

# **UNDRIP, Treaty Federalism, and Self-Determination**

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*This paper discusses the possibility that Indigenous expressions of self-determination might be fulfilled despite the fact that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) subordinates them to the colonial frameworks under which Indigenous peoples now find themselves. Developing an approach to Treaty Federalism that adopts a "consociational" form might assist. Another approach, discussed in more detail in this paper, is based on a form of sharing as expressed in certain treaty negotiations. The latter asserts that the legitimacy of the Canadian state arises, in the first instance, by means of a treaty relationship in which, speaking from a Western point of view, Indigenous peoples still retain "sovereignty".*

*Ce document traite de la possibilité que les expressions autochtones d'autodétermination peuvent être remplies malgré le fait que la Déclaration des Nations Unies sur les droits des peuples autochtones (DNUDPA) les subordonne aux cadres coloniaux dans lesquels se trouvent maintenant les peuples autochtones. Élaborer une approche du fédéralisme de traité qui adopte une forme "consociationaliste" pourrait s'avérer utile. Une autre approche, abordée plus en détail dans le présent document, repose sur une forme de partage telle qu'exprimée dans certaines négociations de traités. Cette dernière atteste que la légitimité de l'État canadien découle en premier lieu d'une relation conventionnelle dans laquelle, d'un point de vue occidental, les peuples autochtones conservent toujours leur "souveraineté".*

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## Introduction

This paper begins with the origin of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>1</sup> after the failure of Indigenous peoples to gain recognition under the 1960 United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>2</sup> I then discuss possible roles the idea of Treaty Federalism might play in countering limitations on the scope of self-determination contained in *UNDRIP*.

## On *UNDRIP*

Indigenous peoples are colonized peoples, and so have the same right to self-determination as other colonized peoples, as it is described in the 1960 *Declaration*. This means that, in principle, their right to self-determination includes the right to free themselves from “alien subjugation, domination and exploitation” and to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>3</sup> In other words, the right to independent statehood, and thus a political standing equivalent to any other state in the international community. The application of this resolution here would mean that Indigenous peoples and Canada in principle are equivalent in political status.

Based on this principle, self-determination in Africa and Asia resulted in the formation of politically independent nation-states that are recognized as legitimate by the United Nations, notwithstanding that formerly they were recognized as under the legitimate rule of colonial powers. It is a recognition that stands in contrast to the *Charter of the United Nations* in which the territorial integrity of states is understood to be an inalienable right of each.<sup>4</sup>

However, largely based on technical reasoning (as exemplified by the ‘blue water’ thesis<sup>5</sup>), the United Nations failed to extend this possibility to those colonized peoples who found themselves to be small minority populations within settler states in North, Central, and South America, as well as New Zealand and Australia. It was the impasse initiated by the refusal of states to negoti-

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1 *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/49/Vol.3 (2007) [*UNDRIP*].

2 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, Supp No 16, UN DOC A/RES/4684 (1960) [*1960 Declaration*].

3 *Ibid* at 67.

4 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2.

5 See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 64 [Asch, *On Being*].

ate further on this matter that ultimately led to a political reclassification of these colonized peoples as Indigenous peoples and, on that basis, after years of struggle, to then be acknowledged by the United Nations as having special political rights as Indigenous (not colonized) peoples. That acknowledgment is memorialized in *UNDRIP*.

Hence, while *UNDRIP* follows the 1960 *Declaration* closely in many respects, it does not include a right to self-determination that could lead to the establishment of independent states.<sup>6</sup> Looked at from this perspective, Indigenous peoples become a category of colonized people that do not have such a right.

Aside from making a distinction that contradicts a foundational right guaranteed to other colonized peoples to govern themselves free of external influence, even if that disrupts the territorial integrity of a recognized state, *UNDRIP*'s effect is to offer this category of colonized peoples far less political clout to achieve any desired political relationship than would have been the case were they not excluded from the application of this clause of the 1960 *Declaration*. Here, then, while the right to self-determination in Article 3 includes the "right [to] freely determine their political status and freely pursue their economic, social, and cultural development,"<sup>7</sup> they are limited in Article 4 in the exercise of their right to self-determination "to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"<sup>8</sup> and as per Article 5 "to participate fully, if they so choose, in the political, economic, social and cultural life of the State."<sup>9</sup> It is a proposition that leaves the political initiative to the colonial states in which they find themselves.

At the same time, there is one provision that possibly offers indigenous peoples a means to exercise robust political clout. It is Article 32(2) which says that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territo-

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6 *UNDRIP*, *supra* note 1, art 46: "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".

7 *Ibid*, art 3.

8 *Ibid*, art 4.

9 *Ibid*, art 5.

ries and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>10</sup>

While there is disagreement as to whether this clause requires the state to gain “prior consent” of Indigenous peoples in such matters or merely that they “consult and cooperate in good faith” to seek that consent has been a matter of great debate in Canada and elsewhere.<sup>11</sup> However, even if it were determined by states or some other authority — as, for example, by means of a UN Resolution — that the prior consent provision applies, it still limits the hegemonic exercise of Indigenous political authority to “project[s] affecting their lands or territories or other resources.”<sup>12</sup> In other words, the clause at best operates as a defense against certain state actions rather than as a means to allow Indigenous peoples the authority to seek to develop their lands on their own terms.

In short, looked at on its own, while providing some potentially robust protections, *UNDRIP* really offers Indigenous peoples much less in terms of political rights than are acknowledged for other colonized peoples, for it ultimately legitimates the hegemony of a colonizing state’s power rather than liberation from it. In this sense, it seems to guarantee the political subordination of Indigenous peoples. The question is, how could Treaty Federalism change this balance?

## Treaty Federalism

Treaty Federalism has been described in many ways by many authors.<sup>13</sup> It is not my intention to outline them here. Rather, let me just offer a quick provisional description with which I hope all will agree. Federalism in this context can be succinctly described as the sharing of political jurisdiction among a number of partners. Here the complexity is in the word “sharing”, and it is a matter I will address further.

Treaty is a more complicated term. For my purposes here, I will describe treaty as a set of relations between Canada and Indigenous peoples memorialized at the time of Canadian Confederation principally in the oral accounts of

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10 *Ibid.*, art 32(2).

11 See S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford: Oxford University Press, 2004).

12 *UNDRIP*, *supra* note 1, art 32(2).

13 See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995); Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1980).

the negotiations provided by the Indigenous parties. In addition, I include the evidence provided by Commissioner Morris in his published account of the promises he made on behalf of the Crown during negotiations.<sup>14</sup> Specifically excluded, based on the evidence that these matters were not addressed adequately during negotiations, are the terms memorialized in the written versions, and the so-called cede and surrender clause in particular — matters I discuss at length in *On Being Here to Stay*.<sup>15</sup>

Based on this evidence, the relationship established through treaty entails that the Indigenous parties agree to share their lands in perpetuity with those subjects of the British Crown who wish to settle on them by establishing an enduring partnership akin to one that exists between relatives in a family. More specifically, the partnership is based on an equality of political standing between the parties in which the kind of sharing and mutual aid that flows from kindness are foundational principles.

To be clear, I would not apply the term Treaty Federalism to the current revisionist arrangements advocated by the Federal Government that are currently being negotiated by Carolyn Bennett.<sup>16</sup> These often are imagined as a form of federalism in which a sphere of jurisdiction is allocated to Indigenous parties — sometimes called a fourth level of government and often described as containing powers similar to those now delegated by provinces to municipalities. In other words, it relies on the idea that Indigenous governance is intended to fit within and under the plenary authority of the Canadian state. As such, these arrangements are neither predicated on equality of political standing between the partners nor do they acknowledge that the arrangements flow from an initial moment of graciousness when the Indigenous parties, without ceding their authority as the pre-existing legitimate political authority, gave permission to Canada to establish governance on these lands. I would make a similar observation with respect to so-called Modern treaties, especially in the South (e.g., Nisga'a' and Tsawwassen peoples).

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14 The Honorable Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co, 1880). See also Asch, *On Being*, *supra* note 5.

15 Asch, *On Being*, *supra* note 5.

16 See Crown-Indigenous Relations and Northern Affairs Canada, *Departmental Plan, 2019-20* (Ottawa: Government of Canada, 2019); Jorge Barrera, “Battle Brewing Over Indigenous Rights Recognition Framework” (11 September 2018), online: *CBC News* <<https://www.cbc.ca/news/indigenous/indigenous-rights-framework-bennett-1.4819510>>.

## Treaty Federalism and Consociation

Federalism can provide two kinds of institutional arrangements, each of which, under the right circumstances, could be applied to Treaty Federalism as described above. Together, I have described them as forms of consociation, or ways to work out of power sharing among groups within a democracy on an equitable basis. Further, while the political science definition of “consociation” mentions elite accommodation as a fundamental characteristic,<sup>17</sup> the sociological form, which I am following here, does not include that as a necessary aspect.

One form, which I have previously called “indirect consociation”,<sup>18</sup> is the kind of territorial federalism that exists in Canada today with respect to the French fact. That is, for example, the organization of provinces in a way that ensures the Québécois form a majority in one and then apportioned jurisdiction in a way that ensured the majority had jurisdiction with respect to Section 92 of the *Constitution Act, 1867*.<sup>19</sup> It is a system that has enabled us to construct a fiction that there is no consociational arrangement, that majority rule is all that matters, and has led, for example, to squabbles in Canada over whether Quebec has special status or is one province among ten.

Indigenous peoples, of course, by and large cannot take advantage of this form of consociation, as they represent small populations scattered through the lands of Canada. Some scholars have tried to resolve this by suggesting that Indigenous territories amalgamate into one that is not contiguous; but the problem here, beyond the difficulty of establishing any territorial form of government on this basis, is that Indigenous peoples do not constitute a homogenous singularity.

The second, which I have called “direct consociation”,<sup>20</sup> is more promising. It specifies the target ethnonational populations that gain political authority constitutionally, and so does not need to rely on territorial considerations at all. The two examples I have previously considered are Belgium and Switzerland, both of which, to be fair, also have a territorial component. Using Belgium as the example, the two constitutionally protected communities are the Dutch speakers and the French speakers. Here, while certain decisions, as in Canada, are made by a majority of representatives for the country, or the province, as

17 See Arend Lijphart, “Consociational Democracy” in Joel Krieger, ed, *The Oxford Companion to Politics of the World*, 2nd ed (Oxford: Oxford University Press, 2001) at 172.

18 Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) at 77-79 [Asch, *Home*].

19 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5.

20 Asch, *Home*, *supra* note 18 at 77-79.

a whole, others would require a double majority — that is, a majority of representatives as a whole that includes a majority of representatives from each ethnonational community and thus apply wherever one might live. Even if the Indigenous contingent only made up 10% of the seats in Parliament or in a legislature, on certain matters a majority of their representatives would have to assent to the legislation. It is something that could perhaps be better modeled in the Senate, were the Senate to have veto power over certain legislation — it could also offer seats to various First Nations communities, thereby providing independent voices. At the same time, this form of consociation provides for self-government through territorial majorities and thus leaves unresolved how it would apply to Indigenous communities that are as scattered as those in Canada.

In general, consociationalism imagines that all parties participate in a Western-based political system, and in the 1980s when the Northwest Territories was considering its form of governance after division, Gurston Dacks and I wrote a paper proposing such a model.<sup>21</sup> However, there was one proposal for governance in the North offered by the Dene Nation in the 1980s called *Public Government for the People of the North*.<sup>22</sup> This proposal would have built a mixed system that would have permitted the Dene to use traditional forms of governance for internal matters — and used an Indigenous senate as the veto mechanism. It was rejected by the Federal Government for a number of reasons, of which one was the resulting dissonance in institutional arrangements. On the other hand, following Nichols, I am persuaded that there is now more willingness to consider political arrangement consonant with the belief in “diverse and cooperative federalism,”<sup>23</sup> as well as one that would identify Indigenous peoples as a protected voting bloc.

As I will address a bit further below, such an arrangement, I believe, would meet the standard set for compliance with *UNDRIP* and might come close to meeting the standard for decolonization in cases where the colonized party chooses to remain within the colonial state. Nonetheless, there is something

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21 See Michael Asch & Gurston Dacks, “The Relevance of Consociation to the Western Northwest Territories” in Western Constitutional Forum, ed, *Partners for the Future: A Selection of Papers Related to Constitutional Development in the Western Northwest Territories* (Yellowknife: Western Constitutional Forum, 1985) 35.

22 The Dene Nation and Metis Association of the NWT, *Public Government for the People of the North* (Yellowknife: Self-Published, 1982).

23 Joshua Nichols, “Sui Generis Sovereignities: The Relationship Between Treaty Interpretation and Canadian Sovereignty” (Waterloo, ON: Centre for International Governance Innovation, 2018), online (pdf): *Centre for International Governance Innovation* <[https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.1\\_1.pdf](https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.1_1.pdf)> at 11.

about this solution that seems to run counter to the spirit, if not the letter, of the treaty relationship we established. In particular, it would construct a relationship in which oppositional politics rather than cooperation and mutual assistance would play a central role, in that it is set up institutionally to encourage the parties, as in Belgium, to seek self-interest rather than cooperation. But is there another way? It is to this question I now turn.

## **Federalism in the Spirit and Intent of Confederation Era Treaties**

To my mind there is such a possibility, at least in theory. And, while its realization is certainly not on the horizon, I would like to suggest certain principles that might be brought into play were it ever to be considered. To this end, let me return to the right to self-determination.

In its classical formulation, political self-determination is described as governance without interference from those who are not Self — that is, away from the unwanted Other. Thus, the construction of an independent state is a natural consequence of its political expression; for in the classical view, only such entities have the legitimate authority to keep at a distance that which does not belong to the Self. Thus, in this imaginary the goal of the Self is to take care of itself, and the goal of the Other is to take care of itself. Their relationship comes second. In other words, such a world imagines states each of which is in control of a singular Self. The placement of two or more such Selves within the same state with none being in charge as in a consociation conflicts with self-determination's principle responsibility within this imaginary: to put into place that which is necessary for the Self to the exclusion of what is Other. Hence, it becomes a recipe for opposition and conflict as the parties contest over how best to take care of each Self. In that sense, as Nichols points out, it anticipates a form of relationship that imagines "agonism" as a central and eternal feature of political life.<sup>24</sup>

But there is another way to imagine a political relationship between Self and Other. It flows from the understanding that the Self does not exist on its own, but only in relation to Other. In this perspective Self and Other are from the outset intertwined in such a way that the relationship between them is identified as part of who they are. Thus, it presumes that Self cannot live in a space that is cordoned off from Other, for they are always together. Nor does it imagine, for the same reason, that the preoccupation of the Self-determining

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<sup>24</sup> *Ibid* at 4.



Self is to look after itself to the exclusion of Others — human and other than human. All are always looking after both themselves and others.

As Todorov described in *Life in Common*,<sup>25</sup> many versions of this formulation exist in Western thought. Often, they are modeled on the “mother-child” relationship. I do not wish to use this image as the presumption here is that of a partnership between adults. In a recent article, Tully quotes Mary Parker Follett who, in 1924, describes such a relationship in these words:

I never react to you but to you-plus-me; or to be more accurate, it is I-plus-you reacting to you-plus-me. “I” can never influence “you” because you have already influenced me; that is, in the very process of meeting, by the very process of meeting, we both become something different. It begins even before we meet, in the anticipation of meeting. On physiological, psychological and social levels... response is always to a relating. Accurately speaking the matter cannot be expressed even in the phrase used above, I-plus-you meeting you-plus-me. It is I plus the-interweaving-between-you-and-me meeting you plus the-interweaving-between you-and-me, etc., etc. This pregnant truth — that response is always to a relation, the relation between the response and that to which the response is being made — is the basic truth for all social sciences.<sup>26</sup>

Another formulation, by Martin Buber, provides an image in which there is no possibility of a Self who is independent of Other. Buber’s position is explained by Levinas in his essay “Martin Buber and his Theory of Knowledge” in these words:

The I-Thou relation is one in which the self is no longer a subject who always remains alone and is for this reason Relation *par excellence*, for it extends beyond the boundaries of the self...The relation is the very essence of the I: whenever the I truly affirms itself, its affirmation is inconceivable without the presence of the Thou.<sup>27</sup>

As Adam Kirsch put it in a recent review in *The New Yorker* of a new book on Buber:

Only when we say “You” to the world do we perceive its miraculous strangeness and, at the same time, its potential for intimacy. Indeed, it’s not only human beings who

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25 Tzvetan Todorov, *Life in Common: An Essay in General Anthropology*, translated by Katherine Golsan & Lucy Golsan (Lincoln, NE: University of Nebraska Press, 2001).

26 Mary Parker Follett, *Creative Experience* (New York: Peter Smith, 1924) at 62 cited in James Tully, “Trust, Mistrust and Distrust in Diverse Societies” in Dimitri Karmis and François Rocher, eds, *Trust and Distrust in Political Theory and Practice: The Case of Diverse Societies* (Montreal: McGill-Queen’s University Press) [forthcoming in 2019], online: *PhilArchive* <<https://philarchive.org/archive/TULTMA-2v1>> at 8-9 [Tully, “Trust”].

27 Emmanuel Levinas, “Martin Buber and the Theory of Knowledge” in Seán Hand, ed, *The Levinas Reader* (Oxford: Basil Blackwell, 1989) at 64.

deserve to be called “You.” As Buber wrote, even a cat or a piece of mica can summon up in us the feeling of a genuine encounter with another: “When something does emerge from among things, something living, and becomes a being for me . . . it is for me nothing but You!”<sup>28</sup>

It is a viewpoint that inspires the analysis of the socio-political as found in the work of Marcel Mauss<sup>29</sup> and Claude Lévi-Strauss<sup>30</sup> among others.

As I see it, the contrast between the views of Self and Other can be analogized to the differing ways the Western mind imagines the physical and biological world. The former, at least in Newtonian terms, views the universe as reducible to singularities: objects that move in space. The relationship between them is created through external forces. The image in political thought is a mechanical man, Hobbes’ *Leviathan*<sup>31</sup> that contains us under its authority. On the other hand, the biological universe is built on relations between a minimum of two living entities (gendered in the minimal instance) that are different from each other, yet necessary to each other if the collectivity is to survive from one generation to the next. In addition as Levi-Strauss argues, among humans (given the incest taboo) the minimal number must be two families (however these are defined). “ This means that, from the beginning (even in the State of Nature in Hobbes), humans build political society through a double connection between Self and Other. The one, which is common in the biological world, is the requirement of biologically different individuals; the other, common to humans alone — in Hobbes’ formulation — is that between families. Hence, in both the biological and cultural universes existence requires that Self and Other are simultaneously different from one another, yet in a relationship. This relationship is intrinsic to their continued existence. In this imaginary, beginning with a singularity produces a dead end, for it cannot maintain its existence from one generation to another . It is an idea that is also reflected in Durkheim’s dictum to “consider social facts as things,”<sup>32</sup> that is, the idea that the social universe (social facts) consists of interactions between people that empirically produce results (things) that are different from the results produced by individuals acting alone.

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28 Adam Kirsch, “Modernity, Faith, and Martin Buber” (29 April 2019), online: *The New Yorker* <<https://www.newyorker.com/magazine/2019/05/06/modernity-faith-and-martin-buber>>.

29 See Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, translated by WD Halls (New York: WW Norton, 1990).

30 See Claude Lévi-Strauss, *Elementary Structures of Kinship* (Oxford: Alden and Mowbray, 1969).

31 Thomas Hobbes, *Leviathan*, ed by Richard Tuck (Cambridge: Cambridge University Press, 1996).

32 Émile Durkheim, *The Rules of Sociological Method*, 8th ed, ed by George EG Catlin, translated by Sarah A Solloway & John H Mueller (New York: Free Press, 1964) at 14.

While such an idea is poorly developed in Western thought, as I discuss in *On Being Here to Stay*,<sup>33</sup> I have come to understand it to be highly developed in Indigenous thought, where, among many other matters, it is applied to the organization of political and other relations between humans, between humans and other than humans, and relations among other than humans. This is how I came to understand political relations as they were explained to me among Dene. It is manifest in relations on the Plains between the Cree, Assiniboine, and Anishinaabe, called the Iron Confederacy,<sup>34</sup> that developed in the fur trade era. It provided a conceptual framework for me to understand how groups, such as Cree and Assiniboine could form communities together notwithstanding that they spoke very different kinds of languages; as an Indigenous student once explained to me, it provides ways to ensure that groups practicing different forms of internal political relationship could nonetheless live together without compromise.

It is to this concept that that Indigenous peoples often apply the term “treaty.” So it has been explained to us at least since Kiotseaton described treaty relations to the French in 1645 as “linking arms” together so tightly that “nothing can part us ... Even if the lightning were to fall upon us, it could not separate us; for, if it cuts off the arm that holds you to us, we will at once seize each other by the other arm.”<sup>35</sup> That is, through treaty we create a “knot that binds us inseparably.”<sup>36</sup>

It is often used to describe the political relationship as understood by Indigenous partners in treaties with the Crown entered into at Confederation and after. As explained by Treaty 8 Chief George Desjarlais at the Royal Commission on Aboriginal Peoples:

We are treaty people. Our nations entered into a treaty relationship with your Crown, with your sovereign. We agreed to share our lands and territories with the Crown. We did not sell or give up our rights to the land and territories. We agreed to share our custodial responsibility for the land with the Crown. We did not abdicate it to the Crown. We agreed to maintain peace and friendship among ourselves and with the Crown.<sup>37</sup>

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33 Asch, *On Being*, *supra* note 5.

34 See John S Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg, MB: University of Manitoba Press, 1988); “Nehiyaw-Pwat: The Iron Confederacy” (15 August 2018), online (blog): *Dibaaajimowin* <<https://www.dibaaajimowin.com/tawnkiyash/nehiyaw-pwat-the-iron-confederacy>>.

35 Asch, *On Being*, *supra* note 5 at 118.

36 *Ibid.*

37 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 428.

Here, the key is sharing. The way that this concept is often viewed is as a means to divide things up, hopefully in an equitable way. In contrast to the *Oxford English Dictionary* definition of “share,” it means: “to participate in [...] to perform, enjoy, or suffer in common with others.”<sup>38</sup> To have a relationship like that, then, must mean that the partners see each other as capable agents who have the intention to act both with kindness towards one another and in the spirit of mutual aid — the latter point being made explicit by all parties during Treaty 6 negotiations.<sup>39</sup> In short, in this way of thinking of Self and Other as inextricably bound together, sharing the land cannot mean dividing it up into jurisdictions, but rather working together to arrive at ways to act in common — ways that simultaneously honour what is important for both Self and Other. That, I believe, is the understanding that must have resulted from Commissioner Morris’ repeated use of the word “kindness,” and his suggestion that all parties were like brothers to one another and the intent was to share the land, not take over.<sup>40</sup>

Jim Tully has recently described this relationship, following from Indigenous understandings, in these words:

This unique type of federal relationship of mutual aid is interpreted by indigenous peoples as the gift-recognition-gratitude-reciprocity relationship or, simply, gift-reciprocity. Each member’s way of life is organized in such a way that it does no harm to its neighbours and provides some goods or services that help to sustain them. The neighbours recognize this gift *as* a gift and experience the emotion of gratitude. Gratitude moves and freely obliges the recipients to reciprocate by giving their gifts of mutual aid to the same or other neighbours; thus setting in motion a virtuous gift-reciprocity cycle that co-sustains all relatives.<sup>41</sup>

It follows that in this form of relationship the identification of who has sovereignty is largely irrelevant, for we begin not with identifying which party has sovereignty in a certain territory, but rather how to work out arrangements

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38 *OED Online* (Oxford University Press, 2019) sub verbo “share, v.2”.

39 In particular, during negotiations about famine provisions and the discussion of mutual aid surrounding it.

40 See Morris *supra* note 14 at 108 [parenthetical information added]. Morris writes:

We have two nations here. We have the Crees, who were here first, and we have the Ojibbeways (Anishinaabe), who came from our country not many suns ago. We find them here; we won’t say they stole the land, and the stones and the trees; no, but we will say this, that we believe their brothers, the Crees, said to them when they came in here: “The land is wide, it is wide, it is big enough for us both; let us live here like brothers;” and that is what you say, as you told us on Saturday, as to the Half-Breeds I see around. You say you are one with them; now we all want to be one.

41 Tully, “Trust”, *supra* note 26 at 17 [emphasis in original].

that are mutually beneficial. Let me add that I say “largely irrelevant” because, looked at from a Westphalian point of view, Indigenous peoples retain sovereignty. However, here it would be realized not in the construction of an independent state, but as leadership in guiding the parties on how to take care of the land.

## Getting from There to Here

Of course, from the time it was first published there have been strong critiques of the political world as constructed by Hobbes. Although they take many forms,<sup>42</sup> among the earliest and strongest have been those that rely on ethics and morality. Basically, they suggest that humans do not act as Hobbes imagines in the State of Nature, and thus the establishment of a political system under the rule of a single sovereign is not necessary to overcome chaos. By and large such arguments have been unsuccessful as the Hobbesian imaginary still dominates the organization of political life in modernity. Yet, virtue arguments persist, likely because there is much truth to them, and I do not wish to discard them here. Humans are better than Hobbes describes, and I would uphold such a perspective in arguing in favour of a political world constructed on relationality.

But in fact, I think we need to add a different argument, for these and many others do not directly address the argument *Leviathan* presents in its own terms. In fine, I am suggesting that *Leviathan* lays out an argument based on necessity that is directed specifically to defeat a virtue argument. That is, the virtue argument is contained in the first law of nature: the Golden Rule. Against this Hobbes presents a necessity argument for individual survival as of a higher value.<sup>43</sup>

So, it appears that it would be useful to construct an argument based on necessity to counter Hobbes. In *On Being Here to Stay* I attempted this in an abbreviated form by discussing Lévi-Strauss’ thought experiment on the origins of society to counter Hobbes’ thought experiment on the State of Nature.<sup>44</sup> Basically, in my interpretation, Lévi-Strauss brings in as central a matter that

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42 For example, anthropology replaces the sovereign in the state of nature with culture.

43 This is because, without some entity to enforce a contract, the right of each individual to defend oneself will lead to mutual annihilation. That is, to Hobbes, Golden Rule or not: “For the sake of self-preservation, people will give up their rights only when others are willing to do the same.” And that, I argue along with many others, is the ethic fundamental to the construction of the existing political system in which it is the purpose of Self to protect Self from Other by establishing recognized political borders.

44 Asch, *On Being, supra* note 5 at 116-133.

Hobbes ignores — the reproduction of humans from one generation to another. Indeed, Hobbes, who does discuss the family in the State of Nature, pays no attention to the question of generational succession. But one must, all things considered, imagine it to result from relations between families. Yet in his model, such relations cannot be stable; therefore, the ongoing existence of humanity is, at best, precarious. To Lévi-Strauss, then, human survival — the second law of Nature — requires some form of relationship between families. Specifically, he suggests that this stability is provided by the “incest taboo,” which in effect is a self-enforcing contract that requires us to build political society by establishing relations with those who are other than Self. This means that, from the beginning, even in the State of Nature in Hobbes, humans build political society through a double connection between Self and Other. The one, which is common in the biological world, is the requirement of biologically different individuals; the other, common to humans alone — in his formulation — is that between families. Therefore, political society is constructed through difference and cooperation rather than separation. Hence, this formulation provides an argument based on necessity to justify relationality that counters, if not defeats, the one based on singularities proposed by Hobbes.

## Conclusion

In sum, I am suggesting that there is nothing in Treaty Federalism that can overcome *UNDRIP*'s denial to Indigenous peoples of the scope of the right to self-determination contained in the 1960 *Declaration*. At the same time, it looks to me as though Treaty Federalism can provide means to put *UNDRIP* into practice in ways that does not lead to the subordination of the Indigenous party. Interestingly enough, were Indigenous parties to agree to such arrangements, this would result in Canada coming into compliance with the 1960 *Declaration*, for in addition to a right to an independent state, Resolution 1541, Principle VII — which implements that resolution — asserts that self-determination could result from ‘free association’ between the parties. This provision is described thusly:

- (a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
- (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional process-

es and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.<sup>45</sup>

A solution along these lines would create a relationship between Indigenous and the Colonizer that reflects the political values and practices Indigenous leaders understood as the spirit and intent of the Confederation era treaties they negotiated. The only question is whether on the one hand, after nearly 150 years of dishonouring the relationship, our Indigenous partners would still espouse that position, and, on the other, whether we are now willing to work with them in good faith to get to that place.

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<sup>45</sup> *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, GA Res 1541 (XV), UNAGOR, 15th Sess, Supp No 16, UN DOC A/RES/4684 (1960).

