Discourse and Negotiations across the Indigenous/non-Indigenous Divide



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Introduction:
Defining a Common Space

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Most of the time, the issue of aboriginal governance is addressed in a compartmentalized manner, that is, only some specific fields of governance are analyzed. In addition, it is nearly always presented as an independent field of study, as if governance were an entity in and of itself whose existence was based on objective and substantial foundations. Research conducted by the "Indigenous Peoples and Governance" project team has shown that the issue of governance, especially when the concept is applied to aboriginal issues, is a societal and contextual question, and that governance cannot be a statement of fact but should rather be conceived of as a relationship-building process. In that sense, and since the relationship is central to this process, it is imperative to look at both sides, the two parties involved in the process, and to analyze the exchange that has been initiated. Once the exchange has been created in this way, the *space* that is born between the parties is finally what the very essence of the principle of aboriginal governance will become. It should, however, be about a shared space, in which each party is recognized in its own reality without seeing its own meaning absorbed or defined in contrast to the identity, discourse and practice of the other. We know that at the historical and ideological levels, the aboriginal reality has been systematically reconstructed in contrast to western identity. It has generally been defined according to what sets it apart from the Canadian reference and has frequently been approached as an illegitimate form of social life, if not by contrast as a model opposed to the western model.

In this set of papers, we study that space and its features, and look at what *theoretical pathways* it brings to refresh the discourse on governance.

How is that space, where discourse meets representations, structured? How can it integrate approaches based on the principles of *negotiated rights and judicial pluralism*? How should that space be rethought to leave room for an exchange based on respect and fairness—a space that can reflect and integrate power relationships?

The articles in the following theme-based section show to what extent that relationship-building space, created since Canada emerged as a country, has made it possible to set in motion a process of judicial and political colonialization of relationships between First Nations and the government.

Conceived colonially, on the basis of unequal power relationships and based on a concept that is not only hegemonic but also Eurocentric, any negotiations can only perpetuate an imbalance in the consideration of the interests, values and needs of indigenous peoples in terms of autonomy and self-determination. As a result, any reflections on governance must take the form of questioning the underlying principles of colonialism.

The political and judicial apparatus surrounding the management and negotiation of relationships between indigenous and non-indigenous peoples also

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produces the appearance of fair resolution and consideration of indigenous claims, while in fact the principles underlying that relationship constitute a negation of interests that are not directly in phase with those of the government and the dominant power.

It is, however, useful to recall the bases on which relationships between indigenous and non-indigenous peoples are currently structured; this structure is discussed in the articles by Mathieu Gagnon and Victoria Freeman. Gagnon's socio-historical analysis notes that *contempt* has frequently been the basis for the relationships Europeans—and later Canadians—have had with the aboriginal world, and that perspective of contempt has systematically served to undermine the legitimacy of aboriginal identity, discourse and practice. He shows that the same mechanisms are still active today, reinforcing the contemporary conservative ideology.

Similarly, Freeman reminds us that in the Canadian context, the rhetoric of reconciliation, as promised more or less unilaterally by federal authorities, only extends the relationships of domination between aboriginals and non-aboriginals. The idea of reconciliation in the relationship cannot be defined by just one party exclusively. By extension, as Freeman notes, the idea of reconciliation has no value in and of itself and cannot be considered outside a clear affirmation of aboriginal identity and, as a result, rejecting any aspect of a colonial framework. Without that, one may have results designed to expunge the reality of aboriginal residential schools or to delegitimize any energetic affirmation of the specific and unique nature of aboriginal ways of life.

That aspect is particularly well documented by Tobold Rollo, who shows how the idea of sovereignty, political responsibility and even progress, as defined by liberal democracy, cannot accommodate the aboriginal conception of the world and the land. These concepts are the foundation of a theoretical and institutional framework that pre-structures all discussions on aboriginal reality and rules out any other reference system. This is the foundation of the theory of *Internal Exclusion*. After studying the notion of *Communicative Democracy* proposed by Young, Rollo concludes that it is necessary to recognize the aboriginal reality as *a form of life*. This is the necessary condition for a true forum where exchanges and negotiations can take place. Doris Farget also studies the trap of imposed concepts, analyzing the results of legal decisions based on the protection of *human rights*: the *right to communal ownership and the indigenous way of life*. Her conclusions demonstrate the inadequacy of concepts proposed by the law in response to aboriginal claims. These concepts impose a redefinition of aboriginal expectations that reflects the legal translation of an unequal balance of power.

In another register, Gordon Christie discusses the problem of the legal reference system on which the Crown's legal obligation to aboriginal peoples is based. Does that obligation define the space for an eventual meeting between aboriginals and non-aboriginals? The Crown's legal obligation has frequently been addressed in the framework of the Canadian constitutional and legal order since 1982. Christie highlights the particular position the Crown occupies within this reference system, showing that in fact, the situation makes it the primary, if

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not the only, player in a game from which it can unilaterally decide to withdraw. At least, that is the attitude the Crown generally took before the Supreme Court recognized, in the *Sparrow*, *Van der Peet* and *Calder* decisions, the historic and ongoing nature of the Crown's obligations to aboriginal peoples. That attitude, which is not limited to the Canadian constitutional framework, by extension poses the necessity of finding a point of support outside that framework on which the Crown's legal obligation can be brought to bear.

Michael Coyle addresses the process of negotiations between aboriginals and non-aboriginals, regardless of the legal framework according to which the conditions and modalities of aboriginal governance are to be established. Coyle has previously discussed the asymmetrical nature of negotiations based on categories that come from the dominant culture, notably negotiations between the government and aboriginal communities. That stumbling block can be overcome in the framework of an approach based on the recognition of the parties' interests (*interest-based or integrative negotiations*), but the failure of a great many attempts shows the need for a fresh reflection on the foundations of these negotiations. An approach based on the recognition of the values embraced by each party would be more likely to justify the recomposition of a viable relationship-based space. This type of negotiation would then cease to be considered a *zero-sum event*. That orientation, consistent with Menkel-Meadow's ideas published in 1984 and revisited in the contemporary literature, is more likely to provide justification for new institutions of aboriginal governance in the long term. Such an orientation could foster the emergence of a *Model of Sensibility around Legal Obligations*, one that calls into question any governance negotiations premised on the dominance of a pre-established central authority and generates a new freedom to reinvent the parties' relationship.

The approach developed in the articles in this issue sheds new light on the modalities of governance, giving us a better idea of the interests and needs of the groups that are fighting to remedy the present imbalance of power, a dynamic at once unfair and disrespectful.

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