of the Indigenous peoples was retained unless and until it was altered or abrogated by the colonizing state. Today, in many First Nations, the goal of restoring customary law, separate or co-existing with the legal system of a colonizing state, is an ongoing objective.

declaration: A formal statement or guiding principles used by various international instruments that are not legally binding and therefore aspirational in intent.

delegated authority: The transfer of authority by one branch of government in which such authority is vested to some other branch or administrative agency.

The authority is, therefore, not inherent in the body that is receiving the delegated authority, i.e., the source of the authority resides in the body transferring the authority.

Municipalities derive their authority from the provincial government and can legally act only with the powers delegated to them.

Delegated authority is not self-government, but has a specified number of governmental powers. It derogates from true self-government.

devolution: The act of decentralizing government responsibilities to lower functioning governing bodies at the regional, local, or Band level. The powers and responsibilities are not absolute and may be temporary or reversible, and ultimate authority resides in the central government.[10]

disallowance: Rejection, invalidation, or refusal to allow.

doctrine: From the Latin *doctrina,* meaning to teach or to learn. A doctrine is a belief system or a principle that is held by a political group, religion, or culture.[11] (*see also* Doctrine of Discovery, Monroe Doctrine)

Doctrine of Discovery: Doctrine of Discovery is an international legal principle invented by European Christian nations in the 15th century to justify their dominance and colonization of Indigenous peoples, lands, territories, and resources in the non-Christian

10 "Devolution," Wikipedia, last modified September 16, 2016, https://en.wikipedia.org/wiki/Devolution.

11 "Doctrine," Dictionary.com, accessed November 4, 2016, http://www.dictionary.com/browse/doctrine.

countries around the world. Its application continues today and sets the foundation of the laws in colonial states—the United States, Australia, New Zealand and Canada. The Doctrine of Discovery is a legal fiction that began with a series of papal bulls. The most notable United States Supreme Court case to articulate the Doctrine of Discovery was *Johnson v. McIntosh* (1823). (*see also* legal fiction)

According to Shawnee legal scholar Robert Miller there are 10 elements to the Doctrine of Discovery. They are as follows:

1. First discovery.

   The first European country to discover lands unknown to other Europeans claimed property and sovereign rights over the lands and Indigenous peoples. First discovery, however, was usually considered to have created only an incomplete title.

2. Actual occupancy and current possession.

   To turn first discovery into recognized title, a European country had to actually occupy and possess newly found lands. This was usually done by building forts or settlements. Physical possession had to be accomplished within a reasonable amount of time after the first discovery to create a complete title.

3. Preemption/European title.

   Discovering European countries also claimed the power of preemption, that is, the sole right to buy the land from Indigenous peoples. This is a valuable property right similar to an exclusive option to purchase land. The government that owned the preemption right prevented or preempted any other European government or individual from buying land from the Indigenous owners. The United States and Canada still claim this power over First Nations lands today. (*see also* Royal Proclamation, 1763)

4. Indigenous or Native title.

   After first discovery, Euro-American legal systems claimed that Indigenous peoples and First Nations had lost their full property rights and full ownership of their lands. Europeans claimed that Indigenous nations only retained the rights to occupy and use their lands. Nevertheless, these rights could last forever if they never consented to sell to the European country that claimed the preemption power. If Indigenous nations did choose to sell, they were only supposed to deal with the government that held the preemption right. Thus, "Indian title" in the United States, "Aboriginal title" in Canada, and "Maori title" in New Zealand, and Indigenous titles elsewhere

allegedly defined limited ownership rights. (*see also* usufructuary)

5. Limited Indigenous sovereignty and commercial rights.

   After a first discovery, Europeans considered that Indigenous nations and peoples had lost some aspects of their inherent sovereign powers and their rights to international free trade and diplomatic relations. Thereafter, they were only supposed to deal with the European government that had first discovered them.

6. Contiguity.

   Under Discovery, Europeans claimed a significant amount of land contiguous to and surrounding their actual discoveries and settlements in the New World. Contiguity became very important when different European countries had settlements somewhat close together. In that situation, each country claimed to hold rights over the unoccupied lands between their settlements to a point half way between the actual settlements. Moreover, contiguity held that the discovery of the mouth of a river gave the discovering country a claim over all the lands drained by that river even if that was thousands of miles of territory.

7. Terra nullius.

   This phrase literally means a land or earth that is null or void or empty. This element stated that if lands were not possessed or occupied by any person or nation, or even if they were occupied but were not being used in a fashion that European legal and property systems approved, then the lands were considered to be "empty" and available for discovery claims. Europeans were very liberal in applying this element and often considered lands that were actually owned, occupied, and being used by Indigenous peoples to be "vacant" and available for discovery claims if they were not being "used" according to Euro-American laws and cultural mores.

8. Christianity.

   Religion was a significant aspect of the Doctrine of Discovery. Under Discovery, non-Christian peoples were not deemed to have the same rights to land, sovereignty, and self-determination as Christians.

9. Civilization.

   The European ideals of civilization were important parts of Discovery and of ideas of superiority. Europeans thought that God had directed them to bring civilized ways, education, and religion to

Indigenous peoples and to exercise paternalism and guardianship powers over them.

10. Conquest.

    The claim that Europeans could acquire Indian title by military victories in "just" and "necessary" wars. In addition, conquest was also used as a term to describe the property rights Europeans claimed to have gained automatically over Indigenous nations just by showing up and making a "first discovery."[12]

domestic dependent nations: This is how the United States federal law, as declared by the Supreme Court decision *Cherokee Nation v. the State of Georgia 1831*, regards the Native Americans of the United States. This case is part of what is known as the *Marshall Trilogy* (1823-1832).

Native Americans in the United States are dependent in the sense that they are no longer recognized as having full independence or absolute sovereignty. They are domestic in the sense that their limited sovereignty operates with the United States and not at the international level.

Native Americans exercise certain important inherent rights except where these have been limited by Acts of the federal government, or by mutual agreement.

12 Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (Lincoln, NE: University of Nebraska Press, 2008), 3-5.

The 1977 American Indian Policy Review Commission stated domestic dependent nations as entailing the following: "The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society."

dominion: From the Latin *dominiō*—lord or master, or *dominium*—a property right of possession. In English common law, lands and territories claimed by the British Crown fell under its sovereignty. Canada was considered a dominion after the passing of the British North America Act, 1867. Dominion remains Canada's official title.[13]

Dominion Lands Act: The Dominion Lands Act of 1872, modelled on American homestead legislation, provided Canada the legal justification under which First Nations lands on the Canadian prairies were to be given to settlers in the pursuit of settler

13 Steven Newcomb, "'Sovereignty' Versus Original Independence," April 20, 2015, Indian Country, http://indiancountrytodaymedianetwork.com/2015/04/20/sovereignty-versus-original-independence.

colonization, and to help prevent the area being claimed by the United States.[14]

entrenchment (or entrenchment clause): A provision or putting language in a constitution so that it cannot be amended by an ordinary act of Parliament or legislatures. This means it cannot be amended by a simple majority. This does not mean a provision is not amendable. In Canada, the 7/50 formula is needed to amend the Constitution.

Simple legislative recognition by the federal government in relation to Indian self-government would not be entrenchment in the Constitution.

existing: Section 35 of the Constitution Act, 1982 recognizes that Aboriginal rights are "existing." The Supreme Court of Canada has stated that this means that any Aboriginal rights that had been extinguished by treaty or other legal processes prior to 1982 no longer existed and therefore are not protected under the Constitution. In other words, the meaning of "existing" according to the *Sparrow* case concluded that such rights are those that were in existence when the Constitution Act, 1982 came into force.[15]

14 T.D. Rehehr, "Dominion Lands Policy," Historica Canada, last edited April 3, 2015, http://www.thecanadianencyclopedia.ca/en/article/dominion-lands-policy/.

15 Erin Hanson, "Constitution Act, 1982, Section 35," 2009. Indigenous Foundations, The University of British Columbia, Accessed April 11, 2016, http://indigenousfoundations.arts.ubc.ca/home/government-policy/constitution-act-1982-section-35.html.

expropriation: When the government takes away land or property for the benefit of the public. The federal, as well as the provincial governments, have the power to expropriate.

A determination of due compensation is based on the fair market value of the land as of a specified date, including appropriate amounts of damages, where applicable.

federation: A system of government set out in a written constitution in which several states form a union, but remain fully sovereign in their internal affairs. This means they retain their independence and self-government.

fiduciary: A fiduciary relationship exists whenever one trusts in, or relies upon, another.

In the *Musquem* case (*Guerin et. al. v. R,* 1984), the Supreme Court of Canada described the federal government as a fiduciary in relation to Indians and Indian lands. This means that the federal government owes a duty of utmost loyalty to Indians in dealing with Indian lands for the benefit of Indians.

First Nations can enforce the federal government's fiduciary duty in court and may receive damages (monetary compensation) where the federal government is in breach of its fiduciary duty.

The federal trust responsibility to First Nations can be divided into three components:

a. The protection of Indian reserve lands and Indian rights to use those lands

b. The protection of First Nations sovereignty and rights of self-governance

c. The provision of basic social, medical, and educational services as outlined in treaty

(*see also* domestic dependent nations)

genocide: First coined by Raphael Lemkin (June 24, 1900–August 28, 1959) in 1944. Raphael Lemkin was a lawyer of Polish-Jewish ancestry who immigrated to the United States in 1941. Raphael Lemkin was instrumental in bringing "genocide" before the United Nations, where delegates from around the world debated the terms of an international law on genocide. On December 9, 1948, the final text was adopted unanimously. *The United Nations Convention on the Prevention and Punishment of Genocide* entered into force on January 12, 1951.

As defined by the United Nations, Article 2 of the convention defines genocide as

"Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

—Convention on the Prevention and Punishment of the Crime of Genocide, Article 2

Article 3 defines the crimes that can be punished under the convention:

a. Genocide

b. Conspiracy to commit genocide

c. Direct and public incitement to commit genocide

d. Attempt to commit genocide

e. Complicity in genocide"

— Convention on the Prevention and Punishment of the Crime of Genocide, Article 3

However, any of those acts must be done with intent to destroy the group totally or partially.

It is evident genocidal acts were—and arguably are—perpetrated against First Nations by Canada. The problem lies in proving that there is intent to destroy the First Nations totally or partially. Preventing genocide, the other major obligation of the convention,

remains a challenge that nations and individuals continue to face.

imperialism: Imperialism is the forceful expansion or extension of a nation's authority, power or dominion by territorial conquest or by establishing economic and political domination of other nations that are not its colonies.[16]

(*see also* colonialism, dominion)

independence: When a former colony or protectorate has cut ties from colonial law of a colonizing state and achieves external sovereignty. Upon gaining independence, the "new" state becomes a subject of international law, and is able to become party to international treaties in its own right.

No other state is able to exercise legal sovereignty over the independent state. Also, the legal independence over every state is a limitation on the sovereignty of every other state.

As globalization continues to increase through international trade agreements, the idea of an absolute independent state diminishes. Therefore, no state really has total or absolute independence or absolute sovereignty. Independence is more abstract than fact,

16 "Imperialism," New World Encyclopedia, Accessed November 4, 2016, http://www.newworldencyclopedia.org/p/index.php?title=Imperialism&oldid=980129.

and more an academic legal concept than a practical one.

An important component of legal independence or external sovereignty is recognition by existing states. Recognition is generally granted once the colonizing state or the protecting state recognizes the new state as legally independent. If recognition is withheld by the colonizing state, it is illegal for other states to recognize the new state as legally independent.

United Nations resolutions and declarations call for respect for the national unity and territorial integrity of existing states so that it is extremely difficult for new states to achieve recognition as a result of secession where the government of the existing state (from which the new state purports to separate) does not agree to the separation.

Article 46(1) of the United Nations Declaration on the Rights of Indigenous Peoples 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 or in part, the territorial integrity or political unity of sovereign and independent States." (*see also* declaration)

Indian: A generic name or misnomer ascribed by Christopher Columbus to the original peoples of the Western Hemisphere.[17]

Indigenous/indigenous: A word deriving from the Latin word "indigenus" meaning "born in a country, native." The word became common internationally after Jose R. Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) developed a working definition in his *Study on the Problem of Discrimination against Indigenous Populations* in 1986.[18] The following criteria are generally understood to define who Indigenous peoples are:

According to recent data, there are approximately 370 million people in the world today that are considered Indigenous. Although there is no specific definition set out in the United Nations Declaration on the Rights of Indigenous Peoples, several definitions have been put forward by those working on international Indigenous rights. The most cited definition for Indigenous peoples has been by Jose R. Martinez Cobo. His *Study on the Problem of Discrimination against Indigenous Populations* outlined certain criteria in defining the concept of Indigenous as follows.

17 Borgna Brunner, "American Indian versus Native American," Infoplease, http://www.infoplease.com/spot/aihmterms.html.

18 UN Commission on Human Rights, "Study of the Problem of Discrimination against Indigenous Populations," March 11, 1986, http://www.refworld.org/docid/3b00f02630.html.

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

a. Occupation of ancestral lands, or at least of part of them

b. Common ancestry with the original occupants of these lands

c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)

d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)

e. Residence in certain parts of the country, or in certain regions of the world

f. Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference."

Another definition of Indigenous peoples was put forward by Andrew Gray (executive director for IWGIA: International Work Group for Indigenous Affairs from 1983-1989) in a paper titled "Who are Indigenous Peoples?"[19] The following is a summary of his definition:

a. Disadvantaged inhabitants of a present day country who have lived in an area since before it became a Nation-State.

b. Often experience higher social problems from the processes of colonization of Nation-State formation.

19 Andrew Gray, "Who Are Indigenous Peoples?" in *Indigenous Peoples, Environment, and Development*, eds. Silvia Buchi, Christian Ernl, Luzia Jurt, Christoph Ruegg (Proceedings of the Conference, Zurich, May 15-18, 1995), http://www.iwgia.org/iwgia_files_publications_files/0145_85_environment_and_development.pdf.

c. Prior rights to territories, lands and resources that are threatened by colonization from the Nation-State.

d. Distinct cultures and economic production methods to those of the dominant society.

e. Self-identification as Indigenous whose recognition is dependent or legitimate by a collective member of a people, tribe, or Nation.

f. Institutions are not recognized and have no means of expressing their desires and aspirations by or within the Nation-State.

g. Vulnerable peoples who claim rights on the basis of occupation prior to the existence of the Nation-State.

h. Often speak of self-determination and control of their lands and resources outside and independent of the Nation-State (whereas settler occupiers talk of self-management of lands and resources within the Nation-State).

Keep in mind the above definitions are by non-Indigenous individuals. Indigenous peoples have their own ways of defining themselves that may or not follow the above descriptions. Since Indigenous peoples and rights are collective in nature, the idea of individual self-identification without collective recognition is problematic and questionable. Indigenous collective

identity is based on relationships though family, kinship, clans, societies, and land whose origins predate settler colonialism. Indigenous identity is certainly not based on a long forgotten ancestor registered on a dusty archive form nor is it based on mere family lore. Indigenous collective identity is about belonging. Perhaps the best comment about Indigenous collective identity and belonging was articulated by noted Cherokee genealogist David Cornsilk as follows: "It's not about who you claim, it's about who claims you."[20]

inherent right: A right that originates within the possessor and does not derive from another source. Therefore, an Aboriginal right is an inherent right.

Inherent rights are fundamental and natural. They are not created by the Constitution or by any other man-made law, but may be recognized by law. Equally, they are not created or given by treaties or any other agreements, but may be so recognized.

The possessor of an inherent right may voluntarily surrender or alienate such a right.

(*see also* Aboriginal right)

International Court of Justice: The court (World Court) is the primary judicial branch of the

20 David Cornsilk, "An Open Letter to Defenders of Andrea Smith: Clearing Up Misconceptions about Cherokee Identification," Indian Country, http://indiancountrytodaymedianetwork.com/2015/07/10/open-letter-defenders-andrea-smith-clearing-misconceptions-about-cherokee-identification.

United Nations (UN), and is located in The Hague, Netherlands. The World Court is the supreme international court for independent states only. First Nations, therefore, cannot appear before the World Court. The World Court settles legal disputes submitted to it by states and provides advisory opinions on legal questions.

All members of the United Nations are able to appear before the World Court, and a few independent states, which are not members of the United Nations, have also been given standing before the World Court. Public international organizations, public or private international corporations, and individuals have no standing before the World Court.

The World Court has no compulsory jurisdiction (i.e., its jurisdiction depends upon the consent of the states) nor does it have power to enforce its judgments, although they are legally binding upon the parties. One example of this non-compliance of judgments is when the court ruled that the United States' covert war against Nicaragua was in violation of international law and the United States withdrew from compulsory jurisdiction. Therefore, states are reluctant to appear before the World Court.

Enforcement of rulings are subject to veto power by the five permanent members on the United Nations Security Council: China, France, Russia, United Kingdom, and United States.

International Criminal Court: The ICC is an intergovernmental organization and international tribunal that is located in The Hague, Netherlands. The ICC has jurisdiction to prosecute people and establishes four core international crimes: crimes against humanity, crimes of genocide, war crimes, and crimes of aggression.

The Rome Statute is an international treaty that established the ICC's function, jurisdiction, and structure. The ICC began operations and came into force on July 1, 2002. As of March 2016, 124 states are party to the statute.[21]

international law: Premised on the Westphalian sovereignty doctrine of nation states having sovereignty over their territory and domestic affairs, to the exclusion of all external powers, on the principle of non-interference in another country's domestic affairs, and that each state is equal in international law. The Peace of Westphalia, 1648, included a series of treaties that ended periodical wars between various European powers.

Sometimes known as public international law, traditionally the law governed relations between legally independent states, but today, international law is also concerned with the rights and duties of public

21 Wikipedia. "International Criminal Court," accessed November 4, 2016. https://en.wikipedia.org/wiki/International_Criminal_Court

international organizations, public or private international corporations, and even, to some extent, private citizens.

International law is weak law (soft-law) and is frequently referred to as "aspirational" in intent. This criticism is justified to some extent. International law is based upon consent of the states; there is no real mechanism for ensuring that states comply with it, and newly independent states often feel that international law has sacrificed their interests to those of the older and more powerful states.

Nevertheless, states obey international law much more than the public believes, and states try to justify their actions by international law, especially where that law is ambiguous.

The generally accepted sources of international law are treaties (multilateral or bilateral), general practices accepted as law, general principles of law recognized by sovereign nations, court decisions, and the writings of prominent scholars. (*see also* natural law)

jurisdiction: It can be summarized into three criteria:

Power, right, or authority to interpret and apply the law

The government's authority to legislate

The territory, or the limits, within which authority may be exercised

Thus, in the first itemized definition, courts are given certain jurisdiction; in the second, due to subsection 91(24) of the Constitution Act, 1867, the federal government and not the provincial governments has jurisdiction over "Indians and lands reserved for the Indians," and in the third itemized definition, the federal and provincial governments have jurisdiction in Canada within their respective division of powers (i.e., sections 91 and 92) or within their respective territorial limits.

The Royal Proclamation, 1763, preserved the jurisdictions of First Nations, in all three itemized definitions, as far as Indians and their lands were concerned; but the Constitution Act, 1867, divided up those jurisdictions among the federal and provincial governments without consultation with, or consent of, the First Nations.

land: Real estate or real property as opposed to personal property. Includes soil, sub-soil, waters and rock, and generally, whatever grows or is erected upon the ground.

According to English philosopher John Locke, private property entails mixing one's labour with land thereby improving the value of its output production resulting in private property. One result of private property is the right to exclude others from its access and benefits.

In Locke's Second Treatise of Government, Chapter 5, paragraph 27:

"Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."

Capable of communal or individual "ownership." Ownership of land, in the common-law tradition really amounts to absolute ownership. The owner of land has qualified ownership, and the Crown has the absolute ownership of all land.

Thus, the typical owner of land owns the following *rights* to the land:

The right to possess the land

The right to occupy the land

The right to exclude others from the land

The right to dispose of the land

The right to use the land

The right to enjoy the products and profits of the land

The right to destroy or injure the land

However, in the general interest such as the rights of other land "owners" and also in the interests of the health, safety and general welfare of the whole community, the land "owner" is restricted in the way he or she may use or dispose of the land.

The point to note is that the so-called "owner" really owns the bundle of rights listed above (which is known as the fee simple absolute) and the Crown is the true and ultimate owner.

Under the Constitution, the Crown that owns the land, mines, minerals and royalties is the Crown of the provinces.

In the *Musquem* Case (*Guerin et.al. v. R*, 1984), the Supreme Court of Canada declared that the First Nations "aboriginal title" was a unique interest (*sui generis*) and that the general terminology of Canadian land law was "somewhat inappropriate" in relation to "aboriginal title."

It would appear, however that "aboriginal title," as described by the Supreme Court, amounts to less than the title of the typical "owner" of land, because, according to the court, the Crown owns the fee simple absolute (highest possible ownership) to Indian lands.

The content of "aboriginal title" *seems* to be the following rights of Indians to the land:

The right to possess the land

The right to occupy the land

The right to transfer the land to the Crown

The right to use the land

The right to enjoy the products and profits of the land, and presumably

The right to destroy or injure the land

Under the Indian Act, as interpreted judicially, an Indian or a Band or the Crown on their behalf may bring an action to exclude trespassers from the land.

land claims: There are two categories of land claims in Canada. In 1973, federal policy divided these two categories as follows: comprehensive (known as modern treaties) and specific, which make claims based on pre-existing treaties or agreements.

Comprehensive land claims—or modern-day treaties—are based on the concept of continuing Aboriginal rights and title that have not been dealt with by treaty

or other legal means. Comprehensive land claims are dealt with through a process established by the federal government to enable Indigenous peoples to obtain full recognition as the original inhabitants of what is now Canada.

Specific claims originate in First Nations' grievances over outstanding treaty obligations, or the improper administration of First Nations lands and assets under the Indian Act. Claims are accepted when it is determined that Canada has breached its lawful obligation or fiduciary responsibility to a First Nation through:

a. The non-fulfillment of a treaty or other agreement
b. The breach of the Indian Act or other statutory responsibility
c. The breach of an obligation arising out of government administration of First Nations funds or other assets
d. An illegal sale or other disposition of First Nations land by government

Specific claims have been dealt with by several mechanisms since 1973, most recently with the creation of an independent judicial body—the Specific Claims Tribunal—which has the authority to make final and binding decisions.[22]

22 Indigenous and Northern Affairs Canada, "Land Claims," accessed November 4, 2016, https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289.

legal fiction: A rule assumed to be true when it is clearly false. It is used by nations, courts, judges, or legislators to achieve a useful purpose or lie, especially in legal matters. Examples of legal fictions are as follows, a) corporations are considered to be a "persons," b) The Doctrine of Discovery used to justify the colonization and land theft of Indigenous lands by European powers.[23]

(*see also* Doctrine of Discovery)

legislation: Laws (acts or statutes) properly passed by Parliament or provincial legislatures. Legislation can have many purposes: to regulate, to authorize, to proscribe, to provide (funds), to sanction, to grant, to declare or to restrict.

Legislation is passed by, and can be amended or repealed, by majority vote. It is therefore not secure.

The courts have jurisdiction to invalidate legislation that is inconsistent with the Constitution.

Machiavellian: Based on the teachings of political philosopher Niccolo Machiavelli. According to Machiavellian theory, honesty—and all other virtues—are expendable if deceit, treachery, and force would be more expedient. In psychology, Machiavellianism is a term that some social and personality psychologists use to describe a person's

23 Encyclopedia Britannica, "Legal Fiction," accessed November 4, 2016, https://www.britannica.com/topic/legal-fiction.

tendency to deceive and manipulate others for personal gain. Machiavellianism could be argued to be a central component of colonialism.[24]

Manifest Destiny: Manifest Destiny is a term for the belief held during the 19th century period of American expansion and colonization that the United States and settlers not only had the right, but were destined, to stretch from coast to coast. The phrase was first coined by journalist John L. O'Sullivan in 1845.[25]

minority: A group of people living in a state made up largely of another group or of other groups. Minorities voluntarily incorporate or integrate themselves with the society as a whole. Minority rights may be protected in the Constitution or by legislation.

Indigenous peoples are not minorities due to pre-existing rights on their own lands and territories.

Monroe Doctrine: The Monroe Doctrine is United States policy toward the Western Hemisphere. It was coined by President James Monroe in December 1823. The doctrine warned Europe that the United States would not tolerate further colonization or puppet monarchs in the Western Hemisphere. The Monroe Doctrine has become a cornerstone of American

24 "Online Etymology Dictionary," accessed November 4, 2016, http://www.etymonline.com/index.php?term=machiavellian

25 History, "Manifest Destiny," accessed November 2016, http://www.history.com/topics/manifest-destiny.

foreign policy. By the mid-1800s, Monroe's declaration, combined with ideas of Manifest Destiny, provided precedent and support for United States expansion on the American continent. The Monroe Doctrine states three major ideas:

a. It conveys that European countries cannot colonize in any of the Americas: North, Central, or South as well as islands of the Caribbean, which were considered to be a part of the Americas.

b. It enforces United States rule of foreign policy, in which the United States will only be involved in European affairs if America's rights are disturbed.

c. It will consider any attempt at colonization a threat to United States national security.[26]

(*see also* Manifest Destiny)

multilateral: Among three or more parties.

municipal government: Town or city hall or local self-government. Municipal governments have jurisdiction to pass by-laws by virtue of powers delegated to them by the provincial governments and must legislate strictly within their powers.

There are two recognized "levels" of "sovereign" government under the Constitution—the federal and provincial—and they are both coordinate and equal

26 National Archives and Records Administration, "Monroe Doctrine."

in status. Municipal governments are entirely subordinate to provincial governments. They therefore exercise only a limited form of self-government.

nation: The notion of a nation is very difficult to define precisely, but generalities can be used to explain the idea behind a nation. A nation can include people of the same race, ethnicity, culture, or social customs and who collectively speak the same language.

Some nations do have multiple peoples of different races and languages and therefore it's possible to have nations that are multicultural, such as Canada. Perhaps the common dominator unifying a nation is its history and culture among the people.

The word is ambiguous and loosely defined and is used interchangeably with state or country.

natural law: A system of inherent rights or justice held to be common to all humans and derived from nature rather than from the rules of society, or positive law. Natural law is granted not by act of legislation but by "God/ Creator," nature or reason.[27] (*see also* positive law)

neo-colonialism: Used by a dominant state of economic, political, or military means to obtain or force compliance over another country's lands and

27 "Internet Encyclopedia of Philosophy," (accessed 11/4/2016.) http://www.iep.utm.edu/natlaw/

resources. It can also be understood as perpetuating the domination of powerful, rich nations over less powerful states.

It can be argued that the federal and provincial governments are practicing neo-colonialism over First Nations, especially in provinces and territories that have not settled land claims or treaties.

Papal bull: A formal edict or statement issued by the pope for various reasons of public communication. Papal bulls cover a wide range of situations, from excommunications to canonizations of Catholic saints.

The 1493 Bull "Inter Caetera" was issued by Pope Alexander VI on 4 May 1493, which granted unlimited rights to Spain to any discovered lands not already held by a Christian prince. Inter caetera laid the foundations for Spanish conquest and genocide in the "New-world." It also legitimized the pope's ability to determine who and what could be ruled by Christian kings. Papal bulls written by the popes are important in understanding the structure of colonization.

There is a growing international Indigenous movement to demand the Vatican officially repeal the papal bulls.[28]

(*see also* Doctrine of Discovery, genocide)

28 New World Encyclopedia contributors, "Papal bull," New World Encyclopedia, http://www.newworldencyclopedia.org/p/index.php?title=Papal_bull&oldid=986990.

parliamentary supremacy: The doctrine that Parliament and the provincial legislatures have the power to make or unmake any law within their respective jurisdictions.

It would follow, from this doctrine, that the courts have no power to deny the force of law to any statute enacted by Parliament or the provincial legislature and there is no judicial power of review. However, this was not entirely so under the Constitution Act, 1867 and is certainly not so under the Constitution Act, 1982. The courts have clear jurisdiction to invalidate any federal or provincial legislation that is inconsistent with the Constitution.

There is therefore no parliamentary supremacy in Canada.

peoples: Indigenous people are "peoples" according to international human rights law. The United Nations Declaration on the Rights of Indigenous Peoples recognizes our inherent rights as "peoples." Originally, the United States refused to accept the term "Indigenous peoples" without qualifying this by saying the use of the term "cannot be construed as having any implications as to rights under international law."[29] Most of the articles were unacceptable to some states as they referred to collective rights, which

29 International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), accessed December 13, 2016, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

they thought were against international human rights laws (basically about individual rights). Many critics of the right of self-determination for Indigenous peoples claim that Indigenous peoples do not constitute "peoples" recognized under international law, and therefore the right of self-determination cannot be applied to them. One concern was accepting the definition of "peoples" as including Indigenous peoples might result in other groups expecting recognition as "peoples." It is feared that this would ultimately lead to instability and political unrest among states.

plenary power: Complete power over a particular area with no limitations. The plenary power doctrine is a legal understanding in which the United States federal government has the power and authority to impart its will on First Nations. "Plenary" is defined by *Black's Law Dictionary* as "full; entire; complete; unabridged," and this definition implies the subordination of tribal sovereignty to an all-encompassing "jurisdictional monopoly."[30]

positive law: Positive law is simply a body of man-made laws consisting of codes, regulations, and statutes enacted, imposed, enforced within a political entity such as a settler state or nation.[31]

30 Legal Information Institute. "Plenary Power," accessed November 4, 2016, https://www.law.cornell.edu/wex/plenary_power

31 Law.com. "Positive Law," accessed November 4, 2016, http://dictionary.law.com/Default.aspx?selected=1552.

principle: A general guide to action that is morally binding only. Principles are rules that govern one's behaviour. Principles are not justiciable.[32]

protected state: A special type of protectorate (*see* protectorate). Protected states were foreign territories to which British protection was extended in some form.

Protected states were places in which:

> There was a properly organized internal government
>
> Britain controlled only the state's external affairs

In a protected state, an Indigenous sovereign controlled internal affairs, and the protectorate arrangements were set out in a treaty between the Indigenous sovereign and the protecting state.

The Royal Proclamation of 1763 refers to "the several Nations or Tribes of Indians with whom We (the British Crown) are connected, and who live under our (the British Crown's) Protection." It made provision for reserve Indian lands in the possession of which Indians should not be molested or disturbed.

Indians were only referred to as Canadian citizens in one Ontario case in 1921. They were not allowed

32 Wikipedia, "Principle," accessed November 4, 2016, https://en.wikipedia.org/wiki/Principle.

to vote, like Canadian citizens or Métis/Half-Breeds, until March 31, 1960.

All of this was done without consultation with, or the consent of First Nations.

It is, therefore, arguable that between 1763, and well into today, First Nations can be equated with protected states rather than as citizen of Canada.

protectorate: A protectorate is a territory over which a protecting state has some jurisdiction but not full sovereignty. It is a territory that has not been formally annexed.

The protecting state does not usually permit third states to enter into international relations with the inhabitants of the protectorate.

The inhabitants of the protectorate have internal self-government, but are not citizens of the protecting state. The inhabitants retained their own citizenship and did not owe allegiance to the protecting state's sovereign. They did owe an almost unlimited duty of obedience in return for protection. In most cases, the protectorate territory was treated as foreign territory to the protecting state.

In the late 1800s, under British Nationality Law, persons who were indigenous to a protectorate and in a protected state became known as British protected persons (BPPs). Although, initially, this may

have been a term of convenience, it soon became a form of British nationality. The status was conferred not by statute but under the Royal Prerogative. The "Indigenous person" test, being unsatisfactorily vague, was replaced by a more sophisticated "belonging" test set out in the British Protected Persons Order 1934/499.

Requerimento: (Spanish for *requirement* as in "demand") A declaration by the Spanish monarchy of Spain's divinely ordained right to take possession of lands of the New World and to subjugate, exploit and, when necessary, to wage war against Indigenous societies. Those who resisted conquest were considered to harbour evil intentions—even though the Indigenous peoples could not understand or speak Spanish. The Spaniards thus considered those who resisted as defying God's plan, and so used Catholic theology to justify genocide and conquest in the New World.[33]

right: An entitlement that is justiciable, i.e., it can be legally asserted against others who have a corresponding duty. A right presupposes a duty. Rights are "owed" individually or collectively and may be transferred or surrendered by the "owner."

Rights may be inherent (*see also* Aboriginal right, inherent right) and recognized by law or they may be created by law (and therefore not inherent).

33 Wikipedia. "Spanish Requirement of 1513," (accessed 11/04/2016.) https://en.wikipedia.org/wiki/Spanish_Requirement_of_1513

Aboriginal rights are inherent, and some treaty rights are created by treaties. The Constitution, 1982 recognizes both under section 35.

Subsection 35(1) recognizes and affirms existing (*see* existing) Aboriginal and treaty rights. The problem lies in the lack of consensus as to the content of those rights, especially Aboriginal rights.

Royal Proclamation, 1763: The Royal Proclamation of 1763 is a document that set out guidelines for European colonization of Indigenous lands and territories in North America. The Proclamation prevented settlers from claiming land or buying land from First Nations, unless it had been first bought or treated by the Crown and then sold to the settlers. It was issued by King George III to establish a governing framework in the British Territories of North America after the fall of New France. It established the constitutional framework for the negotiation of treaties with First Nations to large sections of North America. The Proclamation is referenced in section 25 of the Constitution Act, 1982. As such, it has been labelled an "Indian Magna Carta" or an "Indian Bill of Rights."[34]

34 *Royal Proclamation, 1763*. Indigenous Foundations, University of British Columbia, Accessed December 2, 2016, http://indigenousfoundations.arts.ubc.ca/home/government-policy/royal-proclamation-1763.html.

self-determination: In contemporary law, the right of peoples to choose freely how they can or will be governed. As a political principle (*see also* principle), self-determination can be explained as a group of people, usually possessing a certain degree of national consciousness, forming their own state and choosing their own government. Also, peoples having the right to form their own constitution and choose their own government, as well as the right to attach themselves to one or another state, or constitute an independent state.

The International Covenants on Human Rights declare that "all peoples have the right to self-determination."

The United Nations Declaration on the Rights of Indigenous Peoples states that "Indigenous peoples have the right to self-determination."

So far, this right has been successfully invoked only in situations where colonies were geographically separate from the colonizing states. The United Nations declarations and resolutions call for respect for the national unity and territorial integrity of established states. The United Nations Declaration on the Rights of Indigenous Peoples, Article 46 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.

It is therefore open to argument whether the right applied to overland or internal colonial situations. (*see also* Blue Water Thesis)

self-government: Autonomy; having the ability to rule or govern one's self without being subject to outside authority. A term usually applied in the case of colonies achieving internal self-government.

Professional bodies and municipalities are also referred to as being self-governing, but this so-called "self-government" is of a very limited nature and is not true self-government. Under the Constitution, the provinces are internally self-governing within their respective jurisdictions. On the international level, Canada is self-governing. (*see also* devolution)

settler colonialism: Settler colonialism was (and is) a process in which foreign people or colonists (*colonus*: Latin for farmer) emigrate with the express purpose of territorial occupation and the formation of a new community. Settlers believed that it was necessary to remove the Indigenous population from the land they

claimed. Indeed, Patrick Wolfe, an Australian scholar of settler colonialism, argues that the elimination or extermination of Indigenous peoples itself became the organizing principle of settler colonialism.[35]

sovereign: The one that exercises supreme, permanent authority, especially in a nation or other governmental unit, as:

> A king, queen, or other noble person who serves as chief of state; a ruler or monarch
>
> A national governing council or committee

In modern complex states it is not easy to identify exactly who is sovereign, or where sovereignty is located.

In Canada, the legal sovereign is the Queen-in-Parliament or the Queen-in-Assembly, but their power is not absolute. The Supreme Court has jurisdiction to declare legislation unconstitutional, and therefore "has the last word."

The political sovereign is the people who elect representatives in Parliament or Assembly.

The concept of sovereign is problematic in relation to Indigenous peoples. According to Shawnee scholar Steven Newcomb, whenever a foreign concept such as "sovereign" is applied to pre-contact realities of

35 Wikipedia. "Spanish Requirement of 1513," (accessed 11/04/2016.) https://en.wikipedia.org/wiki/Spanish_Requirement_of_1513

Indigenous peoples it becomes problematic due to "what passes for accurate scholarship about our pre-European existence involves taking European words and concepts and mentally projecting them into our pre-European past, and into a time when only our words and concepts were existing here in our original languages."

sovereignty: Supreme power, subject to no restraints whatsoever, or supreme authority within a territory.

In a federation such as Canada, internal sovereignty is shared so that the federal and provincial governments are all partly sovereign and partly non-sovereign. Their respective areas of jurisdiction are set out in the Constitution.

In the external sense, the federal government has sovereignty, but no country today is totally or absolutely sovereign in this sense of independence or external sovereignty. (*see also* independence)

According to Mohawk scholar Taiaiake Alfred, the concept of sovereignty is a western-based model that is incompatible with Indigenous conceptions of relationships. Taiaiake sees sovereignty as adversarial and coercive in nature and undermining of Indigenous philosophies of peace, power and righteousness.

state: Apart from the states in federations such as United States, a state is a legally independent body

of people politically organized under one government (a unitary state) or more than one government (a federation).

Often used interchangeably and loosely with government, or nation, but a state is distinct from both: the government is the agent of the state and a state may consist of more than one nation.

The state is essentially the organization of which the government is the administrative organ; every state has a constitution, a code of law, a way of setting up its government, and a body of citizens.

a. All individuals or all other organizations within the state territory are ultimately subordinate to the state

b. The state has the legal right to resort to force to compel obedience

First Nations were free and independent prior to European invasion and were recognized as such by the British Crown that dealt with some First Nations by way of international treaties.

treaty: A treaty is an agreement voluntarily entered into between two or more nations that creates mutually binding legal obligations. Treaties established the legal and political relationship between First Nations and the Crown. The written text of the treaties does not reflect all that was agreed to in the treaties.

In contemporary international law, a treaty is a written international agreement concluded between sovereign independent states or nations and governed by international law; it may be in a single document or in two or more related documents; it is intended to create legal relations, and is legally binding. A treaty may also be called a covenant, convention, pact, accord, protocol, or simply an agreement.

The pre-Confederation treaties between the British Crown and First Nations were regarded as treaties in this international law sense at that time. The post-Confederation treaties between the Crown in right of Canada and the First Nations should also be so regarded.

Treaties were negotiated in order that the land would be shared and not ceded or surrendered for the sole sovereignty of Canada.

treaty rights: Rights that accrue to First Nations as a result of treaties between the Crown and First Nations.

Treaty rights are legal obligations that the Crown undertook to assist First Nations in harmonizing the changes brought on by settlers on their lands while protecting the existence of First Nations as distinct societies. For these reasons, promises concerning things like reserve lands, hunting, trapping and fishing, education, annuities, and healthcare were made.

usufructuary: The right to the use and profits of something belonging to another. The *St. Catherine's Milling and Lumber Co. v the Queen* (1888) Privy Council court case was the dominant position for Aboriginal title in Canada up until the 1973 *Calder* case. The *St. Catherine's Milling* case ruled that Aboriginal title was a *usufructuary* right for Aboriginal people and existed (and could be extinguished) at the pleasure of the Crown. The *St. Catherine's Milling* decision claimed that Aboriginal title was granted by the Crown through the Royal Proclamation.[36]

36 Dictonary.Com. "usufruct," (accessed 11/04/2016.) http://www.dictionary.com/browse/usufructWikipedia. "St Catharines Milling and Lumber Co v R.," (accessed 11/04/2016.)

Appendix A

Know Your Rights: A Citizen's Guide to Rights When Dealing with Police* [in Canada]

When dealing with the police, it is important to know what your rights are. This document will provide you with information about what you must do, what you do not have to do, and what you may wish to do in situations involving the police.

This pamphlet contains general information only. It is not a substitute for legal advice and is not intended to replace legal advice from a qualified lawyer. Persons seeking legal advice or guidance with a particular problem should consult with a qualified lawyer.

What if I am stopped by the police?

Police officers can stop you under three general circumstances[1]:

1. If they suspect that you have committed a crime
2. If they see you committing a crime
3. If you are driving

If the police do not arrest you or if they do not have grounds to detain you, they must let you be on your

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way. To find out if you are under arrest or detention, politely ask the officers, "Am I under arrest?" If they say yes, you can ask why. Alternatively, you may ask the officer "Am I free to go?", and if the answer is no, ask "why not?"

Do I have to answer their questions?

The police are allowed to approach you and ask you questions. In most cases, you do not have to answer their questions if you don't want to. However, it is always a good idea to be polite.

If you have been involved in a car accident, and the police ask you questions about the accident, you could be charged with an offence if you do not provide any answers.[2]

If you are detained by the police, they must inform you that you can talk with a lawyer and provide you with an opportunity to do so. It may be a good idea to not answer questions from the police until you have spoken with a lawyer.

Anything you say to the police could be used as evidence in court. Under some circumstances, statements that you are required by law to provide, such as accident reports, cannot be used against you, but this rule is not absolute.[3]

What if the police ask who I am?

If stopped by the police, they will likely ask for your name and address. They may also ask you for identification. In most cases, you are not required to provide this information.

However, if you lie about your name or address you may be charged with obstructing justice or obstructing the police.[4]

If you are stopped while driving, the police may ask to see your driver's licence, car registration and insurance. You are required to provide this information, and if you fail to do so you may be charged with an offence.[5]

If you are riding a bicycle, and the police see you commit an offence (such as failing to stop at a red light), they can stop you.[6] If asked, you must provide your name and address to the police in these circumstances.[7] They can arrest you if you refuse to do so.[8]

What if I am stopped by the police while driving?

The police can stop cars at any time to determine if a driver has consumed alcohol or drugs, to see whether a car is mechanically fit, to check whether a driver has a valid licence, or to make sure a driver has insurance.[9] The police may also stop your car if they suspect that you have committed a driving offence.[10]

If the police ask to see your driver's licence, car registration and insurance, you are required by law to produce these documents.[11] If any of these documents are in the glove compartment, tell the officer that you are reaching for the document before doing so.

Can the police check to see if I have been drinking alcohol?

If the police suspect that you have been drinking alcohol, they can make you do a roadside breath test. They can also ask you to do a physical sobriety test, such as walking in a straight line, on the side of the road.[12] You do not have a right to speak to a lawyer before taking a roadside test.[13]

If the police have reasonable grounds to suspect that you have more alcohol in your blood than the legal limit, or that your ability to drive has been affected by alcohol, they can take you to the police station to do a breath test, sometimes called a "breathalyzer test."[14] You do have the right to speak to a lawyer before taking a breath test at a police station.[15]

Can the police search my car?

If your car has been stopped by the police to check your sobriety, the mechanical condition of the car, or your licence, registration or insurance, the police cannot search your car. They are, however, allowed

to look in the windows of your car, and may use a flashlight to do this if it is nighttime.[16]

The police are only allowed to search your car if they have reasonable and probable grounds to believe that there are illegal drugs or alcohol or evidence relating to the commission of a crime in the car. They must also believe that the evidence, drugs or alcohol would be removed or destroyed if they were to get a search warrant.[17]

When can the police search me?

In most cases, the police can only search you if you have been placed under arrest or if you have consented to the search. However, there are exceptions. These include:

1. If the police find you in a place where they are searching for drugs, and they have reason to believe that you have drugs.[18]
2. The police find you in a vehicle where people are transporting or drinking alcohol illegally, and they believe that you have alcohol.[19]
3. The police believe that you have an illegal weapon or one that was used to commit a crime, and suspect that it might be removed or destroyed in the time it would take to get a search warrant.[20]

If the police search you for any of these reasons, you must allow the search. If you believe that you have been wrongly searched, tell the police that you object to the search, and speak to a lawyer afterwards about your concerns.

If the police search you in relation to one offence, and find evidence that you may have committed another offence, you can be charged in relation to the second offence.[21]

For example, if they search you on suspicion of having drugs, but find an illegal weapon, you can be charged with possession of the illegal weapon.

What if I am detained?

The police have a right to briefly detain you if they are investigating a crime and have reasonable grounds to believe that you are connected to that crime.[22] This type of detention is different from being placed under arrest.

If you have been detained but not arrested, and a police officer believes that there are reasonable grounds to think that his [or her] safety or the safety of others is at risk, the officer may do a "pat-down" search of you to check for weapons.[23]

If you are being detained, you do not have to answer any questions posed by the police.

What if I am arrested?

If you are placed under arrest, the police may search you, your clothes and anything you are carrying. They can also search your "immediate surroundings",[24] which could include your car if that is where you are arrested.[25]

The police are allowed to search you after you have been arrested as long as they believe that the search is necessary for the safety of the police and the public, to protect evidence from destruction, or to discover evidence that may relate to your guilt or innocence.[26]

What are my rights if I am arrested?

The *Canadian Charter of Rights and Freedoms*, which is part of Canada's constitution, sets out the rights that individuals have when they have been arrested.

Will the police tell me why I am under arrest?

You have the right to be informed promptly of the reason for your arrest. If you are unsure, you should politely ask the police officer why you are being arrested.

Do I have to speak to the police if I am arrested?

If you are arrested, you have the right to remain silent. This means that you do not have to answer any questions asked by the police.

Can I speak to a lawyer?

Once you are arrested, you have the right to speak to a lawyer, and the police must advise you of this right as soon as possible. The police must also tell you about Legal Aid and your right to free legal services.[27]

If you wish to contact a lawyer, the police must provide you with a telephone.[28] They must also allow you to make more than one phone call in order to reach a lawyer, if necessary.[29] The police must also stop questioning you until you have been given an opportunity to contact a lawyer.[30] You have the right to speak to a lawyer in private.[31]

Once you have spoken to your lawyer, the police may continue to ask you questions. You do not have to answer these questions.

What if the police come to my home?

The police are allowed to come to your home to talk to you, but you are not generally required to answer their questions or grant them access to your home.

When can the police enter my home?

There are a number of circumstances in which the police are allowed to enter your home. These include:

1. The police have a warrant to enter your home to arrest someone
2. The police have a search warrant

3. The police have permission from you or someone else in authority in your home
4. There are urgent circumstances that require the police to enter your home

The police may also enter your home if they suspect that a crime has been committed in relation to property in your home. In this case, the suspected criminal activity must have been committed against you, not by you.[32]

What are my rights if the police have a warrant?

A search warrant allows the police to search your home and take certain items that they find. Police are allowed to take items that you are not legally allowed to have, such as illegal drugs, or items that may be evidence of an offence.[33] If the police take something that was legally in your possession, they are generally required to return it to you within 3 months.[34] If it is not returned to you, contact the police.

If the police come to your home with a search warrant, they must identify themselves and ask permission to come in. If they have a valid search warrant, you must let them in. If you refuse, they may enter your home without permission.[35] If you try to prevent them from coming into your home, you may be charged with obstructing the police.[36]

In most cases, the police must also show you a copy of the warrant.[37] If they do not offer to show you the warrant, you can ask them to see it. Make sure that the information on the warrant is correct. For example, check that the correct name and address are listed and see if there are any time limits about when the police can use the warrant.

The police are expected to act reasonably in their search. This means that they are not allowed to use excessive force or damage property for no reason.[38]

In what urgent circumstances can the police enter my home?

The police can enter your home without your permission in the following urgent circumstances:

A 911 call has been made from your home, and the police believe that entry is necessary to prevent death or serious injury.[39]

Where the police believe that someone in the home is in need of emergency services.[40]

To help someone who has reported a domestic assault to safely remove their belongings.[41]

To protect people from injury if the police suspect that there is a drug laboratory in the home.[42]

1 This is taken from *Police Powers: Stops and Searches*, online: Community Legal Education Ontario < http://www.cleo. on.ca/english/pub/onpub/PDF/criminal/polpower.pdf>

2 *Highway Traffic Act*, R.S.O. 1990, c. H.8., s. 199, 200.

3 *R. v. White* (1999), 24 C.R. (5th) 201 (S.C.C.).

4 See e.g. R. v. Harry, [2003] O.J. No. 2022 (S.C.J.).

5 See *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, s. 3(3).

6 *Highway Traffic Act*, R.S.O. 1990, c. H.8., s. 218(1).

7 *Highway Traffic Act*, R.S.O. 1990, c. H.8., s. 218(2).

8 *Highway Traffic Act*, R.S.O. 1990, c. H.8., s. 218(4)

9 *R. v. Ladouceur* (1990), 77 C.R. (3d) 110 (S.C.C.).

10 *Highway Traffic Act*, R.S.O. 1990, c. H.8., s. 216(1)

11 *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 7(5) and 33; and Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, s. 3(1).

12 *Criminal Code*, R.S.C. 1985, c. C-46, s. 254

13 *R. v. Orbanski* (2005), 196 C.C.C. (3d) 481 (S.C.C.).

14 *Criminal Code*, R.S.C. 1985, c. C-46, s. 254

15 *R. v. Therens*, [1985] 1 S.C.R. 613.

16 *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 (S.C.C.).

17 James A. Fontana & David Keeshan, *The Law of Search & Seizure in Canada*, 7th ed. (Markham: LexisNexis Canada Inc., 2007), at p. 603.

18 *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

19 *Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 32(5).

20 *Criminal Code*, R.S.C. 1985 c. C-46, s. 117.02, s. 117.04.

21 *R. v. Duong* (2007), 240 B.C.A.C. 104 (B.C.C.A.).

22 *R. v. Mann* (2004), 21 C.R. (6th) 1 (S.C.C.).

23 *R. v. Mann* (2004), 21 C.R. (6th) 1 (S.C.C.).

24 *Cloutier v. Langlois* (1990), 74 C.R. (3d) 316 (S.C.C.).

25 *R. v. Caslake* (1998), 13 C.R. (5th) 1 (S.C.C.).

26 *R. v. Caslake* (1998), 13 C.R. (5th) 1 (S.C.C.).

27 *R. v. Bartle* (1994), 74 C.R. (3d) 129 (S.C.C.).

28 *R. v. Manninen* (1987), 58 C.R. (3d) 97 (S.C.C.).

29 *R. v. Pavel* (1989), 74 C.R. (3d) 195 (Ont. C.A.).

30 *R. v. Manninen* (1987), 58 C.R. (3d) 97 (S.C.C.).

31 *R. v. Jones* (1999), 133 C.C.C. (3d) 1 (Ont. C.A.).

32 *R. v. Mulligan* (2000), 142 C.C.C. (3d) 14 (Ont. C.A.).

33 James A. Fontana & David Keeshan, *The Law of Search & Seizure in Canada*, 7th ed. (Markham: LexisNexis Canada Inc., 2007), at pp. 167-68.

34 *Criminal Code*, R.S.C. 1985, c. C-46, s. 490

35 Eccles v. Bourque (1974), 19 C.C.C. (2d) 129 (S.C.C.); R v. Feeney (1997), 115 C.C.C. (3d) 129 (S.C.C.). See also Susanne Boucher & Kenneth Landa, *Understanding Section 8: Search, Seizure, and the Canadian Constitution* (Toronto: Irwin Law Inc., 2005).

36 *Criminal Code*, R.S.C. 1985, c. C-46, s. 129

37 *Criminal Code*, R.S.C. 1985, c. C-46, s. 29

38 *R. v. Genest* (1989), 45 C.C.C. (3d) 385 (S.C.C.); R. v. Gogol (1994), 27 C.R. (4th) (Ont. Prov. Div.).

39 *R. v. Godoy* (1997), 115 C.C.C. (3d) 272 (Ont. C.A.), aff'd (1998), 131 C.C.C. (3d) 129 (S.C.C.).

40 *R. v. Wu* (2008), 249 B.C.A.C. 311 (B.C.C.A.).

41 *R. v. Sanderson* (2003), 64 O.R. (3d) 257 (C.A.).

42 *R. v. Jamieson* (2002), 166 C.C.C. (3d) 501 (B.C.C.A.).