INDIGENOUS PEOPLES' RIGHTS IN CHILE AND CANADA: A COMPARATIVE STUDY

by

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ABSTRACT

This thesis analyses the past and present realities of the rights of Indigenous peoples in Chile and Canada from a comparative perspective.

In Chapter I, the author explains the international human rights and Indigenous peoples' law that provide the theoretical framework behind this study. The political and territorial rights that different international forums have acknowledged to these peoples in recent years are identified. The methodology used in the elaboration of this study, which includes the analysis of documentary data, the case study and the interview methods, is explained. The author describes the objective of this study, characterizing it as applied social research aimed at providing information that can be useful for the transformation process in which the peoples that are subject of this study are involved.

In Chapters II and III, the author analyses the rights of Indigenous peoples in Chile and Canada respectively from pre-contact until today. The central aspects of their pre-contact cultures and organizations are described. The author also describes main characteristics of the relationships that were established with Indigenous peoples by the Spanish in Chile and by the French and the English in Canada, and later by the states in the two contexts. Special importance is given to those changes recently introduced in the Indigenous-state relationship in both contexts, focusing on their implications for these peoples' rights.

In Chapter IV, the author attempts to expand upon the past and present situation of the Indigenous peoples who live in what is now Canada and Chile by including a case study related to each context: the Pehuenche people of the Alto Bio Bio in Chile and the Nisga'a people of the Nass Valley in Canada.

In the last Chapter of this thesis (V) the author concludes that, notwithstanding the changes introduced in recent years in the relationship between Indigenous peoples and the Chilean and Canadian states, many and significant problems still impede their ability to enjoy the rights they claim. The author acknowledges, nevertheless, that Indigenous peoples in Canada, through different means, including negotiation and litigation, have achieved a much broader recognition of their political and territorial rights today than have the Indigenous peoples in Chile. The legal, political, cultural and economic factors that explain these differences are also highlighted in this final Chapter.
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BIBLIOGRAPHY.
Chile and Canada have developed a growing commercial relationship in recent years. Canada, attracted by Chile's abundant and cheap natural resources, constitutes the largest foreign investor in Chile today. Chile's exports to Canada have steadily increased in the same period. In 1997 the governments of these two countries signed a Free Trade Agreement, giving legal and political recognition to this trading partnership. Important public attention and media coverage has been given to this partnership.

Aside from trade and investment Chile and Canada share a more hidden reality of which the media rarely talks. That reality deals with the existence of Indigenous peoples in both states. Notwithstanding the efforts made by the colonial and state governments throughout history to assimilate or at least integrate these peoples into the dominant societies, many of these peoples and their cultures are still alive today in both contexts. In fact, these peoples represent, particularly in Chile, a not insignificant percentage of the total population of these countries.

Indigenous peoples in Chile and Canada have organized themselves to defend their land rights and their rights as distinct peoples in the last decades. As a result of their claims, through varying processes, reforms of the existing laws and policies that are changing the Indigenous-state relationship have been introduced in both countries. Nevertheless, the extent to which these rights have been acknowledged in both contexts varies significantly. Indigenous peoples in Canada have achieved a much broader recognition of the rights they claim, including among them rights to land and resources and the right to self-government, than what has been achieved by Indigenous peoples in Chile.

This circumstance motivated the author to undertake a study of the current situation of Indigenous peoples' rights in both countries. The author's interest was to understand the extent and nature of the rights acknowledged to Indigenous peoples in Canada today, particularly those of a political and territorial nature, and to compare them with those currently recognized to Indigenous peoples in Chile. Also of interest to this study was to identify and assess the factors which could help to explain the differences in the evolution of Indigenous rights in both contexts.

For this purpose, the author studied the history of the relationship between the Indigenous and the non-Indigenous peoples of Chile and Canada. Consistent with the emphasis that Indigenous peoples place today on the need to know and understand their own histories, an analysis of
Indigenous peoples' pre-contact cultures and organizations was made in both contexts. The relationship between the Indigenous peoples and the Europeans who came to their homelands as well as their descendants was also analyzed, first during the colonial period of both countries and then during the republican period in Chile and the confederated period in Canada.

Notwithstanding the unique characteristics of the history of each country, important similarities were found in the past relationships between Indigenous and non-Indigenous in both contexts. In the common patterns of the relationship, the colonizers forced domination and dispossession on the Indigenous peoples. Indigenous tutelage, assimilation into the dominant society and encroachment upon Indigenous lands were generally imposed on these peoples by the states even until recently.

The significant differences that exist in the recent evolution of Indigenous-state relationships in both contexts are also identified in this study. Aboriginal peoples and their treaty rights have been recognized in Canada's Constitution, and self-government is acknowledged today by the government as an existing right of these peoples. No similar recognition has been made in Chile. In recent years, the judiciary in Canada has interpreted the content of these constitutional rights, progressively broadening the scope of rights they include. Rights to self-government, as well as to land and resources, have been recognized for several Indigenous peoples in Canada who have entered into modern treaties with the governments, both federal and provincial. In contrast, Indigenous peoples in Chile have only limited participatory and land rights under recently-enacted legislation. Despite the recent advances, however, legal and material problems continue to impede the ability of Indigenous peoples in Canada to exercise the rights they claim.

The unique trends in the Indigenous-state relationship in both countries are exemplified in this analysis by the case studies of the Pehuenche people of the Alto Bio Bio in Chile and of the Nisga'a people of the Nass valley in Canada. The different legal, political, cultural and economic factors that help to explain the recent evolution of the Indigenous-state relationship in both contexts are identified in the last part of this study.

Conscious of the limitations of a study of this kind, the author expresses his hopes that this work can help non-Indigenous readers in Chile and Canada to understand this less known, but not less important common dimension of the history and present situation of their countries. The author also hopes that this study allows the same reader to understand and accept the challenges that this reality, which is common to both countries, poses to their future democratic development. Finally,
the author expresses his wish that this study can help Indigenous readers to learn from the process and experiences of Indigenous peoples in other contexts as they assert their rights as distinct peoples.
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CHAPTER I

THEORETICAL FRAMEWORK AND METHODOLOGY.

Two matters of different natures will be dealt with in this Chapter. In the first part of this Chapter we will delineate the theoretical framework which will be used in this study. Significant and extensive academic research has been made in the last century in the field of our interest. Human rights in general and Indigenous peoples' rights in particular have attracted the attention of academics from different geographical and cultural areas of the world. Moreover, important progress has been made at the international level giving increasing legal recognition and protection to individual and collective human rights during the second half of this century.

Notwithstanding the importance of the above referenced academic analysis, which is reflected by the large amount of literature existing on this matter, we will focus our attention on the evolution of Indigenous peoples' rights in recent decades within international forums such as the United Nations, the International Labour Organization, the Organization of American States and other forums concerned with them. It is in the process of the elaboration of international legal instruments, including conventions and declarations concerning these matters, that the richest debate concerning the nature and scope of these peoples' rights has taken place. Moreover, it is in relation to this evolution that Indigenous peoples' representatives and intellectuals have expressed their perspective concerning the topics of our interest. Due to the breadth of the topics included in these instruments and debates, we will focus our attention in this study on two areas where Indigenous peoples' have centred their claims; their political rights and their rights to lands and resources.

In the second part of this Chapter, we will refer to the methodology used in the elaboration of this study. In order to understand the methodology used for this purpose, the objective behind this study, which is to provide Indigenous peoples with information that can be useful for the social, legal and political transformation process in which they are involved, is highlighted. The literature which supports this line of research, which can be identified as applied social research, is analyzed. International guidelines regarding research concerning Indigenous peoples and their heritage are also considered. Finally, the main aspects of the diverse methodology used in this study, which include the analysis of primary and secondary
documentary data, the inclusion of a case study in each of the contexts approached (Chile and Canada), and interviews held with the actors that are relevant for the purpose of this study, are delineated.

1. THEORETICAL FRAMEWORK.

Introduction.

It is acknowledged today that most countries in the world are ethnically and culturally diverse. The world's approximately 200 independent states contain over 600 living language groups and 5,000 ethnic groups. In very few countries can the citizens claim to share the same language or belong to the same ethnocultural group. Among these distinct groups, many of which have traditionally been labelled as "minorities," are Indigenous peoples. Indigenous population was estimated at 300 million human beings in 1990, the majority of whom live in the Americas and Asia, as well as in the polar region in northern Europe. Indigenous peoples have raised their voices in recent decades in demand of the recognition of special rights and treatment.

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2 Francesco Capotorti, UN Special Rapporteur, attempted in 1979 to define this concept for the application of Article 27 of the United Nations Covenant on Civil and Political Rights. According to his definition, a minority is;

   a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979) E/cn.4/Sub.2/384/rev.1. Anthropologist Dr. Bernardo Berdichewsky notes that minority is a social and not a demographic concept. According to Berdichewsky, social position and socio-economic and political power are determinant in majority/minority relationship. He gives the example of the Blacks in South Africa, whom he considers were an oppressed social minority in spite of being the overwhelming demographic majority. Bernardo Berdichewsky, personal communication to the author, Vancouver, July 1999. The author of this thesis agrees with Dr. Berdichewsky in the importance that socio-economic and political factors have in the determination of who a minority group is. Nevertheless, it is also important to note that this concept has traditionally been used by dominant political sectors within states to denominate other ethnic and cultural groups who represent the largest part of the population within the same states in an attempt to diminish their political and demographic significance. Consistently, this author believes that the use that on many occasion is made of this concept can be misleading.

Through their organizations, these peoples have asserted their rights as distinct peoples within the states where they live as well as internationally.\(^4\)

Although the focus of Indigenous peoples' claims vary according to the different contexts in which they live and the problems they face, some claims are common to most of these peoples worldwide. Among these common claims, the protection and control of their traditional lands and resources (territorial rights) and to their right to participate in decisions which concern their lives and their future or to govern themselves in accordance with their laws and institutions (political rights), are to be mentioned. Other claims which are common to Indigenous peoples are those related to the maintenance and development of their own cultures and languages, as well as their right to develop in accordance with their own world views and priorities.\(^5\) The centrality that the recognition of their political and territorial rights by the states and by the international community has for these peoples has been addressed by themselves as well as by non-Indigenous analysts.\(^6\)

As UN Special Rapporteur Martinez Cobo affirms in the Conclusions of his study concerning these peoples, "[t]he recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of the continuous encroachment on their

\(^4\) The emergence of Indigenous peoples' organizations at the national and international level in recent decades, and the influence that these organizations have had in the changes introduced in their treatment by states and the international community is underlined by James Anaya, an Apache legal scholar (S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 46). The importance that the World Council of Indigenous Peoples (WCIP), an entity founded in Canada in 1975 at the initiative of George Manuels of the National Indian Brotherhood of Canada, had in building an international Indigenous movement, whose initial structure covered North, Central and South America, the Nordic region and Australia, is underlined by Douglas Sanders (Douglas Sanders, "The Formation of the World Council of Indigenous Peoples" (Copenhagen, 1977) [hereinafter Sanders, "World Council"] in Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 *American Journal of International Law* 414 at 421).

\(^5\) An example of the relevance assigned to these demands is found in the Declaration of Principles of Indigenous Rights made by the World Council of Indigenous Peoples in 1984 (See World Council of Indigenous Peoples, *Declaration of Principles of Indigenous Rights*, Fourth General Assembly of the WCIP (Panama, 1984), in Anaya, *supra* note 4, at 188-190 [hereinafter WCIP, Declaration]). Similar claims have been asserted in recent years by Indigenous organizations within international forums such as the ILO or the UN Working Group on Indigenous Populations (WGIP), resulting in their inclusion in international law instruments concerning these peoples rights to which we will refer later in this Chapter.

lands. The relationship between Indigenous peoples' right to land and their right to natural resources existing within their lands is also acknowledged by him. As a general norm, Martinez Cobo affirms, "it may be asserted that the natural riches of indigenous land belong to indigenous people, and it is they who can develop it." The rights that Indigenous peoples have over the territories they possess is also acknowledged by him.

The importance that political rights claims have for these peoples is also underlined by Martinez Cobo's study. Aside from acknowledging the problems that impede Indigenous peoples from exercising their political rights within the states where they live, another aspect that he affirms must be considered is the "self-determination and autonomy demanded by indigenous groups, peoples and nations." According to the conclusions of his study, Indigenous peoples have "the right to self-determination which will enable them to continue to exist in dignity, in keeping with their historic right as free peoples."

In contrast with the liberal individualistic approach to human rights which has characterized western democratic states, the collective nature of Indigenous peoples' rights has been asserted by their representatives.

7 Martinez Cobo, supra note 6, at 17 para. 215. According to this UN Special Rapporteur, it is essential to understand the "deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture." Ibid. at 16 para. 196.

8 Ibid. at 18 para. 234.

9 He affirms that "Indigenous peoples have a natural and inalienable right to keep the territories they possess..." Ibid. at 16 para. 198.

10 The UN Special Rapporteur affirms that "[v]arious factors, economic and social ones for the most part, everywhere influence the effectiveness of political rights." Ibid. at 20 para. 255. Moreover, he adds that "these peoples' representation "remains inadequate and is sometimes purely symbolic" and that "[n]ecessary measures must be taken to ensure that their representation in public office is genuine and just." Ibid. at 20 para. 261

11 Ibid. at 20 para. 263.

12 Ibid. at 20 para. 270. An analysis of the nature and applicability of this right to Indigenous peoples will be made later in this Chapter.

13 The emphasis on collective rights can be evidenced when analyzing Indigenous peoples' claims on political and territorial rights. An example of this emphasis can be found in the Declaration of Principles of Indigenous Rights elaborated by the WCIP in 1984 (See WCIP, supra note 5, at 188-190). As Robert N. Clinton affirms when analyzing the nature of Indigenous peoples rights' claims:

The movement for international and domestic legal protection of the rights of indigenous and tribal peoples has refocused attention on the fundamental nature of our conception of human rights. Many proposals for the protection of tribal rights deal with such questions in the manner in which the affected indigenous
Progress has been made in the recognition and protection of Indigenous peoples rights at the national and international level in recent decades. At the first level, legislation protecting Indigenous lands from encroachment by non-Indigenous people has been enacted. Policies to attend Indigenous land claims have also been established. The rights of Indigenous peoples to participate in decisions adopted by government agencies affecting their lives has also been acknowledged in different parts of the world.\(^{14}\) More complex for national governments has been the acknowledgement and protection of Indigenous rights over the natural resources existing within their lands. Even more difficult has been the recognition of Indigenous peoples’ right to self-determination at this level. Only a few states have opened to the creation, through legislation, negotiated treaties or other arrangements, of self-government or autonomous regimes, enabling Indigenous peoples to have broader control of their lives, cultures, resources and development.\(^{15}\) The evolution of these peoples' rights within the international forums concerned with them will be analyzed later in this Chapter.

1.1. Indigenous peoples' definition.

One of the problems that Indigenous peoples have faced in the process of asserting their

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Robert N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1990) 32 No. 4 Arizona Law Review 739 at 739. The collective nature of Indigenous peoples' rights is also underlined by Bernardo Berdichewsky. According to this author, group or collective rights, which include the rights of women, Indigenous peoples, ethnocultural groups, age groups, among others, were discussed and accepted in principle at the United Nations International Conference on Human Rights held in Vienna in 1993 (Berdichewsky, supra note 2. See also Bernardo Berdichewsky, Cultural Pluralism in Canada: What does it mean to the Jewish Community (Vancouver: Canadian Jewish Congress, 1997) at 66.

\(^{14}\) The cases of Chile and Canada, to be analyzed in this study, provide an example of the laws and policies developed at the national level in recent decades for this purpose.

\(^{15}\) The case of the Inuit Home Rule system established in Greenland (Denmark) since 1978 (See Mark Nuttal, "Greenland: Emergence of an Inuit Homeland" in Minority Rights Group ed., Polar Peoples, Self Determination and Development (London: Redwood, 1994) at 1-28) and the self-government regimes created in recent years by the so-called modern treaties in Canada (See Chapter III of this study), are usually mentioned as the most advanced Indigenous self-government regimes worldwide. The autonomous regimes benefiting the Kuna people in Panama since 1953 and the Peoples of the Atlantic Coast of Nicaragua (Miskito, Sumo and Rama) since 1986, are cited as examples on this matter in Latin America (See Rodolfo Stavenhagen, Derecho Indigena y Derechos Humanos en America Latina (Mexico City: Colegio de Mexico, Instituto Interamericano de Derechos Humanos, 1988) at 57-61) [hereinafter Stavenhagen, Derecho]
rights is related to the definition of to whom these rights should be applied. Different criteria, including ancestry, culture, language, residence, group consciousness or self-identification and acceptance by an Indigenous community, have been utilized for this purpose. Despite the attempts made in recent years, no generally accepted definition of Indigenousness exists today. UN Special Rapporteur Martinez Cobo attempted to define Indigenous peoples in his Final Report of the Study of Discrimination Against Indigenous populations by stating:

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 in 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 systems.

Martinez Cobo also acknowledged the right of Indigenous peoples to define what and who is Indigenous according to their own perceptions. According to his Report, such power must not be interfered with by the state concerned through legislation, regulations or any other means. Notwithstanding the potentially limited and controversial view of Indigenous peoples contained in the Final Report definition, it has had important influence as a working definition within the UN system, in the absence of another definition on this matter.

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16 Hannum, supra note 6 at 88

17 Martinez Cobo, supra note 6 at 29 para 379. According to the UN Special Rapporteur, the historical continuity may consist of the continuation, for an extended period of time reaching to the present, of one or more of the following factors: (a) Occupation of ancestral lands or of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general or a specific manifestation of that culture; (d) Language, whether used as the only language or not; (e) Residence in certain parts of the country or in certain areas of the world; (f) Other relevant factors. Ibid. at 29 para. 380.

18 Ibid. at 28 paras. 369-371.

19 As Benedict Kingsbury affirms, it requires Indigenous peoples to have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories. Kingsbury, supra note 4, at 420.

20 According to Sharon Venne, a Canadian Aboriginal lawyer, Martinez Cobo's Final Report was accepted and endorsed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the Economic and Social Council. It could be argued then, she affirms, that Cobo's definition was accepted as a working definition within the UN system. Sharon H. Venne, Our Elders Understand Our Rights. Evolving International Law Regarding Indigenous Rights (Penticton BC: Theytus Books, 1998) at 93. It should be noted that in subsequent discussions, statements and reports the Sub-Commission has referred back to the Martinez Cobo definition as helpful, but not as a final or settled formula of definition. Douglas Sanders, Aboriginal
Indigenous peoples themselves have also attempted to identify elements that can serve to identify those that compose them. According to the World Council of Indigenous Peoples (WCIP), the central elements to be considered for this definition are also historical. The non-dominant position in which Indigenous peoples are within the states where they currently live is also underlined.\(^{21}\)

Another attempt to define who these peoples are was made by the ILO in its Convention No. 169 of 1989 concerning Indigenous and tribal peoples.\(^{22}\) By contrast with Martinez Cobo's definition, the ILO definition has a more diffuse historical requirement, including in its legal definition a category of "tribal peoples." With this definition, the ILO has established the applicability of this treaty in all regions of the world.\(^{23}\)

More recently, the World Bank, a specialized UN agency, has defined Indigenous peoples for the purpose of guiding its personnel as "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the

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\(^{21}\) According to this organization, an Indigenous people is one:

a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and

b) who continue to live in the territory and who do not control the national government of the state or states within which they live.


\(^{22}\) Article 1 (1) of this Convention stipulates that it applies to:

a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.


\(^{23}\) Kingsbury, \textit{supra} note 4 at 420.
development process. This functional approach to define who Indigenous peoples are, which does not consider historical criteria as other definitions do, makes it much more applicable to different contexts of the world. Also important, it acknowledges Indigenous peoples' right to define themselves, as well as the link existing between them and their ancestra lands.

It should be noted that the difficulties of arriving at a universally accepted definition of who Indigenous peoples are and to whom their rights should be applied, has also been present at the specialized United Nations entity concerned with these peoples, the Working Group of Indigenous Populations (WGIP). Despite the attempts made by the WGIP created within the UN system in 1982, no agreement has been reached on this matter until now. The Draft Declaration on the Rights of Indigenous Peoples that emerged from this entity in recent years, to be analyzed later in this Chapter, does not contain a definition of Indigenous Peoples. This situation, nevertheless, should not be considered unusual within the framework of the United Nations system, where after half a century of existence, there have been difficulties with arriving at an accepted definition of terms which appear to be central for the evolution of international law, such as peoples, nations and minorities.

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24 World Bank, Operational Directive 4.20, in IWGIA, Newsletter, Nov./Dec 1991, at 19 in Kingsbury, supra note 4 at 420. Additional criteria set by the Bank to identify their presence in particular geographical areas includes (a) a close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-oriented production (Kingsbury, supra note 4 at 420).

25 Ibid.

26 Venne, supra note 20, at 41.

27 Hannum, supra note 6 at 89; Venne, supra note 20 at 93.

28 The responsibility that state members of the UN, that integrate the WGIP, have in this matter, is underlined by Elsa Stamatopoulou:

Countries that sought to undermine the drafting of the declaration on indigenous peoples' rights insisted in adopting a definition of indigenous peoples first. When this proved to be extremely difficult, these countries suggested an indefinite postponement of any work in the substance of the declaration.


29 According to Stamatopoulou, the United Nations in its forty five year old history has not defined "minorities" nor "peoples." (Ibid). Coinciding with that statement, Venne affirms that the interpretation that should be given to the terms nation, self-determination and peoples has yet to be fully clarified. Although some guidelines have been developed within the UN system for detecting who are peoples with a right to self-determination, no definition of
To end this reflection, it is interesting to note the criteria which has recently been proposed from an academic perspective to define who Indigenous peoples are by Kingsbury. According to this author, the modern development of this concept has been conditioned by the history, circumstances and political discourses of states shaped by European settlement. In order to respond to questions made to the applicability of this international concept to the diverse realities of different regions of the world, Kingsbury proposes a more flexible approach to this definition which "may provide scope to promote the fundamental values underlying the concept of "indigenous peoples," while recognizing both its changing nature and the need to work out its what the term means has yet been ratified (Venne, supra note 20 at 72-73). Harold S. Johnson refers to the unfinished debate that has taken place within this institution concerning the definition of the terms peoples and nation, affirming:

In the discussion in the United Nations concerning the definition of the terms "people" and "nation" there was a tendency to equate the two. When a distinction was made, it was to indicate that "people" was broader in scope. The significance of the use of this term was centered on the desire to be certain that a narrow application of the term "nation" would not prevent the extension of self-determination to dependent peoples who might not yet qualify as nations... a nation was composed of the people belonging to the same ethnic group; that the land on which the nation was settled should be delimited; that the individuals concerned show a collective will to live together; that a nation was the product of a common consciousness of common ideals which were reinforced often but not necessarily always but racial, linguistic, and cultural ties; that a nation was the community to which one belonged by one's own choice; and that in the last analysis the only valid standard was a subjective one, in the sense that any group of people living in a determinate territory constituted a nation if it were conscious of itself as a national entity and asserted itself as such.


Kingsbury, supra note 4 at 446.

Kingsbury notes that representatives of both states and non state groups in Asia have raised questions to the applicability of this concept, which does not incorporate their interests and social realities. Although he thinks that there are elements of opportunism in these questions, he believes that there are important arguments that support the challenge they have made to the acceptance of a concept of Indigenous peoples based on continuity with a "pre-colonial" or "pre-invasion" society. (Ibid.) Similar questions regarding the applicability of this concept to contexts different than those of the Americas, Australia, New Zealand and Greenland were recently raised by UN Special Rapporteur Miguel Alfonso Martinez in his Final Report of the Study on Treaties. According to M. Martinez, the process of the domestication of Indigenous issues must be set off against that of independence/decolonization in the Latin American, Afro-Asian and Pacific countries which differ greatly, raising questions to the applicability of the concept of "indigenousness" to refer to any possible case of "State-oppressed peoples," including "minorities," in the particular context of today's Afro-Asian and Pacific states. Consequently, he considers it necessary for the purpose of his Study, to "re-establish a clear-cut distinction between Indigenous peoples and national and ethnic minorities." (Miguel A. Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report*. Unedited Version (UN Doc. E/CN.4/Sub.2/AC.4/1998/C.R.P.1) at 16 para. 72-73. Bernardo Berdichewsky agrees with the distinction made by M. A. Martinez between Indigenous peoples and ethnic minorities. He exemplifies the distinction between these two categories in the case of Canada, where he highlights the difference existing between Aboriginal peoples and national (French Canadians) and ethnic minorities (communities of immigrants and their descendants). Berdichewsky, supra note 1.
application in a vast range of situations."  

This author emphasizes the importance of the commonality of experiences, concerns and contributions existing among different groups in different regions to define who Indigenous peoples are. He argues that functional matters, such as land, cultural dislocation, environmental despoliation and experiences with large development projects establish a unity among them that is not dependent on the universal presence of historical continuity. He concludes by proposing a dynamic process of negotiation, politics, legal analysis, institutional decision making and social interaction to work out the application of these criteria to the innumerable nuances of each specific case.

1.2. Indigenous peoples in international law.

1.2.1. First international law instruments.

For a long time, international law did not consider Indigenous peoples, or the population who composed them, as a matter of concern. It has only been during the twentieth century, and especially since the 1950's that these peoples have become a subject of positive international law.

32 According to this approach, Kingsbury identifies as essential requirements for the definition of Indigenous peoples, self-identification as distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity. He identifies as strong indicia for this purpose, non dominance in the national (or regional) society (ordinarily required); close cultural affinity with a particular area of land or territories (ordinarily required); and historical continuity (especially by descent) with prior occupants of land in the region. He finally identifies as other relevant indicia, socioeconomic and sociocultural differences from the ambient population; distinct objective characteristics such as language, race, and material or spiritual culture; and to be regarded as Indigenous by the ambient population or treated as such in legal and administrative arrangements (Kingsbury, supra note 4 at 455).

33 Ibid. 457.

34 Early international law concerning these peoples can be found, nevertheless, in the conferences on Africa held in Berlin (1884-85) and Brussels (1889-90), which dealt with the necessity of improving the conditions and well being of the "aborigines" and "native tribes." After World War I, the doctrine of "trusteeship" was developed. Based on this idea, Article 22 of the League of Nations Covenant dealt with "peoples not yet able to stand by themselves under the strenuous conditions of modern world" and saw in their "well being and development, a sacred trust of civilization." Under Article 23 of the same Covenant, members of the League committed to "undertake to secure just treatment of the native inhabitants of territories under their control." (Lerner, supra note 3 at 99). According to Douglas Sanders the language of humanitarian concern or sacred trust, arose in the context of the "scramble for Africa" at the end of the nineteenth century and in the dismantling of the German colonies and the
In the first decades of the present century, the ILO showed concern for the conditions of Indigenous workers. In 1921, the ILO developed a series of studies on Indigenous workers. A Committee of Experts on Native Labour was established in 1926. The Committee's recommendations led to the adoption of several Conventions concerning such workers.35 Years later, in 1953, the ILO published a study on the living conditions of Indigenous and tribal populations worldwide, out of which the Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations of Independent Countries emerged in 1957.36 In its Preamble, this Convention, the first comprehensive international law instrument dealing with these peoples, affirms its aim to "the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions." The same instrument also includes among its contents provisions dealing with land rights.37 The Convention also deals with employment and recruitment of Indigenous workers, social security, health, education and the use of language. Indigenous integration, and in many cases assimilation, were considered by the

Ottoman Empire at the end of the World War I. He sees the use of humanitarian or "sacred trust" language as a self-conscious justification or rationalization of the actions of the colonial powers in these two periods of imperial competition and division of spoils. Douglas Sanders, supra note 20.

35 Among them, Convention No. 29 of 1930 on forced labour, No. 50 of 1936 on the recruitment of Indigenous workers, No. 64 of 1939 on contracts of employment of Indigenous workers, and No. 65 of the same year on penal sanctions related to Indigenous workers, are to be mentioned. Lerner, supra note 3 at 105.


37 Its Article 11 recognizes Indigenous populations the right to ownership, collective or individual, of the land. Article 12 provides that the populations concerned shall not be removed from their habitual territories, "except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations." Under Article 13, the customs of these populations regarding transmission of rights of ownership and use of land shall be respected, within the framework of national laws and regulations. The shortcomings of this Convention's land right provisions, particularly of its Article 12, are highlighted by some authors. (Venne, supra note 20 at 70 and Catherine Brolmann and Marjoleine Zieck, "Indigenous Peoples," in Catherine Brolmann et al. eds., Peoples and Minorities in International Law (Dordrecht: Martinus Nijhoff, 1993) at 201-202. A different perspective on this matter is stressed by Douglas Sanders who sees the land right provisions as the best of Convention No. 107, and the weaknesses as lying in other provisions. According to this legal analyst, the land right provisions of this Convention had significant impact. Douglas Sanders, supra note 20.
states as goals to achieve. The same states did not recognize these peoples as such but only as "populations." Consequently, they were not entitled to collective rights, but only to rights of an individual nature to be exercised in the context of the states in which they lived.38

b. Inter-American system.

American states have also been concerned with Indigenous peoples. In 1940, at the First Inter-American Indian Congress held in Mexico, an international Convention which established the basis for a continental policy regarding Indigenous peoples and created the Inter-American Indian Institute (III) was approved.39 As of 1990 ten Inter-American Indian Congresses had been called by the III, the organism in charge of the coordination of the Indian policy in the continent. Important resolutions concerning Indigenous land and freedom rights, right to vote, and respect for traditional cultures, among others, have been sanctioned by the American states participating in these events. Their effectiveness, nevertheless has been limited.40 As a consequence of these conferences, the OAS included in its Inter-American Charter of Social Guarantees, approved in Bogota in 1948, an article (39) establishing that in those countries where "the problem of indigenous population exists," necessary measures should be adopted in order to give the Indian protection and assistance, guaranteeing them life, freedom and property, defending them from extinguishment, and protecting them from oppression, exploitation and misery, and giving them adequate education.41

38 According to Douglas Sanders, although Indigenous people were recognized in this Convention as a distinct sector of the population, this distinctiveness was to end in time in accordance with its provisions (Douglas Sanders, personal communication to the author, Vancouver, Spring 1998). Only 27 states have ratified this Convention. Canada and Chile are not among them.

39 A declaration, according to which the relationship of American states with Indigenous peoples should be based on respect for Indigenous identities and cultures, the rejection of legal or practical procedures based upon racial differentiation, equal rights and opportunities, respect for positive values of Indigenous cultures, and the promotion of economic development of Indigenous groups, was released by the 1940 Congress. By 1988, the Convention approved in this Congress had been ratified by 17 American states, including Chile and the United States. See Stavenhagen, Derecho, supra note 15 at 107.

40 Most of these resolutions have not been implemented until today, due to the fact that they are not binding for the OAS governments. Ibid. at 108.

41 Trans. by the author.
Since 1953 the III has been a specialized agency of the Organization of American States (OAS). Despite the fact the III constitutes a small institution, it has been influential in the promotion of Indigenous peoples' rights within the continent. It was also influential in the adoption by the General Assembly of the OAS of a resolution (1989) calling for the drafting of an Inter-American instrument on these rights.

1.2.2. Indigenous peoples in the United Nations system.


With the creation of the United Nations in 1945 and the adoption of the Universal Declaration of Human Rights in 1948, the world community recognized for the first time that human rights were not an internal domestic issue of sovereign states, but a concern of all humanity. In spite of this, influence of the western political and philosophical perspectives dominant in the postwar era led the United Nations to give priority to the protection of individual rights and freedoms rather than that of group rights.\textsuperscript{42} According to this perspective, the inclusion in the UN system of minority rights in general, as well as that of Indigenous peoples' rights in particular, was for a long time rejected.\textsuperscript{43} Notwithstanding the resolutions passed within the UN in the coming years regarding Indigenous peoples, their situation and rights were not seriously approached until decades later, when the Working Group on Indigenous Populations (WGIP) was created in 1982.\textsuperscript{44} A special mention should be made of the Covenant on Civil and

\textsuperscript{42} The UN approach was that whenever someone's rights were violated or restricted because of a group characteristic (race, religion, ethnic or national origin, or culture), the matter could be taken care by protecting the rights of individuals, through the principle of non-discrimination. Such is the concept contained in the UN Charter of 1945 (Article 1.3) and in the UN Declaration on Human Rights of 1948 (Article 2.1). Years later, the same concept was entrenched in the International Covenant on Civil and Political Rights of 1966 (Articles 2.1, 26 and 27) (Lerner, \textit{supra} note 3 at 14).

\textsuperscript{43} Proposals for the inclusion of provisions relating to rights of minorities in the human rights declaration were rejected both by the United States and Latin American delegations. No mention was made to Indigenous populations. Rodolfo Stavenhagen, "Human Rights and Peoples' Rights- The Question of Minorities" (1989) 103 \textit{Interculture} 1 at 9ff. [hereinafter Stavenhagen, "Human Rights"]

\textsuperscript{44} During that period, nevertheless, important international Conventions were approved by the UN dealing with among other issues the Prevention and Punishment of the Crime of Genocide (1951), Discrimination in the Sphere of Education (UNESCO, 1960) and the Elimination of all Forms of Racial Discrimination (1965). Although not specifically referring to these peoples, they contributed to create a framework for the protection of discriminated peoples and groups in the world, among which Indigenous peoples could be identified.
Political Rights as well as of the Covenant on Economic, Social and Cultural Rights approved by the United Nations in 1966. These two Covenants, which regulate in a binding way the rights and principles enunciated in the Universal Declaration of 1948, affirm in Article 1 common to both instruments, that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This right originally was not meant to be applied to Indigenous peoples but to peoples in the process of decolonization. Its implications for Indigenous peoples will be analyzed later in this Chapter. The Covenant on Civil and Political Rights includes among its provisions Article 27, which states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Nevertheless, this provision deals with the rights of "persons belonging to such minorities," limiting again its application to individuals and excluding groups. On the other hand, Article 27 does not contain any explicit reference to positive measures to which minorities should be entitled for the protection of their rights. Indigenous peoples were again ignored under this approach. If they were considered at all, they fell under the category of minorities, one that is not acceptable for them.


In 1971 the UN ECOSOC authorized the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to undertake a comprehensive study on the "Problem of Discrimination Against Indigenous Populations," appointing Mr. Jose Martinez Cobo as Special Rapporteur on this issue. Its final report included an analysis of the different aspects in which the discrimination against these peoples was manifested, stating in its

45 Lerner, supra note 3 at 15.

46 Martinez Cobo, supra note 6. The Study, which included 37 countries worldwide, was released only in 1983 in extensive five volumes.
concluding chapter that the social conditions in which the majority of Indigenous populations lived favoured their discrimination, oppression and exploitation. The study also included a comprehensive analysis of the existing institutions and provisions dealing with these peoples both at the national and international level. It attempted to define who these populations were, made several recommendations to the United Nations and other international agencies dealing with them, and set up principles for the elimination of their discrimination. The same report also called for the development of a new study of the same topic in the African countries and another study dealing with treaties in which Indigenous peoples had been involved. Although important as a source of information of Indigenous peoples problems and challenges, its international impact is debated.


In 1982, the ECOSOC authorized the Sub-Commission to establish the Working Group on Indigenous Populations (WGIP). It was given two mandates. The first was to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, and the second, to give special attention to the evolution of standards concerning the rights of the same populations. This WGIP has met every year since its creation except in 1986. Indigenous peoples and their organizations, regardless of whether or

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47 Ibid.

48 The acceptance of Martinez Cobo final report within the UN system was noted by Sharon Venne (Venne, supra note 20 at 93). It has also been underlined by Ms. Erica Daes, currently the Chairperson of the UN WGIP (Erica-Irene A. Daes, A Concise Overview of the United Nations System’s Activities regarding Indigenous Peoples (Background paper presented at the UN Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, Whitehorse, 24-28 March 1996, UN Doc. HR/Whitehorse/1996/SEM/2 at 2) [hereinafter Daes, Concise Overview]. According to Douglas Sanders, the study had little impact. It was too long, outdated and incomplete in its information. Also, the study remained inaccessible until its conclusions were printed in 1987 (Douglas Sanders, "The UN Working Group on Indigenous Populations" (1989) 11 No. 3 Human Rights Quarterly, 406 at 408 [hereinafter Sanders, "Working Group"])

49 The WGIP was created as a subsidiary body of the Subcommission on Prevention of Discrimination and the Protection of Minorities. It is composed of five members of the Subcommission, representing different areas of the world, who serve in their own personal capacity as independent experts. (Sanders, "Working Group" supra note 48, 406 at 407-411)

50 UN ECOSOC, Resolution 1982/34 of May 7 1982.
not they have a consultative status with the ECOSOC, are entitled to attend these meetings that take place in Geneva. Because of its mandate, and its openness to Indigenous participation, it has become the focal point for Indigenous rights issues within the UN system.\(^5\)

One of the major concerns of this WGIP, to be developed later in this Chapter, has been the preparation of a Draft Declaration of the Rights of Indigenous Peoples. The WGIP has also considered a large number of other issues relating to Indigenous rights, needs and aspirations. Among these issues, the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations, the Study on Indigenous Heritage, the possible creation of a Permanent Forum for Indigenous peoples within the framework of the United Nations system, and the International Decade of the World's Indigenous peoples, should be mentioned here.\(^6\)

### 1.2.3. Recent evolution of international law concerning Indigenous peoples.

#### a. International law instruments currently in effect.

Two international law instruments concerning these peoples have been approved in recent years by different international instances:

**i. ILO Convention No. 169.**

Criticism coming from Indigenous organizations of the integrationist approach of Convention No. 107 of the ILO, led this institution to a process aimed at the revision of this legal instrument.\(^7\) Within three years the ILO developed, through a complex procedure that included

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\(^{5}\) 700 participants attended its 1995 sessions, of which 400 were Indigenous people (Daes, *Concise Overview*, supra note 48 at 2).

\(^{6}\) Ibid.

\(^{7}\) The role played by Indigenous organizations in the adoption by the ILO of new legal standards for the achievement of self-determination is underlined by Russel L. Barsh, of the Four Directions Council, Washington State, US. (See Russel L. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 No. 1 *Oklahoma City University Law Review* 209 at 209). Douglas Sanders believes that competition with the UN also triggered this revision process (Sanders, *supra* note 38). A meeting of experts called by the ILO in 1996 agreed that the Convention's approach was inadequate and no longer reflected current thinking on the matters it
Indigenous participation, a new Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries. Like Convention No. 107, the new Convention deals with a wide variety of issues ranging from Indigenous participatory rights and land and resource rights, to education, health, recruitment, conditions of employment, and training for Indigenous workers. The following aspects of this Convention, related to the topics of interest to this study, that is Indigenous political and territorial rights, will be analyzed here.

**Political rights.**

The Preamble and first articles of this Convention lay out its fundamental principles in this matter. The Preamble makes clear its intention of "removing the assimilationist orientation of earlier standards" and of recognizing "the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the frameworks of the States in which they live." Article 1.1 recognizes Indigenous peoples as such and not as populations as Convention No. 107 did in the past. Nevertheless, Article 1.3, after defining the peoples to which its provisions are to be applied (tribal and Indigenous peoples), affirms that "[t]he use of the term peoples shall not be construed as having any implications as regards the rights which may attach to the term under concerned, and recommended its immediate revision (ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107) Report VI (I)*, at 117 (International Labour Conference, 75th Session, Geneva 1988)).

According to Lee Swepston, ILO expert at Geneva, this was the furthest NGOs representing Indigenous peoples or speaking on their behalf, have ever been allowed to go in directly representing their own interests in an international standard setting forum. Many adaptations of the text were made following NGOs interventions. Nevertheless, the same expert admits that some representatives of these groups felt that they had inadequate representation in ILO discussions. (Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: The ILO Convention No. 169 of 1989" (1990) 15 No 3 *Oklahoma City University Law Review* 677 at 687.

The use of the term "peoples" in the Convention, according to ILO Secretariat, was oriented to consolidate the recognition of these peoples right to their identity, and demonstrate a change in the orientation toward a broader respect for their cultures and ways of living. It will also contribute to the adoption of a common terminology with other United Nations instruments existing at the time. ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107), Report IV(2A)* (ILO, Geneva, 1989).
international law.” The implications of the use of the term "peoples" in the new Convention are still uncertain. Finally, Article 1.2 addresses a crucial demand of Indigenous peoples. That is the recognition that self-identification as "a fundamental criterion for determining the groups to which the provisions of this Convention apply." 59

The Convention recognizes both participatory and self-government rights of Indigenous peoples. 60 Participatory rights are recognized to these peoples throughout the Convention provisions. 61 These provisions represent an important step in comparison to Convention 107, which only required governments to "seek the collaboration of these populations and their representatives." Nevertheless, they are weaker than those initially proposed by different instances of the ILO with the purpose of ensuring the effectiveness of Indigenous participation

57 According to Barsh, this clause was a consequence of government pressure due to their fears that the inclusion of the term peoples would imply the right to self-determination in the sense of the Charter of the United Nations, that is the right to independent statehood. Assurances by Indigenous organizations that they were not seeking secession did not change governments fears. Barsh, supra note 53 at 231.

58 According to Lee Swepston, an ILO expert, the argument that the Convention limits the right to self-determination of these groups can be rejected. This right, if it exists for these peoples, remain to be defined in international law, in particular by the United Nations. He considers highly unlikely that the ILO convention will limit the future debate on this issue, and more probable that the use of this term will be positive for increasing the recognition in international law of the right of these peoples to a separate and continued existence. Swepston, supra note 54 at 694.

59 Although resisted by some governments such as Brazil and India, this clause, which is coherent with the principle of granting these peoples control over their own affairs stated in the Convention, was finally adopted through vote at the ILO conference. Barsh, supra note 53, at 216.

60 Barsh affirms that both types of rights respond to different trends in the development of Indigenous peoples rights. The first come from recent debate over development strategies, and is the concept of rights of some kind of groups, as well as of individuals, to "popular participation" or to a direct voice in decisions affecting them, a principle that was adopted by the UN Declaration on the Right to Development. The second arises from Indigenous peoples's insistence that, because of their historical origins and cultural distinctiveness, they are entitled to more than a mere participation. Ibid. at 217.

61 Among these provisions, the following should be highlighted: Article 6.1 that affirms that in applying this Convention, governments shall: a) "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;" b) "establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them"; Article 6.2 that states that "[t]he consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.;" and Article 7.2 which affirms that "[t]he improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for economic development of areas which they inhabit."
process. Notwithstanding this fact, these provisions, especially those referring to the consultation that governments should perform with Indigenous peoples through "appropriate procedures" and through their "representative institutions" and in "good faith" (Article 6.1 and 2), could constitute, if governments who ratify this convention honour their commitment, the basis for important changes in the relationship until now existing between them.

Regarding self-government, although not recognized explicitly as demanded by Indigenous organizations, the Convention contains several provisions which acknowledge it as a right of the said peoples. Several other provisions of this Convention, among them Articles 22, 23, 25, and 27, provide for the devolution of management and policy control over different matters (vocational training, health services, education) without relieving the state from financial responsibility. This includes, upon the request of Indigenous peoples, appropriate technical and financial assistance (Article 23.2). These provisions, in particular those dealing with Indigenous peoples' right to decide their own priorities, to have their own institutions, to exercise control over their development, are stated in a very similar manner as in Article 31 of the UN Draft Declaration on the Rights of Indigenous Peoples to be analyzed later in this Chapter. Consequently, their practical implications in terms of granting these peoples self-government rights in internal and local matters, could be similar.

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62 In 1988 by the ILO Meeting of Experts proposed that Indigenous right to participate in the decision making process should be effective, offering them the opportunity to be heard and have an impact on the decisions taken. The ILO Secretariat proposed later a text requiring governments to "seek the consent" of Indigenous peoples before taking any legislative or administrative measures affecting them. Barsh, supra note 53 at 218.

63 The ILO Secretariat made clear that this statement did not imply that consultations referred to would have to result in obtaining the agreement or consent of those being consulted. International Labour Conference, "Record of Proceedings," 76th Session, 1989, doc.25, 74. in Brolmann and Zieck, supra note 37 at 208.

64 Among them the following are to be mentioned: Article 7.1 that affirms that Indigenous peoples shall have the right to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."; Article 8.1 that states that in applying national laws and regulations to the peoples concerned, "due regard be shall be had to their customs or customary laws." and Article 8.2 that establishes that these peoples have the right to "retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights."

65 Barsh, supra note 53 at 222. These provisions should be considered as a step in order to enable Indigenous peoples' control of their own internal affairs. They may allow the progressive change of government managed policies and resources, to self-managed policies within their communities, with technical and financial assistance from governments.

19
Territorial rights

Part II of the Convention develops Indigenous peoples' land and resource rights extensively. It acknowledges the special importance that the relationship with their lands and territories has for them (Article 13.1), it defines Indigenous territories as those which cover "the total environment of the areas which the peoples concerned occupy or otherwise use" (article 13.2). It also addresses the need of recognition of their rights of "ownership and possession" over the lands which have "traditionally occupied" (Article 14.1), the responsibility of governments in taking steps necessary to identify and guarantee effective protection of the same lands (Article 14.2), and affirms that adequate procedures shall be established within national systems in order to resolve land claims of Indigenous peoples (Article 14.3).

Article 15 approaches a complex issue. It intends to safeguard Indigenous peoples' rights to natural resources pertaining to their lands. This right, according to the Convention, includes their participation "in the use, management and conservation of these resources" (Article 15.1). In cases in which states retain the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall "establish or maintain procedures through which they shall consult these peoples ... before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." Article 16 deals with

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66 The inclusion of the term "territories," which was strongly opposed by governments, was a result of the insistence by Indigenous representatives. They view that this concept would have broader political, as well as geographical and ecological implications, than that of land. Nevertheless, its application was restricted to some Articles (14, 15 and 16) of the Convention. Ibid. at 224.

67 Article 14 was intended to reflect the fact that, in many cases, the concept of ownership is unknown to Indigenous traditional legal structures, and that possession is often a far more important right for them. The inclusion of the term "traditionally occupy" means that there should be some connection with the present, for instance, a relatively recent expulsion from or loss of lands. It should also be read in connection with the request made to states to establish procedures for Indigenous land claims (Article 14.3) without limits in time as to when those claims should have arisen. Swepston, supra note 54, at 700-702.

68 Article 15 was one of the most polemic of the Convention. According to these peoples' customs, the enjoyment of the right to land, necessarily implies the rights to the resources pertaining to it. The problem was complex to resolve, because in most countries, these resources, particularly those of the subsoil, are considered to be state property. According to Swepston, this Article interposes procedural rights for indigenous peoples related to states' exercise of their right to ownership. (Ibid. at 704-705). The provision regarding Indigenous participation, "wherever possible," in the benefits of exploitation of these resources and compensation for the damages it produces (Article 15.2), is less constraining than was desired by the NGOs, who wanted firm guarantees on this matter. Barsh, supra note 53 at 227-229.
Indigenous peoples' relocation, an important factor for their loss of land. It establishes a general prohibition of removal from lands which they occupy (Article 16.1). Relocation should constitute an "exceptional measure." It should require free and informed consent of the peoples concerned to be undertaken (Article 16.2). The right to return to their traditional lands after the grounds for the relocation cease to exist is also established (Article 16.3). When compensation is demanded, it should be paid (Article 16.3, 4).69 Finally, article 17.1 affirms that the procedures established by the peoples concerned for the transmission of land rights among their members shall be respected.70

The ILO Convention No. 169 does not seem to satisfy either the states nor Indigenous peoples. It evidently constitutes a compromise between the different positions in play. Nevertheless, the Convention constitutes an important step when compared to the past Convention of the same organization. It serves as a base from which to continue on the development of an Indigenous peoples' rights framework within international law. Its importance lies in the fact that, after its ratification by several countries, it is the only comprehensive piece of international legislation specifically dealing with Indigenous peoples' rights.71

**ii. Agenda 21.**

This international instrument was adopted in the context of the UN Conference on Environment and Development, in Rio de Janeiro, in 1992.72 Although not specifically related to Indigenous peoples, it contains a Chapter (26) calling States that are signatories to recognize and

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69 Indigenous peoples had demanded consent to be a condition for relocation. The Conference found it necessary to provide for cases in which consent could not be obtained. The paragraph provides for instances where their consent cannot be obtained, and sets up a procedural requirement for appropriate procedures. Swepston, *supra* note 54 at 706-707.

70 The same Article establishes that these peoples should be consulted when their capacity to alienate or transmit their rights outside their own community their lands is being considered (17.2). NGOs present at the debate of this convention affirmed that the lands of these peoples should be made "inalienable." This was not accepted. The Conference adopted the present wording. This should be read together with Article 8, recognizing custom and customary laws. *Ibid.* at 709.

71 By July 1996 the Convention had been ratified by ten states (*Venne, supra* note 20 at 92). Chile and Canada were not among them.

strengthen the role of these "people" and their communities. This Chapter acknowledges the historical relationship between these "people" and their lands, including within this concept the environment of the areas which they traditionally occupy, as well as the traditional scientific knowledge they have of their lands, natural resources and environment (Chapter 26.1). It also calls governments, in full partnership with Indigenous "people," to establish a process that enables their empowerment through the different measures it proposes for this purpose (Chapter 26.3.a). The same Chapter asks the governments to establish arrangements to strengthen their active participation in the formulation of policies, laws and programmes relating to resource management and other development processes that may affect them (Chapter 26.3.b), and to enable their involvement at the national and local levels in resource management and conservation strategies (Chapter 26.3.c). Finally, it considers the adoption by the governments of specific measures - including the ratification of international conventions, the adoption of policies or laws to "protect indigenous intellectual and cultural property, and the right to preserve customary and administrative systems and practices" (Chapter 26.4) - to allow "some indigenous people" greater control of their lands, self-management of resources, participation in decisions affecting them, including participation in the establishment or management of protected areas.

Notwithstanding the ambiguities of this document (it uses the term "people" and not "peoples"; some of its provisions are only applied to "some indigenous people," etc.), and the fact that it is considered to be an action programme for governments not binding on those States which are signatories, it shows the consensus arrived at in recent years, at least rhetorically, regarding the recognition of land, resource and political rights for Indigenous "people" worldwide. It also shows the growing international concern that exists with regard to the protection of Indigenous peoples’ relationship with their resources and environments.

b. Draft declarations on the rights of Indigenous peoples.

As previously referred to, two international declarations aimed at identifying and clarifying the nature and scope of Indigenous peoples' rights, one within the UN system and the

73 Among these measures should be noted: the adoption of appropriate policies and/or legal instruments; the protection of the lands of these people from activities that are environmentally unsound or that these people consider to be socially or culturally inappropriate; the recognition of their values, traditional knowledge and resource management practices with a view to promoting sustainable development; and the development of national resolution arrangements in relation to the settlement of resource management concerns.
other within the OAS system, are currently being debated. Indigenous peoples, through their representative organizations, have attempted to have their perspectives incorporated in these declarations. Although their approval is still pending, draft declarations have been released in recent years by both of these entities. We will analyze each of these documents here.

i. UN Draft Declaration.

After years of careful deliberations, with the active participation of representatives of Indigenous organizations and observer governments, the UN WGIP agreed upon a Draft Declaration on the Rights of Indigenous Peoples in July 1993. This Draft Declaration recognizes that Indigenous peoples have "the right to Self-determination," affirming that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (Article 3). This Article is drafted in the same language as that used for all peoples in other human rights instruments when asserting this right. Article 31 refers to a possible way in which these peoples can exercise this right when affirming:

Indigenous peoples, as a specific form of exercising their right to Self-determination, have the right to autonomy or self-government, in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environmental and entry by non members, as well as ways and means for financing these autonomous functions.

It should be highlighted that the affirmation made in Article 31 of this Draft Declaration of the internal and local nature of Indigenous peoples' self-determination does not impede,

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74 The agreement of the WGIP on this Draft Declaration was produced in July 1993 (UN ESCOR, Comm. on H.R., 11 sess., Annex I, UN. Doc. E/CN.4/ Sub.2/1993) and was submitted to the Sub Commission for the Prevention of Discrimination and the Protection of Minorities. This Sub Commission adopted this Draft Declaration by resolution 1994/45 in August 1994 and submitted it to the Commission on Human Rights for its consideration. Daes, Concise Overview, supra note 48 at 3.

75 Article 1 common to the two United Nations Human Rights Conventions of 1966.

76 Douglas Sanders sees this Article as a possible elaboration of the meaning of Article 3. Some Indigenous representatives expressed their concerns that this Article would be seen as a definition or limitation of the right to self-determination stated in Article 3. According to Sanders, the exact wording of Article 31 denies such linkage. Douglas Sanders, "Developing a Modern International Law on the Rights of Indigenous Peoples" (Course Materials, Faculty of Law, U.B.C., December, 1994) at 30 [unpublished] [hereinafter Sanders, "International Law"]
according to Ms. Erica Daes, Chairperson of the WGIP of the UN, the right that these peoples have to secession under extreme circumstances.\textsuperscript{77}

Also concerning political rights, this Draft Declaration recognizes Indigenous peoples' right "to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully... in the political, economic, social and cultural life of the State" (Article 4); the right "to identify themselves as indigenous and be recognized as such" (Article 8); "to belong to an indigenous community or nation" (Article 9); "to manifest, practice and develop their spiritual and religious traditions, customs and ceremonies" (Article 13); "to participate fully... at all levels of decision-making in matters which may affect their rights, lives and destinies..." (Article 19); "to maintain and develop their political, economic and social systems" and "to be secure in the enjoyment of their own means of subsistence and development" (Article 21); and "to determine and develop priorities and strategies for exercising the right to development." (Article 23).

Another central matter addressed in this Draft Declaration is Indigenous peoples' right to land and resources. As Convention No. 169 of the ILO does, this document not only deals with their right to land, but also to territories and resources. The maintenance and strengthening of their relationship with these lands, territories and resources is underlined by Article 25.\textsuperscript{78} The right to own, develop, control and use their lands and territories in accordance with their laws

\textsuperscript{77} According to Ms. Daes, self-determination and the right to secession cannot be denied to any people who meets the classic criteria for the right, and this includes Indigenous peoples. Nevertheless, she believes that there is a limit to its exercise:

Where there is an existing state, the constituent peoples must act through that state's political system and government, unless the system is "so exclusive and non-democratic that it no longer can be said to represent the whole of the population." There is a continuing right to secession under these extreme circumstances.


\textsuperscript{78} Article 25 of the UN Draft Declaration states:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.
and institutions is highlighted by Article 26.\footnote{Article 26 of the \textit{UN Draft Declaration} states:}

The central concepts of the Draft Declaration on this matter represent, according to Robert Coulter, a great step forward. This author believes that the recognition made by this document of the rights to lands and resources, if implemented, would end the "legal fictions and discriminatory devices" which in almost all countries have been used to deny these peoples full legal ownership of them.\footnote{Robert T. Coulter, "The Draft UN Declaration on the Rights of Indigenous peoples: What is it? What does it Mean?" (1995) 2 \textit{NQHR} 123 at 135.} As is evident from its text, this Draft Declaration goes far beyond the existing international documents, especially the Convention 169 of the ILO in the recognition of these peoples’ rights. Aside from the active pressure coming from Indigenous organizations on its drafting, what explains this situation is the fact that this document is still a draft that has to be sanctioned by the UN member states.\footnote{The \textit{Draft Declaration} is currently being analyzed by the UN Commission on Human Rights, an entity composed of state representatives.} The fact that this document, should it be finally sanctioned by the UN, will not impose binding obligations for states, but rather constitute a guideline for them in their policies concerning these peoples, also helps to explain this situation.

\textbf{ii. The Inter-American Draft Declaration.}

Guidelines similar to those of the UN Draft Declaration referring to political as well as to land and resource rights of Indigenous peoples, have emerged from the Organization of American States which recently drafted an Inter-American Declaration on the Rights of Indigenous Peoples.\footnote{Approved by the Inter-American Commission on Human Rights at the 1278th session held on September 18, 1995. O.A.S. Doc OEA/Ser/L/V/II.90, Doc.9 rev.1 (1995).} Although drafted differently, this regional Draft Declaration also acknowledges the right of these peoples to self-determination when stating that "Indigenous
peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development." (Article XV). Nevertheless, as in the ILO Convention No. 169, it restricts its exercise within the states' framework when affirming that the use of the term "peoples" shall not be construed as having any implication with respect to any right that might be attached to the term under international law (Article I 3.). Moreover, using a similar wording to that of the UN Draft Declaration, this document restricts Indigenous peoples' "rights to autonomy or self-government with regard to their internal and local affairs..." (Article XV).

Indigenous political rights are considered by provisions which deal with the recognition of Indigenous legal systems (Article XVI), and with their incorporation into the national organizational structures (Article XVII). Also relevant to Indigenous peoples' status is the provision which acknowledges the rights these peoples have to the "recognition, observance and enforcement of treaties, agreements and other arrangements concluded with States or their successors, according to their spirit and intent... (Article XXII).

Finally, regarding land and resource rights, this Inter-American initiative reaffirms some of the principles outlined in the UN Draft Declaration. Of particular interest are those provisions dealing with the recognition of Indigenous peoples' property and ownership of their lands and territories, with the nature of the property rights which should be recognized to these peoples by states when they arise prior to state creation, and with the rights they have to natural resources.

Although criticized by Indigenous peoples because of its insufficiencies in relation to their claims, this document is of a great relevance for the Americas - North, Central and South -

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83 Indigenous peoples are entitled to maintain and reinforce their legal systems and also to apply them to matters within their communities... (Article XVI)

84 States shall promote the inclusion, in their national organizational structures, of institutions and traditional practices of indigenous peoples. (Article XVII 1)

85 Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood. (Article XVIII 2)

86 Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible. (Article XVIII 3)

87 The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to use, management and conservation of such resources. (Article XVIII 4)

88 According to the WCIP, the language of the Inter-American Draft Declaration is acceptable to the member
where a significant percentage of the population is Indigenous and where many countries still lack a legal framework which recognizes Indigenous peoples' rights. If approved by the OAS in its current form and wording, even though it will only constitute a Declaration rather than a binding legal instrument, it may have an important impact as a guideline for government policies and for the adoption or reform of legal frameworks with regard to these peoples in the region.


Additional guidelines regarding the relationship between states and Indigenous peoples in matters that are of interest to this study have emerged in recent years from seminars and studies which have been called or requested by different United Nations entities. Even though legally they are considered to be expert opinions, some of these conferences' conclusions and recommendations or study reports provide useful information for the determination of the content and characteristics of the rights that are approached in this study. Of particular interest to this study are the conclusions and recommendations which emerged from the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-government for Indigenous Peoples held in Nuuk, Greenland, in 1991 at the request of the UN Commission on Human Rights. 89

states of this organization, rather than being tailored to the needs of Indigenous peoples that live in those states. The document, according to this organization, lacks the specificity, consistency and comprehensive coverage of the UN Draft Declaration, and the rights recognized in it are generally weaker than those recognized in the UN instrument. It could be described in terms of relative strength as somewhere in between the UN Draft Declaration and the ILO Convention No. 169. Nonetheless, as in the case of this Convention, the WCIP recognizes it does contain a number of rights and principles of use to Indigenous peoples, which, if interpreted expansively, may substantially improve the existing rights recognized in domestic legislation of many states. World Council of Indigenous Peoples, Preliminary Observations on the Draft OAS Declaration on the Rights of Indigenous Peoples (WCIP/FM/15.01.96) [unpublished]

89 The final report of this Experts Meeting concludes that Indigenous peoples, as a consequence of their continued existence as distinct peoples, have the right to self-determination as provided for in the international Covenants on Human rights, and that as an expression of this right, they have the inherent right to autonomy and self-government (2); that the realization of this right, nonetheless, should not pose a threat to the territorial integrity of the state (3); consequently with this definition, the scope of this right is limited to their local and internal affairs such as lands, resources, environment, development, justice, education, culture, etc. (12); and that autonomy and self-government are essential for the survival and further development of Indigenous peoples (9). The same report recommends states to undertake regular periodic reviews, together with Indigenous peoples, of the obstacles to achieve these rights, and to take measures to overcome them as well as promote fully significant processes for their construction (16). United Nations, ECOSOC, Commission on Human Rights, Report of the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-government for Indigenous Peop
Also relevant to the clarification of the problems related to the definition and implementation of Indigenous land and resource rights are the conclusions and recommendations which emerged from the Experts Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, held in Whitehorse, Canada, in March of 1996 at the request of the same entity.\textsuperscript{90}

Finally, mention should be made of the Study on Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Populations undertaken by the UN Special Rapporteur Miguel A. Martinez at the request of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.\textsuperscript{91} After a decade of implementation, in which three progress reports were prepared by Special Rapporteur M. A. Martinez, the final report of this Study was released in 1998.\textsuperscript{92} Notwithstanding the fact that M. A. Martinez limits the applicability of this study to areas of the world (the Americas, Australia, New Zealand and Greenland) where, according to his perspective, the category of Indigenous peoples is established beyond any doubts,\textsuperscript{93} this is a document that can be of great relevance in support of Indigenous people's struggles for land and resource rights and self-determination.

The final report of this study is divided into four Chapters. In its text M. A. Martinez
reaffirms the view that past treaties between Europeans and Indigenous peoples were contractual relations among sovereign nations with international legal implications, and that the Europeans later attempted to divest Indigenous peoples of their sovereign attributes through a process of "domestication." He also affirms that states, consistent with arguments that Indigenous peoples are not peoples in international law and/or that the treaties are not treaties in the present conventional sense, have failed to comply with the obligations that they assumed by signing these treaties. In his conclusions and recommendations M. A. Martinez states that Indigenous peoples who concluded treaties with European settlers have not lost their international status as nations, and that such instruments continue to maintain their original "status in the light of international law" and "to be fully in effect," being "sources of rights and obligations for all the original parties to them (or their successors), who shall fulfil their provisions in good faith."

After noting the relevance that rights to lands and resources have for these peoples' lives and survival, and the fact that Indigenous peoples, like all peoples on earth, are entitled to the right to self-determination, as well as to all rights and freedoms recognized by international human rights instruments, M. A. Martinez affirms that "treaties/agreements or constructive arrangements do have the potential to become very important tools for formally establishing and implementing (because of their consensual basis)" these rights and freedoms.

The acceptance of M. A. Martinez's conclusions and recommendations within the UN system and their implementation by its state members, could be of great support for the political and territorial claims made today by Indigenous peoples worldwide. This, in particular when these claims are based in the existence of such treaties, agreements or arrangements.

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94 Ibid. at 23 para. 108.

95 Ibid. at 23 paras 110-111.

96 Ibid. 24 para 113; 26 para 123.

97 Ibid. at 53 para 270.

98 Ibid. at 54 paras. 275-276.

99 Ibid. at 49-52 paras. 256, 260 and 264.

100 Ibid. at 52 para. 265 M. A Martinez states that the said instruments are "the most appropriate way to approach conflict-resolution of Indigenous issues at all levels with Indigenous free and educated consent." (Ibid at 52 para. 269)
1.3. Progress and limitations of international law concerning Indigenous peoples.

International law concerning human rights in general and Indigenous peoples' rights in particular has significantly evolved in recent decades. From an approach of open integration (if not assimilation) of what were considered to be populations, dominant until the fifties, the international community has moved, both through universal and regional conventions and statements, towards the recognition of their status as peoples, and to a progressive acknowledgement of their political, territorial and cultural rights.

The applicability to Indigenous peoples of the right to self-determination, with its internal and external components acknowledged to all peoples by different international human rights instruments in recent decades, is still being debated. Nonetheless, most states have agreed within the international forums previously referred to, that these peoples have the right to autonomy or self-government in matters that are internal and local to them. They also have agreed that the same peoples have the right to fully participate in decisions adopted at the national level that affect their present and future lives. International law also has increasingly acknowledged the special relationship between these peoples and their lands and territories, including the resources existing within them. It has also moved significantly in the direction of protecting their right to ownership and possession, not only of the lands they now occupy, but also of those they traditionally occupied and which are basic for their economic and cultural survival. Many of the rights acknowledged today through the international conventions and declarations here referred to, as well as the debate that is currently taking place internationally with regard to them, would have been difficult to conceive only a few decades ago.

The limitations of international law concerning these peoples are still significant. The way in which the international conventions concerning these peoples' rights are written, makes their enforceability difficult. The lack of adequate implementation procedures to make the enforcement of these rights possible should also be noted. The draft declarations above

101 ILO Covenant No. 169, for example, affirms that state's obligation to fulfil some of the rights it acknowledges is "to the extent possible" (Article 7.1), "whenever appropriate" (Article 7.3), "whenever possible" (Article 15.2) or "when considered necessary" (Article 16.2).

102 The procedures existing for this purpose usually limit the responsibility of states to reporting the implementation of the Conventions provisions. Resources allocated for this purpose are insufficient. Complaints procedures existing within the UN system are also insufficient and ineffective to allow the enforcement of these rights. An in-depth analysis of the insufficiencies of the implementation and complaint procedures existing in
analyzed, aside from the fact that they still have not been approved by the competent organizations, will not be internationally binding when approved, but rather will act as guidelines for states that are members of these organizations. Forums preoccupied with these peoples and their rights are mainly composed by representatives from the same states with which these peoples are struggling for their rights domestically.  

Nonetheless, the impact that these conventions and declarations have had is significant. At the international level, they have been influential in changes introduced in the policies of other agencies not directly concerned with Indigenous peoples and their rights. At the national level, the international evolution referred to above has triggered important legal and political reforms resulting in the increasing recognition of these peoples’ rights throughout the world, as will be evidenced in this study in the cases of Chile and Canada.

Finally, it is also relevant to mention that the elaboration of international standards concerning Indigenous peoples and their rights has influenced the development of an important academic reflection. This reflection has contributed to the acknowledgement of these peoples’ within the social sciences, as well as to the introduction of changes in the traditional forms in which these scientists dealt with these peoples in the past as we will see in the next section of this Chapter.

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103 Indigenous peoples have demanded the creation of a forum within the UN system that allows their participation in a more permanent and effective manner in decisions concerning them. The creation of a Permanent Forum was officially recommended at the World Conference on Human Rights in Vienna (Resolution 46/163 of December 1993). The idea of an equal participation between government and Indigenous representatives within this Forum was accepted at the UN Conference in Santiago, Chile, in 1997. (Proyecto de Informe del Segundo Taller sobre el Posible Establecimiento de un Foro Permanente para las Poblaciones Indígenas en el Sistema de Naciones Unidas. Santiago, Chile, June 30-July 2, 1997. [Unpublished draft distributed by the Conference organizers]).

104 An example can be found in the World Bank, a specialized financial agency of the UN, which has adopted an Operational Directives (4.20) concerning these peoples. These Directives, aside from contributing to their definition, attempt to ensure that Indigenous peoples do not suffer the adverse effects of developments projects, but that they receive social and economic benefits from the implementation. Moreover, they promote Indigenous peoples informed participation in development initiatives affecting them. (See World Bank, supra note 24).
2. METHODOLOGY.

2.1. Thesis objective.

In order to understand the nature of this study, as well as the methodology used in its elaboration, the perspective and objective that are behind it should be explained. The author is a non-Indigenous Chilean lawyer who is part of the Instituto de Estudios Indigenas at the Universidad de la Frontera, a state university in southern Chile. Despite its academic character, this Institute, similar to those created in recent years in other parts of the world, considers the promotion of Indigenous peoples' cultures and rights as one of its central objectives. The work performed in this Institute is strongly influenced by this goal. The research that is performed there by the Indigenous and non-Indigenous scholars who compose it, in close connection with Indigenous communities, is not oriented at accumulating knowledge about these peoples, but aimed at providing them, as well as the non-Indigenous society in general, with information that can be useful for the recognition of their cultures and rights.

Consistent with this background, this study can be characterized as applied social research that intends to provide information that can be useful for social, legal and political transformation processes in which the peoples that are the subject of this study are involved. The information gathered in this study can be of particular interest for Indigenous peoples in Chile who, as we will see in the next Chapter, still face significant problems that impede them from exercising the rights recognized to the same peoples through the international forums we have previously referred to.

Support for this research approach can be found in the social sciences both in the Latin and Anglo-American contexts in which this study is developed. In the first context, critiques of the traditional use of the social sciences as an elitist science not committed to social transformation of the oppressed, were initially developed by intellectuals in the 1960's and 1970's. Paulo Freire proposed that social scientists take up the practice of what he called the "pedagogy of the oppressed," in which they were to become involved in the struggle for the liberation of those sectors of the population dominated by the elite. Rodolfo Stavenhagen, 105

105 According to Freire, this was a pedagogy which should "be forged with, not for, the oppressed (whether individuals or peoples) in the incessant struggle to regain their humanity." Paulo Freire, Pedagogy of the
argued that social scientists should become a vehicle of expression of the critical conscience of societies. Moreover, he believed that rather than stocking studies concerning the oppressed in libraries, efforts should be made to make them accessible to those that have been studied.\textsuperscript{106}

From then until today, these and other intellectuals in different parts of Latin America have strongly influenced the development of social science research concerned with the oppressed in general,\textsuperscript{107} and with Indigenous peoples in particular.\textsuperscript{108} Special emphasis has been placed by them on the participation of the people who are the subject of study in the definition, the development and the products of social science research. As a consequence of this movement, participatory research and action research are today among the methodologies most used in studies developed both by academics as well as by non-governmental social scientists concerning labourers, women, peasants and Indigenous peoples.\textsuperscript{109}

It is interesting to note that in recent years Latin American anthropologists, along with other Third World anthropologists, have developed a line of research which emphasises the social commitment of this discipline with the populations that are subject of study. This research orientation, which has been proposed by Bonfil Batalla (1989), Isabel Hernandez (1993) and Bernardo Berdichewsky (1992), among others, has been called by this last author action anthropology, or anthropology of transference.\textsuperscript{110}


\textsuperscript{106} Rodolfo Stavenhagen, "Decolonizing Applied Social Sciences," in Hammersley, Martin ed., \textit{Social Research. Philosophy, Politics and Practice} (London: Sage Publications, 1993) at 122. [hereinafter Stavenhagen, "Decolonizing"] This author rejected the neutrality of social scientists affirming that they could not remain true to the ethical principles of his science and, at the same time, refuse to take a stand on the wider ideological and ethical issues of the societal processes in which he is involved.

\textsuperscript{107} Among them, Fals Borda (See Orlando Fals-Borda, "Science and the Common People," in F. Dubell et al., \textit{Research for the People-Research by the People} (Linkoping, The Netherlands: Linkoping University, 1981) at 13-40) and Vio Grosi (See Francisco Vio G. "The Socio-Political Implications of Participatory Research," in \textit{Ibid.} at 69-80)) are to be mentioned.

\textsuperscript{108} Among them, Bengoa (See Jose Bengoa, \textit{Historia del Pueblo Mapuche (Siglo XIX y XX)} (Santiago: Sur, 1985) and Bonfil Batalla (see Guillermo Bonfil Batalla, \textit{Mexico Profundo. Reclaiming a Civilization}. Philip A. Dennis trans. (Austin: University of Texas Press, 1996)) are to be mentioned.

\textsuperscript{109} The impact of this movement has been strong, having influenced the development of the social sciences in other contexts of the world, especially in Europe and Africa (See Dubell et. al ed, \textit{supra} note 107).

\textsuperscript{110} See Bernardo Berdichewsky, "Desafio para el Tercer Milenio: La Funcion Ideologica de la Antropologia" at 12 (Unpublished paper presented at the III Congress of Chilean Anthropology at the Universidad Catolica of Temuco, Chile, November 1998). Consistent with this perspective, Berdichewsky affirms that a study involving
In Anglo America and in Europe, social scientists, perhaps in reaction to the constraints and limited utility of a purely theoretical approach in the sciences, have made serious attempts to introduce social relevance into their work in the last decades, contributing to the emergence of applied social sciences and research. The primary goal of an action-oriented science has been to accumulate facts and principles for immediate application to social problems and for the betterment of human condition. Applied social researchers conduct their studies in the hope that their results have a significant value in the formulation and improvement of programs intended to help solve a wide range of problems.

In the 1960's social sciences were strongly influenced in North America by the civil rights movement. The idea that social scientists should act as advocates for social justice was developed in this context. This movement dramatized the voicelessness and lack of representation of certain segments of society relative to others. The social activism of this period prompted social scientists to intervene directly on behalf of under-represented segments, especially in their dealings with bureaucratic agencies. Minorities, including Afro-Americans and Latins, and Indigenous peoples, became relevant subjects of social science. A large number of social research dealing with their disadvantaged position in society was performed in the United States and Canada. This research, nevertheless, was frequently criticised by the minorities and peoples that were supposed to be benefited with it. Similar critiques were made by Indigenous peoples of studies made by non-Indigenous scholars resulting in the representation

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114 An example of this critique can be found in the critical race theory movement developed by minority legal scholars in the US. According to Gary Minda, these scholars challenged the legal analysis of the race problem used by white legal scholars, practitioners and judges. The same scholars claimed that civil rights scholarship was held captive by a group of elite "white imperial scholars" who created a tradition that systematically excluded or minimized their participation. (See Gary Minda, *Postmodern Legal Movements. Law and Jurisprudence at the Century's End* (New York: New York University Press, 1995) at 167-185.
and appropriation of their reality. These critiques provoked an important debate regarding the nature of the participation of social researchers in contexts or situations that affect other peoples or groups.

The intensity of this debate concerning non-Native involvement in social research related to Indigenous peoples in North America should be noted. Extensive literature has been written in recent years by both by Native and non-Native social scientists concerning this issue. In this literature, the relationship existing between social researchers and Indigenous peoples and the nature of the research undertaken with these peoples is analyzed. Also, proposals aimed at ensuring Indigenous control of their own histories and cultures have been made. This debate has contributed to a more clear identification of the role of applied social sciences concerning these peoples, as well as to delineate the ethical principles which should guide the

115 Vine Deloria Jr., a Native American lawyer wrote two decades ago referring to this matter:

Perhaps we should suspect the real motives of the academic community. They have the Indian field well defined and under control. Their concern is not the ultimate policy that will affect Indian people, but merely the creation of new slogans and doctrines by which they can climb the university totem pole. Reduction of people to ciphers for purposes of observation appears to be inconsequential to the anthropologists when compared with immediate benefits he can derive, the production of further prestige, and the chance to appear as the high priest of American society, orienting and manipulating to his heart's desire.


117 Two interesting books have been published in recent years in the United States on this matter. The first edited by Thomas Biolsi and Larry Zimmerman, contains a critical analysis of Native and non-Native practitioners of cultural anthropology, archaeology, education and history about the implications that Vine Deloria's work has had on social scientist-Native relationship in North America in the last two decades. (See Thomas Biolsi and Larry Zimmerman eds., *Indians and Anthropologists. Vine Deloria Jr. and The Critique of Anthropology* (Tucson: University of Arizona Press, 1997). In a second book, ten leading Native US scholars examine the state of scholarly research and writing on Native Americans dealing with the issue of how American Indian cultures and histories are interpreted and portrayed by non-Native scholars and how Native Americans see themselves and their past (See Devon A. Mihesuah ed., *Natives and Academics. Researching and Writing about American Indians* (Lincoln, Nebraska: University of Nebraska Press, 1998).

118 An analysis of the role of applied social sciences in general and of anthropology in particular, concerning Indigenous peoples in Canada was made in recent years by Edward Hedican. As Hedican affirms, the time has come for the academic community to take a "stance against the colonial suppression of Aboriginal people.... These wider issues concern the extent to which social scientists are willing to speak out on social issues, thereby adding vigour to the debate on issues of national importance by lending the weight of their own research." Referring to the need to make anthropological research concerning these peoples more relevant, he affirms that the directions for research should first come from the people being studied by asking "[w]hat are the issues that they want researched? What problems do they see as important and needing solution? How do they see the role of the researcher in meeting these requirements?" Edward J, Hedican, *Applied Anthropology in Canada. Understanding Aboriginal Issues* (Toronto: University of Toronto Press, 1995) at 232.
development of research concerning them.\textsuperscript{119}

Finally, support for this research approach can also be found in guidelines which have emerged in recent years from international forums dealing with Indigenous peoples' rights. Concern expressed by Indigenous peoples about the appropriation of their cultural and intellectual property by non-Natives led the UN Subcommission on the Prevention of Discrimination and the Protection of Minorities to request Ms. Erica-Irene Daes, Chairperson of the UN WGIP the elaboration of a study on the protection of this property in 1993.\textsuperscript{120} The same Subcommission requested later that Ms. Daes elaborate further on a document containing principles and guidelines for the protection of the heritage of Indigenous peoples. This last document, which was submitted to the Subcommission in 1995, is sensitive to the issue of the appropriation of different forms of Indigenous heritage, including among others archaeological sites and Indigenous knowledge. The document emphasises the need of protecting Indigenous control and participation in all stages of research undertaken either with them or regarding them.\textsuperscript{121}

The ideas summarized previously that are characteristic of a line of development in social sciences both in South and North America, and which have recently been assumed by international forums concerned with these peoples' rights, may be helpful in better understanding

\textsuperscript{119} The ethical guidelines regarding the relations of anthropologists with those they study developed by the American Anthropological Association in 1971 provide a good example of this concern. According to the Principles of Professional Responsibility (1971), whenever there was a conflict of interest between anthropologists and those they study, these last should come first. Anthropologists should do everything within their power to protect their physical, social and psychological welfare and to honour their privacy. The aims of the investigation should be communicated to the informant. Every effort should be made with members of the host society in the planning and execution of research projects. (Principles of Professional Responsibility, Adopted by the Council of the American Anthropological Association, 1971, in Paul Davidson Reynolds, Ethics and Social Science Research (Englewood Cliffs, New Jersey: Practice-Hall, 1982) at 145-149. A more specific ethical code for research in Native communities was approved by the National Endowment for Humanities in the US in 1990 (See Thomas Biolsi and Larry Zimmerman, "What has Changed, What Hasn't" in Biolsi and Zimmerman eds, supra note 117, at 6).

\textsuperscript{120} Erica-Irene Daes, Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples (UN Doc E/CN.4/Sub.2/1993/28) [hereinafter Daes, Property]

\textsuperscript{121} Among the principles and guidelines contained in this document that are of relevance to the perspective of this thesis, are the recognition of Indigenous peoples as primary guardians and interpreters of their cultures (Principle 3); of their right to exercise control over all research conducted within their territories, or which uses their people as subject of study (Principle 8); the need to obtain their consent for the study of their heritage (Principle 9); and of the need to make every possible effort to increase Indigenous peoples' participation in all research activities which may affect or be of benefit to them (Guideline 38) (Ms. Erica Irene-Daes, Protection of the Heritage of Indigenous People Final Report UN Doc E/CN.4/Sub.2/1995/26) at 9-12.[hereinafter Daes, Heritage]
the perspective of this study, as well as the methodology behind it. They also serve to explain the author's commitment to share its results with Indigenous peoples, in particular in Chile, with the hope that it can contribute to the struggles for the recognition of their rights.

2.2. Methodologies considered in the elaboration of this study.

In order to allow the inclusion of different sources of information, the methodology used in the development of this thesis is varied. According to the norms that are accepted in social sciences for this type of research, and consistent with the objectives described previously, the most relevant aspects of the methodology considered in this study are the following:

2.2.1. Documentary data.

In the elaboration of this study, a substantial amount of time has been devoted to identifying, reading and analyzing the abundant documentary data that is available on the topic. Documentary data considered for this purpose is both primary and secondary.\(^{122}\) In the case of primary data, special relevance is given to past and present legal documents regarding Indigenous peoples' rights in both Chile and Canada, such as constitutions, acts and laws. A special effort is made to consider the treaties through which the relationship between these peoples and the colonizers (and later the states) has been established in both contexts here analyzed. The data to be considered in the field of law also includes court decisions, especially in Canada where their influence in the evolution of Indigenous peoples' rights has been significant. In the case of secondary data, documentation that can contribute to the analysis and understanding of the primary sources earlier described is considered. Consistent with the objective of this study, special importance is given to documentary data containing Indigenous interpretation of the primary documents referred to previously - in particular of treaties - as well as to that containing their perspectives on their past and present situation in general.\(^{123}\)


\(^{123}\) The different interpretation that states, academic legal discourse and Indigenous peoples have of the treaties of which they are part is highlighted by Special Rapporteur M. A. Martinez in his Final report of the Study on Treaties. The fact that Indigenous views on treaties have begun to receive increased attention in among other countries, Chile
Due to the authors’ interest in the perspective of Indigenous peoples, and to the fact that this perspective is in many occasions disseminated in non traditional sources, such as newsletters, Internet, etc., an effort is made to include these kinds of sources in this research. Due to the interdisciplinary nature of the topic approached in this thesis, aside from legal documentary data, historical and anthropological data is also considered. A broader understanding of Indigenous peoples' past and present situation cannot be achieved today without the help of these disciplines. Finally, due to the qualitative nature of this study, the documentary sources considered here are dominantly descriptive and analytical. Exceptionally, some quantitative or statistical information regarding population, as well as socio-economic conditions of the peoples who are subjects of this study, is considered.

Documentary data included in this study is identified in the text, the footnotes and the bibliography.\textsuperscript{124}

\section*{2.2.2. Case study.}

This thesis also includes the use of the case study methodology. The purpose of incorporating this approach, which is generally accepted today in the social sciences, is to exemplify through one specific case from each of the two countries considered in this study, the past and present situation of Indigenous peoples' rights.\textsuperscript{125} The use of this methodology is also aimed at making possible the incorporation of Indigenous peoples' perspective.

The cases considered for this purpose are those of the Pehuenche people of the Alto Bío Bío, Chile, and the Nisga'a people of the Nass Valey, Canada. Several factors have been taken

\textsuperscript{124} In accordance to the University of British Columbia's requirements for a Graduate Thesis in Law, the style manual used for this purpose are McGill Law Journal, \textit{Canadian Guide to Uniform Legal Citation} 3rd ed (Scarborough, Ontario: Carswell, 1992) and Kate L. Turabain, \textit{A Manual for Writers of Term papers, Theses and Dissertations} 6th ed. (Chicago: University of Chicago Press, 1996)

\textsuperscript{125} According to social methodologist Richard Hessler, despite the critiques that positivistic social scientists, and in particular, quantitative or statistically oriented sociologists, have made to this methodology because of its subjectivity and its uselessness for testing an hypothesis, its use can be of great relevance in social sciences. Hessler affirms that the case study is indispensable for in-depth viewing of social life, for the inclusion of more detailed and profound data. (See Richard M. Hessler, \textit{Social Research Methods} (Saint Paul, MN: West Publishing, 1992) at 195-196.
into consideration for their inclusion in this study. Although, as we will see in Chapter IV, their current situation differs substantially from one another, these two peoples have a common history of oppression and dispossession at the hands of the dominant societies of the countries where they live. Both peoples have a long history of struggle in defence of their lands and resources which have gradually been appropriated by non-Indigenous people in the last centuries. Both of them have also been involved in recent years in events that are crucial to their future. Finally, and perhaps most importantly, due to the relevance of the events in which they are currently involved, both peoples are considered to be symbols of Indigenous-state relations in the countries where they live.

Aware of the limitations of traditional academic research performed by non-Indigenous scholars with Indigenous peoples, the author's desire was to develop with the Pehuenche and the Nisga’a people what in social sciences is known as participatory research. Nevertheless, due to restrictions related to time and resources, it did not seem possible to implement a participatory research in these cases. Despite this fact, authorization for the inclusion of these two peoples as a case study in this thesis was requested from their representative organizations. Also, a request to interview their leaders with the purpose of incorporating their perspectives in this study was made to the same organizations. Finally, devolution of the product of this study was promised by the author.

2.2.3. Interviews.

Finally, interviews with different people and institutions related to the topic of this study have also been considered as part of the methodology used in its implementation. Among these people and institutions were Indigenous leaders representing the legitimate organizations of the

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126 Participatory research is defined by Ralph Ruddock as one based on democratic principles, that is discussed and accepted by the subjects of the study, that is rooted in their understanding, and that generates their commitment to its development during all the stages of the research work (See Ralph Ruddock, Evaluation: A Consideration of Principles and Methods (Dorset: Direct Design, 1981) at 68-69.

127 The Centro Mapuche Pehuenche del Alto Bio Bio, in representation of the Pehuenche people of Chile, agreed to this request in letter addressed to the author dated on September 16, 1998. Similarly, the Nisga’a Tribal Council agreed to the same request on letter addressed to the author dated on February 24, 1998. In that same letter, the author was invited to attend the 41st Annual Convention of the Nisga’a people held in the Nisga’a territory (New Aiyansh, British Columbia) on April of 1998.
Pehuenche and the Nisga'a people. Also considered for this purpose were officials in charge of government agencies dealing with Indigenous peoples in Chile and Canada in general, and with the Nisga'a and the Pehuenche people in particular.

The need to include Indigenous peoples' perspective in applied social research that concern them was previously highlighted. The need to make possible the incorporation in this study of Indigenous peoples’ oral traditions, through which their knowledge is usually transmitted, constitutes an additional reason for interviewing the representatives of their organizations.\(^{128}\) The reasons for interviewing government officials are related to the need to obtain information concerning government plans dealing with Indigenous peoples, as well as the need to incorporate their perspective about the past and present situation of these peoples' rights.

Written questionnaires, together with an informed consent form, were submitted for this purpose to representatives of the Centro Mapuche Pehuenche and of the Nisga'a Tribal Council, as well as to officials of the National Corporation for Indigenous Development (CONADI) in Chile and the Ministry of Aboriginal Affairs in British Columbia in Canada. Oral interviews were held in Chile the fall of 1998 with Jose Antolin Curriao, President of the Centro Mapuche Pehuenche, and with a high ranking official of the Chilean government who requested that his name remain confidential.\(^{129}\) Despite the efforts made by the author, it was not possible to interview Nisga'a or BC government representatives in Canada.\(^{130}\)

These interviews were performed in accordance with the norms and procedures that are

\(^{128}\) The importance of orality as a means for the transmission of Indigenous peoples' knowledge has been highlighted by social scientists both in Chile and Canada (See Bengoa, supra note 108 at 5-6; Julie Cruikshank, *Life Lived as a Story* 4th ed. (Vancouver: UBC Press, 1997) at 1-36).

\(^{129}\) These interviews were held with the consent of those interviewed in Santa Barbara, Alto Bio Bio, in the first case, and in Santiago, Chile, in the second. Both interviews were taped with the agreement of the interviewees. The tapes were after transcribed in Spanish, the language in which interviews were held. Translation into English of those parts of the interviews that were included in this study was made by the author.

\(^{130}\) No response was obtained from the Nisga'a Tribal Council representatives to the letter addressed to this organization in the summer of 1998 containing the written questionnaire for an interview. Representatives of the British Columbia Ministry of Aboriginal Affairs postponed the interview session until it was too late for the author to hold it. It should be acknowledged that both parties here mentioned were at this time involved in the debate that was taking place in the BC legislature concerning the ratification of the Nisga'a Final Agreement. Important information for this thesis was provided by the Nisga'a Tribal Council to the author on a visit made to the Nisga'a territory in April of 1998. Also, abundant information containing both Nisga'a and BC government's perspectives on the topic approached in this study was obtained from their respective websites.
accepted today in the social sciences.\textsuperscript{131} Finally, they were performed with the approval of and according to the rules set by the Behavioural Research Ethics Board of the University of British Columbia for interviews held on research concerning human subjects.\textsuperscript{132}

\textsuperscript{131} See Mann, \textit{supra} note 122 at 119-170; and Hessler, \textit{supra} note 124 at 91-112, 135-158.

\textsuperscript{132} Approval dated October 16, 1998.
CHAPTER II

INDIGENOUS PEOPLES’ RIGHTS IN CHILE.

INTRODUCTION.

Since time immemorial, the territories that today comprise Chile were inhabited by different peoples. Each one of these peoples had its own culture, spiritual beliefs and laws which ruled their internal and external relations, as well as the relationship they had with their lands and resources.

The arrival of the Spanish conqueror in the sixteenth century drastically altered their lives forever. The numerous wars in which Indigenous peoples\(^1\) engaged in defence of their territories, as well as the diseases that were brought by the newcomers, devastated their population in a few decades. The newcomers forced the remaining population to work for them through the encomienda. They also attempted to appropriate their lands. Some of these peoples, such as the Picunche of Chile’s central valley, disappeared as a consequence of diseases, abuses and of intermarriage with the Spanish settlers. Others, such as the Mapuche to the south, were able to resist the intruders, forcing the colonial regime to recognize them, as well as their traditional territories, as independent.

After the creation of the Chilean state, Indigenous territories which were not conquered by the Spanish during the colonial period were occupied. Such is the case of the Mapuche territory, where lands were distributed to settlers, and Natives were confined to reducciones or reserves in no more than five percent of their traditional homelands. In the same period, the Chilean state annexed the ancestral territories of the Aymara and Atacamenean in the northern part of the country, those of the Rapa Nui people in Easter Island, as well as those of the peoples who inhabited the austral part of the country. Chilean laws and culture were imposed on them.

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\(^1\) According to the terminology which is currently used by international law instruments to which we referred in Chapter I, and that is dominantly accepted today by the peoples to whom we refer in this Chapter, we will use the term "Indigenous people" to refer to the original inhabitants of Chile. We will use the term "Indigenous peoples" to refer to their political and cultural entities, such as the Mapuche, the Aymara and the Rapa Nui. We will also use the term "nations" to refer to the same peoples when coming from statements made by Indigenous organizations, leaders or intellectuals who use this terminology.
During this period, and until recently, ethnic and cultural diversity in Chile was denied. The discourse imposed by the ruling class has since then been that Chile is a racially homogenous society, basically of European origin. The few acknowledgements of Indigenous peoples dealt with their past, not with their present. The image of the brave "Araucanian" who resisted the Spaniard conqueror due to their libertarian spirit, was socially accepted and promoted. Consistent with these ideas, the Indigenous population was predominantly perceived as remaining pockets of "Indians" living in remote areas, mainly in southern Chile. These remaining Indians were seen as people of interest to tourists, and promoted as such, through media and travel agencies.

The main governmental concern about these "populations" has been their cultural distinctiveness as well as their economic backwardness and poverty. In order to confront these realities, policies aimed at the “Chileanization” of Indigenous population were implemented by the state. Policies encouraging their economic development, not different than those promoted for peasants, were also proposed by the state. These government policies, which were applied to them without consultation, varied in time according to the dominant ideological perspectives, ranging from conservatism to socialism, but did not differ substantially in their ultimate goals: assimilation or integration into the dominant society. The Chilean legal framework was also inspired by these concepts. The country’s Constitution, even today, acknowledges the existence of one people, the Chilean, excluding all others from its provisions. Similarly, until recently laws did not recognize these peoples, their cultures, or their languages. The few laws that were passed regarding them, dealt with their communal lands and the means to convert them into individually owned lands.

This situation may help one to understand why many were surprised when, in 1992, the official population census outcome showed that almost one million Chileans (998 thousand) of a total of thirteen million declared themselves to be part of one of the three Indigenous "cultures" acknowledged in it (Aymara, Rapa Nui or Mapuche). According to experts’ estimations, this

2 The term Araucanian corresponds to the name given by the Spanish to the Indigenous people living in the Araucania territory in southern Chile. We will use instead the term Mapuche, which means "people of the land" in their own language, and is used by them today to identify as a people.

3 The census did not acknowledge the existence of peoples but only of "cultures". See Instituto Nacional de Estadísticas, Censo de Población y Vivienda Chile 1992 (Santiago: Instituto Nacional de Estadísticas, 1992) in José Bengoa, Los Mapuches. Comunidades y Localidades en Chile (Santiago: Instituto Nacional de Estadísticas and Sur, 1997) at 11. [hereinafter Bengoa, Los Mapuches]
population rises to 1 million 350 thousand, approximately 10 per cent of Chile's total population, if those under the age of 14 are considered. 4

Many people in Chile were reluctant to admit the hidden reality that emerged from this census, which was performed in the context of the re-establishment of the country's democracy and of the 500 years anniversary of Columbus arrival to the new world. Nevertheless, these numbers were of great importance in the fall of the long term myths constructed by Chilean society regarding its ethnic composition. They were also helpful in the enactment of a new legislation recognizing Indigenous peoples as distinct “ethnic” groups and communities with special rights.

In this Chapter we will attempt to describe and analyze Indigenous peoples’ rights in Chile throughout history, from pre-contact time until today. According to the priorities defined on Chapter I (Theoretical Framework and Methodology), we will focus our attention in the analysis of the territorial and political rights of these peoples as they are understood by international legal instruments and draft declarations existing on this matter.

We will divide this Chapter into three main periods; pre-contact world, the colonial period and the republican era. In this last stage we will focus on the analysis of legislation and policies implemented in Chile from its independence until today. Special importance will be assigned to the analysis of the changes which have been introduced in the relationship between the Chilean state and Indigenous peoples since the democratization of society in 1990. In the final part of this Chapter, we will analyze the problems and challenges that Indigenous peoples face today in Chile.

1. PRE-CONTACT WORLD.

There is sufficient information today that proves that the territory which is currently occupied by Chile, similarly to that of other parts of the American continent, has been inhabited by different human groupings for at least ten thousand years. 5 In a vast and ecologically diverse

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5 The site of Monte Verde found recently by the U.S. archaeologist Tom Dillehay in southern Chile (Llanquihue), evidences the existence of a population which dates back 12,000 to 13,000 years (See Tom D. Dillehay, A Late
territory, such groupings lived closely connected to their lands and the rich resources existing in them. Throughout time, they evolved and related to one another, giving birth to different cultures, social and political organizations and patterns of subsistence. At the time of the European arrival, at least thirteen different peoples, with their own languages, religions, laws, forms of governments and economies, lived from the northern highlands of the Andes to Tierra del Fuego. The total Indigenous population living in this territory at the time of the Spanish arrival has been estimated at approximately one million. Half of this population corresponded to that of the Mapuche living in the Araucania region.

It would be too lengthy to refer here to all of these peoples. Nevertheless, the central aspects of the past cultures and organizations of the principal Indigenous peoples who have subsisted until today should be highlighted here.

Pleistocene Settlement in Chile, vol. 1 Paleoenvironment and Site Context (Washington D. C.: Smithsonian Institution Press, 1989). According to archaeological data also, there is evidence that as early as 10,500 years ago, a group of terrestrial hunters had reached as far as Tierra del Fuego (See Mauricio Massone, "Los Cazadores de Tierra del Fuego (8.000 a.C al Presente") in Jorge Hidalgo et al. eds., Culturas de Chile. Prehistoria desde sus Orígenes hasta los Albores de la Conquista (Santiago: Andres Bello, 1989) at 349). This information coincides with that provided by authors in North America who affirm that there is now general agreement that humans were inhabiting the length and breadth of the Americas in about 11,000 BP, with the greatest concentration of population being along the Pacific coast of the two continents (See Olive Patricia Dickason, Canada's First Nations: A History of Founding Peoples from Earliest Times, 2nd ed. (Toronto: Oxford University Press, 1997) at 15-16 [hereinafter Dickason, Founding Peoples]).

These peoples include the Aymara, the Atacameneans, and the Coyas in northern Chile, the Rapa Nui in Easter Island, the Mapuche and its different sub-groupings in the center and south of the country, and the Kawésqar and Yámana in the southern channels, all of which have subsisted until the present. They also include several other peoples who lived at that time in Chilean territory, but, because of numerous reasons, including wars, diseases, and assimilation, are now extinct. Among them, the Changos in the northern coast, the Diaguitas in the north, the Picunche in the central valley, the Chonos in the southern channels and the Aonikenk and Sélknam in Patagonia and Tierra del Fuego respectively, should be mentioned here. Information regarding these peoples can be found in Hidalgo et al. eds., supra note 5; José Berenguer ed., Chile Antes de Chile. Prehistoria (Santiago: Museo Chileno de Arte Precolombino, 1997); and in Sergio Villalobos, Historia del Pueblo de Chile vol. 1 2nd ed. (Santiago: Zig-Zag and Instituto Chileno de Estudios Humanísticos) [hereinafter Villalobos, Historia vol. 1].

José Bengoa, Historia del Pueblo Mapuche (Siglo XIX y XX) (Santiago: Sur, 1985) at 15 [hereinafter Bengoa, Historia Mapuche]. According to Villalobos, Indigenous population only totalled 800,000 (See Villalobos, Historia vol. 1, supra note 6 at 95).

Bengoa, Historia Mapuche, supra note 7 at 15.
1.1. The Mapuche.

According to Mapuche oral tradition, the origin of their ancestors is explained by a flood which occurred long time ago. The flood was caused by a quarrel between two great serpents, tren tren and kaikai. The higher kaikai raised the waters, the higher did tren tren raise the mountains on which some humans took refuge, while others became transformed into fish, marine animals and rocks. At the end of the flood, the surviving humans engendered offspring who became their ancestors.9

Recent archaeological studies trace back Mapuche origin to different human groupings with diverse material cultures who inhabited their historic and surrounding territories for thousands of years.10 At the time of the arrival of the Spanish, Mapuche (Araucanian) speaking people inhabited a vast territory west of the Andes which extended for approximately 1,500 kilometres from the Choapa river in the north to the Island of Chiloe in the south.11 Due to the vastness of their territory and to the different ethnic groups from which they derived, the Mapuche were divided into three main groupings at the time of contact; the Picunche in the north, the Mapuche in the centre, and the Huilliche in the southern part of their traditional territory.12


10 Those who today are identified as Mapuche, are descendants of the ancient hunters of Monte Verde (dating back twelve thousand years) and of Chan Chan and Quillen (five thousand years). They also descend from the people of Pitren (first centuries of our era) and El Vergel (second millennium of our era). They have incorporated elements from Native peoples of the Andes (Pehuenche) and from the Pampas. See Carlos Aldunate, "En el pais de los Lagos, Bosques y Volcanes. Los Antepasados Antiku pu Che," in Berenguer ed., supra note 6 at 59-67. Human groupings of what today is central Chile which date back to 8 thousand to 9,500 years before our era, are also said to have been among the ancestors of the Mapuche-Picunche. Luis E. Cornejo "El Pais de los Grandes Valles. Prehistoria del Chile Central," in Berenguer ed., supra note 6 at 46.

11 Cooper, supra note 9 at 688.

12 The Pehuenche of the Andes are also considered by some authors as part of the Mapuche people in pre-contact time. Nevertheless, as we will see in Chapter IV, the Pehuenche were a different people until the first half of the XVII century. Since then the Pehuenche would be gradually dominated by the Mapuche (Mapuchizados) in their numerous incursions to the Argentinean pampas. See Salvador Canals Frau, "Expansion of the Araucanians in Argentina", in Julian H. Steward ed., supra note 9 at 764.
The Picunche in the central valley had been strongly influenced by the Inca who conquered their territories in the fifteenth century. Little information is left of their traditional organization. At the time of the Spanish arrival, Inca governors had been appointed in the Picunche territory. Tribute was paid by them to the Inca authorities. The Inca also introduced agriculture among the Picunche, who from that point on became farmers. Irrigation systems were introduced in their territory during the one hundred years that the Inca domination lasted.

The Mapuche and the Huilliche were fundamentally hunters and gatherers. Although they practiced some basic farming techniques, which they learned from their northern neighbours, their population was concentrated in areas where resources were abundant. The temperate rainforests which covered most of their traditional territories, as well as the numerous lakes, rivers and the long ocean shore that existed within it, provided them with sufficient animal and plant products to sustain their living. In order to obtain these products, the Mapuche developed numerous hunting and fishing instruments and techniques similar to those of other Indigenous peoples in similar ecological contexts. These activities were complemented by the practice of horticulture (they planted potato and beans, and later corn and quinoa) and by the breeding of guanacos, a species which was endemic to their territory.

The central organization of the Mapuche was the lof, a complex and extended kinship lineage of patrilineal origin. The lof's authority was the lonko or head in Mapuche language. Each of these families lived in a ruca, a kind of longhouse, where the lonko lived with his wives, which could be as many as he could maintain, as well as his descendants.

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13 Cooper, supra note 9 at 696.
14 Bengoa, Historia Mapuche, supra note 7 at 18.
15 According to different chroniclers, among these instruments were the large dugout canoes, nets and hooks which were used to fish, mainly in inland waters, and bow and arrow which were used to hunt.
16 Bengoa, Historia Mapuche, supra note 7 at 18-22. According to this author the abundance of resources existing in the heartland of the Mapuche territory (Araucania) was such, that it sustained a population of half a million at the time of contact (one inhabitant per square kilometre).
17 Juan Ñanculef, "La Autonomía y la Organización Social del Pueblo Mapuche" (1990), 2 Nutram, 3 at 6-7 [hereinafter Ñanculef, "Autonomía"]. According to this author, a respected Mapuche intellectual, the lonko was democratically elected by his family members. According to Bengoa, lonko prior to contact was elected by the community on the base of merits. Nevertheless, due to influences introduced by contact and the concentration of power within Mapuche society, the lonko became an hereditary authority (Bengoa, Historia Mapuche, supra note 7 at 65).
18 Bengoa, Historia Mapuche, supra note 7 at 26. More than 100 persons are said to have lived in these houses at the time of early contact with the Spanish.
Aside from the lonko, other Mapuche authorities within the lof were the werken, or messenger, the machi and the nguillatufe. The machi, traditionally - although not exclusively - a man, were persons with shamanistic and healing powers. Due to these powers, they were in charge of the machitún, a Mapuche religious-magic ritual, and recognized as an important figure in Mapuche spiritual life. The nguillatufe is a religious leader who is ritual head of the nguillatún, a ceremony which is central to Mapuche religious and shamanistic world.

Mapuche organization also considered the existence of lof alliances or rewes, for specific purposes. The head of these rewes was the ulmen, a leader who was elected among the lonko due to his wisdom and strength. In times of a crisis which affected the Mapuche as a people, such as in the case of war, alliances of nine rewes, or aillarewes were formed. These were considered to be the superior level of organization of the Mapuche people. The authority in charge of these aillarewe were the ulmenfyxa lonko in times of peace, and the toqui in times of war. All of the aillarewes together gave origin to the concept of Głu-Mapu which meant "all the Mapuche Nation." This concept was used in the past to indicate all the Mapuche who lived within a territorial space and shared similar characteristics, among them a religion and a language.

The unity and co-ordination among these aillarewe were ruled by the concept of Admapu. Admapu, which literally means the good earth, has been defined as "the great declaration of principles, the doctrinaire and ideological foundation of the Mapuche that guided their relationship among themselves and with nature." Admapu was Mapuche customary law. In the

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19 Ñanculef, "Autonomía," supra note 17 at 5; Bernardo Berdichewsky, The Araucanian Indian in Chile (Copenhagen: IWGIA, 1975) at 10 [hereinafter Berdichewsky, "Araucanian"]. According to Berdichewsky, as in many other shamanistic societies, in ancient times Mapuche shamans (machi) were normally men. In modern times, nevertheless, the majority of the machis are women (see Bernardo Berdichewsky, "La Ceremonia Religiosa del Nillatún entre los Araucanos Chilenos" (1979) 15 Ethnica 9 at 12 [hereinafter Berdichewsky, "Nillatún"]). A description of machi's shamanistic and healing role in the machitún can be found in Rolf Foerster, Introducción a la Religiosidad Mapuche (Santiago: 1993, Universitaria) at 102-110 [hereinafter Foerster, Religiosidad].

20 According to Foerster the term nguillatún literally means "a petition action" in Mapuche language (Mapudungún). An analysis of the religious and shamanistic elements that characterize this Mapuche ceremony can be found in Foerster, Religiosidad, supra note 19 at 92-96. A description of the way in which the "Nillatún" is performed in modern days in the Araucania can be found in Berdichewsky, "Nillatún", supra note 19 at 16-21.

21 Ñanculef, "Autonomía," supra note 16 at 8-9; Bengoa also acknowledges that rewes were constituted not only in times of war, but also for the implementation of economic activities such as fishing and gathering (See Bengoa, Historia Mapuche, supra note 7 at 27).

22 Juan Ñanculef, "Concepto Territorial en el Pueblo Mapuche" (1989) 4 Nutram 5 at 8 [hereinafter Ñanculef, "Concepto"].

23 Juan Ñanculef, "La Filosofía e Ideología Mapuche" (1990) 4 Nutram 9 at 14 [hereinafter Ñanculef, "Filosofía"]
past, it ruled every aspect of life. In accordance with this concept, before an act was undertaken, the elders would be consulted. If an *Admapu* mandate was breached, a moral and social sanction or penalty was imposed.  

*Admapu* also dealt with land rights of each family or *lof*. Each family claimed a given territory, which had been passed on to it by its ancestors and was held communally by its members. It is important to underline that rights over these territories did not only deal with the access to resources, but also with the authority or jurisdiction of the *lonko* over the people living within its boundaries.

The flexibility of Mapuche social and political structure enabled the *lof* to act independently or jointly with other *lofs* in times of conflict. This characteristic, as we will see later on this Chapter, is said to have been central in the success that the Mapuche had in resisting the Spanish as well as the Chilean occupation of their territory south of Bio Bio from the sixteenth until the nineteenth century.

### 1.2. The Aymara.

The Aymara appeared as a distinct people in the highlands of the Andes, which are now part of the territories of Bolivia, Peru and Chile, after the decline of the *Tiwanaku* culture (1172 of our era).

The basic social organization of the Aymara was the *ayllu*, which has been defined as real or ascribed kinship groupings. These *ayllus*, or a group of them, depending on the case, are said

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24 *Ibid.* at 14-15. According to this author, these principles were strictly respected by Mapuche ancestors, who never threatened nature, or burned *montañas* (forested mountains), contaminated waters, or made fun of supranatural events. The author affirms that *Admapu* is still present in many Mapuche communities today.

25 Cooper, *supra* note 9 at 727. According to Bengoa, this would change with the later introduction of agriculture by the Spanish (see Bengoa, *Historia Mapuche, supra* note 7 at 57).

26 Roberto Choque, "Historia," in Hans van den Berg and Norbert Schiffers comps., *La Cosmovision Aymara* (La Paz, Bolivia: UCB/Hisbol, 1993) at 60-61. Choque, an Aymara scholar from Bolivia, affirms that there is no certainty regarding their place of origin. According to Spanish chronicles, the Aymara came from the south, where the Chilean provinces of Coquimbo and Copiapo are located today. The Peruvian linguist Alfredo Torrero believes they expanded from the area of Ayacucho, Peru into the highlands of the Andes (See Hans Gundermann and Hector Gonzalez, *La Cultura Aymara* (Santiago: Museo Chileno de Arte Precolombino, 1989) at 19.

27 Gundermann and Gonzalez, *supra* note 26 at 19. It is important to highlight here the fact that the concept of *ayllu* has experienced changes throughout time according to major evolutionary periods, having today a different meaning than that it had in the past. According to anthropologist Dr. Bernardo Berdichewsky, this millennia old prehistoric kinship community characteristic of this part of the Andes first changed with the appearance of the early Andean statehood society, the Mochica, and crystallized during the Inca empire. Here, the tribal kinship structure was unified
to have been divided into two different regions. Above or parallel to these configurations, confederations grouping different ayllus, which have been known as señorios, also existed. These señorios were fundamentally based in the Andes highlands where the Aymara bred llamas and alpacas and cultivated potatoes and quinoa, which constituted the principal economic activities of the Aymara society.

The sophistication of the Aymara agricultural system in pre-contact days has been highlighted by several authors. Huge terraces and complex irrigation systems, which are still visible in their traditional territory, made possible the cultivation of different crops on a mountainous area and at high altitudes. Consistent with this situation, the relationship with the land or Pachamama, which was considered to be a mother and a giver, was central in Aymara spirituality and religious cult.

Although based mainly in the highlands of the Andes, many of these señorios are said to have established Aymara colonies at different ecological sites - which went from the Pacific Ocean to the Amazon jungle - to obtain other products they required for their subsistence, such as corn, coca leaves, salt, fish, and wood, among others. This system allowed the Aymara to

with a territorial base in a village community, which was not independent as in the tribal society but dependent on the larger umbrella "community" of Inca statehood. The principle of egalitarian reciprocity of the former was changed in the latter to unequal redistribution, where the top of the chain was the Inca, to whom the ayllu paid tribute in products but mainly in labour, which was known as mita. During the colonial period the ayllu village became pueblo de indios, being obliged by the colonial power to provide a kind of mita in labour to the encomendero. By the end of the colonial period and during the independence period, the ayllu changed again, becoming the peasant Indian communities whose members became mostly inquilinos or labourers in the new hacienda system. The encomendero who originally had received a grant in the form of Indian labour, transformed this later, when the economy changed, into a grant in land, and himself, into an hacendado. Bernardo Berdichewsky, personal communication to the author, Vancouver, March 1999. See also Bernardo Berdichewsky, "Del Indigenismo a la Indianidad y el Surgimiento de una Ideología Indígena en Andinoamérica" (1987) Canadian Journal of Latin American and Caribbean Studies 24 vol. XII 25 at 28 [hereinafter Berdichewsky, "Indigenismo"].

28 Alasaya or Araxsaya or the upper half, and Masaya or Manghasaya or the lower half. Gundermann and Gonzalez, supra note 26 at 19.

29 Ibid. According to Gundermann and Gonzalez there were eleven of these señorios. According to Choque, by the XIII century, the Aymara were organized in four main señorios, with others smaller that were dependent on them (See Choque, in van den Berg and Schiffers comps., supra note 26 at 62).

30 Gundermann and Gonzalez, supra note 26 at 19.


32 Hans van der Berg, "Religión Aymara," in van der Berg and Schiffers eds., supra note 26 at 291.
expand over a large territory, enabling them to manage different ecological levels and to relate to other peoples with whom they traded and interrelated cultures.\textsuperscript{33}

The Aymara had a well-defined system of authorities for each level of its political organization. The señorios were governed by the Apu Mallku, the marka, an intermediate social organization existing between the region and the ayllu, was governed by a Mallku, and the ayllu was governed by a Jilaqata. After the Inca conquest of the Aymara, the political chief of the Aymara state became the Quapaq.\textsuperscript{34}

The Aymara were dominated by the Inca approximately in the XV (1430) century. Their territories and population were incorporated into the Collasuyo, one of the four parts in which the Inca empire or Tawantinsuyu was divided.\textsuperscript{35} During the era of Inca domination, which lasted until the arrival of the Spanish in 1540, Aymara culture was considerably influenced. The introduction of Inca aristocracy increased the social and political complexity of Aymara organization, although in general local dynasties remained. New trends in religion and temple cults were introduced, and their rituals and mythology were enriched. Foods were also available in greater variety, and foods of foreign origin spread. Also, new art styles, especially in ceramics and metals, were introduced.\textsuperscript{36}

\textsuperscript{33} These ideas correspond to the theory developed by John Murra, an American scholar who has written extensively about Andean history in the last decades (1950's till 1970's). According to Murra, Andean peoples of this area in pre-Hispanic times had what he calls a "vertical control of ecological sites" (see Gundermann and Gonzalez, \textit{supra} note 26 at 19-20). It is important to highlight here a complementary theory that has been proposed in recent years with regards to the patterns of interconnection existing between the different peoples that lived in this area at that time. According to María Rostworowski de Diez Canseco, a prestigious Peruvian ethnohistorian, along with the interrelation that existed among the peoples which lived on the different ecological sites ranging from the coast to the Andean valleys or sierras to the jungles to the east of the Andes, there is evidence today that the coastal peoples of this area in pre-hispanic time also interrelated one with each other along the coast. There is proof today that navigation was used by these peoples for this purpose. The abundant resources existing in this area, which included not only sea products but also agricultural products of the fertile coastal valleys, made these peoples self-sufficient. Therefore, they did not necessarily need Andean products to survive. Nevertheless, the author admits that the two patterns of interrelation previously described coexisted, and that the coastal area seem to have been a point where different peoples met, and consequently where ethnic and cultural fusion took place (see María Rostworowski de Diez Canseco, \textit{Costa Peruana Prehispanica} (Lima, Perú: Instituto de Estudios Peruanos, 1977) at 13-20).

\textsuperscript{34} Choque, \textit{supra} note 26 at 62.

\textsuperscript{35} Gunderman and Gonzalez, \textit{supra} note 26 at 19.

\textsuperscript{36} Tschopik, in J. Steward ed., \textit{supra} note 31 at 501.
The Inca not only respected the basic aspects of Aymara political territorial organization (señorios and ayllus), but took advantage of it as a means of expanding their territorial control over a large area which was part of the Aymara jurisdiction at that time.\(^{37}\)

1.3. The Rapa Nui.

According to archaeological data, the Rapa Nui people migrated from the area of the Marquesas Islands in central Polynesia to Easter Island, located in the Pacific Ocean, 3,700 kilometres east of continental Chile, approximately in the year 400 to 500 of our era.\(^{38}\) According to Rapa Nui oral tradition, their people descend from Hotu Matua, their Ariki and leader who guided them on the sailing expedition from Polynesia to the island, and settled there until his death.\(^{39}\)

Similar to other Polynesian societies, the Rapa Nui had a rigid social structure composed of different ranking strata. It was based on extended families or ivi o paenga, where residence and descendancy were defined patrilineally. Several of these extended families composed an ure or lineage, which had its own ahu or ceremonial centre where ancestors were worshipped. They also had a common territory or kainga divided among the different families that composed the lineage, but exploited communally. Related lineages also grouped in clans or mata which was the superior level of their social organization.\(^{40}\)

The supreme chief of the Rapa Nui was the Ariki Mau.\(^{41}\) He was considered to be a descendent of the gods. As such, he had supra natural powers or mana. There was also a noble

\(^{37}\) Gundermann and Gonzalez, supra note 26 at 20

\(^{38}\) Carole Sinclaire, "Rapa Nui: Prehistoria del Chile Polinésico," in Berenguer ed., supra note 6 at 83; Andrea Seelenfreund, "Los Primeros Pobladores de Rapanui (400 a 1868 d.C.)," in Hidalgo et al. eds., supra note 5 at 400.

\(^{39}\) The Island was originally named by the Rapa Nui as Te Pito O Te Henua, or the navel of the world. Susana Rochna, La Propiedad de la Tierra en la Isla de Pascua (Santiago: CONADI, 1996) at 16-17.

\(^{40}\) Sinclaire, supra note 38 at 83; Rochna, supra note 39 at 17. According to the first author, in historic times, there seemed to have been twelve mata, grouped into two big confederations which divided the island's territory in two halves.

\(^{41}\) According to anthropologist Dr. Bernardo Berdichewsky, Polynesian peoples, including the Rapa Nui, were classless-stateless societies. Their political organization was what in anthropology is known as chiefdoms, which is the polity of a tribal confederation headed by a paramount chief. When Europeans encountered them, they called their leaders, according to their terminology, kings and queens. Bernardo Berdichewsky, personal communication to the author, supra note 27.
stratum, which was composed of the Ariki or royal family and the principal priests. This group was also composed of elders which were able to read the holy scriptures, or who were medicine men, astronomers, carvers or specialized crafters. Aside from the nobles, warriors or matatoa were also an important social stratum within the Rapa Nui. Under these strata were the commoners or huru manu which was composed of farmers and fishermen. Finally, the inferior social group was that of the kio, which was composed of those defeated in wars and who were made slaves or servants of the defeating clan.

The Rapa Nui had an agricultural economy. They grew crops brought from other Polynesian islands. When their population increased and the island's lands were scarce, they built terraces and irrigation channels to make agriculture possible. They were also excellent navigators, a knowledge they used to fish off the island's shores. Based on the social organization previously described, the Rapa Nui seemed to have enjoyed a long period of stability (from the XI to the XVII century of our era), during which they gave birth to an incredible material culture. As a means to worship their ancestors, the Rapa Nui built in this period 300 ceremonial centres (ahu) and carved 600 gigantic stone human figures (moais), some of which are still preserved today.

Different factors, including the fragility of the island's natural resources (the total territory of the island is of approximately 170 square kilometres), over population, and rivalry among the two prevailing clans, are mentioned as the causes of internal wars among the Rapa Nui. As a result of these wars, the construction of moais and ahus was discontinued. Moreover, the Rapa Nui belief system and social and political organization was broken.

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42 It is said that there were around 60 wooden pieces (Rongo Rongo) where Rapa Nui scripture was carved. Today only twenty remain. According to oral history, they were brought by Hotu Matua in their trip to Easter island, and contain the myths of origin, ceremonial chants and other important aspects of Rapa Nui culture (see Sinclaire, supra note 38 at 82).

43 Ibid, at 83-84.

44 Ibid, at 84

45 Ibid, at 87; Seelenfreund, supra note 38 at 400.

46 Archaeologists have estimated that the island reached a total population of 20,000 at the end of this period. Oral tradition talks of a war which took place between the XVI and XVII century between the two main tribes, Hanau Eepe or Long Ears and Hanau Momoko or Short Ears. In this war, the first tribe, which was the dominant one, was exterminated by the second tribe, which was more of the common people. See Rochna, supra note 39 at 17-18.

47 Seelenfreund, supra note 38 at 400; Rochna, supra note 39 at 17-18.
The weakness that characterized Rapa Nui society at the time of their contact with Europeans in the XVIII century facilitated the imposition of European cultural and trade patterns in Easter Island. The same situation facilitated the annexation of the Island by the Chilean state at the end of the XIX century.

1.4. Common characteristics of Indigenous peoples’ cultures.

Indigenous peoples’ cultures in Chile in pre-contact time differed in some aspects importantly from one another. As we previously saw, while the Rapa Nui and especially the Aymara were sophisticated farmers, the Mapuche and other peoples of southern Chile, although they were also agriculturists, had hunting and gathering as their main subsistence activity. Their socio-political structures also differed one from the other. The Rapa Nui, who were of Polynesian origin, had a stratified socio-political structure, headed by a paramount chief or Ariki, which was characteristic of the chiefdoms or tribal confederations of that part of the world. The Aymara had a highly complex and unified political system, later becoming a part of the Inca empire which dominated most of the Andean world. The Mapuche, meanwhile, had the lof as their basic socio-political organization, and only had an overall authority for specific situations, mainly, but not exclusively, war.

Nevertheless, the commonalities which may be found in these peoples’ cultures on matters which are central to this study are significant. One of these commonalities is related to their socio-political structures. Their basic social structures (lof, ayllu and mata) were constituted by kinship and extended family groupings. Membership in these social groupings was defined patrilineally. Decision making within these same groupings, except for the case of the Rapa Nui, seems to have been made by consensus.48

The same peoples, with the exception of the Aymara under the period of Inca rule, were sovereign self-governing societies, whose social organizations and political institutions were

48 Evidence of the consensual nature of decisions in the case of the Mapuche can be found in Nanculef, "Autonomía", supra note 17 at 8; In the case of the Aymara similar evidence is provided by Yampara, supra note 31 at 228. It is unlikely that consensus prevailed in the context of the hierarchical Rapa Nui society.
established in accordance with their own customs and traditions. Moreover, all of them had a territory, which was generally recognized as such by themselves and by other neighbouring peoples. Within these territories, each of these peoples had its own institutions and legal systems, in accordance to which their social life and access to lands and resources were ruled. Also within them, their authorities had jurisdiction.

According to all the information existing, and consistent with the traditions of other Indigenous peoples who inhabited this continent in pre-contact time, Indigenous peoples’ lands were held communally by their members. Access to resources, as well as subsistence activities, including farming, were also held communally within their societies. Land and resources did not only have a material significance for these peoples, but also, a profound spiritual and religious meaning. It is not by chance that the Mapuche called themselves "the people of the land." They used the term *fital mapu*, which means "all our land," to indicate that the land was not only composed of the soil, but also by what was under the surface, by the rivers, the forests, and all that existed above the surface of the earth. They also referred to the land as *Nuke mapu* or mother earth, meaning that the land gave everything, and that in accordance with the magic and religious world of the ancestors, it had to be cared for and protected. Similarly, concern for nature in the Aymara world finds its explanation in the concept of *Pachamama*, or mother earth, which was, and continues to be, considered by them as the owner of the land where a community is established, and of the soil that they cultivate. Consistent with these conceptions, land and resources were protected and venerated in accordance with the Aymara religion and cosmogony.

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49 Even under the period of the Inca empire, the Aymara were able to maintain important independence from the Inca. It was only briefly under the Spanish conquest that the Inca appointed a governor that ruled on the Aymara territory, which became a part of the *Qullasuyu* or southern part of the Inca empire. Choque, *supra* note 26 at 64.

50 According to Nanculef, the Mapuche had the concept of *Meliwixan mapu* to refer to the territorial ownership and jurisdiction that they had over their territory. In Nanculef, "Concepto," *supra* note 22 at 8.

51 Cooper, in J. Steward ed., *supra* note 9 at 727; Sinclair, *supra* note 38 at 83; Yampara, *supra* note 31 at 229. According to this last author, in the case of the Aymara *ayllu*, lands were considered to be a property and enjoyment of families. Nevertheless, this enjoyment was only possible due to the fact that they were members of the *ayllu*.

52 Juan Nanculef, "Concepto", *supra* note 22 at 9.

53 In the highlands, *Pachamama* is considered to be an elder woman, who for centuries has fed her child. Nevertheless, she is also considered to be a young mother, because it continues to be fertile and productive. In van den Berg, *supra* note 32 at 296.
We can conclude by affirming that when the Spanish arrived in what is now Chile, they found different sovereign self-governing peoples. Each of these peoples had its own territory, which they used communally to provide their subsistence, and which was recognized as such by themselves and usually by other peoples who lived at that time. The same peoples lived in a close connection to their lands and resources, which provided them with what they needed for living, and which were protected due to the spiritual significance they had for them. Within the same territories, they lived in accordance with their own institutions and legal systems, which were enforced by their own authorities.

2. THE SPANISH COLONIAL REGIME AND THE ATTEMPTS TO CONQUER INDIGENOUS PEOPLES AND TERRITORIES.

2.1. Early contact.

Hernando de Magallanes, a Portuguese sailor who was searching for a passage to Asia, navigated from the Atlantic to the Pacific Ocean through the straight that took his name as early as 1520. However, the first Europeans to intrude into Indigenous territories in this southern part of the new world was Diego de Almagro in 1535. Almagro was granted by emperor Charles V the right to found a new Spanish government in lands south of Cuzco. He crossed the Andes and settled for a brief period of time in what is today central Chile, with the support of the Incas who dominated the area at that time. After having found no gold, and having faced some Indigenous resistance to his expedition, he returned back to New Castilla (Peru).

In 1540 Pedro de Valdivia formed another conquering expedition with the authorization of Pizarro, governor of New Castilla (Peru). Once again supported by the Inca, Valdivia travelled by land from Peru, arriving in the Mapocho River valley, in what today is central Chile, in 1540. From Santiago, the city he founded in 1541, Valdivia continued his expedition, founding

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54 This does not mean that territorial conflicts did not exist among these peoples in pre-contact time. The best example of this type of conflict was the expansion of the Inca into the territories that belonged to other Indigenous peoples to the south a century before Spanish arrival to Chile.

55 Villalobos, Historia vol.1, supra note 6 at 201-206.

56 Ibid. at 206-210. Similarly to Almagro, Valdivia had invested all his assets in his conquering adventure.
eight fortified cities in the next years, in the southern part of what became the governorship of Chile, several of them in the heartland of the Mapuche territory. In the coming years his successors founded a similar number of cities in places as distant as and Cuyo to the east (1561) and Chiloe island to the south (1567).57

2.2. Concepts behind Spanish conquest of the new world.

The concepts behind the Spanish conquest of the new world were a consequence of those that had been developed in Europe in previous centuries in the context of the Catholic debate concerning dominion over those considered to be infidels or pagans and their lands. As a consequence of this debate, the legitimacy of conquest of these peoples and their lands under natural law had already been accepted in Europe at the time of Columbus' so-called "discovery" of America.58

The foundational documents of the Spanish conquest were imbued with these concepts. The capitulaciones59 made among the Crown of Castile and Columbus affirm that, as it had occurred in Africa in the past, the lands discovered by him on the way to India could be appropriated by act of possession, and that the people found would be kept under the authority of the Crown.60

The same ideas would be present in the papal bulls which were granted by Alexander VI legitimating Spanish and Portuguese conquest enterprises. In the first of his four bulls (Inter

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57 Alamiro de Avila M., "Régimen Jurídico de la Guerra de Arauco," in III Congreso del Instituto Internacional de Historia del Derecho Indiano (Madrid: Instituto Internacional de Estudios Jurídicos, 1973) at 327. The foundation of new cities is explained by this author by the need to feed the new conquerors that were expected to come. Villalobos, nevertheless, points out that it was also explained by the scarcity of Indigenous population which was needed for the encomiendas in Santiago and its surroundings. (see Villalobos, Historia vol. 1, supra note 6 at 215-216).

58 An analysis of the debate developed in the previous century within the Catholic church, in particular in the context of the Council of Constance (1414-1418) can be found in Robert A. Williams Jr., The American Indian in Western Legal Thought. The Discourses of Conquest (New York: Oxford University Press, 1990) at 59-74.

59 Expeditions undertaken by Spanish conquerors since Columbus were enterprises which involved not only the Spanish crown, but also the conquerors personally. Consistently, the crown's participation was many times limited to authorizing these expeditions, and establishing the conquerors' rights. The expeditions costs were funded by the conquerors themselves. The contract made between both parties for this purpose were called capitulaciones (See Jaime Eyzaguirre, Historia del Derecho, 12th ed. (Santiago: Universitaria, 1992) at 131-133).

60 Ibid. at 136. According to this contract Columbus was to keep one-tenth of the wealth obtained in his partnership with the Crown. (See Williams Jr., supra note 58 at 81).
caetera, 1493), the Pope authorized the rulers of Spain to bring under their rule "countries and islands" discovered by Columbus, along with "their residents and inhabitants, and to bring them to the Catholic faith." 61 In the second of these bulls, also issued in 1493, which took the same name as the first, the Pope drew a demarcation line to divide the newly discovered lands between Spain and Portugal, assigning Spain exclusive rights to evangelize and trade in all lands assigned to it not already under the control of a "Christian prince." 62

When the Spanish arrived in the new world, they considered the Native population to be pagans, with no god or faith, as well as savages with no law or organization. As Columbus affirmed when referring to the Arawaks of the Carribean:

The people of this island and of all the other islands which I have found and of which I have information, all go naked, men and women... They have no iron or steel or weapons...They do not hold any creed nor are they idolaters... 63

These first perceptions of the Native population of the new world would prevail in Spanish and European discourse of Natives in general. Amerindians, Dickason affirms, were rapidly classified as "savages" and not fully humans - but capable of becoming so - living in a state of nature "sans roy, sans loy, sans foy." 64 Somewhere between beasts and humans, Indigenous people in America did not fit into any of the European categories, being left outside natural law. 65

Inspired in these Eurocentric perceptions, Spain developed several institutions in order to make possible its domination of the new world. A central institution created for this purpose was the encomienda. In accordance with the papal bulls, and as a manifestation of the crown's sovereignty, the monarchs had the right to dispose of the Native population of the new world. Theoretically, as with the institution of vassalage that prevailed in Europe at that time, the Native

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64 Dickason,"Concepts," *supra* note 61 at 182

population of the new world should pay tribute to the king. The king could transfer these tributes to the encomenderos, thus conciliating the interest of the crown with that of the conquerors. Indigenous population should have to work in order to pay the tribute, but would maintain their freedom. This institution allowed the king to compensate the encomenderos for their efforts in the conquest enterprise, and at the same time, ensure productivity in the new lands.  

In practice, the encomienda imposed by Columbus in the Antilles and later by others in different parts of the new world, was not an institution of tribute, but one of personal service. The Native population was forced to work on farmlands and mines for the Spanish conquerors, in an institution that did not differ substantially from slavery.  

The first criticism against the enslavement to which in practice the application of the encomienda had led was made by Catholic missionaries in the new world. Abuses committed by Spanish conquerors against the Native population of Hispaniola were denounced by Dominican Friar Antonio de Montesinos. These accusations resulted in the crown's approval of the Laws of Burgos in 1512. Although these laws acknowledged the freedom of the Native population of the new world and the right to humane treatment, they also recognized the necessity of forcibly establishing conditions whereby they could be inculcated with virtues of Christianity and civilization. The same laws regulated almost all aspects of Native life in the new world. Legitimizing the encomienda system, these laws also established the rights and responsibilities of the encomendero. Natives were relocated into new villages closer to the Spanish settlements. Church and religious instruction were provided to them. Baptism of children and marriage among adults was encouraged, and nakedness prohibited. Natives were compelled to give nine months of service each year.

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66 Sergio Villalobos, Historia del Pueblo Chileno vol. 2 2nd ed. (Santiago: Zig-Zag and Instituto Chileno de Estudios Humanísticos, 1983) at 56-57 [hereinafter Villalobos, Historia vol.2].

67 Such is the case of the encomiendas established by Columbus in the Hispaniola. Ibid.

68 Different forms of Native servitude would be imposed later in Mexico, Brazil and in the Andes until the encomienda was abolished in the eighteenth century (See Dickason, "Concepts," supra note 61 at 191).


70 Ibid. According to Williams, this legislation continued to legitimate outright appropriation of Native resources and labour as a means to facilitate assimilation (see Williams Jr., supra note 58 at 88.
Questions about the legitimacy of the Spanish crown’s dominion over the people and lands of the new world were made by other European nations in the early sixteenth century. In order to ensure the validity of the papal foundation of Spanish crown titles in the new world, a new regulation regarding future Spanish conquest enterprises was drafted. This regulation gave origin to the requerimiento, a sort of charter of conquest, according to which Native populations were requested in simple terms to accept the Christian missionaries and Spanish domination of their territories on the basis of the papal donations made to the crown. If they refused, Spain would invade their country and make war against them. Warnings of the enslavement of their wives and children, vassalage, harm and appropriation of Native goods were also part of the message communicated to Native people through the requerimiento.\footnote{The regulations which mandated that the requerimiento be read aloud to any group of Natives newly discovered by Spanish conquerors before hostilities could legally begin were written in 1513 and reinforced in 1526. Their first recorded use was in Darien (see Dickason, "Concepts," supra note 61 at 190). The text to be read to the Natives addressed their natural-law obligation to hear and obey the gospel. It also informed the Natives of the donation of their territories to the Spanish crown made by the pope, who was in charge of all nations of the world. The requerimiento was formally abolished in 1556. After that, the Spanish colonial effort was declared a missionary enterprise as opposed to a military conquest. At that time, nevertheless, the Spanish had conquered most of the Native population of the new world through these methods (see Williams Jr, supra note 58 at 88-93).}

As a consequence of the criticisms made about the treatment given to the Native population of the new world, in 1537 Pope Paul III drafted Sublimis Deus. In this papal bull, the Catholic church attempted to intervene in the controversy regarding the nature of this population, strongly condemning those who supported their enslavement "as if they were brute beasts." The same papal document acknowledged that although "Indians" were infidels, "they may freely and licitly enjoy their dominion and liberty, and they are not to be reduced to slavery."\footnote{See Eugene H. Korth, Spanish Policy in Colonial Chile: The Struggle for Social Justice, 1535-1700 (Stanford, California: Stanford University Press, 1968) at 16.} The importance of this bull is that it is considered to be the earliest statement made by the Catholic church recognizing the human condition and rights of the Native population of the new world.

Challenges that arose during the sixteenth century from religious and secular perspectives to the concepts and practices of the Spanish conquest were influential in changes introduced in Spanish policy towards Indigenous people in the new world. Probably the best known of these challenges came from Bartolome de las Casas, a Dominican Frair who insistently questioned
Spanish institutions and treatment of Indigenous people by those who settled in the new world. Aside from the accusations he made throughout his life about the abuses committed by the Spanish against Indigenous people in the new settlements, Las Casas held that the main purpose of the papal bulls, which were the justification of Spain's presence in the new world, was to bring Native population into Christianity. Las Casas affirmed that the bulls did not grant Spain coercive powers to do so, questioning the use of war and servitude against the Natives. Las Casas also asserted that natural law was to be applied to all mankind, including the Native people. Consistently with that, he believed that these people shared the same rights as others. He also believed that the Natives' right to govern themselves as they had done in the past should be acknowledged.

Moreover, in the debate held in Valladolid in 1550-1551 at the request of Charles V with the purpose of examining mistreatment of Indigenous people in the new world and defining the policies to be applied to them, Las Casas questioned Spanish authority to take the lands and freedoms of the pagans. According to Las Casas, under papal bulls the Natives could only be considered subjects of the king for the purpose of preaching the Christian faith to them. If the Spanish failed, as they had done, to spread the faith by Christian methods, their title to land was

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73 Las Casas, who was intermittently in the new world between 1502 till 1547, was initially an encomendero. He renounced his encomienda in 1514, and became a tireless advocate of Indigenous rights. He was also bishop of Chiapas (1544-1550).

74 Dickason attempts to summarize Las Casas most relevant accusations. Among them he identifies:

...(T)hat Spain had unjustly usurped the kingdoms and lordships of the Indies which by right of possession since time immemorial had belonged to the Amerindians, that encomiendas were iniquitous and tyrannical, placing those who supported or benefited from them in a state of mortal sin, that by far the greatest part of the riches Spain had obtained from the New World had been stolen...


75 Bartolome de las Casas affirmed regarding this matter:

They are not ignorant, inhuman or bestial. Rather, long before they heard the word Spaniard, they had properly organized states, wisely ordered by excellent laws, religion, custom. They cultivated friendship, lived in populous cities in which they wisely administered the affairs of both peace and war justly and equitably, truly governed by laws that in many points surpass ours...


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invalid. According to his perspective, lands had to be restored to Natives, along with the wealth
taken from them.76

As important as Las Casas' critiques were those made in the same period by Franciscus
de Victoria, a Thomistic humanist theorist and Dominican scholar. Victoria held that there was a
natural law connection, with rights and duties, between all nations, including those that were in a
state of nature, by virtue of their sovereignty. In applying his concept of the Law of Nations to
the analysis of the rights and status of Native people in the new world, he affirmed that they
possessed natural legal rights as free and rational people. Consistently, he argued that the Pope's
grant to Spain of title to the America's was baseless and could not affect Native people's inherent
rights. Nevertheless, he stressed that transgressions of the universally binding norms of the Law
of Nations by Native people might justify a Christian nation's conquest and colonial empire in the Americas.77

According to Victoria's concept, the Natives could be subjected to Spanish rule for
denying the Spanish conquerors free passage in their territory, for preventing Spanish merchants
from making their profit, for refusing to share communally held wealth, or hindering the
propagation of Christianity. Any of these actions would constitute transgressions of the Law of
Nations for which the Spaniards could wage a just war and assume the rights of conquest.78 Just
war under the Law of Nations gave Spain rights over the Native people, among them "despoiling
them of their goods, reducing them to captivity, deposing their former lords and setting up new
ones."79

As a consequence of Las Casas campaign, as well as of Victoria's influence in the
Spanish crown, the New Laws were passed by the Spanish courts in 1542. According to these
laws the Native population was no longer to be enslaved for any cause whatsoever. Those who
were unjustly held were to be liberated. The existing encomiendas were severely restricted, and

76 Thomas Berger, A Long and Terrible Shadow. White Values, Native Rights in the Americas 1492-1992
(Vancouver: Douglas and McIntyre, 1991) at 17.

77 Williams Jr., supra note 58 at 97. These ideas were contained in a three part lecture delivered by Victoria in 1532
and published in 1537 entitled "On the Indians Lately Discovered" (See Franciscus de Victoria, De Indis et de Ivre
Belli Reflectiones (E. Nys ed. Bate trans. 1917))

78 Williams Jr., supra note 58 at 106-107.

79Ibid. at 103
no more were to be granted. When present *encomenderos* died, the Native population that were part of them reverted to the crown. No longer were the Natives to be captured in expeditions, and the amount of the tribute to be paid by them was to be controlled by the governor.\textsuperscript{80} The implementation of these laws in the Spanish new world, however, was a difficult task. *Encomenderos* did not comply with its mandates. On the contrary, rebellions in different colonies (Nicaragua and Perú among others) led the crown to revoke those measures restricting *encomienda*. The efforts made to abolish Native slavery in the colonies were relatively more successful, although the practice of condemning Natives for criminal offences to forced service would be maintained for a long time.\textsuperscript{81} Victoria's ideas were particularly influential in the laws passed in 1573 according to which all further extensions of the Spanish crown in the new world were to be called "pacifications" rather than "conquests" and mandated peaceful conversion of Natives.\textsuperscript{82}

The challenges made both by Las Casas and Victoria to the premise on which the Spanish conquest of the new world and its people was based, had a great influence in Spain and the colonies in the coming centuries. It resulted in the dictation of legislation and the implementation of policies which attempted to humanize Native people's treatment. Notwithstanding these changes, the central institutions that Spain had initially built up to make its domination of the new world possible, were maintained throughout the colonial regime. In practice, as we will see in the case of Chile, slavery and *encomienda* continued to exist and to sustain the life of the colony until the seventeenth and eighteenth century respectively.

2.3. Early Spanish policies affecting Indigenous peoples of Chile.

The policies implemented and actions undertaken by Valdivia until his death in 1553 set up the patterns of the relationship to be established among the Spanish and Indigenous peoples in Chile. Among these policies and actions, the following are worth mentioning:

\textsuperscript{80} Dickason, "Concepts," *supra* note 61 at 212.

\textsuperscript{81} Ibid.

\textsuperscript{82} Berkhofer, Jr., *supra* note 63 at 125. Williams Jr. calls these laws the "Spanish Crown Royal Proclamation" in a comparison with the English Royal Proclamation of 1763 (see Williams, Jr., *supra* note 58 at 106).
2.3.1. The imposition of the *encomienda* system.

The first initiative undertaken by Valdivia was the distribution of the Indigenous population to the Spanish soldiers who came with him through the *encomienda* system. In order to compensate these soldiers for their participation in the expedition to Chile, as well as to establish an economic base for the newborn colony, and in accordance with the Spanish policy in the new world, Natives were distributed among them by Valdivia. By 1544 Valdivia had distributed the entire Native population of the area surrounding Santiago into sixty *encomiendas*. After two years, this number was reduced to thirty two, due to the scarcity of Indigenous labourers in the area.\(^83\)

In the coming years, after the foundation of new cities in the southern part of the colony, Valdivia proceeded to distribute the Indigenous population living there among those soldiers who had not benefited from this system. In Imperial and its surroundings, in the heartland of the Mapuche territory, seventy five *encomiendas* were created.\(^84\) Due to the abundant population that inhabited the area, the *encomiendas* created there were much larger. Some of them, such as that assigned to Francisco de Villagra, included 30,000 Natives.\(^85\) Valdivia also assigned himself several *encomiendas* in the north and central part of the governorship. He later renounced them in exchange for a large *encomienda*, which included 40,000 Mapuche, in Arauco, south of Bío Bío.\(^86\) Those *encomiendas* allocated to less influential Spaniards usually included between 1,000 to 3,000 Natives.\(^87\)

Within a few years Valdivia had distributed among the Spanish settlers of the colony a significant percentage of the Native population of Chile. However, constant uprisings of the

\(^{83}\) Sergio Guevara, "Historia de la Civilización Indígena y Sistemas Legales por los Cuales se Rigieron Hasta la Independencia," in Sergio Guevara and Rafael Eyzaguirre, *Historia de la Civilización y Legislación Indígena de Chile* (Santiago: Universidad de Chile, 1948). According to Villalobos, after the number of *encomiendas* was reduced, each of them would have approximately thirty to a hundred Indigenous labourers (see Villalobos, Historia vol. 1, *supra* note 6 at 215).

\(^{84}\) Villalobos, *Historia vol. 2*, *supra* note 66 at 61.

\(^{85}\) Guevara, *supra* note 83 at 32.

\(^{86}\) The labour force within this *encomienda* has been estimated in 8,000 (See Villalobos, *Historia vol. 2*, *supra* note 66 at 62).

\(^{87}\) *Ibid.* at 64.
Mapuche in southern Chile challenged the implementation of the *encomienda* system in that area. The importance of this institution, consequently, was limited to northern and central Chile, where the Spanish were able to maintain territorial control.

2.3.2. Interest in gold.

As had occurred with other Spanish expeditions in the new world, those of Almagro and Valdivia in Chile were not only aimed at discovering new lands for the Spanish crown, but also at finding precious metals. As chroniclers who came with Valdivia affirm, the dream of the Spaniards who came to this part of the world was to accumulate sufficient gold to enable them to go back to Spain and buy noble titles. 88

Consistent with this objective, initial Spanish efforts in Chile were centred in finding gold in the newly conquered territories. It should be mentioned here that, in accordance with the Spanish laws in effect at that time for the colonies, the mines belonged to whomever claimed and exploited them and not necessarily to the conquerors. The crown ceded mines through administrative entitlements (*mercedes*), usually assigning those who benefited from this act a number of Natives to work in them. 89 Many of those who came with Valdivia became involved in the exploitation of gold mines. Labour for this purpose was provided by the *encomienda* Natives. 90

Although gold was found in Chile - several *lavaderos de oro* (placer mines) were established in the area surrounding Santiago, as well as south of Bio Bio - the product obtained from its exploitation was not that promised by the Incas or expected by the Spanish. 91 The amount of gold extracted in Chile grew systematically during the first thirty years of the conquest, reaching by 1568 to approximately 200,000 gold pesos annually. After that point,

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88 Mariño de Lobera, in Villalobos, *Historia vol. 1*, supra note 6 at 213


90 Villalobos, *Historia vol. 2*, supra note 66 at 12. By 1575 the colony had 26 Spanish neighbours devoted to mining activities. Valdivia also became involved in this activity, using for this purpose 800 Natives of his *encomienda* in the surroundings of Concepción, where a rich gold mine was found.

however, it diminished substantially. By the end of the century (1593) it only reached to 67,500 gold pesos.\(^\text{92}\)

### 2.3.3. Land distribution.

Although less attractive than gold or encomiendas, land gradually became important for the Spaniards who settled in Chile. The need to feed an increasing population, as well as the emerging trade with other colonies and with Spain, made farming and grazing lands more interesting for the newcomers.

As the crown promised, usually in the capitulaciones, the Spanish soldiers who came to the new world received a *merced de tierra* (land entitlement) on which to live and build a house. These land parcels were entitled to them after four years of residence in the newly founded cities by the *Cabildo* or municipal council, who administered those crown lands considered to be "unoccupied."\(^\text{93}\) Agricultural lands surrounding these cities were also distributed among Spanish settlers by the *Cabildo*. Parcels of up to 300 hectares were allotted among them in the surroundings of Santiago and other cities of the colony for agricultural purposes.\(^\text{94}\)

It is important to highlight here that, in accordance with the theoretical principles that inspired the Spanish conquest in the new world, the crown is said to have recognized the previous title of Indigenous people to those lands that were utilized by them. Therefore, the only lands that were left for entitlement by newcomers were those which were considered to be unoccupied.\(^\text{95}\)

In practice, however, this principle was not respected in Chile. The creation of cities such as La Serena, Santiago and Concepción, resulted in the deprivation of Indigenous peoples’ best farming and grazing lands. Different tribes were relocated as a consequence of the new Spanish

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\(^{\text{93}}\) The *Cabildo* also assumed the administration of lands for reserved for streets, parks, markets, etc., as well as those considered common lands of the population, which included grazing lands and forests. See Mario Gongora, *El Estado en el Derecho Indiano, Epoca de Fundacion 1492-1570* (Santiago: Instituto de Investigaciones Historico Culturales and Universidad de Chile, 1951) at 140-142 [hereinafter Gongora, *El Estado*].

\(^{\text{94}}\) Villalobos, *Historia vol. 2, supra* note 66 at 28-29

\(^{\text{95}}\) Ibid, at 27; Gongora, *El Estado, supra* note 93 at 141.
settlements.\textsuperscript{96} Moreover, Indigenous land title was not respected by the \textit{encomienda} either. In theory, this institution did not grant the \textit{encomendero} land rights, but only rights and duties with regards to the Native population under their control. Nevertheless, on several occasions \textit{encomiendas} were granted to Spanish neighbours under the condition of "dominating" the territory of the Indigenous population which was assigned to them. In practice these conditions resulted in the appropriation of Indigenous land by the \textit{encomendero}. Moreover, the \textit{encomenderos} usually were granted lands within the territory of the Natives that were assigned to them through the \textit{encomienda}. Finally, most of the \textit{encomenderos} acquired the lands of the Native villages or \textit{pueblos de indios} where the \textit{encomendados} were forced to live. \textsuperscript{97}

This situation, which was a clear breach of the \textit{encomienda} laws and principles, and which resulted in the appropriation of Indigenous lands in northern and central Chile, is considered to have been a consequence of Chile's isolation from Spain and the rest of the colonies. Due to Chile's remoteness, Spanish laws were not always enforced, and sometimes, not even known in the colony.\textsuperscript{98}

\textbf{2.4. Indigenous peoples' early reactions to the Spanish presence.}

Indigenous attitudes towards the Spanish conquerors were diverse. At the time of European arrival, the peoples of northern and central Chile (Aymara, Atacameneans, Diaguita and Picunche among others) had already lived for a century under the domination of the Inca. As previously mentioned, Inca people had participated in the first Spanish expeditions to Chile. This situation helps one to explain why the peoples that inhabited this part of the country did not show a significant resistance to the Spaniards and were subjugated by them within a short period of time.\textsuperscript{99}

\textsuperscript{96} In the case of Santiago, for instance, several chiefs and their tribes were relocated to new lands outside the city limits which belonged to other chiefs and tribes, creating serious conflicts among them. In Gongora, \textit{El Estado, supra note} 93 at 161-162.

\textsuperscript{97} \textit{Ibid.} at 157-161. This land acquisitions were made by the \textit{encomendados} in absence of a competent authority or by inheritance from those Natives who died.

\textsuperscript{98} \textit{Ibid.} at 156-157.

\textsuperscript{99} Avila M., \textit{supra note} 57 at 328. Some exceptions, such as the uprisings of the Picunche against the recently founded city of Santiago should be mentioned. (see Villalobos, \textit{Historia vol. 1, supra note} 6 at 213).
The impacts that European diseases and the *encomienda* system - including the imposition of forced labour, their relocation to *pueblos de indios*, etc. - had on Indigenous people, resulted in a sharp decline of their population in few years. In 1547 Valdivia reported that the male Native population of a vast area of northern and central Chile was reduced to only 15,000. By 1559, the male Native population in the district of Santiago had dropped from 25,000 to 9,000.100

The attitude of the Mapuche south of the Bio Bio river was substantially different. Initially they seemed to have been overwhelmed by the superiority of the Spanish weaponry, which facilitated the newcomers occupation of their territory, as well as the distribution of its population in *encomiendas* in a short period of time. Nevertheless, the Mapuche were soon after able to reverse this situation. The decentralized nature of Mapuche organization enabled them to resist and many times defeat the Spanish centralized army. The knowledge they had of their complex territory, as well as the warfare strategies they used, which by the end of the sixteenth century included the use of horses, also help to explain the success of Mapuche resistance.101

Since 1553, the year in which Valdivia was killed at the hands of the Mapuche, they fiercely resisted the Spanish occupation of their territories in the Araucania. After decades of wars in which both sides lost many lives, the Mapuche organized a general rebellion (Curalaba) against the Spanish. By 1602, they had destroyed eight of the cities founded by Valdivia and his successors, including all of those located south of Bio Bio.102 After half a century of military confrontation, the Spanish decided to abandon the Araucania, recognizing, in practice, Mapuche sovereignty over this part of the territory.

100 Villalobos, *Historia vol. 2*, supra note 66 at 105. According to Bengoa, numerous Picunche refused servitude to the Spanish, seeking refuge among the Mapuche in the south. (See José Bengoa, *Conquista y Barbarie* (Santiago: Sur, 1992) at 49 [hereinafter Bengoa, *Conquistal*

101 According to González de Najera, a Spanish chronicler, the Mapuche (Araucanians) chose their battles carefully, fighting only when they felt they could win. They accepted servitude when Spanish forces seemed strong. But once the conquerors military vigilance declined, they would rise again in rebellion. They also possessed a potent psychological arsenal, which included face painting and screaming in the battle field. (See Alonso González de Nájera, *Desengaño y Reparo de la Guerra del Reino de Chile* (Santiago: Universitaria, 1971) in Stephen E. Lewis, "Myth and the History of Chile's Araucanians" (1994) 58 *Radical History Review* 112 at 120).

102 Avila M., *supra* note 57, at 328; Rolf Foerster, *Jesuitas y Mapuches 1593-1767* (Santiago: Universitaria, 1996) at 64-65 [hereinafter Foester, *Jesuitas*]. Additional information of Mapuche resistance during this period is provided by Bengoa in *Historia Mapuche*, *supra* note 7 at 28-32. The impacts that the first fifty years of contact had on the Mapuche population living south of the Bio Bio river, nevertheless, were significant. Two thirds of the total Mapuche population living in that area, estimated at half a million, died as a consequence of wars and diseases. (See Bengoa, *Historia Mapuche*, *supra* note 7 at 16-17).
2.5. The central institutions of the colonial regime in its relationship with Indigenous peoples.

With the defeat of the Spaniards at the hands of the Mapuche in the late sixteenth century and the early seventeenth century, a new phase of the colonial regime began. In this new context, Spain maintained control over the territories and scarce Indigenous population north of the Bio Bio. In the south, however, they were forced to accept the existence a frontier, recognizing, in practice, political and territorial autonomy of the Mapuche people.

Several reasons led the Spanish to establish a border which divided their territory with that of the Mapuche, as well as to change the military strategy that until then had been used with them. First of all, they feared the military strength which the Mapuche had demonstrated in wars against them since Valdivia's arrival. They were also afraid of becoming Mapuche prisoners. The Spanish at that time depicted the Mapuche treatment of prisoners as cruel, barbarian, and savage. Secondly, the wars against the Mapuche resulted in the impoverishment of the new colony. Many human lives and economic resources had been lost in these wars. Moreover, the most important mines and the largest encomiendas, which were located south of Bio Bio, were also lost as a result of the same wars. This situation could not be prolonged in time without causing major harm to the colony's fragile economy.

Lastly, but no less important, criticism coming from Catholic missionaries regarding the mistreatment of Indigenous peoples by the Spanish conquerors, was also influential in the decision to put an end to the wars with the Mapuche made in the early seventeenth century. As we will see later, a proposal made by the Jesuits to implement a less cruel and more effective Christianization strategy, which included the establishment of a defensive war strategy, were

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103 There is abundant literature in this period portraying the Mapuche as fearful and cruel warriors of an indomitable nature. González de Nájera, affirmed about Mapuche savagery with those who were made prisoners in wars that "[t]he barbarians cut their prisoners' legs off while they are still alive..." and "used the shin-bones to make bugles and flutes. Before dying, prisoners were forced to blow out the marrow of their own bones." (In Alonzo González de Nájera, at 53, in Lewis, supra note 101 at 115, trans by Lewis). Acknowledging the bravery of the Mapuche in their wars against the Spaniards, Lewis believes that the savage image of the Mapuche became a myth constructed by the newcomers in order to justify their defeats in wars with them, as well as to encourage their enslavement in future wars. (see Lewis, supra note 101 at 114-119).

104 According to the historian Encina, the Spaniards could not afford to continue the wars in the Araucania and the same time create a new country and make it progress. In Francisco Encina, Historia de Chile vol IV (Santiago: Ercilla, 1983) at 30 in Foerster, Jesuitas, supra note 102 at 83-84.
accepted by the authorities of the Viceroyalty of Peru and the Chilean colony, which depended on the first.

As a consequence of this new context, differentiated policies were promoted and institutions applied by the Spanish with the various Indigenous people of the colony, depending on their particular situation. For those peoples of northern and central Chile who remained under their control, the *encomienda* was the central institution to be applied.\(^{105}\) For the Mapuche people of the Araucanía, who continued to live independently in their territories of the Araucanía, a policy which included war, both defensive and offensive, and *parlamentos* (parleys) was implemented. Due to the legal and political significance that these policies had, and to the fact they persisted until the end of the colonial regime, we will refer to them in particular.

### 2.5.1. The *encomienda* and other related institutions.

As it has been highlighted, notwithstanding the numerous laws enacted by the Spanish crown to humanize the *encomienda* system, this institution did not significantly change in its application in the new world. In practice, it led to varied forms of Indigenous personal service or forced labour in different Spanish colonies in the Americas. Chile was not an exception to this rule.

The *encomiendas* that were assigned to the Spanish by Valdivia and those who succeeded him during the first decades of the colony basically obeyed the needs of the *encomenderos* and were not subject to any regulation. Against the will of the crown, the *encomienda* system in Chile did not become an institution of Native tribute, but one of personal service or forced labour.\(^ {106}\) Aside from this situation, *encomienda* laws were also violated in Chile when colonial authorities assigned them without the power to do so. Regulations which mandated that the

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\(^{105}\) Other forms of forced labour, such as the *yanaconaje*, also existed in the colony. The *yanaconas* were those Natives who came with Valdivia from Peru, who were estimated in 1,000. Other *yanaconas* were those taken later by Spanish in Chile and forced to work for them in domestic activities within their households or farms. The *yanaconas* followed their masters and could be sold or rented. Their was no specific regulation of their rights. Due to these circumstances they were considered by many to be slaves. (See Villalobos, *Historia* vol. 2, supra note 66 at 82-84).

\(^{106}\) Villalobos affirms that in the case of Chile the crown accepted this situation due to the constant wars in which the colony was engaged with Indigenous people. Another explanation he gives of the crown attitude in Chile on this matter is that the tribute system, which had worked among the Incas and other societies who practiced agriculture and paid tribute at the time of contact, could not be applied to the Mapuche who were basically hunters and gatherers, had little agriculture, and were not accustomed to pay tributes to anybody. *Ibid.* at 67.
**encomienda** would last a maximum of two lives or generations - that of the *encomendero* and that of his direct successors - in practice had no application. *Encomenderos* usually appropriated the lands of the *encomendados*, violating regulations concerning Native land rights.  

The colonial authorities in Peru soon heard about abuses committed by the *encomenderos* in Chile against Native people. In order to impede these abuses, different *tasas* or regulations concerning the *encomienda* were enacted throughout colonial history. The first of these *tasas* to be enacted was that of Santillan in 1559. Although Santillan had planned to establish tribute and eliminate personal service in Chile, the *tasa* he drafted was a compromise with the *encomenderos* of the colony. Its provisions maintained Native forced labour, although they also attempted to improve Native situation and impede abuses against them. They prohibited the use of *encomendados* for the transportation of heavy loads and differentiated among labour in gold mines and other forms of labour, mainly in agriculture. Only one sixth of the male population between 18 and 50 years old could be employed in the gold mines. The rest of them were free to work in their own villages and lands. This *tasa* also established the *mita* or turn in Quechua language, according to which the Natives only worked in the mines for a limited time, from two to four months, being replaced later by other Natives. The maximum working period was determined to be eight months a year. In agricultural activities, only one fifth of the Natives could be used. This *tasa* also established provisions ensuring that food and clothing would be provided to the *encomendados*. Finally, it provided that one sixth of the gold extracted by the *encomenderos* should be reserved for the Natives in order to improve their own economy.

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108 The bodies of those who refused to serve through this institution were mutilated by the *encomenderos*. The legs for those who escaped, or hands for those who robbed, would be cut. Violation of women were also common. Bengoa, *Conquista*, supra note 100 at 42.

109 They took the name of *tasa*, or measure, because they attempted to estimate or assess the value of the tribute to be paid by Natives through this institution.

110 As mentioned earlier, the term *mita* was taken by the Spanish in the colonial period from the tribute in labour that the *ayllu* paid to the Inca statehood in pre-contact times. Berdichewsky, personal conversation with the author, *supra* note 27. See also Bernardo Berdichewsky, “Surgimiento y Caracter del Estado Andino (Un Ensayo de Arqueologia Social)” (1996) 14-15 *Dialogo Andino* 75 at 84-85 [hereinafter Berdichewsky, "Estado Andino"]

The Santillan regulations were not entirely applied by *encomenderos*. Due to public accusations made by Catholic missionaries, a new regulation, the *tasa* of Gamboa, was enacted in 1580. This *tasa* attempted to introduce tribute in the colony. In accordance with its provisions, each Native should pay 8 pesos a year, 5 of them in gold and the rest in species. The tribute was to be distributed among the *encomendero*, who received a large percentage, and the priests in charge of the *encomendados* who received the smaller percentage. Personal service was maintained, although limited to four months a year. This *tasa* also established a *corregidor* and an administrator who were to be in charge of the *pueblos de indios* and ensure their well being.\(^{112}\)

Discontent among the *encomenderos*, who in practice managed the colonial economy, and whose support in the wars against the Mapuche in the Araucanía was crucial, made this *tasa* inapplicable. By the end of the century, governor Sotomayor passed a new *tasa* in accordance with which forced labour was reintroduced and the *encomiendas* were divided in three parts; one third who worked in the gold mines, receiving one sixth of the gold obtained (the rest went to the *encomendero*), and two thirds who stayed in their villages or the lands of the *encomendero*, receiving a salary and food from them. These last Natives could also work in their own affairs. Nevertheless, they had to pay to their *encomendero* a certain amount of agricultural products. Also, according to this *tasa* the working period in mines was for six months a year.\(^{113}\)

Several new regulations or *tasas* were enacted during the seventeenth century without substantially changing the nature of this institution, nor the abusive treatment of Native people. Most of these *tasas*, with one exception (*tasa* of Esquilache), were only applicable to those already submitted to the *encomienda* north of the border established with the Mapuche.\(^{114}\)


\(^{113}\) Villalobos, *Historia vol. 2*, supra note 66 at 72-73.

\(^{114}\) Among the most important *tasas* enacted during this period was that drafted by Ribera in the early seventeenth century. According to its provisions, Indigenous lands (*pueblos de indios*) were demarcated, allocating to each Native four *cuadras* (blocks) of land, chiefs eight *cuadras*, and widows two. Its application is said to have been limited. Another important *tasa* was that drafted by Esquilache, Viceroy of Peru, in 1620. According to its provisions forced labour was prohibited, not only for those Natives who lived in peace north of the frontier, but also for those called Natives of war who lived south of the Bio Bio. The first Natives were to be voluntarily employed by Spanish. A minimum wage was to be paid to them. The second category of Natives who were made prisoners in defensive war, were to be assigned to "respectable" neighbours of the colony. The use of Indigenous labour in gold mines was prohibited. Those who were part of *encomiendas* could pay their tribute through work in agricultural activities. They were only obliged to work for the *encomendero* one third of the year, and could devote time to their own activities for the remaining two thirds. Finally the *tasa* drafted by Lazo de la Vega in 1633 should also be mentioned. In accordance
The best evidence that the encomienda did not change its nature, subsisting as a forced labour institution, is the fact that Spain constantly had to monitor the compliance of these tasas and adopt new regulations in order to impede their breach by encomenderos. It was only in 1791, in the last decades of the colonial regime, that this institution was abolished in Chile. According to a cedula enacted by the Spanish crown that year, all the encomiendas in the colony passed to the crown. Lands which belonged to Indigenous people were to be acknowledged to them. Nevertheless, after centuries of servitude, only few of the encomendados recovered their freedom. Most of them, who were no longer pure Native but rather mixed blood or mestizo and had lost their language and cultural traditions, were hired as inquilinos or labourers in the haciendas of central Chile. Within these haciendas, they maintained with the hacendado a relationship of dependency that was not different than that they had in the past with the encomendero.\footnote{Ibid, at 53-54. Inquilino is the name used until today in Chile for farm labourers (of Indigenous ancestry or not) hired in the haciendas or estancias in Chile. The importance that Native populations had in the emergence of this institution (inquilinaje) in central Chile, has been acknowledged by the historian Gabriel Salazar in his in-depth study on the origins the Chilean peasantry. Salazar affirms that one of the components of the campesinización in Chile was through the permanent settlement of Indigenous labourers within the haciendas or estancias, after the pueblos de indios were emptied (See Gabriel Salazar, Labradores, Peones y Proletarios (Santiago: Sur, 1985) at 38.}

Slavery.

A mention should be made of slavery, an institution that also applied to the Indigenous people in Chile during the colonial regime. Due to the scarce Native population that remained in central Chile after the Spanish arrival, the colony implemented slave raids in different areas in order to obtain the labourers it needed for mining activities in particular. Initial slave raids were made, bringing to Santiago and other cities in central Chile a large number of Huarpe\footnote{Villalobos, Historia, vol. 2, supra note 66 at 84.}s from the eastern side of the Andes, and of Veliches (Mapuche Huiliches) from southern Chile.\footnote{Mapuche enslavement was practiced by the Spanish from the first decades of the colonial regime. Five hundred Mapuche were enslaved in the Araucanía and sent to La Serena in northern Chile in 1574 to work in gold mines (Ibid. 73.) Later, Mapuche people captured in wars in the Araucanía were enslaved and forced to work in different economic activities in the colony.\footnote{Ibid. 73.} Mapuche people were enslaved not only in war, but also with this tasa all Indigenous people in Chile were freed from personal service and were only obliged to pay a tribute in species. (see Guevara, supra note 83 41-47)
through the constant slave raids that the Spanish made inside their territory during the seventeenth century. Those who were captured in these raids were sold as slaves in Santiago.\textsuperscript{118} Despite the commitment made by the Spanish from the early 1600's through the parlamentos in which they entered with the Mapuche, the practice of enslaving those captured in wars in the Araucanía was maintained in the colony for a long time until its final prohibition in the last decades of that century.\textsuperscript{119}

2.5.2. Defensive war and parlamentos.

Initial efforts aimed at re-establishing peace with the Mapuche in the frontier lands were made by colonial authorities in Chile only years after Curalaba. Paces (peace) were made among governor Rivera and several Mapuche chiefs of what the Spanish considered to be the "states" of Arauco, Tucapel and Catiray in 1605.\textsuperscript{120} Similar peace agreements were made by Garcia Ramon that same year with a total of 182 Mapuche chiefs also in frontier lands where Spanish presence was significant.\textsuperscript{121}

Peaceful relations with the Mapuche were further encouraged in the early seventeenth century by Jesuit missionaries, in particular Luis de Valdivia. Valdivia, a priest inspired in the principles of Bartolome de Las Casas, was instrumental in the changes introduced in that period concerning the nature of the colony’s relationship with the Mapuche. Valdivia proposed the

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\textsuperscript{118} Bengoa, Historia Mapuche, supra note 7 at 34. According to Barros Arana, only in 1673 more than one thousand prisoners were made among the Mapuche in Purén. Barros Arana, Historia Jeneral de Chile Vol V (Santiago: Rafael Jover, 1884) at 207, in Foerster, Jesuitas, supra note 102 at 247.
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\textsuperscript{119} A royal cedula passed in 1683 abolished Native slavery in Chile and prohibited the imposition of the encomiendas to the Mapuche. Another cedula dictated in 1696 ordered that Natives captured in war should be treated as prisoners of war. In Foerster, Jesuitas, supra note 102 at 255.
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\textsuperscript{120} In accordance with this peace agreement, the chiefs promised to accept the entrance of missionaries to preach the gospel within their territories, and agreed to pay a moderate tribute in the form of agricultural products but not in personal service (encomienda). They also promised not to accept enemies of Spain within their lands and to inform the Spanish of any uprising that they knew. It should be highlighted that these were the chiefs of areas that had already submitted to the Spanish. In Diego de Rosales, Historia General del Reino de Chile, Flandes Indiano vol. II (Valparaiso, Chile: El Mercurio, 1877-1878) at 423-424 in Foerster, Jesuitas, supra note 102 at 86-88.
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\textsuperscript{121} Foerster, Jesuitas, supra note 102 at 86.
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implementation of a defensive strategy, according to which the Spanish would only engage in war against the Mapuche to repel their attacks against their individuals or settlements, or when parlamentos were breached. In order to keep the peace that was required to make possible the Christianization of the Indigenous people in the Araucania, Valdivia promoted the signing of parlamentos with the Mapuche. In these parlamentos a border, located along the Bio Bio river, was to be established. Mutual rights and responsibilities, including that of missionaries to enter into Mapuche territory, were to be acknowledged.122

Several parlas encouraging peace and Christianization of different Mapuche tribes in the frontier lands and in the Andes - probably involving the Pehuenche - took place under Valdivia's policies in 1612.123 Although war against the Mapuche intensified again in the 1620's and the 1630's, in fact putting an end to the defensive war strategy, the institution of the parlamentos was maintained throughout that and the following century. In 1641, again with the support of the Jesuits, the parlamento de Quilin was held among governor Baides and numerous Mapuche chiefs from all over their territory.124

In its provisions, the Mapuche agreed to abandon their refuges in the mountains and to return to live on their lands south of the border; to return Spanish captives, receiving compensation from the governor; to fight against the enemies of the king, to whom they acknowledged themselves to be subjects (vassals); and to allow the entrance of missionaries within their territories. The Spanish agreed that their military forces should not enter into

122 In 1612 the Viceroy of Peru gave Luis de Valdivia full mandate to enforce the defensive war strategy with the Mapuche. Valdivia was influenced by the debate concerning the nature of the Spanish conquest and the rights of the Indigenous peoples which had taken place in Spain in previous years. He believed that a peaceful relationship with the Mapuche, as well as their Christianization, would only be achieved with the elimination of personal service that had been imposed on Natives through the encomienda. Valdivia considered personal service imposed on the Mapuche to be the principal cause of the wars with them. He also proposed the establishment of a border between both people in order to ensure peace. According to Valdivia, Spanish people were to abandon any attempt to settle or enter into Mapuche territory. Royal legislation allowing the enslavement of those made prisoners was to be repealed. Mapuche were to be pardoned for their past actions and their lands should not be bothered. They were not to be the subject of encomienda, nor obliged to extract gold, or serve the Spanish unless paid. In exchange for this, the Mapuche should allow missionaries to enter into their territories, return the captive women living among them, and allow the Spanish passage across their territories. It should be mentioned that the influence of the Jesuit order on the Spanish colonies was not only present in Chile, but also in Mexico where a defensive war strategy was implemented with the Chichimecas their support, and Paraguay, where missions among the Guarani were implemented by them beginning in the seventeenth century. Ibid. at 95; 133-136.

123 Ibid. at 132.

124 Chiefs from Angol and Arauco in the frontier lands, Maquehua in the Mapuche heartland and chief Lientur, who had been in war with the Spanish in previous years, participated in this parliament. Ibid. at 182.
Mapuche territory and that the Natives were no longer subject to the encomienda.\textsuperscript{125} The importance of this parlamento is that it established the guidelines which were followed by others that were held in the future. This agreement also reaffirmed the existence of an independent territory controlled by the Mapuche south of the Bio Bio river.

In 1647, the governor Mujica called a second parlamento at Quilin, this time with Mapuche representatives from all over their territory.\textsuperscript{126} This parlamento included a new provision by which the Mapuche agreed to allow the Spanish to cross their territory when travelling to the city of Valdivia in the south.\textsuperscript{127}

Despite the strong criticism to which the parlamentos were subjected within the colony due to their high costs and their lack of effectiveness to ensure peace and Spanish economic interests,\textsuperscript{128} similar agreements among the two parties were entered in that century in 1651, 1683, 1692, 1693 and 1694. Moreover, many parlamentos were held during the eighteenth century, among them those of 1716, 1726, 1738, 1746, 1756, 1760, 1764, 1771, 1774, 1784, 1787 and 1793. The last parlamentos among the same parties were agreed to in 1803 and 1816 on the eve of the colonial regime. These agreements constituted the last Spanish effort to obtain Mapuche support against the revolutionary movement that had emerged among the criollos, leading to Chile's initial independence from Spain in the 1810 and final independence in 1818.\textsuperscript{129}

Among the most important of these parlamentos was that held in Negrete in 1726 after a Mapuche rebellion. Aside from the usual provisions contained on previous agreements, this document included others that attempted to regulate trade between the Spanish and Mapuche, an activity which became central to the economy of the colony,\textsuperscript{130} and a matter of constant conflicts.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{125} Rosales, supra note 120 at 184-185, in Foerster, Jesuitas, supra note 102 at 186-187; Avila M. supra note 57 at 334.
\item\textsuperscript{126} According to Foerster it was accepted by chiefs from Bio Bio to Osorno. Foerster, Jesuitas, supra note 102 at 197.
\item\textsuperscript{127} Avila M., supra note 57 at 334.
\item\textsuperscript{128} See Foerster, Jesuitas, supra note 102 at 37; Bengoa, Historia Mapuche, supra note 7 at 35-36.
\item\textsuperscript{129} Avila M., supra note 57 at 334- 336.
\item\textsuperscript{130} Historian Jorge Pinto has written extensively about the economic benefits that different Spanish sectors, such as the army and traders, obtained from the commercial relationship with the Mapuche during the colony. See in particular Jorge Pinto, "La Ocupación de la Araucanía en el Siglo XIX, ¿Solución a una Crisis del Modelo Exportador Chileno?" (1990) 3 Nutram 7 at 12.
\end{enumerate}
\end{footnotesize}
among both parties. It also contained provisions dealing with justice within Mapuche territory. The sovereignty of the Mapuche within their territory south of the Bio Bío was clearly acknowledged in its provisions by affirming that no Spanish, mixed blood, mulato or black person could enter Indigenous territory without a specific mandate from the Spanish authorities. Those who breached these provisions were to be punished and sent out of the Indigenous territories where they were caught. A similar prohibition was made banning Mapuche entrance to those territories controlled by Spain without previous registration for that purpose.  

**Significance of the parlamentos.**

A literal reading of the parlamentos previously referred to does not allow one to understand the real meaning and implications that these documents had throughout colonial period in the relationship between Spanish and Mapuche. Their wording, for which the Spanish were obviously responsible, makes the reader think that they were formal documents which regulated the obligations of a dominated people, the Mapuche, with their oppressors, the Spanish. Most provisions of these documents, such as those relating to the entrance of missionaries into Mapuche territory, the prohibition of the Mapuche to ally with the enemies of the king, etc., dealt with Mapuche obligations towards its neighbours to the north. Only a few provisions established Spanish obligations with the Mapuche.

A more in-depth analysis of these documents, as well as of the context in which they originated, leads to a radically different conclusion. As some academics, and more recently the Mapuche themselves, have affirmed, the parlamentos held during the colonial period constituted a clear recognition of the independent status of the Mapuche people and its territory (Araucanía). Despite the many obligations that the Mapuche assumed with the Spanish in most of these documents, the parlamentos coincided in acknowledging the existence of a border, the Bio Bío river, which divided the two peoples' territories and jurisdictions. The parlamento of Negrete in 1726, for instance, was particularly clear in establishing that neither people could cross this border.

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131 Articles 9 and 10 of the parlamento of Negrete, 1726, in Guevara, supra note 83 at 50-51.
border without the authorization of the other, setting up penalties to punish those who breached this provision.\footnote{As Bengoa affirms, since the parlamento of Quilin in 1641, all of these documents acknowledged the existence of the frontier among the two peoples and of an independent Mapuche territory which went from the Bio-Bio in the north to the Tolten river in the south. In practice, Bengoa affirms, this was a territory not dependent from the Capitania General de Chile, which related directly, as an "independent nation" with the colony. In Bengoa, Historia Mapuche, supra note 7 at 33.}

Moreover, the legal status of the parlamentos, as one of the few Chilean legal scholars, Alamiro de Avila, who has reflected on this matter has argued, was that of an international treaty among two sovereign nations. This argumentation, according to the author, is consistent with the growing application of Jus Gentium (Law of Nations) in Spanish-Mapuche relationship during the colony. In fact, from the first decades of the seventeenth century the so-called Arauco war was no longer considered a war of rebel vassals or delinquents against the Spanish, but more a foreign war, a conflict among states, increasingly regulated by Jus Gentium and not by criminal colonial law.\footnote{Avila M., supra note 57 at 332-333.} Moreover, as the same author affirms, Jus Gentium was increasingly applied by the Spaniards when justifying enslavement. While during the sixteenth century enslavement was understood by the Spanish as a mitigation to the death penalty that was to be applied to those who rebelled against the crown, in the seventeenth century it was understood as the result of captivity in "wars against barbarians," which were regulated by Jus Gentium.\footnote{Ibid. It is important to note that this view is shared by United Nations Special Rapporteur Miguel A. Martinez in his Final Report of the Study on Treaties. In this Final Report Martinez reaffirms the view that treaties entered by Europeans with Indigenous peoples were contractual relations among sovereign nations with international legal implications. Moreover, Martinez makes a specific mention to the parlamentos entered by the Mapuche with the Spaniards in colonial Chile. He concludes that, taking in consideration their origin, causes and development, they can be compared, in some aspects, to certain Indigenous treaties in British and French North America. Miguel A. Martinez, Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples. Final Report. Unedited Version. UN Doc. E/CN.4/Sub.2/AC.4/1998/CRP.1 at 23 para. 107-108.}

In recent years, this argument has been supported by Mapuche organizations in Chile. In particular, the Consejo de Todas las Tierras (Aukiñ Wallmapu Ngulam) has recalled the significance of the parlamentos entered into by their forebears with the Spanish crown, asserting the binding character of these agreements.\footnote{Resolution adopted during the fourth session of the Mapuche Tribunal held in Temuco, Chile, from the 28 to the 30 of March, 1994, in Miguel A. Martinez, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples (Third progress report ), UN Doc E/CN.4/Sub.2/1996/23, at 31, para. 169.} The same organization has based its claims for political and territorial autonomy of the Mapuche people from Chile and Argentina in these
parlamentos, which it considers to be treaties between sovereign "nations" that are still in effect.\textsuperscript{136}

The parlamentos were also expressions of the political independence of the Mapuche people. The fact that the Spanish negotiated with Mapuche representatives freely defined by themselves, and not with those that they decided, speaks about their sovereignty as a people.\textsuperscript{137} Moreover, parlamentos were also an expression of Mapuche military power. Once the defensive war strategy promoted by the Jesuits was over, the main reason that justified their existence for the Spanish was the maintenance of peace in the colony of Chile, peace that was threatened by Mapuche military strength. In practice, the Spanish army could not defeat the Mapuche in war, so they had to go back constantly and negotiate peace with them, many times against their will.\textsuperscript{138}

Finally, it should be highlighted here that parlamentos were not only the documents which resulted from negotiations between the Spanish and the Mapuche people, but more importantly, were social events which brought together thousands of people from different world views and traditions to debate and celebrate peace. During the two centuries in which they were held, parlamentos became ceremonies full of formalism and symbolism which included greetings, speeches, presents, etc. These events are said to have allowed the acknowledgement

\textsuperscript{136} The "Conference on Mapuche Parlamentos and Treaties" held by this organization in January of 1997 concluded that:

...the rights that the Mapuche people as a Nation claims today to the Chilean and Argentinean states, were already acknowledged by the Spanish colonial system and explicitly ratified in the Mapuche-Spanish Parlamentos. These documents, due to their unprescriptive nature, remain in effect today despite the fact that the Chilean and Argentinean states deny their validity. They constitute the legal protection when it comes to the time of claiming Mapuche ancestral and collective rights, such as self-determination.


\textsuperscript{137} Political significance of the parlamentos in the colonial period for both parties has been underlined by historian Leonardo Leon. According to his interpretation, these events allowed the recognition of Mapuche authorities (lonkos, ulmenes, among others), who directly negotiated with Spanish authorities. See Leonardo Leon "El Parlamento de Tapihue, 1774" (1993/2) 32, Nutram 7 at 7 [hereinafter, Leon, "Tapihue"].

\textsuperscript{138} In a letter addressed by Manso de Velasco, governor of Chile, to the Spanish king in 1738, this authority acknowledged that, notwithstanding he disliked having to negotiate with the Mapuche as an "independent nation" through the parlamentos, he had to do so in order to maintain peace within the colony. This situation was a consequence of the weakness of the Spanish army. In Bengoa, Historia Mapuche, supra note 7 at 36.
and respect of the other.\textsuperscript{139} They also enabled the establishment of relations that went beyond formalities, which on many occasions, gave origin to friendship, reciprocity and dependency that were crucial in the colonial life.\textsuperscript{140}

\section*{2.6. Consequences of the Spanish conquest on Indigenous peoples.}

By the end of the eighteenth century, after more than three centuries of Spanish presence in Chile, the impacts of the colonial regime among Indigenous peoples of Chile had been devastating. Some of them, such as the Changos and Diaguitas in northern Chile, as well as the Chonos in the south, no longer continued to exist due to the impact that diseases brought by the Europeans, or mistreatment by the colonists, had on them. As a consequence of their fusion and cultural assimilation with the dominant population, only a reduced number of Picunche continued to live in central Chile.

Other peoples who were not under the rule of the Chilean colony were also severely impacted. Such is the case of the Aymara and Atacamaneans in the north, who during this period were under the direct control of the Viceroy of Peru. Their submission to the \textit{encomienda}, the heavy work they had to perform through this institution, mainly in mines, as well as European diseases, also resulted in a significant diminution of their population.\textsuperscript{141} It is also the case of the Rapa Nui people of Easter island, who were not under Spanish control, but who were affected by periodic visits of European sailors, many of whom attempted to control the island and dominate its inhabitants.\textsuperscript{142}

\footnotesize\textsuperscript{139} According to Foerster, this acknowledgement was as an equal people from the Mapuche perspective, and as a subordinated people from the Spanish perspective. In Foerster, \textit{Jesuitas}, supra note 102 at 17.

\footnotesize\textsuperscript{140} Leon, “Tapihue,” \textit{supra} note 137 at 8.

\footnotesize\textsuperscript{141} Evidence of the abuses committed against them since the sixteenth century is provided by Gundermann and Gonzalez. Their best lands, located in the lower valleys in the case of the Aymara, were occupied by the Spanish. Their population was significantly reduced as a consequence of diseases and mistreatment. The remaining population sought refuge in the Andes highlands where they continue to live until today. Gundermann and Gonzalez, \textit{supra} note 26 at 20.

\footnotesize\textsuperscript{142} French, English and Spanish navigators were among them. As a consequence of these contacts, by 1770 the Rapa Nui population was estimated in only 600 or 700 hundred. Rochma, \textit{supra} note 39 at 18-20. This population continued to diminish in the nineteenth century as a consequence of Peruvian slave raids which took many Rapa Nui to work in the \textit{Guano} Islands of that country. Bernardo Berdichewsky, personal communication to the author, \textit{supra} note 27.
The only peoples who were not severely impacted until the republican era, due to the remoteness of their territories, were those of Chilean Patagonia (Aonikenk), the Austral channels (Yámana and Kawéskar) and Tierra del Fuego (Sélknam). These peoples, as we will see later in this Chapter, were devastated within a century of contact with Europeans.\textsuperscript{143}

The Mapuche, as previously explained, were able to maintain their political and territorial autonomy in the Araucanía until the nineteenth century. Nevertheless, contrary to the discourse that has been promoted by official historiography in Chile,\textsuperscript{144} Mapuche autonomy was a product of the constant wars in which they were engaged with the Spanish throughout most of the colonial period.\textsuperscript{145} These wars are said to have been particularly violent in the period going from the \textit{parlamento} of Quilin in 1641 to the \textit{parlamento} of Negrete in 1726. Apparently, from then until the Chilean independence, times of peaceful relationship among Mapuche and Spanish became more frequent,\textsuperscript{146} making possible Spanish commercial as well as missionary activities in the Araucanía.\textsuperscript{147} Wars among both parties, nevertheless, continued to take place throughout the eighteenth century, not in the form of general confrontations as in the past, but in the form of local armed conflicts or \textit{malocas} in which different Mapuche chiefs participated, and of Spanish revenge to these attacks.\textsuperscript{148}

\textsuperscript{143} See Jose Aylwin, \textit{Comunidades Indigena de los Canales Australes} (Santiago: Conadi, 1995) [hereinafter Aylwin, \textit{Canales Australes}]

\textsuperscript{144} Villalobos, one of the best known of Chilean historians, has portrayed the colonial period as one where peace largely prevailed over war in the frontier. According to this interpretation, the Mapuche were defeated by the Spanish not by war, which only occurred initially, but mainly through a process of assimilation by the Spanish through trade relations, missions and through their blending with Spanish settlers. (See, Villalobos, \textit{La Vida Fronteriza en Chile} (Madrid: Mapfre, 1992 [hereinafter Villalobos, \textit{Vida}])

\textsuperscript{145} The prevalence of war among Spanish and Mapuche relations in this time of history is supported by prestigious historians which include Mario Gongora, (see Mario Gongora, \textit{Ensayo Historico sobre la Noción del Estado en Chile en los Siglos XIX y XX}, 4 ed. (Santiago: Universitaria, 1986) at 29-48 [hereinafter Gongora, \textit{Ensayo}]) and Jose Bengoa (see Bengoa, \textit{Historia Mapuche, supra} note 7 at 36). An interesting analysis of the debate regarding the prevalence of war or peace in Mapuche-Spanish relationship during this period is found in Luis C. Parentini, \textit{Introducción a la Historia Mapuche} (Santiago: Dirección de Archivos y Museos, 1996) at 64-74.

\textsuperscript{146} Bengoa, \textit{Historia Mapuche, supra} note 7 at 34

\textsuperscript{147} For an analysis of the relevance of this last activity (missions) undertaken by different Catholic orders, in particular by the Jesuits, within Mapuche territory see Foerster, \textit{Jesuitas, supra} note 102.

\textsuperscript{148} \textit{Malocas} were surprise attacks to towns and farms made by Mapuche chiefs in the frontier lands. Their main objective was robbing animals, fundamentally cattle and horses, as well as women, who were made captive and taken to their territory. See Leonardo León, \textit{Maloqueros y Conchavadores en Araucanía y las Pampas 1700-1800} (Temuco, Chile: Universidad de la Frontera, 1991) at 15-21 [hereinafter León, \textit{Maloqueros}], in Parentini, \textit{supra} note 145 at 74.
Consequently, it was not only through the *parlamentos*, but also through warfare, that the Mapuche were able to maintain their independence from the Spanish conqueror until the end of the colonial regime. Although able to resist the invasion of their territories in the Araucanía, it has to be acknowledged that Mapuche strength was considerably undermined through trade and missions, activities which resulted in a process of cultural transformation that significantly altered this people's life.\(^{149}\) The same activities weakened the political and cultural strength of the Mapuche. They also introduced divisions among them, affecting their ability to resist the final invasion of their territory by the Chilean state in the second half of the nineteenth century.

We can conclude by affirming that although the Spanish were not able to finish their conquest enterprise throughout all of the territory of Chile, they would alter the existence of Indigenous peoples who lived there forever. The population of those peoples who survived was reduced to the category of servants and slaves. The social structures and cultures of the same peoples were strongly undermined. When analyzing the devastating consequences that Spanish conquest had for Indigenous peoples of Chile in this early period of contact, it is natural to ask who were the civilized and who the barbarians. If we question the traditional paradigms imposed by Eurocentric thinking, the answer is obvious.\(^{150}\)

3. THE REPUBLICAN PERIOD: CONFINEMENT, ASSIMILATION AND REVIVAL OF INDIGENOUS PEOPLES IN THE CONTEXT OF THE CHILEAN STATE.

3.1. The egalitarian period.

Chilean independence in 1810 was imbued with the liberal and egalitarian ideas that inspired the French revolution and the emancipation of many American states in the late eighteenth and early nineteenth century. In accordance with these ideas,\(^{151}\) the leaders of the

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\(^{149}\) See Parentini, *supra* note 145 at 124 and Pinto, *supra* note 130 at 31-32.

\(^{150}\) For an analysis of this last topic see Bengoa, *Conquista, supra* note 100.

\(^{151}\) These principles had been recognized and affirmed in previous years in documents such as the Declaration of Independence (1776) and the Bill of Rights (1789) in the United States of America and the Declaration of Rights of Men and Citizens (1789) in France.
recently born state of Chile concluded that all men, including Indigenous people, were free and equal in nature and rights.

Consistent with the same ideas, the first republican initiative concerning Native population was a decree issued in 1819 by Bernardo O'Higgins, considered to be Chile's liberator, establishing the liberal principles that would orient the government's early policy towards Indigenous people. In an attempt to differentiate this policy from that of the colonial regime, the decree criticized the Spanish government for its "inhumane" policy of servitude and guardianship which did not allow the Indigenous people any kind of representation. It also declared Native population to be Chilean citizens, free and equal in rights to the rest of the inhabitants of the state.  

In 1823, a law was enacted requiring the authorities of the provinces into which the country was divided (Intendentes) to appoint a person who, aided by a surveyor, was to inform them of the pueblos de indios remaining in their jurisdictions. The law provided that the lands currently possessed by the Natives were to be "declared as their perpetual and secure property." Some analysts consider this as a protectionist law aimed at impeding the dispossession of the Native population who remained living in the pueblos de indios of central Chile after the termination of the encomienda. From a literal reading of its text, however, it is evident that the law's intention was to make available the remaining lands for purchase in public auctions in portions no greater than ten cuadras. These purchases would enable, according to

152 The nature of the equality pursued by the government through this decree was clearly legalistic. That is why it affirmed, that due to the incompatibility between the Spanish policy and the liberal system which Chile adopted, this "precious portion of our species" should:

Henceforth...be Chilean citizens...free as the other inhabitants of the State with whom they will have equal voice and representation, possessing for themselves the power to enter all classes of contracts, defend their causes, contract marriages, (engage in) trade, practice the arts towards which they are inclined, and pursue a career in letters and arms to obtain political and military employment according to their abilities.


154 José Bengoa, Breve Historia de la Legislación Indígena en Chile (Santiago: CEPI, 1990) at 15 [hereinafter Bengoa, Breve Historia].

155 Articles 4 and 5 of Law of June 10, 1823.
the interpretation of some analysts, the development of these Native lands by those who acquired them.\textsuperscript{156} The importance of the 1823 law, nevertheless, was to be minimal, since it was not applied to the Mapuche and other peoples of the southern part of the country, who constituted the majority of Indigenous population at that time.\textsuperscript{157}

It was not until the 1850's that O'Higgins' egalitarian decree had significant implications for Indigenous people. In the context of the expansion of Chile's agriculture southwards,\textsuperscript{158} this decree was used by non-Natives to acquire Mapuche lands south of Bio Bio through fraudulent means. Huge tracts of lands, sometimes thousands of hectares, were purchased from their Mapuche owners by non-Natives who paid minimum prices or exchanged them for a few cows or horses.\textsuperscript{159} Mapuche living in that area, who did not understand the concept of individual and exclusive property promoted by Chilean law, were easily deceived by unscrupulous settlers, usually farmers or military men. In few years, most of the lands immediately south of the Bio Bio river were acquired by non-Natives through this procedure, and Mapuche population was expelled southwards. Consequently, equality proclaimed by O'Higgins' legislation never existed for the Mapuche. Those Mapuche living north of Bio Bio, rather than becoming legal "equals", acquiring property or obtaining a political or military employment as in theory O'Higgins expected, were hired as \textit{inquilinos} in the \textit{haciendas} of central Chile.\textsuperscript{160} South of Bio Bio, equality became a fiction used by unscrupulous settlers in the frontier lands to usurpate this people's lands.

\textsuperscript{156} Jara, a Chilean historian, affirms that the basic interest of the state with these laws was to sell the land that had belonged to the \textit{pueblos de indios} (See Alvaro Jara, comp. \textit{Legislación Indígena de Chile} (Mexico City: Instituto Indigenista Interamericano, 1956) at 15). Kevin Worthen considers it was also aimed at bringing order to the property system in the country (see Worthen, \textit{supra} note 152 at 12).

\textsuperscript{157} The total Indigenous population living in the so called "peace areas" north of the Bio Bio river by 1813 was of 48,000, less than 10 percent of the total population of Chile at that time (Jara, \textit{supra} note 156 at 14-15). Most of them were in an advanced stage of assimilation. Meanwhile, Mapuche population south of this border had been estimated on a census corresponding to 1796 in 95,000 (Bengoa, \textit{Historia Mapuche}, \textit{supra} note 7 at 252).

\textsuperscript{158} By 1856 thirteen thousand non-Natives are said to have been living on Mapuche territory south of Bio Bio. This phenomenon has been identified by historians as one of spontaneous settlement or infiltration in contrast with the planned occupation of the Araucania which would take place the second half of the nineteenth century (See Arturo Leiva, \textit{El Primer Avance a la Araucania, Angol 1862} (Temuco, Chile: Universidad de la Frontera, 1984) at 31 ff; Bengoa, \textit{Historia Mapuche}, \textit{supra} note 7 at 157-158).

\textsuperscript{159} Numerous cases of fraudulent land purchases made to Mapuche by non-Natives are described in Bengoa, \textit{Historia Mapuche}, \textit{supra} note 7 at 158 and in Leiva, \textit{supra} note 158 at 33-34.

\textsuperscript{160} Wilson Cantoni, \textit{Legislación Indígena e Integración del Mapuche} (Santiago: Programa de la Sociología del Cambio Económico, Universidad de Wisconsin, 1969) at 8; Salazar, \textit{supra} note 115 at 38.
3.2. The protectionist and expansionist period.

3.2.1. Abusive contracts and protectionist laws.

Different motives led the legislators in the 1850's to enact legislation that put an end to the egalitarian period instituted by O' Higgins. Concerns of the abuses committed against the Mapuche through the fraudulent contracts previously referred to, was one of these motives. Another reason behind this legislation was related to the desire of the government in Santiago to exercise more control over the Mapuche territory as a first step for its future occupation.

In accordance with these goals, in 1852 the province of Arauco, which included those territories going from Bio Bio in the north to Valdivia in the south, then controlled by the Mapuche, was created. In 1853 the government dictated a special decree for the newly formed province. In accordance with this decree, all land purchases made from Indigenous people or concerning lands located within those considered to be Indigenous territories, required government approval.

Despite these and other decrees that were dictated during the following years to protect Indigenous lands, their acquisition through fraudulent contracts in the frontier area continued to take place as settlers expanded southwards. The numerous conflicts which arose between the Mapuche and settlers due to these contracts, was one of the causes that explain the general Mapuche uprising in 1859. As a consequence of this rebellion, most of the haciendas recently formed and cities founded in the frontier area were destroyed. By 1864, more than 450 contracts, including purchases, rents, cessions and other legal figures, concerning Mapuche land had been registered by local authorities in this area.

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161 Law of July 2, 1852.

162 Article 1 of this decree established that a government officer, the Intendente or the Gobernador de Indígenas should ensure that Natives effectively and freely consented in the transaction; that the land belonged to them; and that the price agreed was paid. These requirements were also demanded in land rentals which extended for more than five years. A special registry of these purchases was maintained by the same authorities.

163 Between 1854 and 1863 seven other decrees were dictated for this purpose. According to them, the requirements established in 1853 were to be applied to all land purchases within Indigenous territories (1854). They were later extended to the province of Valdivia (1855) and to the territories of Llanquihue (1856).

164 Bengoa, Historia Mapuche, supra note 7 at 168-170.

165 Leiva, supra note 158 at 30.
3.2.2. The final occupation of the Araucania.

a. Saavedra's plans.

In contrast with the spontaneous infiltration of the Mapuche frontier lands which took place in the mid nineteenth century, the final occupation of the Araucania which took place from 1860 to 1883, was the product of a carefully planned and regulated strategy of the Chilean state. After the Mapuche uprising of 1859, and its suffocation by the Chilean army in 1860, the debate concerning the need to occupy and incorporate into Chilean territory the lands controlled by the Mapuche was intensified. The reasons that were given to justify occupation were varied. Among them were those of a geopolitical nature which stressed the need to connect the central and southern parts of the country which until then were divided into two portions due to Mapuche control of the Araucania. The need to expand Chile's agriculture into the fertile lands of the Araucania in the context of a growing export oriented economy was also argued by powerful sectors of Chilean society.

The military man in charge of operations against the Mapuche, Colonel Cornelio Saavedra, was made responsible (Intendente) for the province of Arauco in 1860. One year after, in 1861, he presented a plan for the gradual occupation of the territories controlled by the Mapuche in the Araucania to the national Congress in Santiago, at the request of the government. According to Saavedra's plan, the frontier with the Mapuche was to be moved approximately 100 kilometres south, to the Malleco river. The lands occupied were to be declared state property, subdivided and sold in small plots, emulating the settlement patterns employed at that time in the United States. Military men and "industrious" settlers were to colonize the area too, and

166 According to Bengoa, these argumentations were made fundamentally by the militaries. Bengoa, Historia Mapuche, supra note 7 at 174-177.

167 Pinto, supra note 130 at 7 at 7-16.

168 The reservation system was imposed in the United States of America in a similar period of time. In previous years, this country had established its present boundaries, and settlers were moving to the west. Pressure on the Indigenous peoples, who had been removed to the Great Plains states, and their lands, increased. To implement the reservation system some treaties with different Indigenous peoples were made in the 1850s and 1860s. According to this policy encouraged by the US government, reservation lands were identified and surveyed. The lands reserved for Indians were protected against encroachment by settlers. On these lands, Natives were still able to govern themselves. See Martin C. Loesch, "The First Americans and the "Free" Exercise of Religion" (1993) 2 vol. 18 American Indian Law Review 313 at 326-327; Berger, supra note 76 at 86.
lands effectively possessed by the Mapuche demarcated, respected, and acknowledged to them in accordance to the law. The frontier was to be moved further to the south in the future, until all of the lands controlled by the Mapuche were annexed by Chile.\textsuperscript{170}

b. The 1866 law.

Saavedra's proposal was approved by the Congress and converted into legislation in 1866.\textsuperscript{171} According to this legislation, the lands which belonged to Natives - a fact that had to be proven by them with an effective and uninterrupted possession of one year - were to be demarcated by a commission composed of three engineers appointed by the government. After the boundaries of the land belonging to a cacique or chief and his descendants were set, títulos de merced (land entitlements) originating reducciones were to be issued and registered in the official records. Under this law, Indigenous lands were to be held communally among all the members of the reducción. These land entitlements, however, were to be issued in the name of the cacique. Communal lands could be divided among heads of family if one eighth of them requested it. A Protector of Natives was appointed to aid the Mapuche in boundary and contract proceedings. The lands not assigned to Natives in accordance with this procedure were considered unoccupied or vacant lands. These lands, as well as those acquired by the state in the future in Native territories, could be sold in public auctions in lots of less than 500 hectares. A part of the same territories was left for colonization with foreign and national settlers. Finally, the restrictions imposed on contracts concerning Native lands in the 1853 law would continue to

\textsuperscript{169}The term "industrious" was used in Chile at that time to refer to European settlers, who were considered to be hard working people, in contrast with Chileans, who were not considered to have those characteristics. This perception explains the efforts made after the final occupation of the Araucania to encourage settlement by Europeans in the Araucania as we will see later in this study.

\textsuperscript{170}Cornelio Saavedra, Documentos Relativos a la Ocupación de Arauco (Santiago: La Libertad, 1870) at 10 ff. in Bengoa, Historia Mapuche, supra note 7 at 174-176. Although there seemed to be consensus within Chilean ruling class that the Mapuche territory should be occupied, an important debate took place at that time concerning the strategies to be implemented for this purpose. Saavedra's proposal was criticized by sectors who proposed the extermination of the Mapuche as the only means to occupy their territory. It was also questioned by others who proposed a more peaceful and gradual strategy consisting in the foundation of cities and settlement within Mapuche lands. \textit{Ibid.} at 175-178.

\textsuperscript{171}Law of December 4, 1866.
be applied if a Native was one of the contracting parties, unless the purchase was made by the government itself.  

**c. The implementation of Saavedra's plans.**

It took the Chilean government two decades to occupy the Mapuche territory (Araucania) and to start implementing Saavedra's plans. This delay was explained in part by the nature of the strategy that was used by the Chilean state in occupying this territory. According to the government's strategy, the frontier line was gradually moved southwards during the 1860's and 1870's. Forts were built to protect the occupied lands. Settlement by non-Natives was encouraged by the government through legislation and administrative action. Wars in which the Chilean state became involved in this period with other states also help to explain this delay. Fierce Mapuche resistance to Chilean expansionist actions was also another important factor that delayed the occupation of the Araucania and the application of Saavedra's plan.

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172 Ibid.

173 Only ten reducciones were established in Angol, in the northern part of the Mapuche territory, in the 1870's. Public auctions of land tracts in the territory of Malleco, which was gradually occupied by the Chilean state in 1860's, were only initiated in 1873. Efforts to establish settlers in the area were not seriously implemented until the occupation of the Araucania in the early 1880's. More information on this matter can be found in José Aylwin, Estudio sobre Tierras Indígenas de la Araucanía: Antecedentes Histórico Legislativos (1850-1920) (Temuco, Chile: Universidad de la Frontera, 1995) at 23-26 [hereinafter Aylwin, Estudio]

174 Ibid. at 18-32.

175 Chile was involved in a war with Spain in 1866 and with the Peruvian-Bolivian Confederation in 1879.

176 Mapuche people were divided into different groupings in this period. Among them, the arribanos in the upper frontier lands, the abajinos in the lower frontier lands and the Pehuenche in the Andes, are to be mentioned. The arribanos, lead by Lonko Quilapan, fiercely opposed the Chile's expansionist plans. They were involved in constant armed conflicts with the Chilean army in the frontier area. They were able to involve other Mapuche groups, including those living at the east of the Andes, in a general uprising against the Chileans which took place in 1869. The Chilean army punished this uprising in what was called the "extermination war," persecuting the rebels inside their territories, killing thousands of men, imprisoning women and children, and destroying their houses and plantations. Similar raids, although less harmful for the Mapuche, were organized by the Chilean army in 1870-1871. The frontier line was moved further south to the Traiguen area in 1878, where several forts were established. In 1880, the government decided to enter into the heartland of the Mapuche territory, the Cautín river area, and founded the city of Temuco in February of 1881. Despite the general Mapuche uprising which took place that year, which caused thousands of deaths to both parts in conflict, the Chilean army was able to control most of Mapuche territory in 1881. In 1882 and 1883 military raids were made to the Andes in order to take control Pehuenche territory. The occupation of the ruins of Villarica in 1883, a city that had been destroyed by the Mapuche three centuries earlier, is considered to be the last military episode of the Araucania war. With this episode, the Chilean army assumed total control of the Araucania, ending up with Mapuche political and territorial autonomy. It is interesting to note that the occupation of Mapuche territory has been euphemistically called by Chilean historiography as the "Pacification of the Araucanía". This
It should also be mentioned here that at the same time as Chile's military expansion into Mapuche territory, the Argentinean government decided to take control of the Indigenous lands of the plains or pampas located to the southwest of Buenos Aires. With this purpose, it launched a military campaign, which was known as the "desert war" where most of the Indigenous population of the area, including the Mapuche living there, was cleansed. This campaign, which was inspired by those that in previous years had been undertaken by the United States army against Indigenous peoples of the western part of that country, is considered to have been a war of extermination against the Natives. Thousands were killed by the Argentinean army. Many Mapuche living east of the Andes sought refuge in Chilean territory among the Pehuenche people. No land rights, or rights of any kind, were acknowledged by the Argentinean government for the few who survived this war. Assimilation was, and continued to be until recently, the main policy implemented towards them by that government. 177

d. The imposition of the reducción system.

The 1866 law, with some minor modifications that were introduced in 1874 and 1883, was the legal framework used for the creation of the reducción system. It was on these reducciones, also known as comunidades (communities), where the Mapuche were forcibly settled in the Araucanía and territories to the south after their military defeat by the Chilean army in 1881. 178

177 An in-depth analysis of this extermination war and its devastating impacts on the Mapuche people living in Argentina can be found in Curapil Curruhuiina and Luis Roux, Las Matanzas del Neuquén. Cronicas Mapuches (Buenos Aires, Argentina: Plus Ultra, 1984). Curruhuiina is a Mapuche author.

178 According to a law enacted in 1874, the state was authorized to sell in public auctions the lands it acquired in the Araucanía within the area between the Bio Bio river in the north and the Malleco river to the south, the Andes mountains to the east and the Vergara river to the west. This law also extended in time, as well as to all kind of contracts, the restrictions imposed on Native land sales introduced in previous legislation (1853, 1866). It also granted a Minister of the Court of Appeals in Concepcion the responsibilities (demarcation of Native lands) assigned in 1866 to a commission of engineers. Finally, it promoted the settlement of European or North American immigrant families in state owned lands in the area by granting individuals who brought them to Chile one hundred and fifty hectares of flat lands or double that size of mountainous lands for each immigrant family to be settled. Additional lands were granted for each child who came with them (Law of August 4, 1874). Another law enacted in 1883 renewed the restrictions imposed in 1874 on all kind of contracts concerning Native lands in the area for ten years. It also transferred the responsibility of issuing land entitlements to Natives who complied with the requisites established in the 1866 law from
In accordance with this legislation, between 1884 and 1929 the government commission created for this purpose issued a total of 2,918 land entitlements to Mapuche chiefs or heads of families, "benefiting" 82,629 Mapuche individuals. The area allocated to them, from the province of Arauco in the north to the province of Osorno in the south, amounted to 510,386,67 hectares. Although lands entitled in these reducciones were held communally, on average, each Mapuche settled on them was allocated a total of 6.18 hectares of land. The total area allocated to the Mapuche through the reducciones was equivalent to only a small part (6.39 per cent) of their traditional territories. These lands were limited mainly to those where their houses and plantations were located. The larger territories they had traditionally used for hunting and gathering, where possession could not be proved, were not acknowledged as theirs. Almost one third of the Mapuche population was left with no lands.

Moreover, settlement in reducciones was arbitrarily made, breaking the traditional Mapuche social organization. Land communities created through this system took their name from the Civil Code, but had no relationship with the lof, rewe or other traditional forms of social and territorial organization that were characteristic of Mapuche society. This fact created serious problems within the reducciones, some of which have persisted until the present. Finally, it should be mentioned that it took the state almost half a century to finish the Mapuche settlement. In the meantime, their lands were often granted to European settlers who were encouraged to

the Court of Appeals in Concepción to a commission composed by a lawyer and two engineers (Comisión Radicadora de Indígenas). Finally it reestablished the Protector of Natives which had been suppressed by a law passed in 1875. (Law of January 20, 1883)


180 Ibid.

181 Mapuche population living in the area was estimated at 120,000 (see Bengoa, Historia Mapuche, supra note 7 at 357). Mapuche living in remote areas in the Andes or in the southern territories of Valdivia and Osorno, were not visited by the state's surveyors, and thus were not entitled to their lands (see Aylwin, Estudio, supra note 173 at 40).

182 Bengoa, Historia Mapuche, supra note 7 at 364. This fact is highlighted by Bernardo Berdichewsky when affirming that many reducciones created by the state included more than one Mapuche traditional community and others were formed by parts of different Mapuche communities. Berdichewsky, communication to the author, supra note 27.
colonize the area, or to individuals that had purchased them through public auctions made by the
government in Santiago.\footnote{Free settlement in the newly acquired lands was restricted until the end of the
nineteenth century to European settlers. Although the government's expectations in European colonization of the area were
never fulfilled, an important number of immigrants of German, Italian, French, Dutch and other European nationalities
settled in the area, receiving lands much larger in area than those entitled to the Mapuche. Nevertheless, most of the lands in the
Araucanía would be sold in public auctions to Chilean individuals, mainly military men who had fought in the wars with the
Mapuche, and landowners of central Chile, interested in expanding their properties to the south. For a more in-depth analysis of
this other forms of occupation of the Araucanía, see Aylwin, Estudio, supra note 173 at 46-65.}

A final comment should be made to highlight the close interrelation that existed between the military and the legal strategies
implemented by the governments of the time in their efforts to occupy Mapuche territory. The first strategy was used to gradually push the Mapuche
southwards, as well as to consolidate Chilean settlement in the newly acquired territories. The second strategy was used to legalize the dispossessions of Mapuche lands at the hands of the non-Natives that were encouraged to settle in them. It was also used to regulate Mapuche property
over the few lands that were acknowledged to them by the state, which was a communal property system in transition to becoming an individual property system. Without the use of these two complementary strategies by the government, the annexation of Mapuche territory to the Chilean state would not have been possible.

3.3. The reducción or community division period.

Notwithstanding the many problems that the reducciones had for the Mapuche, they soon became the space which enabled their subsistence and permanence as a people. Within the reducción the traditional culture and organization of this people was maintained and developed, but not without adaptations to the new context it faced.

3.3.1. The division laws.

In order to impede this phenomenon and encourage Mapuche assimilation into Chilean society, legislation aimed at dividing the reducciones into individually owned plots of land, was promoted by the Chilean state. Through different laws approved from 1927, successive governments attempted to impose individual ownership on Mapuche lands as a means to
incorporate them into the individual land tenure system that was characteristic of the Chilean legal system. Moreover, laws approved during this period also encouraged the transferral of Mapuche lands - which were considered to be in a state of abandonment - to non-Natives who could economically "develop" them, and consequently, the region where they were located.

Consistent with other assimilationist policies dealing with the Mapuche people that were implemented by the state in the early twentieth century, particularly in the field of education, in 1927 the national Congress approved legislation creating a special tribunal based in Temuco with exclusive jurisdiction over cases concerning the division of reducciones. The tribunal gave priority to those cases where division was requested by members of a reducción. However, it also divided reducciones in cases where no such request was made. Once the reducción was divided into individual plots among its members, these plots could be sold by their owners, as long as they or their wife or adult children were literate. The same law also contained a

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184 It should be mentioned that communal property was, and continues to be, considered to be an anomalous situation of a transitional nature by the Chilean Civil Code. As such, in the few cases in which it is recognized, such as in inheritance, its partition among common owners is encouraged by law.

185 The economic and cultural motives behind the laws encouraging the division of communal lands has been highlighted by Wilson Cantoni. As this author affirms, both the Chilean state and the ruling class believed that this division favoured the concentration of agricultural property and the transformation of the Mapuche from independent farmers into dependent peasants. They also believed that this division was to result in the erosion of Mapuche culture, which was depicted by them as undesirable and as a threat to the white racial homogeneity of the country (see Cantoni, supra note 160, at 37-40). It is interesting to note that a policy with similar purposes was being implemented at that time by the government of the United States with relation to Indigenous peoples of that country. In 1887, the U.S. Congress passed the General Allotment Act, also known as the Dawes Act. According to this Act, lands that had been assigned to Indian tribes in the past and that were generally held in common, were subdivided into parcels of sixty-four hectares of land to each family head and thirty two hectares to each single person over eighteen. These parcels were permanent, could be passed on through inheritance, and were inalienable for twenty five years. As a consequence of this Act, which was aimed at encouraging Native Americans to adopt an individual agrarian lifestyle, the Indians are said to have lost almost two thirds of their previous land holdings (see Loesch, supra note 168 at 327-330).

186 Important efforts were made by the state to extend its primary educational system, as well as Spanish as official language to Mapuche communities. See Pablo Mariman, Demanda por Educación en el Movimiento Mapuche en Chile 1910-1990 (Temuco: University of La Frontera, 1993) [hereinafter P. Mariman, Demanda] [unpublished], in Jessica González, "Elementos para el Análisis del Impacto de las Políticas Estatales en el Proceso de Construcción de Identidad Mapuche" (1995) 4 Pentukun 37 at 39-43.

187 Law No 4,169 of August 29, 1927. In its message to the Congress, the law proposal sent by the government described past laws which impeded the Mapuche ability to make contracts concerning their lands as unjust and obsolete. According to the same message, its consequences were poverty and stagnation, not only for the Mapuche themselves, but also for the regions where their lands were located. In E. Figueroa and L. Larrain, "Mensaje de Ley Indigena," in Camara de Diputados, Sesión Ordinaria No 47, vol. 2 (Santiago: Camara de Diputados, 1926)

188 In this last case, tribunal authorization was required. After ten years, these requirements were not needed any longer.
provision which considered landless Mapuche living within reducciones as "national settlers". The law encouraged the government to settle them on state lands.\textsuperscript{189} Finally, this law created the Protector de Indígenas (Indian Protector), a legal figure responsible for aiding the Mapuche in legal procedures it established.\textsuperscript{190}

Responding to Mapuche claims, a regulation was made to this law in 1928. This regulation ordered the tribunal to make restitution to the Mapuche for those lands that were part of the reducción and were occupied by non-Natives.\textsuperscript{191} This law was modified in 1930 by another which created five "Indian" courts aimed at dividing Mapuche reducciones. In accordance with this law, the initiative for this division could come not only from its members, but also from the tribunal itself, even against the will of its members. Divided lands could be sold with court authorization.\textsuperscript{192}

In 1931, two legislative acts modified previous laws on this matter.\textsuperscript{193} In accordance with them, the five Indian courts created in the past could proceed to divide a reducción only at the request of one third of its members. Once the reducción was divided into individually owned plots, their owners could make any kind of contracts regarding them with court authorization. The court's role, however, was limited to verifying that the contract was freely entered into by the Mapuche.

Two important laws were passed in 1953 in response to Mapuche claims. The first granted tax exemption both to communal or individual Mapuche property for a period of ten years.\textsuperscript{194} The second created, for the first time in Chile's history, a government entity in charge of Indigenous policies, the Office of Indigenous Affairs (Dirección de Asuntos Indígenas) within the Ministry of Lands and Settlement.\textsuperscript{195} The final law enacted by the legislature during this

\textsuperscript{189} Article 14.

\textsuperscript{190} Article 15.

\textsuperscript{191} Article 23, Decree No 1.851 of July 4, 1928.

\textsuperscript{192} Law No 4802 of January 24, 1930.

\textsuperscript{193} Decree with Law Status (Decreto con Fuerza de Ley, a special legislation dictated by the President with authorization from the Congress) No. 266 of May 20, 1931, and Supreme Decree (Decreto Supremo) No. 4111 of June 12, 1931. This last Decree condensed provisions still in force of previous legislation.

\textsuperscript{194} Decree with Law Force No.12, 1953

\textsuperscript{195} Decree with Law Status (D.F.L.) No. 56, 1953.
period in 1961 did not introduce substantial modifications to the existing legislation, nor alter the process leading to the division of Mapuche lands.\textsuperscript{196}

The impact that these laws had on Mapuche reducciones was enormous. The number of reducciones which were divided between 1931 and 1971 in accordance with them was of 832 (28.5 per cent of the total). The division created 12,737 individual titles. On average, individual plots resulting from this division were of 11.24 hectares each.\textsuperscript{197}

The same laws resulted in the appropriation of individual Mapuche lands by non-Natives. Individual land transfers to non-Natives were particularly high in number between 1943 and 1947, when no restriction impeded contracts concerning them.\textsuperscript{198} The loss of Mapuche lands due to their acquisition by non-Natives, as well as the growth of Mapuche population,\textsuperscript{199} resulted in a higher population density inside the reducciones. On average, the number of hectares per person had dropped from 6.1 in 1929 to 1.8 in 1969.\textsuperscript{200} Also as a result of this process, reducciones became poorer during this period. Poverty triggered the emigration of many Mapuche from their reducciones to urban centres, a reality that has recently been confirmed in the 1992 population census.

\textbf{3.3.2. Mapuche reactions.}

It took the Mapuche several decades to overcome the impact of their military defeat at the hands of the Chilean army, as well as those related to their encroachment by non-Natives within their own lands. Unlike what happened during the past century, when they resisted their

\textsuperscript{196} Law No. 14,511 of June 12, 1961. This law, passed by the conservative administration of Jorge Alessandri, modified the nature and jurisdiction of the former Indian courts. The newly created courts (five Juzgado de Letras de Indios) had jurisdiction not only on the division of reducciones, which required one third of its members to take place, but also over the restitution of Native lands, and internal conflicts within the community. Court authorization was also required for selling or renting divided lands.

\textsuperscript{197} González, supra note 179 at 9.

\textsuperscript{198} Approximately 100,000 hectares of the 500,000 that were allocated to the Mapuche by the state are said to have been transferred to non-Natives during these four years. Hugo Ormeño and Jorge Ossess, "Nueva Legislación sobre Indígenas en Chile" (1972) 14 Cuadernos de la Realidad Nacional 15 at 21.

\textsuperscript{199} By 1969 Mapuche population living in reducciones was estimated in 300,000. Cantoni, supra note 158 at 125.

\textsuperscript{200} Ibid. at 129.
incorporation into Chile, Mapuche people channelled their discontent within the society that dominated them from early this century. Several organizations aimed at expressing this discontent and seeking solutions to the many problems they encountered in their new reality as an oppressed people within the Chile were created.\footnote{Among the most relevant early Mapuche organizations were the Sociedad Caupolicán created in 1910, the Federación Araucana created in 1922, and the Unión Araucana created in 1926. For an analysis of these organization and their role in early Mapuche politics. See Rolf Foerster and Sonia Montecinos, Organizaciones, Lideres y Contiendas Mapuches (1900-1970) (Santiago, CEM, 1988) at 16-52.}

The need to obtain additional lands for those Mapuche who had not been settled by the government through the reducción system, insufficiency of lands granted to Mapuche by the state according with this policy, access to credit and to social services, in particular education, which could enable them to improve their living conditions, were among the most important claims raised by these organizations during this early period.\footnote{Ibid.; Pablo Marimán, "Tierra y Legislación Indígena: Una Mirada desde el Programa del Movimiento Mapuche (1910-1970)" (1997) 4 Anuario Liwen 143 at 143-163 [hereinafter P. Marimán "Tierra"]). Pablo Marimán is a Mapuche historian at the Instituto de Estudios Indígenas of the Universidad de la Frontera in Temuco, Chile.}

The Mapuche position concerning the land division policy encouraged by the government was not unanimous. While some of their leaders and organizations supported legal initiatives aimed at dividing their communal lands,\footnote{Manuel Manquilef, leader of the Sociedad Caupolicán, is considered to be the author of the 1927 law (ley Manquilef) which promoted division of communal lands. Manquilef, who was elected by the Liberal party as a member of the Deputy Chamber in 1925, considered the division of reducional lands as the only means to "transform the mapuche in a citizens with the same rights and duties of other inhabitants of the republic." According to him, the reducción, which he considered to be the cause of Mapuche backwardness, should be divided to enable the Mapuche to become farmers within their own lands and labourers in neighbouring farms (fundos). In Foerster and Montecinos, supra note 201 at 73.} others strongly criticized this legislation arguing that the freedom to sell the individual plots resulting from the reducción division further impoverished Mapuche at the hands of non-Natives. These last organizations emphasized the need to complete land entitlements benefiting Mapuche people and to make restitution of lands that had been taken from them.\footnote{Statements made by Federación Araucana, and Sociedad Caupolicán, Manquilef's organization too. In P. Mariman, "Tierra," supra note 202 at 156-157.}

Mapuche claims were crucial to the legal reforms introduced in 1931 requiring the approval of one third of the reducción members for the division of communal lands. Other claims which were central to the Mapuche during this period were those related to the restitution
of communal lands that had been appropriated by non-Natives, the need for obtaining additional state owned lands for those Mapuche who had not been entitled through the reducción system, as well as tax exemption on their communal and individual lands.\textsuperscript{205}

It should be highlighted here that Mapuche organizations initially sought alliance with political parties, mainly - but not exclusively - left wing parties. They also sought the support of churches, mainly the Catholic church. Realizing the threats that these alliances posed to their independence as political and social actors, they later attempted to become more autonomous. Achieving this independence, in particular from political parties, was not always possible due to Mapuche interest in obtaining political representation within the national Congress and the government as a means to influence laws and policies concerning them. Most of the Mapuche leaders initially elected to the legislature had the support of different parties. Others were appointed in high-ranking positions of state agencies by governments of different political orientation.\textsuperscript{206} This strategy of the Mapuche movement, nevertheless, had an important cost for their people. That cost was related to the loss of independence from political parties or churches with whom they allied during this period in their attempts to obtain political power within Chilean society.

3.4. The agrarian reform period.

Economic and social transformations which took place in Chile in the late sixties and early seventies had a strong impact on the Mapuche people. Of particular significance to this people was the agrarian reform process, aimed at distributing land ownership in the country, which was implemented in the mid sixties by the Christian democratic government of Frei Montalva (1964-1970)\textsuperscript{207} and intensified during the short lived socialist government of Allende (1970-1973).

\textsuperscript{205} Ibid. at 146-164.

\textsuperscript{206} Foerster and Montecinos, supra note 201 at 109-113. An example of this political strategy can be found in the case of Mapuche leader Venancio Coñuepán. Coñuepán was elected as a member of the Deputy Chamber in 1944 with the support of the Alianza Popular, a populist coalition. He was appointed as Minister of Lands and Settlement in 1952, and later as Director of Indian Affairs. During the ten years in which his organization, the Corporación Araucana was in charge of this last institution, no reducciones were divided in the provinces of Cautín and Malleco in the Araucania. Ibid. at 221-223 and P. Mariman, "Tierras," supra note 202 at 161-163.

\textsuperscript{207} Law No 16.640 of 1966.
The need to reform the laws concerning their lands then in effect, as well as to participate in the agrarian reform process was stressed by the Mapuche movement in this period. During the two Mapuche National Congress convened in Ercilla in 1969 and Temuco in 1970, their organizations unified their claims on land rights and other social and economic issues. A law proposal which emerged from the 1970 Congress demanded that the government reform the 1961 law which had allowed the "disintegration, destruction and usurpation" of Mapuche lands; to finish with the division of communal lands, proposing instead their "rational division" based on socio-economic studies which gave security of their possessions to those living in reducciones; to guarantee a minimum land unit within the reducción in order to impede the minifundium; to incorporate those living in reducciones in the asentamientos created in farms which were expropriated in accordance with the agrarian reform law; to create a Corporation for Mapuche Development as a government entity in charge of policies concerning their people; and to provide education, housing and health for their people.\(^{208}\)

Consistent with its government program, in 1971 the Allende government sent a law proposal to the national Congress incorporating many of the demands that had been made by the Mapuche. Among other objectives, the proposal attempted to strengthen Indigenous communities, create Indigenous cooperatives, establish legal procedures to make justice in their communities, as well as to establish a specialized government agency dealing Indigenous peoples.\(^{209}\)

The legislature approved a new Indigenous law in 1972, but not without introducing substantial modification to the government initiative.\(^{210}\) An important aspect of this legislation was that, unlike previous legislation, it did not only refer to the Mapuche, but to other Indigenous people living in the country as well.\(^{211}\) Another important characteristic of this law is that it dealt not only with land rights, but also contained provisions encouraging social, economic and

\(^{208}\) Foerster and Montecinos, *supra* note 201 at 331-337.


\(^{210}\) Law No 17.729 of September 26, 1972. Modifications to Allende’s law proposal were introduced by opposition parties who controlled the national Congress.

\(^{211}\) In its Article 1, the law defined Indigenous people not only as those who had rights on Indigenous lands, as in the past, but also as those who, living anywhere in the country, were part of a group that usually spoke in Aboriginal language, and could be distinguished from the rest of the population by its customs, religions, life or working patterns, which they had inherited from original groups of the country.
cultural development of Indigenous people. Of particular importance were provisions that created an Institute of Indigenous Development (IDI) as a national entity responsible for Indigenous policies and development programs, and provisions promoting access to education for Indigenous peoples.

The 1972 law also focused on Mapuche land rights, encouraging communal property. Division of communal lands was restricted to cases where the majority of the reducción members requested it or to cases where technical reasons made it desirable. Divided lands could be sold by their individual owners. Restitution of land lost by the Mapuche in the past was also encouraged. The Indian courts of previous laws were eliminated and its jurisdiction transferred to the IDI. Another important mechanism considered for this purpose was land expropriation with accordance to the agrarian reform law. Expropriation benefiting the Mapuche was to be made by the Agrarian Reform Corporation (CORA) at the request of IDI.

Although this law remained in force until 1979, it was fully applied only for one year until the military coup of September of 1973. An analysis of its impact, however, should consider the whole of Allende's period, from 1970 to 1973. Since the early seventies the Mapuche, with the support of left wing political organizations, were involved in a process aimed at obtaining restitution of Mapuche lands, at that time in the hands of non-Natives, in the Araucanía and neighbouring regions. Land restitution was made through tomas (occupations or takeovers), which were later legitimated by the government through expropriation in accordance to the agrarian reform law. Agreements aimed at transferring expropriated lands to

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212 Articles 34-52.
213 Articles 68-73.
214 Articles 6 to 16.
215 Articles 29 to 34.
216 Influence from left wing political movements in this land restitution process has been acknowledged by authors that are supportive of Allende’s government efforts to bring justice for the Mapuche. The influence of MIR (Movimiento de Izquierda Revolucionaria) is admitted by Staffan Berglund, a Swedish scholar of the University of Uppsala who studied this period (Staffan Berglund, The National Integration of Mapuche Ethnical Minority in Chile (Stockholm: Almqvist and Wiksell International, 1977) at 110. A similar analysis is made by American scholar Kyle Steenland in a study on agrarian reform in Lautaro county at that time. See Kyle Steenland, Agrarian Reform Under Allende. Peasant Revolt in the South (Albuquerque: University of Mexico Press, 1977) at 211 ff.
the Mapuche were made between CORA and DASIN (*Direccion de Asuntos Indigenas*) before the 1972 law, and between CORA and IDI after the 1972 law.\(^{217}\)

In contrast with the 1,443 hectares that had been restored to Mapuche communities between 1960 and 1970, the agrarian reform process implemented by Allende enabled the restitution to them of 70,000 hectares in two years (1971-1972). Extra-judicial agreements and CORA-DASIN arrangements were encouraged by the government for this purpose.\(^{218}\) After lands were expropriated and assigned to the Mapuche, many of them were incorporated into the production units of the reformed sector, which included *asentamientos* and CERAS (Agrarian Reform Centres). Likewise, a number of peasant co-operatives were created among Indigenous communities. Access to credit and commercialization of Mapuche products was supported by the state. Mapuche unionization and participation in communal councils was also significant. Mapuche organizations proliferated. Grants for Mapuche students created by the 1972 law substantially increased. Educational and health programs for the Mapuche were launched too.\(^{219}\)

Since 1972, the division of *reducciones* was stopped due to the restrictions imposed by the new law. Efforts made by the government to reverse the past injustices inflicted on Indigenous peoples, as well as the significant legal and material progress achieved in particular by the Mapuche, during this period should be highlighted. Nevertheless, an important critique should be made with regards to the policies implemented by the Allende's government for the Mapuche. Looking back with the perspective of time, it appears to be evident that actions undertaken during this period were aimed at incorporating the Mapuche into a project - in this case a socialist project based on class analysis and not on ethnicity - that was defined by the 

\(^{217}\) As Bernardo Berdihewsky, a Chilean anthropologist who assisted the Allende's government in its policies concerning the Mapuche, affirms:

The Corporación de Reforma Agraria (CORA), depending on the Minister of Agriculture with the collaboration of the Directory of Indigenous Affairs (DASIN), echoed the petitions for land restitution presented by numerous indigenous communities. Many of these lands had been previously taken by indigenous peasants, even before CORA took on the burden, after the respective expropriations or even before. But in almost all cases CORA has dealt with, it has given back the lands to the communities and even, in numerous situations, has attempted to adjudicate to the reservations more land that they claimed.

In Berdichewsky, *Araucanian*, supra note 19 at 23.


Chilean society, and not the Mapuche themselves. Although the need for social justice was shared by the Mapuche due to obvious reasons, reforms encouraged by the government, which included the collectivization of rural property, were not necessarily shared by them. This situation explains the significant involvement of left wing political movements in the Mapuche territory during those years.

In fact, analysis made by supporters of the agrarian reform process has acknowledged the resistance of the Mapuche to the collective land tenure and co-operative productive reforms that were promoted by the government agents.\textsuperscript{220} The fact that Mapuche opinion was not always respected by the government when it came to decisions that affected them has also been acknowledged by the same analysts.\textsuperscript{221}

Consequently, Allende's government policies on this matter did not differ substantially from those of past governments. The Mapuche, as well as other Indigenous peoples, continued to be subordinated to projects which were determined by the Chilean society. Consistently, changes which took place in their territory were dominantly planned and controlled by government agents and connected political parties from the outside society, rather than by the Mapuche themselves.

\subsection*{3.5. The termination of the \textit{reducción} system.}

Unfortunately for Indigenous people in Chile, the period just discussed only constituted a short break in the long history of encroachment and assimilation imposed on them by the state. Once the de facto military regime assumed power in 1973, it attempted to eliminate Mapuche organizations. As a consequence of this effort, many of their leaders were killed, imprisoned and

\begin{quote}
\textsuperscript{220} Mapuche rejection of collective property system is evidenced by Berglund when stating:

They preferred individual ownership and the minifundium, with hardly enough to live on, to collective solutions with undeniable material benefits. Even the co-operative in its various forms was seen as a threat to land ownership.

In Berglund, \textit{supra} note 216 at 110.
\end{quote}

\begin{quote}
\textsuperscript{221} Berglund affirms that "[d]espite a professed respect for the principle of Mapuche participation in the making of decisions, there was no loyalty to this principle in the Indian policy which developed." \textit{Ibid.} at 113.
\end{quote}
tortured by government agents. Others sought refuge in exile where some of them live until today. 222

Although the 1972 law remained in force, most of Allende’s government policies favouring the Mapuche, in particular those dealing with land restitution, were no longer implemented by the military regime. Moreover, the new regime developed a process that has been known as "counter agrarian reform" according to which the farms that had been expropriated during the Allende government and had not been entitled to their new owners, were restored to their previous owners. 223 This counter agrarian reform was particularly relevant in the Araucanía, where most of the lands had not been entitled to the Mapuche at the time of the coup, which facilitated their restitution to previous owners by the new authorities. 224

3.5.1. The 1979 division laws.

Gradually the military regime introduced a free-market oriented economy in the country. Consistent with the neoliberal principles that inspired this economic model, a new Indigenous law aimed at terminating the reducción system, as well as with the Mapuche as a people, was enacted in 1979 by its legislature. 225

In accordance with this legislation, any person occupying a reducción, Native or non-Native, could request its division by a common trial judge with jurisdiction in the territory where it was located. The law contained several provisions which established a fast legal procedure, and free legal aid for claimants, in order to encourage division. Once this division was approved

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222 There are no accurate statistics regarding Mapuche who suffered repression during these years. Berdichewsky estimates them in thousands (see Berdichewsky, Araucanian, supra note 19 at 31). Many of them left the country and lived in exile abroad. In the mid seventies they founded the Comite Exterior Mapuche, and organization based in England representing Mapuche in exile.

223 Ibid. at 30-32.

224 Due to this situation, very few of the farms expropriated between 1970 and 1973 remained in the hands of the Mapuche by the end of the military regime. Most of them were given back to their previous owners with the support of the military government. This loss of land was evidenced by the author in a study concerning land conflicts in 80 Mapuche reducciones in the province of Malleco made at the request of Comisión Especial de Pueblos Indígenas (CEPI) in 1993. In José Aylwin and Martín Correa, Estudio de Tierras Indígenas de Malleco (CEPI, 1993) [unpublished]

by the judge, lands were to be assigned in individually owned plots to members of the reducción as well as to dwellers, Native or non-Native, living on them. Individual property was to be registered in accordance with general legislation. Plots resulting from the division could not be sold until twenty years after their registration as individual property. The law also eliminated the Instituto de Desarrollo Indígena (IDI), transferring this agency's responsibilities to the Instituto de Desarrollo Agropecuario (INDAP), an agrarian entity within the Ministry of Agriculture, a change that itself shows the new orientation of government policies towards Indigenous peoples.

An important provision of this law was that establishing that once individual property was registered as such, the plots of lands resulting from the division of a reducción were no longer considered Indigenous lands. The same was applicable to their owners, who were no longer considered to be Indigenous. \(^{226}\) This provision, which made evident the real motives behind the enactment of this law - the termination of the Mapuche people - was repealed months later by a new law due to the strong criticism coming from the Mapuche themselves as well as from the Catholic church. \(^{227}\) Other provisions of this law, as well as the motives behind it, remained intact as its implementation in practice would prove.

The impact that this legislation had on the Mapuche and their lands was enormous. From its enactment until the end of the military regime in 1990, a significant percentage of Mapuche reducciones were divided, creating 72,068 individual land entitlements encompassing a total of 463,409,81 hectares. \(^{228}\) On average, the size of individual plots assigned to the Mapuche during this period was of 6.4 hectares of land. \(^{229}\) If we consider the estimations made regarding the number of persons living within each plot of land in Mapuche rural areas (6.2 in 1982 and 6.3 in

\(^{226}\) Article 1. This provision was consistent with the position held at that time by the Chilean government at international forums concerning Indigenous peoples' rights. Generally the reports sent by the government to the Working Group on Indigenous Populations of the United Nations manifested that Chile's Constitution established that all men were equal for the law, and therefore laws or policies could not introduce discrimination based on race or ethnicity.

\(^{227}\) Law Decree No 2750 of July 12, 1979.

\(^{228}\) Information concerning the VIII, IX and X Regions. Dirección de Asuntos Indígenas of the Instituto de Desarrollo Agropecuario (June 1990) in José Aylwin and Eduardo Castillo, Legislación sobre Indígenas en Chile a Través de la Historia (Santiago: Comisión Chilena Derechos Humanos, 1990) at 13-14. No information was obtained regarding the exact number of reducciones divided during this period. Nevertheless, if the total area allocated to the Mapuche until 1929 was 510,000 hectares, the 463,409.81 hectares divided during these years constitute the vast majority of them.

\(^{229}\) Ibid.
we can conclude that on average each Mapuche was entitled during this period to approximately one hectare of land as a consequence of the division of reducciones.

Moreover, although the law prohibited new individual owners from selling their lands until twenty years after their property was registered, no prohibition was established to impede land rentals or other contracts concerning them. This provision enabled unscrupulous non-Natives to appropriate Mapuche individual lands through rentals for up to 99 years or the purchase of rights and shares (acciones y derechos) over these lands.

The minifundium that was created through this division process resulted in the impoverishment of rural Mapuche, as we will see later in this study. Another consequence of the same process, to which we will refer later, was the acceleration of Mapuche migration to urban centres, a phenomenon that was demonstrated in the 1992 population census.

3.5.2. Mapuche reactions.

Contrary to government expectations, the law in analysis resulted in the strengthening of Mapuche consciousness and organization. The threats that division of communal lands posed to their physical and cultural survival motivated the creation of numerous organizations through which the Mapuche manifested their criticism and discontent with government policies.

The first of these organizations, the Centros Culturales Mapuche (CCM), was created in 1978. Its actions were mainly aimed at denouncing the contents of the division law that at that time was being planned by the government. Until 1982 this organization, which in 1981 took

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230 This statistic corresponds to a study performed in the 1980's and 1990's on Mapuche reducciones in the province of Cautín, IX Region. In Bengoa, Los Mapuche, supra note 3 at 18.

231 Aylwin and Castillo, supra note 228 at 13. A large percentage of lands of tourist interest, mainly those located on lake and river shores, were acquired by non-Natives through these type of contracts.

232 Migration outside the reducción was directly encouraged by the 1979 law. In accordance with its provisions, the members of a reducción who were not present on them at the moment of its division, were not assigned lands. Instead, the law considered compensation for the loss of rights on their lands.

233 CCM was initially composed by leaders from 90 communities representing different political perspectives, including Marxist and Christian, present among Mapuche people. Within a year it represented more than 1.300 urban and rural communities. See Iberia Torres A., Indianidad and Class Consciousness in Two Mapuche Organizations: Ad-Mapu and Nehuen Mapu (1978-1990) (Thesis submitted in partial fulfilment of requirements for the degree of Master of Sociology at George Mason University, Fairfax, Virginia, U.S.A, 1991 at 27-29) [unpublished]
the name Ad-Mapu, had a considerable mobilization capacity in defence of their people and played a leading role in the struggle against the imposition of land division.\textsuperscript{234} In 1983 Ad-Mapu called communities not to pay their debts to the state, oppose eviction, and ignore division of communal lands, using all forms of struggle for this purpose. Repression against this organization by government forces was intensified.\textsuperscript{235}

Since that time, conflicts within the Mapuche movement resulted in its fragmentation, seriously undermining its ability to resist the policies implemented by the government. Several new organizations, responding more to the logic of Chilean political parties or churches than to Mapuche interests, were created.\textsuperscript{236} This fragmentation was only overcome in the last years of the military regime (1987-1990) with the creation of several coalitions involving different Mapuche organizations. Among them, the Coordinadora Unitaria Mapuche or Futa Trawun created in 1987 bringing together ten Mapuche groups,\textsuperscript{237} and the Comisión Técnica de Pueblos Indígenas de Chile (CTPICh), a coalition of different Indigenous peoples which included the participation of 17 urban and rural Mapuche organizations that was created in 1988, are to be mentioned.\textsuperscript{238}

Most of these initiatives, rather than confronting the military regime's policies, were aimed at raising proposals for future legal and political recognition of the Mapuche as a distinct people within Chilean society, in the context of the recuperation of the country's democratic institutions.

\textsuperscript{234} Ibid. at 30.

\textsuperscript{235} Ibid. at 33. This strategy was a consequence of that adopted by the Communist Party against the military regime in those years.

\textsuperscript{236} Such is the case of the new Centros Culturales Mapuche created in 1982. CCM stressed the ethnic nature of the Mapuche movement and its opposition to the Marxist political orientation of Ad-Mapu's leaders. From 1984 to 1990 three new organizations connected to different left wing parties emerged from Ad-Mapu. In 1986 Nehuen Mapu, an organization connected to the Christian Democratic party, as well as to the Catholic church, was created (Ibid. at 35; 41-42). An exception in this context would be the Junta de Caciques del Butahuillimapu, an organization created in 1982 representing the Mapuche Huilliche. This organization, that was based on the traditional institution of the cacicado (chiefdom), unified this people in their struggle against the division of communal lands (see José Aylwin and EnriqueBesnier, Demandas de los Pueblos Indígenas en la Transición Democrática (Santiago: Comisión Chilena de Derechos Humanos, 1990) at 4).

\textsuperscript{237} This coordination would have a short existence, disappearing in 1988.

\textsuperscript{238} Aylwin and Besnier, supra note 236 at 5.
Although the organizational process in which the Mapuche were involved during this period failed in its attempts to stop the division of communal lands, it enabled Mapuche leaders to revise the claims related to land rights, education and social development that they had addressed to the Chilean society in the past. The links developed in those years by their organizations with other Indigenous peoples at the national and international level, their participation in annual meetings at the United Nations Working Group on Indigenous Populations, as well as in the debates leading to the approval in 1989 of Covenant No. 169 of the International Labour Organization, allowed Mapuche leaders to assume a new discourse. According to this new discourse, proposals for the recognition of Indigenous peoples' political, territorial and cultural rights by the Chilean society in the context of the restoration of democracy in the late 1980's were made by their organizations.

3.6. The Chilean state and other Indigenous peoples.

The Chilean state has shown little concern for other Indigenous peoples in the country aside from the Mapuche. Specific laws concerning them are difficult to find. Political and demographic significance of the Mapuche seems to have watered state initiatives dealing with other Indigenous peoples. The fact that the territories where these other peoples lived were not legally or materially incorporated to Chile until late last century also helps to explain the lack of interest shown by the state for them. Nonetheless, some laws concerning the territories where these peoples lived, or policies implemented with regards to them, can be found. Although it would be impossible to refer to all of them here, some central aspects of these laws and policies concerning other peoples should be highlighted.

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239 In 1980 the CCM joined the South American Indian Council (CISA). The same year Melillan Painemal, a national officer of the same organization, was elected vice president of the World Council of Indigenous Peoples (WCIP). Mapuche exiled committees were formed in England and Canada. Mapuche leaders traveled throughout the world invited by prestigious universities, organizations and institutions. In Torres, supra note 233 at 28.
3.6.1. The Aymara.

The territories where the Chilean Aymara population live today were under the control of Peru and Bolivia until their annexation by Chile by war in 1879. The boundaries imposed after that war separated them from the vast majority of their brothers who continued to live in Peruvian and Bolivian territory. Since then, and until recently, the Aymara have been almost totally ignored by Chilean authorities. No legislation acknowledging them any kind of rights has ever been enacted. Moreover, Aymara lands, when not registered as property in accordance with laws of general application, were considered to be state owned lands.

As a means to impede the loss of their lands and resources - mainly water and pastures - Aymara people initiated the registration of their properties in accordance with Chilean legislation. This resulted in numerous conflicts among the Aymara themselves, as well as with non-Natives, who claimed rights over their lands.

The main policies implemented by the state with regards to them have pursued their political control, as well as their assimilation in Chilean society. Representatives of the national government (Inspectores de distrito) were appointed in each Aymara village, resulting in the destruction of traditional Aymara organization. Significant efforts were made to Chileanize their population, which was generally depicted as "Bolivians." The main policies with this purpose undertaken by Chile throughout the last century were the establishment of schools in rural Aymara communities, as well as the enrolment of Aymara youngsters in the army.

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240 Currently, Aymara population in Bolivia is estimated in more than one million, and in Peru, half a million (see Gerrit Koster, "Los Aymaras: Características Demográficas del Grupo Étnico Indígena Antiguo en los Andes Centrales," in van der Berg and Schiffer eds., supra note 26 at 81). Meanwhile, the Aymara population in Chile was estimated by the 1992 population census in 48,000 (persons 14 years old or older). Information of the Instituto Nacional de Estadísticas (in Bengoa, Los Mapuches, supra note 3 at 11).

241 Juan van Kessel, a Dutch Jesuit priest and social researcher living in the Aymara territory affirms in one of his studies that "[w]ith the incorporation to the Chilean legality, the Aymara communal property, as well as the Aymara community itself, expired de jure." Juan van Kessel, Holocausto al Progreso: Los Aymaras de Tarapacá (Amsterdam: CEDLA, 1980) at 227 (trans. by the author) [hereinafter van Kessel, Holocausto]

242 Aylwin and Castillo, supra note 228 at 36.

243 Juan van Kessel, Los Aymaras Contemporáneos en Chile (1879-1985): Su Historia Social (Iquique, Chile: CIREN, 1985) at 16 [hereinafter van Kessel, Los Aymaras]

244 Aylwin and Castillo, supra note 228 at 37.
incorporation of Aymara population as labourers in the mining activities which are central to the economy of that area has also resulted in their assimilation to the working class population living there.\textsuperscript{245}

The most significant problem affecting their rural communities in the last decades has been that related to the loss of their ancestral waters by virtue of the 1981 Water Code passed by the military regime.\textsuperscript{246} In accordance with this Code, waters are considered to be state property and of public use. Nevertheless, their use can be ceded by the government to those who request them. Although water property continues to be held by the state, the rights granted to those who request them (derecho de aprovechamiento de agua) by government administrative act, are considered to be property of the grantee. Consequently, they can sell this right to others as if water itself belonged to them. In few years the application of this Code resulted in the appropriation by mining companies of most of the Aymara's waters. These companies have successfully requested the state water concessions for their developments. As a consequence, Aymara communities have been deprived of this vital element for their agricultural or herding activities, drying their lands, and increasing their migration to neighbouring cities.\textsuperscript{247}

As in the case of the Mapuche with the 1979 law, the threat imposed by the Water Code triggered an Aymara organizational process without precedent. Local organizations were created in the early 1980's by the Aymara to fight against the appropriation of their ancestral waters. Later, in the mid 1980's, new organizations also incorporating ethnic and cultural demands, emerged both in rural and urban areas.\textsuperscript{248} Some of these organizations have succeeded in

\textsuperscript{245} Ibid. at 36

\textsuperscript{246} Decree with Law Status No. 1.222 of 1981.

\textsuperscript{247} Of the total Aymara population, two thirds are said to have migrated from their ancestral homelands in the northern Andes, in the border with Peru and Bolivia, towards cities located in the Atacama desert (Calama, Pozo Almonte, among others), or to the nearest coastal ports (Arica and Iquique). The remaining third continues to live a rural life in the highlands of the Andes, above 3.000 meters, where they herd llama and alpaca, or in the desert valleys, where they devote to agriculture depending on irrigation. In Taller de Estudios Aymara. \textit{Problemas y Perspectivas para el Desarrollo Aymara Regional} (Arica, Chile: TEA, 1987).

\textsuperscript{248} Among them the Centro Cultural Aymara of Cariquina, in 1886 and Aymar Markas and Corporación Andina de Desarrollo in 1987. In Juan van Kessel, \textit{Los Aymaras de Chile Bajo el Regimen Military de Pinochet (1973-1990)} (Iquique, Chile: CREAR, 1991) at 29-32 [unpublished] [hereinafter van Kessel, Aymara Bajo Regimen]
impeding the appropriation of their water by outsiders through their registration to Aymara communities in accordance with the Water Code provisions.\textsuperscript{249}

Later, on the eve of the military regime, the same organizations created an Aymara Federation. They also joined Mapuche and Rapa Nui organizations in demanding the recognition of their distinct status as Indigenous people, as well as the legal and constitutional entrenchment of their political and territorial rights from Chilean society.\textsuperscript{250}

3.6.2. The Rapa Nui.

Unlike the Mapuche and Aymara territory, which were incorporated by Chile as a consequence of military occupation, Easter Island was annexed to Chile in the same period as a result of an agreement signed in 1888 between the Rapa Nui chiefs and the government of Chile. In this agreement, which is considered by the Rapa Nui people to be a treaty, these Chiefs declared "[t]o cede forever and without any reserve to the Government of the Republic of Chile, the full and total sovereignty of the said Island, reserving for ourselves the Chief entitlements that we presently enjoy."\textsuperscript{251} According to Rapa Nui oral history, Atamu Tekena, their paramount chief at the time, clearly stated that through this agreement the Chilean government would only have usufructuary rights over the island.\textsuperscript{252}

Shortly after the government took possession of the island, its lands were rented to different foreign investors (Merlet Company first and Compañía Explotadora de Isla de Pascua later) who in practice ruled island life until the mid twenty century.\textsuperscript{253} During this period, forced

\textsuperscript{249} Ibid. at 31.

\textsuperscript{250} Most of the Aymara organizations participated in the Comisión Tecnica de Pueblos Indígenas de Chile (CTPICH) created at that time. In Aylwin and Besnier, supra note 236 at 5.

\textsuperscript{251} Extracted from Victor Vergara, La Isla de Pascua. Dominacion y Dominio (Santiago, Universidad de Chile, 1939) in Rochna, supra note 39 at 94 (trans. by the author).

\textsuperscript{252} Rapa Nui story tells that in the treaty ceremony, Atamu Tekena took in his hand a piece of grass and soil from the ground, gave the grass to Policarpo Toro, the Chilean representative, and kept the soil in his pocket. This is considered by the Rapa Nui today as a symbol of their ancestors intentions when entering into this treaty with Chile; the government could keep what grew in the islands soil, but the soil itself was considered to belong to their people. Ibid. at 30

\textsuperscript{253} The island's property had to be acquired by the Chilean government from its different legal owners (mainly French and English) at the time of the annexation. After the failure of plans to promote Chilean colonization in the

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labour was imposed on the Rapa Nui people by these companies. The Native population was also relocated to a small part of the island, prohibiting their free circulation across the remaining lands. Government attempts to regulate mistreatment of the Native population during this period systematically failed.\(^\text{254}\)

In 1933, Easter Island's lands were registered by the Chilean state in Valparaíso as its property in accordance with laws of general application. This registration, of which Rapa Nui people were not informed or consulted, resulted in their legal dispossession from their rights over the island's soil. Although administration of the island was given to the Chilean navy in 1953, resulting in an improvement of the living conditions of the Rapa Nui, it was not until 1966 that the Rapa Nui were granted the right to vote in local and national elections under a special law for Easter Island.\(^\text{255}\)

An important provision of this law for the Rapa Nui was that which converted Easter Island into a municipality dependent on the province of Valparaíso.\(^\text{256}\) The municipality was to be governed by a council elected by the island's citizens, the vast majority of which were, and continue to be Rapa Nui. Another important provision of this law established the reduction of penalties applied to the Rapa Nui due to their distinct culture. According to the law, penalties applied to crimes related to family, public morality and property committed by Rapa Nui people were to be reduced by one degree to the minimum penalty established for them on the Criminal Code.\(^\text{257}\)

During the military regime, a law openly ignoring the Rapa Nui land claims was passed.\(^\text{258}\) According to this law, the Rapa Nui could request that the government issue

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\(^{254}\) According to the Rapa Nui, especially during the first years of the foreign companies control of the Island, their ancestors were treated as slaves in their own lands. Men and women over 14, and even the royal family, were obliged to work long hours, with no wages or food. *Consejo de Ancianos de Isla de Pascua*, in Aylwin and Castillo, *supra* note 228 at 25.

\(^{255}\) Law No. 16.411, March 1, 1966.

\(^{256}\) Article 4.

\(^{257}\) Article 13.

\(^{258}\) Law Decree No. 2885, December 12, 1979.
individual property titles for lands occupied by them, equivalent to less than one fifth of the island’s surface, thus legitimizing state dominion over the remaining lands.\textsuperscript{259}

The resistance against this law, as well as the lack of participation of the Rapa Nui community in decisions which concerned them during this period, resulted in the strengthening of their ancestral organization, the \textit{Consejo de Ancianos de Rapa Nui} (Rapa Nui Elders Council), an entity composed of the 36 remaining Rapa Nui families. This Council played a significant role in defence of its people’s rights which were threatened by the military regime. Its central claim was the restitution of their ancestral lands by the Chilean state. For this purpose, they sued the government in the national courts, as well as made presentations at international forums dealing with Indigenous peoples’ rights.\textsuperscript{260}

In November of 1989 the Elders Council issued a law proposal concerning Easter Island and Rapa Nui rights. Among its central contents were the creation of an Easter Island Development Corporation controlled by the Rapa Nui, the acknowledgement of the linguistic and cultural rights of their people, as well as the restitution of their traditional lands by the Chilean state.\textsuperscript{261} The Rapa Nui Elders Council also joined in 1988 Mapuche and Aymara organizations in the CTPICH in order to obtain the legal and constitutional recognition of Indigenous peoples’ rights in Chile after democratic institutions were recovered.\textsuperscript{262}

The current Rapa Nui population has been estimated in recent years in between 2,000 and 3,000.\textsuperscript{263}

\textsuperscript{259} Of the total area of the Island (16,134 hectares), 6,646 hectares correspond to the Easter Island National Park dependent on CONAF, Ministry of Agriculture. Other 6,560 hectares correspond to farmland administered by SASIPA, a state owned enterprise which is also in charge of the islands facilities, including water, electricity and a port. The Rapa Nui live in the village of Hanga Roa (466 hectares) and surrounding rural lands (2,907 hectares) which in total comprise 18 per cent of the islands’ lands. In Aylwin and Castillo, \textit{supra} note 228 at 31-32.

\textsuperscript{260} Rochna, \textit{supra} note 39 58-62.

\textsuperscript{261} “Borrador Proyecto de Ley sobre Corporación de Desarrollo de Isla de Pascua,” in Aylwin and Besnier, \textit{supra} note 236 at 30-36.

\textsuperscript{262} \textit{Ibid.} at 5.

\textsuperscript{263} Manuel Dannemann and Alba Valencia estimate their population in 2,200 (in Manuel Dannemann and Alba Valencia, \textit{Grupos Aborigenes Chilenos. Su Situación Actual y Distribución Territorial} (Santiago: Universidad de Chile, 1989) at 37). Grant McCall affirms that of the 2,770 persons living in the island in 1992, three fourths were Rapa Nui or Rapa Nui-related (in Grant McCall, \textit{Rapa Nui, Tradition on Easter Island} 2 nd. ed. (Honolulu, Hawai: University of Hawai Press, 1994) at 192). The estimation of 21,000 Rapa Nui over 14 years old contained in the 1992 census, has been questioned by demographers as well as by the Rapa Nui people themselves.
3.6.3. The peoples of austral Chile.

Mention should be made of the peoples of austral Chile. By the 1850's, the period in which Chile established its presence in the area, the total population of the Aónikenk and the Sélknam of Patagonia and Tierra del Fuego respectively and of the Kawéskar and the Yámana in the coastal channels, was estimated at approximately 10 to 12 thousand.\(^{264}\) By 1990, the first two peoples had entirely disappeared from Chilean territory. A community of approximately 100 Kawéskar and 75 Yámana continued to live in fishing villages or urban centres in their ancestral territory, in a condition of poverty and cultural assimilation.\(^{265}\)

The extermination of these peoples can be explained by the devastating impact of European diseases and by the influence that the introduction of newcomers habits, such as alcohol, had on them. The lack of laws or state policies to protect them from abuses and encroachment by non-Natives who settled in their lands is another fact to be considered. This last factor was particularly important in the case of the Aónikenk and Sélknam. Unlike what happened with the Mapuche, where reducciones set up by the state enabled their survival as a people, no lands were granted to them. By the end of last century, almost all their hunting and gathering grounds, mainly in the flat lands located east of the Andes, had been ceded in large tracts, consisting of thousands of hectares, to foreign sheep breeding companies.\(^{266}\)

The killing of the Selknam in Tierra del Fuego at the hands of these companies' agents late in the last century is today well documented. Those who survived these experiences, were relocated to a Salesian mission on a neighbouring island, where the large majority of them died as a consequence of diseases unknown to them, such as tuberculosis, pneumonia, syphilis and measles.\(^{267}\) The Chilean state and society never acknowledged, until recently, its responsibility for the sad fate of these peoples. Unfortunately, when it did so, it was too late to ensure their survival.

\(^{264}\) Mateo Martinic, *Historia de la Región Magallánica* vol. 1 (Punta Arenas, Chile: Universidad de Magallanes, 1992) at 122

\(^{265}\) Aylwin, *Canales Australes*, supra note 143 at 33-41

\(^{266}\) The only exception was a plot of 10,000 hectares assigned temporarily to Mulato, the last Aónikenk chief in Chilean territory, in 1893. English companies were among the largest investors in the area at that time. *Ibid.* at 42-51.

\(^{267}\) *Ibid.* at 44-46.
3.7. Indigenous peoples’ rights since the restoration of the democratic system (1990-1999).

3.7.1. Indigenous peoples’ claims during the transition to democracy.

Indigenous peoples in Chile not only opposed the ethnocentric laws and policies that the military regime attempted to impose on them. They were also involved during the 1980's, together with non-Native organizations, in a broader movement aimed at recuperating Chile’s democracy.\textsuperscript{268} Mapuche, Aymara and Rapa Nui organizations realized that the restoration of democratic institutions in the country was a prerequisite for the recognition of their claims within Chilean society.

Due to their frustration with the military regime and their involvement with the democratic movement, their organizations addressed their claims to the coalition of democratic forces (\textit{Concertación de Partidos por la Democracia}, CPD) which had emerged as the most probable future government alternative. Unlike in the past, when their claims dealt with the specific problems that concerned each of their peoples, mainly the protection of land or water rights, a broader demand which focused on their common situation as distinct and oppressed peoples within Chilean society was raised by these organizations in the late 1980's.

The emergence of a demand which focused on the problems that were common to their peoples at that time, as well as in their common future aspirations, was a consequence of the networks that had been built by their organizations in previous years. The meetings that were held among Mapuche, Aymara and Rapa Nui leaders in the late 1980's, as well as the emergence in the same years of the \textit{Comisión Técnica de Pueblos Indígenas de Chile} (CTPICH), which included representatives of the same peoples, significantly contributed to make this common demand possible.\textsuperscript{269} This broader demand was also possible due to the influence that the international debate concerning Indigenous peoples’ rights had on Indigenous leaders in Chile.\textsuperscript{270}

\textsuperscript{268} Mapuche organizations, in particular \textit{Ad-Mapu}, were actively involved together with non-Native social and political organizations in social mobilization against the regime during the 1980's.

\textsuperscript{269} Aylwin and Besnier, \textit{supra} note 236 at 4-5.

\textsuperscript{270} Covenant No. 169 of the International Labour Organizations that was approved in 1989 was particularly influential among Chilean Indigenous organizations. Participatory rights included in their demands, as well as those related to Indigenous lands and resources and customary law, were clearly taken from this international legislation.
Most of the demands made by these organizations at that time addressed the need to obtain a constitutional recognition of Indigenous peoples as distinct peoples within Chile. The same demands stressed the need to introduce legislation acknowledging Indigenous distinct cultures and languages, protecting the lands and waters they still had, and enabling the recuperation, through legal means, of those lands which they claimed to belong them. They also addressed the need to legally protect rights to natural resources within their traditional territories. Moreover, these demands asserted the need to acknowledge Indigenous customary laws and the right to participate at all levels in decisions regarding matters that concerned them. Finally, the same organization demanded the implementation of state policies aimed at enabling their economic development in a way consistent with their cultures.271

Understanding the importance of democracy as a framework for the negotiation of their rights, Indigenous organizations signed an agreement with the CPD representatives in December of 1989. According to this agreement, which is known as the Acuerdo de Nueva Imperial, they supported this coalition in its efforts to reestablish democracy in exchange for the legal and constitutional recognition of the rights they claimed.272 In accordance to the same agreement, the first democratic government of the CDP, together with Indigenous representatives from north to south, entered into a process leading to the drafting of a proposal for the legal and constitutional recognition of the rights previously mentioned. The proposal was worked out through a Special Commission on Indigenous Peoples (CEPI) created by the government, an entity composed of both government representatives and Indigenous leaders elected by the different Indigenous peoples of the country.273 The same initiative was afterwards debated in hundreds of meetings in

271 Demands addressed in this period by Indigenous organizations to the CPD, as well as an analysis of their contents, can be found in Aylwin and Besnier, supra note 236. It should be mentioned that some Indigenous organizations, among them Nehuen Mapu and Comisión Técnica de Pueblos Indígenas de Chile (CTPICH), also demanded the right to self-determination and to autonomy for their peoples. These rights, nevertheless, were incorporated by these organizations as a kind of slogan, without really specifying their contents or the way in which they should be implemented. In the coming years other organizations, in particular the Consejo de Todas las Tierras and Liwen, elaborated more on this demand and its implications for the Mapuche people in Chile and Argentina.

272 This agreement was signed by most of the Mapuche, Aymara and Rapa Nui organizations existing at that time and by Patricio Aylwin, who became elected president of Chile in the same year (1990-1994), in representation of this coalition.

273 The author as a representative of the government, was a member of CEPI's national council from 1990 to 1993, participating, together with Indigenous representatives, in the drafting of the law proposal concerning Indigenous peoples' rights that was sent to the legislature in 1991.
rural communities and urban areas throughout the country, and later, in January 1991, in a national congress of Indigenous peoples with the participation of 500 leaders.  

3.7.2. The 1993 Indigenous law.

Based on the claims that emerged from CEPI and from the Indigenous peoples national congress held in 1991, the government sent to the national Congress that year a constitutional reform proposal, as well as a proposal for the enactment of new legislation concerning Indigenous peoples’ rights. It also sent for the ratification of Congress the Convention No.169 of the ILO. Two years later, this legislature, whose Senate was, and continues to be, composed not only of elected representatives but also of individuals appointed by the President of the Republic in accordance with Pinochet's 1980 Constitution, enacted a law aimed at the "protection, promotion and development of indigenous people", better known as "Indigenous law." Nevertheless, neither the constitutional amendment, nor the ILO Convention, were approved by the national legislature due to opposition coming from right wing parties.

Notwithstanding the limitations imposed on Indigenous peoples' demands on its debate within the government and legislature, the new legislation enacted by Congress incorporated important demands that Indigenous organizations had raised in previous years. Among its provisions, the following are to be mentioned;
- The recognition, for the first time in the country's history, of Chile as a multicultural society composed of different Indigenous "ethnic" groups and communities;

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274 A summary of the proposals which were made by Indigenous representatives at this national congress can be found in Comisión Especial de Pueblos Indígenas ed., Congreso Nacional de Pueblos Indígenas (Santiago: CEPI, 1991).

275 According to the constitutional amendment proposal, a phrase stating that "[t]he State will ensure the adequate legal protection and development of the Indigenous peoples which are part of the Chilean Nation," was to be included in its Article 1 (trans. by the author)

276 Law No 19,253 of October 5, 1993.

277 Article 1. The recognition of the term "peoples" made by international conventions concerning Indigenous rights, such as Covenant No.169 of the ILO, and demanded by Indigenous organizations in Chile, was rejected by Congress due to its apparent contradiction with the national Constitution which only recognizes the existence of one people; the "Chilean."
- The recognition of the duty of Chilean society in general, and of the state in particular, to respect, protect and promote the development of Indigenous individuals, their culture, families and communities, as well as to protect Indigenous lands, see to their adequate exploitation and ecological balance and contribute to their expansion;\textsuperscript{278}

- The protection of those lands that had been allocated to Indigenous peoples by the state in the past through a series of legal mechanisms, including their tax exemption, the prohibition to sell these lands or to rent them for more than a limited numbers of years, and restrictions imposed to the division of communal lands. The creation of a land and water fund, composed both of state financial resources and state lands or waters aimed at acquiring new lands or waters rights, or transferring state lands to Indigenous individuals or communities who depend upon them for their living, should also be mentioned;\textsuperscript{279}

- The creation of a development fund aimed at providing Indigenous individuals or communities with financial support to implement economic or cultural initiatives which may contribute to the improvement of their quality of life in a way compatible with their cultures;\textsuperscript{280}

- The establishment of the so called Indigenous development areas (IDA) in areas which constitute the ancestral homelands of Indigenous individuals, and where they represent a significant percentage of the population. These IDAs are aimed at promoting the co-ordination of state policies designed to benefit the same people. Indigenous participation in the administration of protected areas located within these IDA is encouraged;\textsuperscript{281}

- The recognition of the comunidad (community) as an Indigenous rural organization and of the asociación (association) as a functional organization. The law contains provisions acknowledging the rights of these organizations to be heard and considered in their opinions by government agencies when making decisions regarding their lives;\textsuperscript{282}

\textsuperscript{278} Article 1.

\textsuperscript{279} Articles 12 to 22.

\textsuperscript{280} Articles 11 to 25.

\textsuperscript{281} Article 26. These "areas" were created in response to Indigenous demand for the recognition of their ancestral "territories" and for the acknowledgement of their right to participate in decisions that affect their lives. The provision contained in the law does not reflect Indigenous aspirations in this regard.

\textsuperscript{282} Articles 9 to 11, 34-37. As explained earlier, the term community was used in the past to refer to the reducción as well as to those who communally owned the reducción land. Nonetheless, the community, as a human grouping, had no legal recognition under the law. According to the same law, Indigenous asociaciones are organizations created for a
- The acknowledgement and protection of their cultures and languages, and the promotion of a system for the implementation of a bilingual and intercultural education for Indigenous students;\textsuperscript{283}
- The establishment of a National Corporation for Indigenous Development (CONADI), including within this body the participation of Indigenous representatives, as the state entity in charge of the implementation of the policies delineated in this law;\textsuperscript{284}
- And the acknowledgement of the validity of Indigenous customs when used in a trial among parties that belong to the same ethnic group, when not inconsistent with the Constitution of the state. In criminal matters, these customs may be used for the application of an exemption or reduction of responsibility.\textsuperscript{285}

Although the law’s provisions generally apply to the eight ethnic groups and communities which are identified in Article 1, it also contains several complementary provisions which deal with the particular situation of the Mapuche Huilliche, the Aymara, Atacameneans, Rapa Nui, communities of the Austral Channels, as well as that of the urban and migrant Indigenous people. Most of these provisions are aimed at ensuring their access to resources on which they rely for living or establishing mechanisms to enable their participation in decisions that affect them.\textsuperscript{286}

The dominant provisions of this law emphasized Indigenous cultural, participatory and land rights. They also emphasized the right of Indigenous individuals and communities to improve their living conditions and to develop. This orientation responded in part to the priority that Indigenous movement placed on these matters in its demands. The orientation of this law specific object, including among others the development of educational, cultural, professional or economic activities for the benefit of their members.

\textsuperscript{283} Articles 28 to 33.

\textsuperscript{284} Articles 34 to 50. The national council of CONADI is to be composed by the national Director of this entity, by eight government representatives appointed by the President of the Republic, as well as by eight indigenous representatives elected by their organizations. The election of Indigenous representatives, nevertheless, is of an indirect nature, due to the fact that the President of the Republic has to choose the names among those candidates who receive the majority of votes.

\textsuperscript{285} Article 54. This provision is restrictive when compared to that contained on Indigenous proposals, which dealt with a broad recognition of their customary laws. Indigenous peoples had proposed the establishment of an Indigenous justice system to be administered by Indigenous elders within their communities.

\textsuperscript{286} Articles 60 to 77.
also responded to the restrictions that were imposed during this project’s debate within the government and the legislature. Some Indigenous demands, such as those dealing with their rights to autonomy and inclusion of the concept of territories, were rejected by the government before the law proposal was sent to the Congress. Others, however, such as those dealing with the recognition of their status as "peoples," the recognition of their traditional territories, with Indigenous preferential right to obtain concessions on natural resources within their lands, the restrictions imposed to relocation of Indigenous people from their lands, or a broad recognition of customary rights, were introduced by the legislature.287

Despite its many limitations, the law constituted an important progress on Indigenous rights in Chile, not only when compared to the assimilationist laws of 1979, but also when compared to previous legislation, including that enacted in 1972 during Allende's government. Unlike previous laws whose provisions were mainly limited to the Mapuche rural population, the provisions of the 1993 law related to the different Indigenous peoples in the country, including not only rural, but also urban population.288 The perspective of this law was aimed not only at solving land problems or economic backwardness of Indigenous peoples, which had been characteristic of previous laws, but also at enabling, if not Indigenous autonomy, Indigenous participation within the country in the decision making process for matters that concern them. Finally, this legislation was based in the acknowledgement of the cultural distinctiveness of Indigenous peoples. Most of its provisions, including those related to land rights and development, were aimed at ensuring the protection and strengthening of their cultures, which were considered in its provisions to be part of Chile's heritage.

287 The limitations imposed to the law were strongly criticized by Indigenous leaders. As a Mapuche leader José Santos Millao (AD-Mapu) affirmed at the ceremony where the law was enacted in 1993, the law approved by the legislature did not contain the "fundamental historic demands of the Native peoples." Among those missing demands he identified, the "constitutional recognition, the concept of peoples, the recognition of their territory." He also addressed the fact that the law enacted did not consider "their political participation...," and would not "change the educational system enabling the true story of their people until today denied, to be taught." In José Marimán, "Transición Democrática en Chile ¿Nuevo Ciclo Reivindicativo Mapuche?" (1994) 63 Caravelle 91 at 109 [hereinafter J. Marimán, "Transición"] (trans. by the author).

288 This is particularly relevant when taking into consideration that, according to the 1992 population census, almost half of the population who declared themselves to be Indigenous in the country, was living in urban centres, predominantly in Santiago.
3.7.3. The implementation of the 1993 Indigenous Law.

a. The role of CONADI and other government agencies.

According to this legislation, the first national council of CONADI was constituted in 1994. Notwithstanding the many legal, economic and political constraints that CONADI has faced during its first years of existence, important efforts have been made by this institution in order to fulfil the tasks which were assigned to it by the 1993 law. Among the principal actions undertaken by CONADI and other government agencies during this period in the topics that are of interest to this study - that is Indigenous political and territorial rights - concerning the Mapuche people, the following should be highlighted:

i. Participatory rights.

Significant efforts were made by CONADI to fulfil the law provisions aimed at promoting and protecting the right of Mapuche people to participate at all levels in decisions that affect them. As a means to make their representation and participation possible, CONADI promoted and supported the creation of Indigenous organizations established in the 1993 law. A total of 1,338 communities have been granted legal status in the Mapuche territory between 1994 and 1997. Also, 74 associations have been formed in the same period in this territory.

CONADI has also promoted the creation of Indigenous development areas (IDA) established by the same law. The original Mapuche demands in this matter were related to the acknowledgement of territorial rights, including rights to natural resources, in areas where their

\[290\] We will focus here on the Mapuche people due to the lack of up to date information concerning the actions undertaken by CONADI in relation to other Indigenous peoples in the country.

\[291\] Information from 1994 to 1996 has been extracted from CONADI Annual Reports corresponding to that period. Information corresponding to 1997 was obtained by the author from the Subdireccion Sur of CONADI. In José Aylwin, *Ley Indígena: Avances y Obstáculos para su Materialización en el Territorio Mapuche* (Temuco: Instituto de Estudios Indígenas Universidad de la Frontera, 1998) at 15 [unpublished] [hereinafter Aylwin, *Ley Indígena*]
population was dominant. They were also oriented toward allowing, if not self-government, at least Indigenous co-management of these territories along with government institutions existing on them. In 1994 CONADI's council identified nine areas to be created within the country, five of them in the Mapuche territory. In 1995 and 1996 CONADI made a proposal concerning their management to the Ministry of Planning (MIDEPLAN), the entity responsible for their creation. Indigenous participation, through its legal and traditional organizations, was considered on this proposal. It was only in 1997 and 1998 that three of these areas were created by MIDEPLAN's decrees. Two of these IDAs (Lake Budi and Alto Bío Bío) correspond to Mapuche territory.²⁹²

Efforts have also been made to ensure the fulfilment of Indigenous participatory rights within CONADI. Indigenous people have actively been involved in this public institution of a special nature during its first years of life.²⁹³ It has to be acknowledged that Indigenous participation within this agency, far from being limited to their elected members at its national council, has been present at all levels. Two of the three national Directors that this entity has had until today have been Mapuche. A high percentage of the professionals hired by this agency to implement its policies and deliver its programs have also been Indigenous.²⁹⁴

ii. Territorial rights.

With regards to territorial rights, several initiatives have been undertaken by CONADI to ensure the protection of the existing Indigenous lands of the Mapuche and to impede the division of the few remaining communal lands, as well as contracts concerning Mapuche individual lands which could result in their loss at the hands of non-Natives. The creation of the Indigenous property registry established in the law, as well as the registration of an important number of the individual entitlements resulting from the division of reducciones, are to be highlighted.²⁹⁵

²⁹² Ibid. at 19-20

²⁹³ Article 38 considers CONADI as a "public service, functionally decentralized...subject to the supervision of the Ministry of Planning and Cooperation" (Law No 19.253, trans. by Chile's Ministry of Foreign Affairs).

²⁹⁴ In fact, one of the criticism that has been made of CONADI by conservative sectors during the last years, is related to its ambiguities as a public institution, considered by them as an Indigenous entity rather than as a governmental agency.

²⁹⁵ According to information provided to this author by Ms. Edith Meier, responsible for this registry, since 1995, when it was open, until 1997, approximately 150 thousand hectares of Mapuche land, equivalent to almost one third of lands granted to Mapuche through the reducción system, has been registered. The registry allows the identification of
The legal aid program in charge of CONADI's Sub Dirección Sur for Mapuche individuals or communities involved in land conflicts, has also been an important mechanism for the protection of Mapuche lands. A large number of people and communities involved in land conflicts have obtained legal assistance in law suits through this program.\(^{296}\)

Finally, several studies have been undertaken throughout the Mapuche territory by CONADI's Department of Lands and Waters in order to ensure the effective protection of Indigenous land rights. These studies have been related to, among other issues, the identification of mining concessions within Mapuche lands, the identification of resources on coastal Mapuche lands, Indigenous development areas, etc..\(^{297}\)

One of the most important achievements of CONADI during these years has been the allocation of state owned lands or acquisition of private lands for Mapuche people through the land fund created by law. This program has benefited an important number of individuals or communities who lacked sufficient lands to sustain their livelihood. The fund has been implemented through different programs since its initiation in 1994. One of these programs has been the transfer of state lands to the Mapuche. Through this program approximately 54,000 hectares were transferred to Mapuche up until 1997.\(^{298}\)

Another action implemented by CONADI has been the acquisition of lands in conflict. This program, administered directly by the national council of CONADI, has allowed the acquisition of approximately 15,000 hectares, benefiting a total of 1,348 families.\(^{299}\) Finally, CONADI has also implemented a land subsidy program administered by its Lands and Waters those that lands are subject to the limitations and rights that the law establishes for Indigenous lands. In Aylwin, Ley Indigena, supra note 291 at 37.

\(^{296}\) Ibid. at 38-39

\(^{297}\) Ibid. at 46.

\(^{298}\) The number of families benefited with these transfers, except for a small program of 7,000 hectares which benefited 1,300 Mapuche families, has not been determined. Information provided by CONADI and Ministry of National Properties (Ministerio de Bienes Nacionales) to this author, in Ibid. at 51.

\(^{299}\) Information extracted from CONADI reports, in Ibid. at 55.
Department. A total of 5,000 hectares of privately owned lands, benefiting 407 Mapuche families have been acquired between 1995 and 1997 through this program.

When considered all together, the lands acquired by CONADI or transferred by government agencies to the Mapuche from 1974 to 1997 total 75,000 hectares. The number of Mapuche families benefited is close to 4,000 and the total budget allocated by the state for this purpose is of $10,203,352,059 (Chilean pesos). Although insufficient to satisfy the needs of the Indigenous communities, these lands represent a substantial increase in those until recently owned by the Mapuche. If this program is projected to the future, it could help to solve an important percentage of their land problems within their territory in a reasonable period of time.

iii. Development and cultural rights.

Although they do not constitute the focus of this study, mention should be made of actions undertaken by CONADI in support of Mapuche economic and cultural development. The implementation by CONADI of the development fund established in the law has resulted in the materialization of a number of self-managed economic and cultural initiatives by Indigenous organizations, both in rural and urban areas. In total, the resources devoted by CONADI to this fund throughout the country from 1994 to 1997 amount to $4,961,323,000 (Chilean pesos)

These resources have enabled the materialization of projects dealing with sustainable forestry or agriculture in rural areas, the development of small scale industries in urban centres, the construction of community centres both in cities and rural communities, as well as programs

300 Individual or communities that lack sufficient lands to ensure their living apply to a monetary fund destined by CONADI annually for this purpose. Those benefited by these funds acquire private lands previously identified at market prices.

301 Information extracted from reports of the Land and Waters Department, CONADI, in Aylwin, Ley Indigena, supra note 291 at 61.

302 Equivalent to approximately US$ 25 million. Estimations made by the author based on information provided by the Department of Land and Waters of CONADI and the Ministry of National Properties, in Ibid.

303 Equivalent to approximately US$ 10 million. See CONADI, Informe de Gestion 1994-1996 (Temuco: Conadi, 1997) at 32. No specific statistics concerning the Mapuche people were obtained. An important part of these funds, nevertheless, has benefited Mapuche individuals, communities or associations in southern Chile and Santiago. These funds are distributed through contests called annually by CONADI. Indigenous individuals and organizations are selected by CONADI among those who present specific proposals for this purpose.
dealing with bilingual and intercultural education, among others. Although clearly insufficient in relation to the needs of the Mapuche and other Indigenous peoples in Chile, the efforts developed by CONADI, with the active involvement of their organizations, have contributed to the improvement of living conditions of those directly benefited by them. They have also contributed to strengthen Mapuche cultural identity according to CONADI's analysis.

b. Critical analysis.

The progress achieved in the Mapuche territory in the matters referred to here is valuable. Nevertheless, despite the efforts made by CONADI and other government agencies to implement the law mandates in this area, many problems have impeded the fulfilment of expectations that the Mapuche had with the enactment of this law. The limited funds allocated by the legislature to CONADI during this period to make possible the development of its multiple legal tasks, should be mentioned. Administrative problems that are inherent to the creation of a new government agency, such as lack of expertise, dependency on other government agencies, etc., have also affected CONADI's ability to fulfil its obligations with Indigenous peoples in general and Mapuche people in particular. A central factor that has weakened CONADI's ability to fulfil its legal obligations which should be highlighted here is the contradiction which has existed between the principles that are behind the Indigenous policy delineated in the 1993 law and the current administration's economic policy.

While the Indigenous law, with all its limitations, is based on principles of participation and the protection of Indigenous communities, cultures and lands, the export oriented economic model strengthened by the Frei Ruiz-Tagle administration since 1994, has resulted in the expansion of the global economy into Indigenous territories, in particular to that of the Mapuche people. Whenever there has been a conflict between initiatives which could result in economic investment and the participatory or land rights granted to Indigenous people by the 1993 law, the government has clearly opted for these initiatives. The priority that the government has given to its economic policy has constituted, in the opinion of this author, the central factor which has

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304 No information concerning the total individuals or communities benefited by these programs during this period is available. According to CONADI statistics corresponding to development and cultural programs implemented in 1996, 57,976 individuals corresponding to 11,738 families are said to have been benefited by them this year. Of them, 28,174 individuals, corresponding to 6,157 families, were Mapuche. Ibid. at 31.
impeded the full exercise of the participatory and territorial rights that were acknowledged to Mapuche individuals and communities in the 1993 legislation.

i. Participatory rights.

The creation of communities and associations, especially in rural areas, has on many occasions increased Mapuche ability to speak for themselves in matters which pertain to them. Nevertheless, the number of communities created is still insufficient when considering that reducciones created in the Mapuche territory in the past totalled approximately 3,000. This number is even more reduced if we take into consideration the fact that on many reducciones more than one legal community has been constituted. The number of asociaciones created is also reduced. Moreover, notwithstanding the express prohibition established by law, they have been used in practice as a mechanism to enable the federation of Mapuche communities. This demonstrates a clear insufficiency of the law in this matter.

Communities created with CONADI's support are generally a western type of organization rather than a Mapuche traditional organization. As a consequence of this situation, they have usually ended up being controlled by young leaders who are more open to this "modern" type of organization, bypassing Mapuche chiefs and elders who often oppose them. This situation explains why the creation of communities in accordance with the 1993 law has resulted on many occasions in conflicts between young people and elders, traditionalist or modernists, more than in the unification of their members.

The IDAs created by the government are far from responding to Mapuche aspirations. In practice, they are considered by the government, in accordance to the wording of Article 26 of the law as a "specific instrument to allow the state to focus, through its institutions, its actions

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305 Information provided by Mapuche Associations of Lonquimay, Budi and Bio Bio, in Aylwin, *Ley Indigena, supra* note 291 at 15-18. According to Article 10 of the law, it is possible to constitute a community with only one third of its adult members. This provision introduced by conservative representatives in the legislature, was clearly aimed at fragmenting the strength of Indigenous representation through this legal entity.

306 Ibid.

307 Ibid.
and resources in order to benefit Indigenous people living in them." Moreover, the government has responded to entrepreneurial concerns with regard to the impacts that these IDAs could have in their investments affirming that in no case their establishment will affect the rights of individuals.  

Not much has happened up to this point with the IDAs established by the government. The only exception to this rule, as we will analyze later in Chapter IV, has been the Bío Bío area. Here, the government has recently (1998) created a co-ordination of public entities - without considering Pehuenche participation - and allocated funds for activities such as road improvement, forestry and soil management, which benefit not only the Pehuenche, but all the population of the area.  

Several factors have limited the significance of Indigenous participation within CONADI. The two Mapuche were appointed as national Directors of this entity until now were fired by the President of the Republic after entering into conflicts with the government. The situation of Indigenous staff working at different CONADI departments is no different than that of these Directors. These employees depend on the government to maintain the positions to which they have been appointed.  

With regard to Indigenous representation at its national council, although elections were held among Mapuche organizations for this purpose in 1995, not all of those who received the

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308 Affirmation made by a high ranking government representative to the author in oral interview made in Santiago in September 30, 1998 (trans. by the author). Consistent with this perspective, the decrees that gave birth to these IDAs consider them to be areas where state entities will focus their action in benefit of the balanced development of Indigenous people and communities. Ibid, at 20.

309 This is an obvious reference to the right to private property located within the IDAs. In MIDEPLAN, "Área de Desarrollo Indígena. Concepto y Alcance." (Internal MIDEPLAN document facilitated by this public entity, 1998) [unpublished].

310 Information provided to the author by a high ranking government authority, supra note 308. The materialization of this IDA, is considered by the Pehuenche to be a response to their critiques to the construction by ENDESA, a private enterprise, with government support, of a second hydroelectric dam in the Mapuche Pehuenche territory of Alto Bío Bío. José A. Curriao, President of the Centro Mapuche Pehuenche del Alto Bío Bío, in oral interview with this author, Alto Bío Bío, October 7, 1998.

311 These national Directors of CONADI were fired in 1997 and 1998 respectively. Although administrative reasons were given by the government to justify these decisions, the real motives behind them have been related to the opposition they have shown to government involvement in development projects affecting Indigenous land rights.
most votes were appointed to this council by the President. This situation has been strongly criticized by Indigenous leaders. The need to reform the 1993 law in order to allow the direct election of their representatives at CONADI, without presidential mediation, has been asserted by these leaders in recent years.

The fragility of Indigenous representation within CONADI’s national council has been demonstrated recently in the case of the Ralco hydrodam project. According to the 1993 law, CONADI’s council had to authorize land swaps that are needed to proceed with the construction of this dam located in Pehuenche lands. The appointment in October of 1998 of a non-Native to direct this entity ensured government majority within this council to approve these transactions. Indigenous representatives at CONADI, who were opposed to this project, consequently became a minority within the council, thus being unable to impede the land swaps. The government has made clear with this last appointment that CONADI is not a co-government institution, as expected by Indigenous leaders, but rather a public agency controlled by the state.

Finally, a mention should be made of the application of the law provisions which mandate government agencies to hear and consider Indigenous organizations’ opinions when making decisions that affect them. The experience that Mapuche organizations have had with government agencies to this regard has generally been negative. According to their representatives, in most cases their opinions have not been heard by authorities when making decisions that affect their communities. This is particularly evident in the case of state or private development projects that have been proposed for their territories in recent years. Government

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312 Such is the case of Emilio Cayuqueo, a Mapuche leader from the Araucanía region, who obtained the second largest number of votes in this region. Despite this fact, he was not appointed by the President to CONADI’s national council. In Aylwin, Ley Indígena, supra note 291 at 30-31.

313 Camara de Diputados, Seminario la Ley Indígena. Un Balance de su Aplicación (Valparaíso, Chile: Camara de Diputados, 1996) at 33

314 The land swaps in the Ralco case were approved by CONADI’s council last January 8th, 1999. The council met on this occasion with the minimum quorum of nine councillors required for this purpose; eight government representatives and the national Director, none of them Indigenous. In “CONADI Exigirá Seguro a Endesa por Ralco,” El Mercurio, January 16, 1999, Available from Internet at http://www.xs4all.nl/~rehue/, accessed February 2, 1999.

315 Statement made by a high-ranking government authority in an oral interview with the author, supra note 308.
representatives have insisted on the need to proceed with these initiatives, notwithstanding the opinion of Mapuche organizations who generally oppose them.\(^{316}\)

**ii. Territorial rights.**

With regard to the protection of Indigenous lands, some problems related to the implementation of the land registry, as well as with its effectiveness in the Mapuche area have been admitted by CONADI. Officials of the national property registry have failed to inform CONADI, as mandated by law, of contracts made concerning Indigenous lands. This situation has impeded CONADI from registering these transactions on its Indigenous land registry.\(^{317}\) Moreover, there is evidence that rentals of a longer extension than that allowed by law (five years), are being completed with the authorization of state officials.\(^{318}\)

The reduced budget of CONADI's legal aid program in southern Chile, as well as the insufficiency of its personnel to reach those who require its assistance, has to be underlined. Important sectors of the Mapuche rural population in remote areas, especially on the coast and the Andes, have no access to this program based in Temuco. These insufficiencies have, on many occasions, made the protection of Mapuche lands established by law ineffective.\(^{319}\)

With regard to Indigenous land and resource studies undertaken by CONADI, unfortunately, their contents have rarely been returned back to the communities concerned. Nor have they resulted in the implementation of specific actions in order to ensure adequate protection of Mapuche rights on these matters.\(^{320}\)

\(^{316}\) This critical perspective is dominant among Mapuche leaders today. It was also stated by representatives of Mapuche Association of different counties in the Araucanía region, in particular those of Lake Budi, Lonquimay and Bio Bio in interviews with the author during 1996-1997. In Aylwin, *Ley Indígena*, supra note 291 at 26-29.

\(^{317}\) Statement made by Edith Meier, responsible of CONADI’s land registry (*Ibid.* at 37).

\(^{318}\) Statement made by Sandra Gelves, responsible of the Legal Aid Program of CONADI Sur, in oral interview with the author held in Temuco in 1997 (*Ibid.* at 43).

\(^{319}\) This situation was denounced by Mapuche organizations present at a seminar on the implementation of the Indigenous law held in 1996. In Camara de Diputados, *supra* note 313, at 28. It has also been stressed by representatives of Mapuche Associations of Lonquimay, Budi and Alto Bio Bio in 1996. In Aylwin, *Ley Indígena*, *supra* note 291 at 41.

\(^{320}\) *Ibid.* at 46-47.
Some critiques have also been made of the way in which CONADI's land fund has been administered. The transparency of decisions made by its national council when acquiring lands in conflict has been questioned. The inadequacy of the lands acquired to enable an agricultural development of Mapuche beneficiaries has been highlighted. Finally, and more importantly, the lack of governmental support to enable the beneficiaries of these lands to improve their life conditions has been stressed by the Mapuche and acknowledged by the government. The need to co-ordinate the land fund with other CONADI or state programs in order to ensure they receive the support that is required to develop these lands has been recognized by the government.

3.8. The impacts of economic globalization on Mapuche lands and resources.

Despite the important progress achieved through CONADI's efforts to protect existing Mapuche lands and to expand their area through the land fund, serious problems have affected Mapuche territorial rights as a consequence of government policies promoting Chile's incorporation into international markets in the context of a growing globalization of the world economy.

The export oriented and resource based economy that has been promoted by the government, in particular by the Frei administration, has resulted in the last few years in the implementation of large development projects, usually know as mega-proyectos, within the country by both national and foreign investors. Many developments based upon the use and appropriation of lands, waters, forests and subsurface resources have been implemented on Indigenous lands or territories which are claimed by them. Unfortunately, as previously mentioned, Indigenous rights to natural resources, which are central to their economies and

321 Ibid. at 58-66.

322 Interview with a high ranking government official, supra note 308.

323 During the last five years, the Chilean government has signed Free Trade Agreements with Mexico and Canada, has become a member of MERCOSUR, a free market association including Argentina, Uruguay and Brazil. Chile was also the first country in Latin America to join the APEC, the Asia Pacific Economic Conference. These agreements demonstrate the orientation of Chile's economic activity during the same period. An interesting analysis of the origins of Chile's free market economic policies during the Pinochet regime, as well as of its current social and environmental impacts can be found in Miguel A. Altieri and Alejandro Rojas "Lessons From a Latin Partner" (1998) 24 No. 4 Alternatives at 24-30.
cultures, were left with no protection under the 1993 law. Consequently, they can be ceded by the state to non-Natives who can develop them, notwithstanding their location within Indigenous lands.\(^{324}\)

The impact that these developments are having on Mapuche territory, which is rich both in natural resources and in tourist potential, is alarming. By 1996, 1,357 mining exploration or exploitation concessions had been granted by the state to national and international enterprises. Of these concessions, 104 of them were located within Indigenous lands. By that same year, an important number of aquaculture concessions, most of them for salmon farming purposes, including almost all the lakes and ocean shores existing on the Mapuche territory, had been authorized by governmental agencies. Up to the same year, approximately 75 per cent of the water rights available in the same territory (regions of Bío Bío, Araucanía and Los Lagos) had been given by the state to those who requested them. Only two percent of these rights were in the hands of the Mapuche.\(^{325}\)

Some specific cases which should be highlighted in order to understand the problems existing today in Mapuche territory as a consequence of the lack of adequate legal protection of Indigenous lands and resource rights are the following:

3.8.1. The Ralco hydrodam project.

In 1994, ENDESA (Empresa Nacional de Energía), a private enterprise, announced the construction of a second dam in the upper basin of the Bío Bío, called Ralco. This dam, which will flood 3,500 hectares of land, will result in the relocation of approximately 100 Mapuche Pehuenche families, approximately 500 people, living in the communities of Ralco Lepoy and Quepuca Ralco. Despite the strong Native opposition to this project,\(^{326}\) and the fact that the

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\(^{324}\) It is important to highlight that the initiatives undertaken on Indigenous lands involve both private and public participation. The Chilean state has participated in these developments as a direct investor involved on the implementation of activities such as mining in the north, or the construction of highways in the Mapuche territory. It has also been present through the authorization given to these projects by government agencies such as the National Commission on Energy (CNE), the National Commission on Environment (CONAMA), or the National Corporation of Forestry (CONAF).

\(^{325}\) Victor Toledo, "Todas las Aguas. El Subsuelo, las Riberas, las Tierras" (1997) 4 Anuario Liwen 36 at 42.

\(^{326}\) This opposition was made public both through the Centro Mapuche Pehuenche del Alto Bío Bío, an organization composed of the chiefs of the seven Pehuenche communities of the area, as well as by the members of the two communities directly affected by this dam. In María A. Relmuan, "El Proyecto Hidroeléctrico Ralco en el Alto Bío Bío 128
environmental impact assessment study of the dam was initially rejected due to its social and cultural costs, CONAMA, the government's environmental agency, gave its authorization to ENDESA's plan in 1997.

Since then, economic offerings - including lands, houses and employment - made by ENDESA to the Pehuenche families who live in the lands to be flooded by Ralco, convinced many of them to sign individual contracts in which they agreed to their relocation. As a consequence of this maneuver, only 10 families whose lands are needed by ENDESA to go on with this development, continue to oppose any agreement with this enterprise.\footnote{Jose Antolin Curriao, in oral interview with the author, supra note 310. An in-depth analysis of the Ralco dam and its implications for the Pehuenche people will be made in Chapter IV.} According to the 1993 law, the land swaps that ENDESA is required to do with those Pehuenche families to be relocated from their lands also need authorization from CONADI. After the removal of two of the national Directors of this entity, its national council authorized 64 of the 84 land swaps submitted for its review in January of 1999. The council also rejected 9 land swaps and left 7 to later study.\footnote{El Mercurio, supra note 314.}

Everything indicates that the Pehuenche opinion in this case will not be respected, and that ENDESA, with the support of the government, will go on with the construction of Ralco, a project which is seen by many Indigenous and non-Indigenous in the country as a symbol of the kind of development that Chile is adopting.

3.8.2. The expansion of the forest industry into Mapuche territory.

Forest industry has experienced enormous growth in Chile in the last twenty years, increasing the country's exports of timber, wood chips and paper. During the last two or three decades, this industry has acquired important land tracts in southern Chile, many of which are claimed by the Mapuche.\footnote{Some of the lands acquired by this industry belonged to Mapuche clans or families before their territory was occupied by the Chilean army last century. Others had been part of their reducciones and were sold throughout the century to non-Natives in accordance to laws that promoted the division of communal lands. Others had been occupied} These lands, which have been estimated at 1.5 million hectares...
between the Bio Bio and Los Lagos regions, have mainly been planted with exotic species for fast growth (radiata pine and eucalypts) by the companies who now own them.  

In practice, these plantations have surrounded Mapuche communities, resulting in important changes not only in landscape, but also in the soil, which has been damaged by tree resin and erosion. The same plantations have affected creeks and water sources, most of which have dried up due to their absorption by the new trees. Finally, they have introduced serious alterations in Mapuche traditional activities. Many Mapuche have left their farming activities on their lands to work at temporary jobs at forest companies.

Mapuche communities directly affected by this industry have requested that CONADI acquire those lands in conflict for them. Nevertheless, because of the limited resources of the land fund, most of these demands have not been satisfied to the present. Other communities, frustrated with this situation, have decided to take direct actions aimed at recovering lands or forests which they consider to belong to them or call public attention to their problems. From October of 1997 until today, numerous direct actions - which have included attacks on forest industry properties, land occupations and road blockades - have been implemented by Mapuche organizations against forest companies that are affecting their lives.

These actions demonstrate the desperation of the communities affected by the expansion of forest industry into their territories. Government reactions have been contradictory. While CONADI attempted to negotiate with forest companies the acquisition of lands in conflict for Mapuche families, the central government has generally used all available mechanisms,

\[\text{(tomadas)}\] and planted with trees by Mapuche families during Allende's government. These lands were later recovered by their former owners during the counter agrarian reform process which took place during the military regime.


\[331\] Some analysts estimate Mapuche demand to be of 60,000 hectares. M. A. Venegas, supra note 330.

\[332\] These actions have mainly taken place in the northern part of the Mapuche territory, in particular in the province of Arauco on the Bio Bio region, and in the province of Malleco, on the region of Araucanía. In the last of them, which took place in January of 1999, a group of seventy Mapuche in Malleco, destroyed trucks belonging to Miminco, the largest forest industry within the Mapuche territory (ibid).
including repression, to impede the continuation of Mapuche direct actions against this industry.\footnote{Ibid.}

3.8.3. The construction of highways on Mapuche lands.

The Ministry of Public Works has planned to construct two highways crossing the heart of the Mapuche territory in recent years. The first project, known as the Coastal Highway, is being constructed along the Pacific coast of southern Chile, from the region of Bío Bío to the region of Los Lagos, crossing through densely populated Mapuche territories. Such is the case of lake Budi in Araucanía, home of the Mapuche Lafquenche, and San Juan de la Costa in Los Lagos, home of the Mapuche Huilliche.\footnote{Nieves Aravena, "Vialidad Denunciada por Tala de Bosque Nativo Protegido," \textit{El Mercurio}, December 21, 1997. Available from Internet at www.elmercurio.cl. Accessed March 13, 1998. Although not recognized by the government, the obvious purpose of this road is to provide a means for the extraction of the timber which exist in that area, one of the few areas of remaining old growth forest which has not been exploited by logging companies.}

The second project is the construction of a new high speed highway going from Santiago to Puerto Montt, more than a thousand kilometres long. Twenty kilometres of this highway will cross through Mapuche lands, affecting four communities surrounding Temuco, in the Araucanía region. The highway will be constructed in an area which is currently occupied by houses, agricultural lands and sites of historical and cultural significance to the Mapuche. It will also result in the division of communities into two separate areas.\footnote{335 According to information provided by officials of the Araucanía government to the author in March of 1997, the so called "Temuco bypass" will directly affect 48 Mapuche families. According to the same source, the initial highway planned by the government affected a total of 30 communities and hundreds of families. The number of people affected was reduced after the original plan was changed due to pressure coming from Mapuche communities of the area.}

Mapuche communities directly affected were neither informed nor consulted by the government until the construction of these highways was seen as inevitable. The Mapuche have reacted against these developments with surprise and anger. Committees and other organizations have been created in opposition to these projects.\footnote{336 The best known Mapuche organization opposing this last project is the \textit{Comite de Defensa Contra el By Pass de Temuco}.} Evidence indicates again that the government will not renounce these developments. Compensation will probably be given to communities that oppose them. The terms of the compensation are still uncertain.

\footnote{Ibid.}
3.8.4. Indigenous reactions.

Indigenous-government relations have gone through different stages since the enactment of the 1993 Indigenous law. A large part of their organizations initially considered the law to be an achievement of their peoples. Moreover, the same organizations considered CONADI to be the result of a compromise with the government. Consequently, they understood this entity not as a normal government agency, but rather as an institution of special nature which was to be co-governed by them.\textsuperscript{337} This perspective helps to explain the initial involvement of Indigenous representatives in different positions within CONADI, as well as their active participation in the implementation of the law provisions, in particular those dealing with land rights.\textsuperscript{338}

This relationship, however, has systematically deteriorated in recent years. Indigenous representatives who participated in the restoration of democracy in the late 1980's, signed the Nueva Imperial Agreement in 1989, and became involved in CONADI after the 1993 law was enacted, have felt betrayed by governmental support and involvement in the development projects previously referred to. In the case of the Mapuche, the speed at which these developments have been expanding into their territories, as well as their dimensions, have lead their organizations to consider them as a "second occupation" of Araucania.\textsuperscript{339}

The Mapuche People's National Congress held in November of 1997 made its opposition to these developments public and condemned the environmental, social and cultural impacts that they are having in their communities. This Congress' resolutions stressed that these initiatives put in danger the relationship of their people with their lands, waters, and resources in general,

\begin{footnotesize}
\textsuperscript{337} As Mapuche leaders affirmed when Mauricio Huenchulaf, a Mapuche, was fired from his position as national Director of CONADI, "[t]he central Government must understand that CONADI is a special public institution, co-governed by the Indigenous and the State, created to defend Indigenous rights, their lands and cultures." Press release issued by 16 Mapuche leaders, including 5 national councilors of CONADI, Temuco, April 28, 1997 (trans. by the author) [unpublished].

\textsuperscript{338} The most important Mapuche, Aymara, Atacamenean, Rapa Nui and Mapuche organizations became actively involved in CONADI in the years that followed the enactment of the 1993 law. In the case of the Mapuche, those participating in CONADI included Ad Mapu, an organization linked to the Communist Party that had played a leading role in the opposition to the termination laws of 1979. The only Mapuche organizations that did not participate within CONADI were the Consejo de Todas las Tierras and Liwen. These organizations, as we will see later in this Chapter, were critical of the 1993 law, proposing instead an autonomous development for the Mapuche people.

\textsuperscript{339} Resolutions of the Mapuche Assembly in Defense of Our Territories (Asamblea Mapuche por la Defensa de Nuestros Territorios), April 1997 [unpublished]. The first occupation of the Araucania is that which took place last century when the Chilean army entered into their territories in the 1880's.
\end{footnotesize}
threatening their subsistence and identity. The same resolutions demanded the modification of the legal framework concerning natural resources, including the Water Code and other laws, in order to ensure the adequate protection of those resources existing within Mapuche lands and territories. The Congress also stated that neoliberal economic policies promoted by the government were threatening basic agreements reached between their people and the Chilean society (referring to the Nueva Imperial Agreement). Finally it affirmed that the same policies have strongly affected their peoples lives, resulting already in their social, economic and cultural marginalization within the country.340

Despite these protests, the government seems to be committed to continue with its expansionist plans in Indigenous territories. The approval of Ralco dam land swaps in January of 1999 by CONADI's council, indicates that the government will not change its priorities on economic matters, even at the cost of further deteriorating its relationship with Indigenous peoples. In the case of the Mapuche, as we have seen, this deterioration has resulted in the definition of a new strategy at the grass root level. Although some Mapuche leaders continue to participate within CONADI, since 1997 Mapuche rural and urban communities have constantly been involved in road blockades, land occupation, violent actions against enterprises present in their territories, and demonstrations against CONADI and other government agencies concerned with them. These actions are showing that the era of the Nueva Imperial Agreement and of CONADI as a co-government institution is over. An era of conflict and confrontation among Indigenous peoples and the government, resembling that lived during the military regime, has once again emerged.

4. FINAL REMARKS.

As we have analyzed throughout this Chapter, the arrival of Spaniards would introduce substantial alterations to Indigenous peoples’ lives. No longer would they be able to live as self-

governing peoples as they did in the past, nor would they be able to maintain control of their traditional territories. Their population would significantly decrease as a consequence of their resistance to colonial and later republican intruders. It would also diminish as a consequence of the biological impacts produced by contact, as well as a result of the impact of the *encomienda* and related institutions that were imposed on them. Some of these peoples did not survive these experiences. Those who survived were strongly impacted by the assimilating efforts promoted by the colonial authorities initially and later by the Chilean state. They would also be impoverished due to the confiscation of their territories and resources, a process that, as previously described, continues to take place today.

As a consequence of assimilationist policies, many people of mixed blood ancestry, who constitute an important percentage of the country's population, would no longer consider themselves as Indigenous, but simply as Chileans.\(^{341}\)

Notwithstanding these circumstances, the 1992 population census demonstrated, against the expectations and myths of the European elite that rules the country,\(^{342}\) that these peoples are still a part of Chile today. According to this census, those who considered themselves to belong to one of these peoples are equivalent to one tenth of the total population of the country.\(^{343}\)

These and other factors previously referred to help to explain the changes introduced in 1993 in Chile's legal framework concerning Indigenous peoples' rights, according to which the multiethnic composition of the country was acknowledged. Nevertheless, the progress that in

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\(^{341}\) There are no statistics available regarding the population of mixed blood ancestry in Chile. Population censuses in the past have not considered this category. Neither did the 1992 census. The author personal estimates that at least fifty per cent of the Chilean population today has some degree of Indigenous ancestry.

\(^{342}\) From the creation of the Chilean state, the country's elite has elaborated the concept of the "Chilean nation," a nation according to which their discourse, is composed of a racially homogeneous people of European origin. This construction is a myth which does not take into consideration the strong Indigenous influence in the country's population. This myth has been noticed by foreign historians. Such is the case of Stepehen E. Lewis, a U.S. historian, who affirms:

> Like Argentina, Chile has felt itself to be distinct from other Latin American countries because its population is primarily of European origin. A people that considers itself "the Englishmen of America" necessarily overlooks its indigenous heritage. Chile's obsession with its racial origin dates back to the founding of the Republic.

In Lewis, *supra* note 101 at 135.

\(^{343}\) The total population of the Chile according to the 1992 census was of 13,348,401 (population over 14 years old). Instituto Nacional de Estadísticas, in Bengoa, *Los Mapuches*, supra note 3 at 11.
practice has been achieved by these peoples through this legislation has been limited. As it has been highlighted throughout this Chapter, its shortcomings, particularly when considering participatory rights and rights to natural resources, in the context of the resource based economy prevailing in the country today, have frustrated the expectations that Indigenous peoples had for this legislation as a mechanism to achieve a more equal and respectful relationship with the Chilean state and society.

4.1. Indigenous peoples’ social and economic discrimination.

The legal constraints impeding the materialization of Indigenous peoples’ rights in Chile have already been highlighted. The need to reform this legislation, as well as other laws which regulate rights to natural resources in the country, has been addressed by Indigenous organizations in recent years. Another obstacle that Indigenous peoples face in Chile today deals with their social and economic discrimination by the larger society. As a result of the long process of dispossession of which they have been victims, Indigenous people have been confined to a situation of material poverty throughout history. Indigenous social and economic backwardness has continued to grow in the last decades as a consequence of the laws and policies implemented during the military regime, affecting their lands and resources.

The case of the Mapuche, which constitute by far the largest Indigenous people in the country, serves to illustrate this reality. According to the 1992 population census, the Mapuche people totalled 928,060. If those under 14 years old are considered, Mapuche population rises to 1,282,111. Of this population, only 192,763, representing 20 per cent of the total, live in

344 See Camara de Diputados, supra note 313. See also Congreso Nacional del Pueblo Mapuche (1997) supra note 340.


346 José Marimán, "Movimiento Mapuche y Propuestas de Autonomía en la Década Post Dictadura." Available from Internet at http://www.xs4all.nl/~re hue. Accessed January 7, 1999 [hereinafter J. Marimán, "Movimiento"]. The Mapuche population living in Argentina, which has been estimated between 20,000 to 60,000, should be added (See Carlos Martinez Sarasola, Nuestros Paisanos los Indios. Vida, Historia y Destino de las Comunidades Indígenas en la Argentina (Buenos Aires, Argentina: EMECE, 1992) at 493.
rural areas. Meanwhile, a total of 735,297, representing 80 per cent of this people, live in urban areas. Of this last population, 409,079 were living in the Metropolitan Region of Santiago.

Social and economic backwardness of Mapuche living in rural areas has been demonstrated by different studies performed in the last two decades. A study undertaken on these areas in the Araucania region in 1988 showed an infant mortality rate of 45 deaths in 1,000 births, double the rate existing in the country at that time. The same study showed that life expectancy among the rural Mapuche was 63 years, equivalent to that of Chile's population in 1970. Illiteracy rate was of 16 per cent, double the rate of Chile's population.

Problems of access to education on Mapuche rural communities were identified by the 1992 census. According to this census, 14 per cent of the Mapuche living in this area had not attended school, and 69,2 per cent only had access to one or more years of elementary education. Those with secondary education were equivalent to 14 per cent, meanwhile those with access to higher education only constituted 2,2 per cent. According to the same census, only 43,53 per cent of the rural Mapuche’s economically active population were subsistence farmers, working their own lands. Among the remaining active population, those hired as labourers, mostly outside of their communities, were 31,43 per cent, representing the largest group.

A study undertaken in 1995 in Mapuche rural communities has highlighted other social and economic problems affecting them. According to this study, only 10 per cent of the Mapuche households had electricity. 20 per cent of Mapuche households have no radio or electronic equipment. The lack of employment opportunities within Mapuche rural communities has resulted in the migration of its members, especially the youth. As a result of migration, Mapuche families living in these communities had become older, increasing from an average of 28,9 years

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347 Instituto de Estudios Indígenas, Universidad de la Frontera et al., supra note 345 at 7.


349 Universidad de la Frontera et. al., Condiciones de Vida de los Pueblos Indígenas. Estudio Realizado en Reducciones Mapuche Seleccionadas IX Región, Chile (Santiago: UFRO, CELADE, 1991).

350 Instituto de Estudios Indígenas, Universidad de la Frontera et al., supra note 345 at 8.

351 Bengoa, Los Mapuche, supra note 3 at 24-51.

352 Ibid. at 22.
old in 1982 to 35.54 years old in 1995. Due to the same phenomenon, the number of women living in these communities during this period has decreased, in comparison to the number of men which has increased. In 1982 men represented 55 per cent and women 45 per cent of the community members. By 1995 women represented only 38 per cent and men 62 per cent.

The limited information that is available with regard to the Mapuche in urban areas show that their living conditions are not better than those of rural communities. Urban Mapuche are usually among the poor of the poor, living in shanty towns in the margins of cities such as Santiago, Temuco and Concepcion. Most of the urban adults are unemployed or employed in activities such as bakeries, construction, or domestic service receiving the minimum wage, lacking employment stability and social security.

Most of the statistics available on urban Mapuche refer to the city of Santiago. The 1992 census showed that a significant percentage of those living in the poorest municipalities of Santiago identified themselves as Mapuche. Demonstrative of the social and economic problems that affect urban Mapuche in the capital city is the fact that several Mapuche organizations have been created with the goal of providing economic alternatives or improving the living conditions of its members.

Aside from economic problems, social marginality, alcoholism and lack of cultural identity are said to affect in particular Mapuche youngsters in urban areas. As José Ancan, an urban Mapuche intellectual affirms when analyzing the identity crisis among Mapuche youngsters:

Undeniably Mapuches, these sons and daughters of migrants are the principal victims of the military and political defeat of 1881 in Araucanía. They are the inheritors of marginalization, dispersal, and the discrimination of a society alienated from its most visible traits that tries to "protect" them from the larger

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353 Ibid. at 20.  
354 Ibid. at 23-24. According to Bengoa, this phenomenon is explained to the opportunities that women have to become employed as domestic servants in urban areas, particularly in Santiago.  
356 Ibid. at 183-184.
society's scorn. The urban Mapuche defines his or her existence on the triple discrimination for being Mapuche, poor and urban.\(^{357}\)

There is no doubt that racial discrimination and intolerance by the Chilean society are behind the social and economic problems that affect Mapuche population today. Although Chilean society usually praises itself for not being racist, the reality is that it is a highly discriminatory society.\(^{358}\) In practice, social stratification is directly related to the ethnic origin of the population. While those of European ancestry are more likely to be part of the upper classes and economically better off sectors of the population, those of Indigenous ancestry tend to be found in the lower classes and poorer sectors of Chilean society. This problem needs to be confronted urgently by different means. The 1993 law by itself will not be sufficient to impede the social, economic and cultural discrimination which continues to affect Indigenous peoples in the country. Additional legislation concerning human rights and multiculturalism should be enacted in the future in order to confront the different manifestations of discrimination which affect these peoples. Nevertheless, discrimination is a problem which will not be solved through legislation, but rather through education on tolerance and respect for ethnic and cultural diversity, a matter which unfortunately has not been systematically addressed in Chile up to this point.

4.2. Future perspectives.

4.2.1. Conflict and confrontation.

There are no expectations that legal or political changes favouring Indigenous peoples’ rights will be introduced by the Chilean state in the immediate future. The support that the neoliberal economic policies that prevail today in the country have among the dominant political

\(^{357}\) José Ancán, *supra* note 348, at 3.

\(^{358}\) Racism existing within Chilean society has been confirmed through recent studies on this matter. According to an opinion poll made in 1997 by the Sociology Department of the Universidad de Chile and Ideas Foundation, 28.3 per cent of those interviewed consider Chile to be more developed than the neighbouring countries due to the fact that there is less Indigenous population. 30 per cent of those interviewed consider people of white skin more beautiful than those of dark skin. The study concluded that Chilean population tends to perceive itself as white and European, and to have a negative perception of Indigenous people. Cristina Zuñiga "Todos Somos Mestizos" *Temas de Mujer*, October 10, 1998 at 8-9.
parties, including those parties within the government coalition, makes it unlikely that this will happen.

Presidential elections are scheduled for December of 1999. Candidates running for this election have made different proposals to confront the problematic situation of Indigenous peoples. The socialist candidate, who represents the government coalition in this election, proposed that more lands should be destined by CONADI's land fund to solve the land problems affecting Mapuche people. The conservative candidate, representing the opposition forces, has proposed the implementation of training programs in order to encourage Mapuche integration to productive activities, and consequently to national life. Nevertheless, more substantial changes concerning the protection of Indigenous participatory and resource rights have not, and probably will not, be announced by presidential candidates due to the threat that these rights could impose to national and foreign investments in the country.

The crisis caused by the Ralco hydrodam project and other developments that are taking place or planned on Mapuche territory has resulted in the failure of CONADI as a co-government institution involving both state and Indigenous participation. The government has made it clear that CONADI is a state institution under its control. With this crisis, CONADI has also lost its legitimacy as a space for the negotiation of conflicts involving Indigenous peoples. Although Indigenous representatives are still participating within CONADI's national council, this participation has become ineffective for the protection of their interests. Moreover, if these representatives continue to participate within this council in the current circumstances, they will probably lose their already weak credibility within their communities.

There is not much hope for many Indigenous people who trusted in the 1993 law. In the immediate future, the appropriation of Indigenous lands and resources by developments supported by the government is likely to continue. Confrontation between Indigenous peoples, in particular the Mapuche, on one side, and the government as well as the investors involved in their territories on the other, will probably increase. Desperation has triggered, and is likely to

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360 In fact, criticism of the dependency that Mapuche representatives have had from the government has been made since the period of CEPI (Comisión Especial de Pueblos Indígenas), the government entity that preceded CONADI. J. Marimam, "Transición," *supra* note 287 at 117.
continue to do so, direct actions by Indigenous people who see no response to their urgent claims. Although ineffective as means of obtaining solutions to the land and resource claims to which these actions are aimed, some of these actions - at least those of a non-violent nature - may contribute to create awareness within Chilean society of the impacts that the resource based economic model is having on Indigenous communities.

4.2.2. Autonomy: A future alternative for Indigenous peoples in Chile?\(^{361}\)

Probably one of the most significant consequences that this crisis is having within Indigenous organizations is related to the growing independence that they are achieving from the government, as well as from political parties in general. This situation was evidenced in the conclusions which came out of the Mapuche People National Congress held in November of 1997. According to this Congress' conclusions, policies implemented by the state concerning the Indigenous peoples have not allowed the Mapuche people the autonomy, participation, equity and dignity they deserve as a people. Consequently, autonomy is being proposed as the central concept which should guide the future relationship between Mapuche people and the Chilean state and society in the future. Important to note is that autonomy was understood by the Mapuche in this Congress as "the form in which an intermediate group in a society decides over its own destiny...."\(^{362}\)

Consistent with this proposal, the Congress "agreed to promote the unity of Mapuche people above all ideological, political and religious tendencies." Finally, and in order to make Mapuche autonomy possible, the Congress delineates several Mapuche organs to be created for

\(^{361}\) The term autonomy has been used in the last decade by Mapuche organization to characterize their proposals concerning the future political and territorial development of their people. Although the contents of Mapuche autonomy proposals vary from one organization to the other, most of them refer to the right that Indigenous peoples have to take decisions and exercise control on matters which are local and internal to them and that are central to their lives, cultures and development. Mapuche autonomic demands, therefore, are consistent with the rights that have been acknowledged or are in the process of being acknowledged by international forums dealing with Indigenous peoples to which we referred in Chapter I. Although different terms - such as self-government and self-determination - are used by Indigenous peoples in other countries to refer to this demand, we have used the term autonomy to respect the specificity of Mapuche demand here analyzed.

\(^{362}\) Congreso Nacional del Pueblo Mapuche, supra note 340 at 3-4 (trans. by the author) The Congress includes among other resources to be controlled by the Mapuche in accordance to this proposal, those of a linguistic and of a territorial nature.
this purpose, including an assembly of the Mapuche people, a national directory, a Mapuche parliament and a Mapuche tribunal.\textsuperscript{363}

Although autonomic demands emerging from the Mapuche People’s National Congress after the crisis of CONADI are still vague,\textsuperscript{364} this demand has to be analyzed in the context of the proposals that have been raised on this matter by other Mapuche organizations since the early 1990’s, prior to the approval of the 1993 law and the creation of CONADI. As previously mentioned, the \textit{Consejo de Todas las Tierras (Aukiñ Wallmapu Ngulam)} and \textit{Liwen},\textsuperscript{365} two Mapuche organizations that did not participate in negotiations with the government which led to the 1993 law, have been advocating the need to open spaces for an autonomous development of their people in the last decade. Strongly influenced by Indigenous self-determination demands that have been addressed by Indigenous organizations within different states as well as at the United Nations and other international forums during the last decades, these organizations have been elaborating specific proposals in order to make possible Mapuche political and territorial autonomy in Chile.

The first of these organizations, the CTT, has been stressing the right that Mapuche have to autonomy since 1991. In different statements, sometimes inconsistent one with the other, their leaders have stressed the need to create a Mapuche government, parallel to that of the Chilean administration, in the historical Mapuche territory, which has been identified as that located south of Bio Bio. More specifically, their leaders have affirmed the need to share political, economic and administrative power as a means to guarantee a balance between the two societies within this territory.\textsuperscript{366} The parlamentos or treaties that were entered into by their forefathers with the Spanish during the colonial period, which they consider to have recognized rights to them which have not prescribed, are mentioned by the CTT as a basis on which this parallel government is to be grounded.\textsuperscript{367} The exact territory where Mapuche autonomy should be

\textsuperscript{363} \textit{Ibid}. at 4.

\textsuperscript{364} The term autonomy is used on this Congress’ conclusions both to refer to independence of the Mapuche movement from political parties, as well as to refer to a political strategy of assuming control of their territories, resources and cultures.

\textsuperscript{365} \textit{Liwen} is a Mapuche research and documentation centre based in Temuco.


\textsuperscript{367} \textit{Consejo de Todas las Tierras}, in "Conferencia sobre Parlamentos y Tratados Mapuche," supra note 136 at 4.
exercised, the powers that it should grant to their people, as well as the form that this government will take, have not been clearly addressed by this organization.  

A more elaborate proposal aimed at enabling "the political and territorial autonomy of the Mapuche people" was presented by Liwen in 1990. According to this proposal, which has continued to be perfected by Liwen in recent years, Mapuche autonomy should be entrenched through a regional autonomy statute in the current region of Araucanía. This statute should guarantee the Mapuche the right to a territory in which to exist as a people and develop its culture. It should be manifested through a regional assembly and a regional government democratically elected by all the population with real powers over substantive matters that concern the region.  

Although this autonomous regime should consider the multiethnic composition of the entire population - Indigenous and non-Indigenous - the Mapuche nature of this region should be clearly established. This regional character should be expressed in the rights to be acknowledged to Mapuche on the autonomy statute, which include, among others, the right to natural resources, in particular land, the rights to participate of the benefits of their exploitation and the rights to environment.  

The viability of the autonomic proposals made by the Mapuche people has yet to be analyzed. The proposal which recently emerged from the Mapuche Congress seems to be more an internal action program of their organizations rather than a demand to be negotiated with the Chilean state. The proposal coming from the CTT as it is today, in a process of elaboration, does

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368 An analysis of the insufficiencies of the autonomy proposal of the Consejo de Todas las Tierras is made by J. Marimán, "Movimiento," supra note 346 at 5-10.

369 José Marimán, Cuestión Mapuche, Descentralización del Estado y Autonomía Regional (Temuco: Liwen, 1990) at 10 [hereinafter J. Mariman, Cuestión.]

370 Ibid. Among the reasons given by the same author to limit the Mapuche autonomous regime to the Araucanía, is the fact that this is the historic territory of the Mapuche people. Also, the fact that Mapuche population constitutes an important percentage of the total population (26 per cent). In J. Mariman, "Movimiento," supra note 346 at 15.

371 J. Marimán, Cuestión, supra note 369 at 10.

372 Ibid. at 10-11.

373 Ibid. at 11.

374 Ibid.
not seem to have many chances of succeeding, not only within Chilean society, but also within the Mapuche movement. The contribution that this last organization has made both at the national and international level in addressing the importance of the parlamentos entered by the Mapuche with the Spanish crown in the past as treaties which are fundamental to the autonomic claims of their people, as well as the need to take into consideration the international (Chilean and Argentinean) characteristics of the Mapuche people today, has to be acknowledged. 375

Liwen's proposal is much more elaborate. However, its implementation will not be an easy task. Mapuche people will have to confront the fact that they are a minority within the Araucanía region today. Moreover, they will also have to confront the fact that lands within their traditional territory are in a large percentage owned by non-Indigenous people. The need to stop Mapuche emigration outside this region and encourage the resettlement of those who had left it in the past has been addressed by Liwen as central in the effort to achieve the proposed regional autonomy. The need to develop a Mapuche political and identitarian consciousness which enables them to become a regional political actor has also be stressed by this organization. 376

Concerning the same autonomic perspective, the practical experiences aimed at achieving political control within their traditional territories - mainly at the municipal level - implemented by different Indigenous grass root organizations during the 1990's, should be highlighted here. This less ideological strategy has been successfully implemented by some Aymara and Atacamenean organizations in recent years. These organizations have gained political control of several municipalities through democratic elections in those areas where their population is dominant. 377

The same strategy has been implemented during the 1990's by the Rapa Nui people, enabling them to take control of the municipality of Easter Island. Similar attempts have been made by Mapuche organizations, particularly in the Andean and coastal territories of southern

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375 These acknowledgements can be found on Miguel A. Martinez, Special Rapporteur on Treaties (UN), supra note 135, at 31.


377 By 1994, Aymara and Atacameneans had elected mayors on five municipalities within their traditional territories in the northern Andes. An important number of their representatives had also been elected as members of municipal councils. In José Aylwin, "Pueblos Indígenas, Territorio, Autonomía" (1995) 3 Pentukán 23 at 45 [hereinafter Aylwin, "Autonomía"]
Chile where their population is significant. Mapuche people have been successful in creating a new type of territorial organizations, the Asociaciones Comunales Mapuche (Mapuche County Associations), which have broken their traditional dependency from national Mapuche organizations, usually related to national political parties. Nevertheless, their attempts to win control of their traditional territories through municipal elections or other means, have failed.

The importance of these experiences is that they have enabled some Indigenous peoples to assume control, through local governments, of matters which are central to the lives of their communities, such as health, education, social security, property taxation, development, etc. Although limited to local matters, and not granting Indigenous peoples rights of any kind on a national or regional level, these experiences of autonomy seem to be much more possible in the current political and cultural context of Chile than those addressed by the Mapuche organizations previously referred to. They are seen by the larger society as less threatening than the regional autonomy proposals that have been issued by CTC or Liwen, which are generally depicted by the larger society as separatist.

It is interesting to highlight that this strategy was also present in the Mapuche People's National Congress held in 1997. Its resolutions acknowledge the importance of Mapuche territorial organizations, the need to create Mapuche offices at the municipal level, as well as the need to strengthen Mapuche participation within the Indigenous development areas (IDAs) to be created throughout their territories.

However, the strategies that some Indigenous peoples have been implementing at the local level in recent years will need of other complementary strategies at the national level in order to be effective. It will be necessary to have the legislature approve those initiatives that were left pending in the early 90's, among them the constitutional amendment concerning state...
recognition and protection of Indigenous peoples' rights and the ratification of the Convention No. 169 of the International Labour Organization. The approval of the first initiative would enable a stronger recognition of the multiethnic nature of the Chilean society, a principle on which the local autonomous experiences implemented in the last years by different Indigenous peoples have been based in practice. The approval of the ILO Convention would be of a great importance in order to make possible Indigenous participatory rights in Chile. It would also be helpful to protect the territorial and resource rights which are recognized to Indigenous peoples on its provisions.

Finally, and as a complement to these important initiatives, it will also be necessary to introduce reforms to the 1993 law in order to ensure that the protection it grants to land rights is extended to the natural resources existing within them, as well as to ensure the participatory nature of the Indigenous development areas.\(^{384}\)

If changes to the legal and constitutional framework are not made, the experiences previously referred to will probably be frustrated as a consequence of the expansion of developments into Indigenous peoples' territories. However, legal and political changes in this matter do not depend only on the strategies implemented by Indigenous peoples in defence of their rights. They will also depend in the ability of the Chilean society as a whole to understand the need to establish a new and different form of relation with these peoples which ends up with their historic discrimination and dispossession and enables them to take control of their own lives and destinies.

\(^{384}\) The need to reform the constitution, ratify Covenant No. 169 of the ILO and introduce changes to the legislation to entrench Indigenous peoples' rights in Chile's legal order was addressed by Aymara, Rapa Nui and Mapuche representatives at the seminar concerning the 1993 law held at the Deputy Chamber in 1996 (See Camara de Diputados, supra note 313). It was also addressed by the Mapuche People National Congress in 1997 (See Congreso Nacional del Pueblo Mapuche, supra note 340 at 9-12).
CHAPTER III

ABORIGINAL PEOPLES' RIGHTS IN CANADA.

INTRODUCTION.

As in the case of Chile previously referred to, the territories that today comprise Canada were also inhabited by different peoples for thousands of years. Each one of these peoples too had its own cultures, spiritual beliefs, social and political organizations, laws, lands and territories, which distinguished one from the other.

Notwithstanding the many physical and cultural impacts that the coming of the Europeans had on Aboriginal peoples, these peoples continue to exist in Canada today. The Aboriginal population in Canada was estimated to be over 811,400 in 1996, a number which was equivalent to 2.7 per cent of the total population of this country (29,963,700). Of this population, 624,000, representing 76.9 per cent of the total Aboriginal population, are North American Indians (First Nations); 152,800, representing 18.8 per cent of the same population, are Metis; and 42,500, representing 5.2 per cent of the total Aboriginal population, are Inuit.

Although conflicts and wars among these peoples and the Europeans occurred since early contact, the initial relationship established between these peoples and the Europeans has been dominantly characterized as peaceful and friendly. Nevertheless, the newcomers gradually
imposed their laws and beliefs in an attempt to control Aboriginal lives and resources. After a long period of domination, Aboriginal peoples in Canada have raised their voices to demand a place as "founding peoples" of this country.\(^5\)

First Nations, Inuit and Metis people have been struggling with the Canadian governments to obtain recognition of their traditional lands and territories, including the natural resources existing within them. They have also demanded the right to maintain activities which are central to their peoples’ cultures, such as hunting, fishing and trapping, as well as the right to develop their own economies, their lands and assets. Finally, they have claimed the right to be acknowledged as distinct societies, with their own languages, cultures and institutions within the Canadian society. As such, they have asserted the right to self-govern themselves within their own territories, as they had done for a long time prior to the arrival of the Europeans.

As a consequence of this struggle, significant changes have occurred in recent years in Canada resulting in the acknowledgement of these peoples’ place in Canadian society. The Supreme Court’s decision in the *Calder* case in 1973, a case involving the Nisga'a people of British Columbia, significantly altered the framework for arguing Aboriginal rights in Canada.\(^6\) This decision opened the door to the future acknowledgement and development of the concept of Aboriginal title by Canadian courts, defining a broad scope of rights which are included within this title.

When the Constitution was patriated from England in the *Constitution Act, 1982*, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada" were "recognized and affirmed." The same Act made a specific acknowledgement of "Indians, Inuit and Metis" as Aboriginal peoples of Canada.\(^7\) Parallel to this recognition, the federal and provincial governments have been negotiating with different Aboriginal peoples their land and self-government claims. Agreements or treaties have been reached acknowledging these peoples important rights on these

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\(^5\) In contrast with the traditional vision of the French and the English as being the "founding peoples" of Canada, this term is currently used by Aboriginal organizations and academics to refer to the Indigenous peoples who have lived in this land since time immemorial. An example of this usage can be found in Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2nd ed. (Toronto: Oxford University Press, 1997) [hereinafter Dickason, *Founding Peoples*]. The author of this book is a prestigious historian of Metis ancestry.


\(^7\) *Constitution Act, 1982*, section 35.
matters. Although Aboriginal self-government is not explicitly recognized in the Constitution, the federal government has recognized it as an inherent right of Aboriginal peoples.

In this Chapter we will analyze Aboriginal peoples’ rights in Canada throughout history, from pre-contact period until today. Consistent with the focus of this study described in Chapter I, we will emphasize the analysis of the territorial and political rights of these peoples as understood by international law instruments and draft declarations today existing on this matter. In order to have a better understanding of Aboriginal peoples’ rights in Canada throughout history, we will use the time framework contained in the Report of the Royal Commission on Aboriginal Peoples (RCAP). This report identifies four moments in the history of Aboriginal peoples and their relationship with those who settled in what today is Canada. Three of these moments deal with the past and one with the present.

1. SEPARATE WORLD.

1.1. Aboriginal peoples in Canada prior to European contact.

For thousands of years, prior to the arrival of the Europeans, Aboriginal peoples lived as sovereign nations within the vast territory which is now occupied by Canada. These peoples, who spoke about fifty different languages that have been classified into twelve families,
included a total population which has been estimated from 500,000 to over 2 million at the time of the arrival of the Europeans.\textsuperscript{10} Their cultures, languages and social organizations were as different from each other as were the cultures of European nations.\textsuperscript{11}

Although it is not possible to refer here to all of these peoples and their cultures, it is important to highlight the central aspects of the main Aboriginal groupings existing in Canada at the moment of the arrival of Europeans. O.P. Dickason provides an interesting and relatively comprehensive classification of the peoples who inhabited what is now Canada at that time, based on the geographical areas they occupied, and on the activities they developed.\textsuperscript{12} We will use this classification to describe the main characteristics of these peoples and their cultures, incorporating additional information coming from other sources.

\textbf{1.1.1. Peoples of the northwest coast.}

The northwest coast peoples were semi-sedentary and mainly dependent on the sea and the forest for their subsistence. The chiefdoms that were characteristic of their social organizations, such as those of the Haida, Nuu'chah'nulth, Kwakwaka'wakw and Tsimshian, were hierarchical, with clearly marked ranking stratification between chiefs, nobles and commoners, based on wealth and heredity.\textsuperscript{13}

Some of these peoples, as the Haida and the Tsimshian, were matrilineal, while others recognized descent either through the male or the female side of the family. The basic unit for all these peoples was the extended family, whose members claimed descent from a common ancestor. This ancestor was either an animal that could assume human form or a human being who had encountered a supra natural being. Each lineage and clan claimed specific sites for fishing, shellfish, gathering, woodcutting and bark collecting. Other less tangible possessions included the rights to perform certain dances, use certain names and wear particular ceremonial masks. Most

\textsuperscript{10} Dickason, \textit{Founding Peoples}, supra note 5 at 43.

\textsuperscript{11} RCAP, \textit{Report vol. 1}, supra note 1 at 46; Dickason, \textit{Founding Peoples}, supra note 5 at 46.

\textsuperscript{12} Dickason, \textit{Founding Peoples}, supra note 5 at 46-62.

\textsuperscript{13} \textit{Ibid.} at 47.
clans had their own crests, sometimes called totems, representing animals or supernatural beings believed to be their founders.\textsuperscript{14}

A central institution to these peoples was the potlatch, which could be used for various purposes, one of which was to provide the mechanism to rise the social scale, and another was to distribute wealth. Originally potlatches had a subsistence function, facilitating food exchanges between those groups with surpluses and those with shortages.\textsuperscript{15}

The potlatch provided occasions to acknowledge and confirm Aboriginal social orders ceremonially. They were convened to mourn deaths, bestow names, recognize succession to titles and economic rights and acknowledge marriages and divorces. The chief hosting the potlatch had the authority to convene the feast and to collect the surplus goods from clan members to feed the guests and distribute presents, but his ceremonial position did not give him authority over members. The potlatch was also essential in the maintenance of boundaries, limiting trespass and securing harvesting rights of these peoples.\textsuperscript{16}

\textsuperscript{14} Canada, Indian and Northern Affairs, \textit{First Nations in Canada}, (Ottawa, Minister of Public Works and Government Services, 1997) at 44-46 [hereinafter Indian and Northern Affairs, \textit{First Nations}] and RCAP, \textit{Report vol. I, supra} note 1 at 74. According to anthropologist Dr. Bernardo Berdichewsky, the kinship system of the northwest coast peoples was unilineal, either patrilineal or matrilineal, mainly the later. It was constituted by tribes subdivided into moieties, phraties, clans and lineages divided in extended families. These families existed only as part of a lineage, which in its turn was part of a clan, together with other related lineages. The author adds that clans were usually totemic, and mostly joined within a tribe in two moieties, under two totems, such as the Wolf and the Raven. Bernardo Berdichewsky, personal communication to the author, Vancouver, July 5, 1999. An in-depth analysis of the kinship system in different societies can be found in Bernardo Berdichewsky, \textit{Antropologia Social} [in print in Santiago: University of Chile Press] [hereinafter Berdichewsky, \textit{Antropologia}]. See also the analysis on this matter contained in William A. Haviland, \textit{Cultural Anthropology} 7th ed. (Fort Worth, Texas: Harcourt Brace College, 1993) at 259-283 (Chapter 10 on Kinship and Descent). The role of kinship groups in non-industrial societies, such as that of the peoples of the northwest coast, is analyzed by Haviland. According to this last author, in these societies, kinship groups deal with problems that cannot be handled by families and households alone, such as defense or the allocation of property and resources. As societies become larger and more complex, the author affirms that formal political systems take over many of these matters (Ibid. at 282).

\textsuperscript{15} Dickason, \textit{Founding Peoples, supra} note 5 at 47. According to Bernardo Berdichewsky, the potlatch was the main institution for the produce circulation in the tribal non-market reciprocity economies that were characteristic to the northwest coast tribal confederations as well as to many other tribal societies. According to this author, in these ranking stratified societies, the economic system, more than on equal reciprocity, as in simple non-stratified tribal societies, was based on unequal reciprocity, also known as redistribution. The same author highlights that potlatch also had other functions, including a political function, serving not only to the accumulation of wealth-products to the upper chiefs stratum, but also to the accumulation of prestige and power, particularly to the chieftom’s paramount chief’s Bernardo Berdichewsky, personal communication to the author, \textit{supra} note 14. See also Berdichewsky, \textit{Antropologia, supra} note 14.

\textsuperscript{16} RCAP, \textit{Report vol. I, supra} note 1 at 74-75. For an in depth analysis of the Tsimshian Potlatch and its evolution up to the present see Margaret S. Anderson, "Understanding Tsimshian Potlatch", in Morrison and Wilson, eds., \textit{supra} note 9 at 556-585.
These peoples had a sophisticated material culture, which aside from the totems before referred to, included dugout canoes, large wooden houses, fishing and hunting techniques, to which we will refer more in-depth when describing the culture of the Nisga’a people in Chapter IV:

1.1.2. Farmer/traders of the boreal forest.

Other sedentary peoples, who had adopted agriculture, were the Iroquoians as well as some Odawa (Ottawa) of the St. Lawrence River and Great Lakes. The Iroquoians included the Wendat (Huron)\textsuperscript{17}, and the Five Nations (later Six Nations) usually referred to simply as Iroquois, who became among the best known of Canada's Aboriginal societies.\textsuperscript{18} These peoples were all farmer-hunters, practiced agriculture, based on corn, bean and squash, and spoke related languages (apart from the Algonkian-speaking Odawa). They lived in longhouses in villages that counted up to 1,500 inhabitants or more. These villages were moved to new sites when resources became exhausted.\textsuperscript{19}

a. The Wendat (Huron).

The Wendat, with a population of 20,000 to 30,000 at the end of the sixteenth century, lived in up to 25 villages surrounded by cornfields.\textsuperscript{20} Huron built elaborate palisades (fences made of wooden stakes) around their settlements to help keep out their enemies.\textsuperscript{21} Huron settlements were occupied year-round but were moved once every 10 to 15 years. The Wendat organized themselves

\textsuperscript{17} Although many authors have given this people the denomination of "Huron", a term which was used by the French to refer to them, we will use the term Wendat - which means islanders or dwellers on a peninsula - a name they gave to themselves. See RCAP, Report vol 1, supra note 1 at 106.

\textsuperscript{18} Dickason, Founding Peoples, supra note 5 at 49. According to this author, during the sixteenth century, or perhaps earlier, groups of Iroquoians organized into confederacies, which included aside from that of the Five Nations in the Finger lakes region of what is now northern New York state, that of the Wendat (Hurons) in the northern part of their territory, an alliance which included four nations (with a possible fifth) in the southern end of Georgian Bay, and the alliance of the Neutrals in the south on the Ontario peninsula.

\textsuperscript{19} Ibid.

\textsuperscript{20} Ibid. at 50.

\textsuperscript{21} Indian and Northern Affairs, “First Nations”, supra note 14 at 20.
into matrilineal extended families, and, like their Haudenosaunee relatives, lived in longhouses. The women tended the fields of corns, beans, and squash, while the men hunted, fished, traded and carried out military and diplomatic missions.\textsuperscript{22}

Wendat government consisted of the village councils, tribal councils and the confederacy council. The confederacy meeting served to strengthen their friendship ties, but also to coordinate dealings with their enemy tribes. Deliberations lasted as long as necessary to enable the council members to reach to an agreement or consensus.\textsuperscript{23} Aside from their common language, the unity of their confederacy was cemented by the Feast of the Death, in which the bodies of those that had died were disinterred and prepared for reburial in a common ossuary.\textsuperscript{24}

Situated at a crossroads in the trading networks of North America, Huronia, as their territory was called, dominated trade routes, as well as the political scene. These peoples surrounded their rival Five Nations with a system of alliances that extended 800 kilometres to the south. Despite their initial position of strength, Huronia would rapidly disintegrate after the arrival of the Europeans, as we will see later in this Chapter\textsuperscript{25}

\textbf{b. The League of Five Nations or Iroquois.}

The territory of the League of Hodenosaunee (People of the Longhouse) or Five Nations (that included the Mohawk, Oneida, Onondaga, Cayuga and Seneca),\textsuperscript{26} stretched from the Mohawk River on the east to the Genesee River on the west, a distance of about 180 kilometres. By the end of the sixteenth century their population was estimated in 16,000.\textsuperscript{27} Each of these nations occupied


\textsuperscript{23} \textit{Canada, Indian and Northern Affairs, “First Nations,”} supra note 14 at 18.

\textsuperscript{24} Dickason, \textit{Founding Peoples, supra} note 5 at 50.

\textsuperscript{25} \textit{Ibid.} A more in-depth analysis of the Wendat, its economic and social base, its confederacy, as well as their disintegration as a people can be found in Georges E. Sioui, \textit{For an Amerindian Autohistory}, trans Sh. Fischman (Montreal: McGill University Press, 1992). Another historical analysis of Wendat society can be found in Denys Delage, \textit{Bitter Feast, Amerindians and Europeans in Northeastern North America, 1600-64}, trans. J. Jane Brierley (Vancouver: UBC Press, 1993) at 163-237.

\textsuperscript{26} The League later became known as Six Nations due to the later inclusion of the Tuscarora. RCAP, \textit{Report vol. I}, \textit{supra} note 1 at 52.

\textsuperscript{27} Dickason, \textit{Founding Peoples, supra} note 5 at 50.
its own villages, had its own councils, and spoke their own distinct language. The "Great League of Peace" as it was also called was governed by a council of fifty chiefs representing participant tribes. Each tribe had one vote. The aim was to keep peace between them and to co-ordinate their external relations, which had to be by unanimous decision. Centralization was by no means complete, and member tribes maintained a considerable degree of autonomy in internal affairs.

Within the confederacy, matters of common interest were discussed first in the extended family, second in the convocation of clans to which the family members belonged, then in groups of clans, next by the council of the nation and ultimately, in its council. The confederacy council decisions dealt with issues related to external affairs, which included trade, alliances and treaties. They also made decisions dealing with war, although this was also a decision of individual nations, villages or families. Iroquois social organization included division into phratries and clans as in the Northwest Coast. Women exercised considerable influence and the right to choose sachems, or to order the removal of one who proved to be unsatisfactory. Although men cleared the fields, it was women who did the farming.

The sophistication of Iroquois organization impressed the Europeans, especially the English. Authors, such as Bruce Johansen, have gone as far as to suggest that federalism was not invented by the Founding Fathers of the United States at Philadelphia in 1787, but had its genesis in the principles of the Iroquois Confederacy.

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30 Dickason, *Founding Peoples, supra* note 5 at 51-52. According to anthropologist Dr. Bernardo Berdichewsky, Iroquois people were an advanced tribal society with a complex unilinear kinship system and a sophisticated political organization of tribal confederation's chiefdoms. They were also socially stratified under a clear ranking system. Berdichewsky, personal communication, *supra* note 14.

1.1.3. Hunters of the Taiga and Tundra.

a. The Mi'kmaq.

The Mi'kmaq of the Atlantic Coast were a people who after agricultural beginnings, became hunters and gatherers. According to their traditions, and to archaeological evidence, they descended from a people who had migrated from south and the west. Mi'kmaq social organization was more complex than that of other hunting and gathering peoples such as the Inuit. 32

The division of their territory into districts, each of which had a chief, contributed to the maintenance of internal peace among the kinship groups. District and territorial division depended on the size of the kinship groups and the abundance of game and fish. These kinship groupings made up several small gatherings or councils. From these councils, the Grand Council of the Mi'kmaq was created. At the annual meeting, the Council saw that each family had sufficient planting grounds for the summer, fishing stations for spring and autumn, and a hunting range for winter. The environment the Mi'kmaq used included both the coastal and the interior lands of their territories. 33

Beneath the district paramount chief were the local chiefs, which headed a group composed of his bilocally extended family, with a minimum size of about thirty or forty members. Beneath the local chiefs were the commoners, including their family members and other people, who followed the directions of the local chief and organized their lives along the lines of sexual division. As in most hunting and gathering societies, kinship was traced bilaterally, with perhaps a patrilocal emphasis in post-marital residence and a patrilineal emphasis on inheritance of chiefly positions. 34

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32 Dickason, Founding Peoples, supra note 5 at 53.
33 RCAP, Report vol. 1, supra note 1 at 49-50.
b. The Inuit.

A note should be made here about the Inuit and their ancestors the Thule. The Thule moved eastward across the Arctic, displacing the earlier Dorset, and reaching the Atlantic coast sometime during the fifteenth century. The Thule, like the modern Inuit, possessed the bow and the arrow, spear thrower, and sealskin-covered kayaks and umiaks, and they used dogs as draft animals. They were the unchallenged masters of the tundra lands beyond the tree line. This supremacy was recognized by other Aboriginal peoples who seldom encroached on their territory. 35 People of the Thule culture harvested whale, seal, walrus and fish from the sea and caribou and musk-ox from the land. They manufactured their clothing, houses and implements from the material at hand. 36

When Europeans had contact with those living in northern Canada (the Inuit) in the eighteenth and nineteenth centuries, much of the commonalities of the Thule culture had given way to regional variations. Those regional variations are explained as adaptations to the "little ice age" that began around 1,200 AD which apparently were related to local conditions created by changing climate or intercultural contact. 37

At the time of contact with Europeans the Inuit lived as semi-nomadic hunters occupying much of northern Canada. They moved from camp to camp according to seasons and the availability of game. Within their territories, hunters moved constantly during all seasons. With few exceptions they were maritime people. Their basic social unit was the extended family. Camps usually consisted of several related families (kinship group) in informal association. The Inuit governed themselves by a flexible system based on consensus. They made decisions affecting camp life through discussion and general agreement. Each camp had a leader - usually a man who had superior abilities as a hunter - who greatly influenced the decision making process. 38

35 Dickason, Founding Peoples, supra note 5 at 53.

36 RCAP, Report vol. 1, supra note 1 at 82.

37 Ibid.

38 Ian Creery, "The Inuit of Canada," in Minority Rights Group ed., Polar peoples. Self-Determination & Development (London: Minority Rights Publications, 1994) at 108. According to Dr. Bernardo Berdichevsky, traditional Inuit society was a simple non-stratified tribal society, with a low technological and political level of hunting bands. Their kinship system was not as complex as unilineal systems that were characteristic of the typical tribal societies, but was a bilateral one. In that sense, Dr. Berdichevsky affirms, it was similar to the modern industrial kinship system, which is also bilateral. Berdichevsky, supra note 14.
1.1.4. Northwestern Plains.

In this vast area, where the population was scarce, with less than one person per 26 square kilometres, the bison (buffalo) hunt provided the basis for Aboriginal cultural patterns. The forms of hunting developed by the peoples living there required a high degree of co-operation and organization, not only within bands, but also between them and sometimes intertribally. Part of this territory later became the homeland of the Blackfoot confederacy. The confederacy was composed of the Siksikawa (Blackfoot), the Kainaiwa (Blood), and the Pikuniwa (Peigan), all of whom shared a common language and culture. They were also joined by their allies the Tsuu T'ina (Sarcee) and Gros Ventres.

Existing as politically distinct nations, the members of the confederacy occupied well-defined territories and were economically self-sufficient. While the confederacy allied them in the protection of their lands and security of their nations, each member nation was politically independent. Nevertheless there was often intermarriage among them and they frequently united to hunt buffalo or fight.

The smallest Blackfoot political unit was the band, usually having an extended family as its nucleus. These bands were self-contained units small enough to find food, and large enough to protect themselves from enemy attacks. Bands had a political and a war chief. The first presided the council meetings and settled disputes within the band. The second assumed control when there was danger of enemy attacks. When bands gathered together, one of the leaders was recognized as head chief. Council meetings, where decisions were made by consensus, were attended by the head chief, the war chief and the heads of the leading families.

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39 Dickason, *Founding Peoples*, supra note 5 at 54.

40 The boundaries of the Blackfoot confederacy in the period after 1765 were the Rocky Mountains on the west, the Yellowstone River in the south, Cypress Hills to the east and North Saskatchewan River to the north. RCAP, *Report vol. 1*, supra note 1 at 61

41 *Ibid.* The introduction of the horse later would greatly increase the mobility of the plains people, allowing them to use large territories to support their hunting and gathering economies.


The Blackfoot have been referred to as Tigers of the Plains.\textsuperscript{44} Nevertheless their actions were more oriented to capturing horses and taking revenge, or to preventing illegitimate incursions on their respective lands, rather than to securing territory.\textsuperscript{45} The plains peoples were profoundly spiritual, and each day at sunrise they gave thanks to the Creator for the gifts they received. They also performed pipe ceremonies, which were spiritual ceremonies in celebration of life.\textsuperscript{46} Once a year, in summer time, they gathered for the sundance, a ceremony that was a time for spiritual renewal and purification. It also was a social and political gathering, where head chiefs and minor band chiefs made important decisions concerning peace or war. It was also a time for exchanging gifts.\textsuperscript{47}

\section*{1.2. Commonalities existing among Aboriginal peoples’ cultures.}

Notwithstanding the differences existing among Aboriginal peoples histories and cultures in pre-contact time, many commonalities can be found among them. These commonalities are particularly strong when it comes to understand the nature of the relationship they had with their lands and resources, as well as the dominant features and principles behind their social and political organizations. Statements made by Aboriginal leaders and intellectuals containing their views and interpretations of the central aspects of their past - and many times present - cultures, help to highlight some of these commonalities.

\subsection*{Lands and resources.}

According to Aboriginal interpretation, their peoples have lived in close connection to their lands since time immemorial, and certainly, prior to the arrival of the Europeans. It is important to highlight that the concept of land has always had a broad meaning for Aboriginal peoples,

\begin{itemize}
\item \textsuperscript{44} RCAP, \textit{Report vol. 1, supra} note 1 at 62.
\item \textsuperscript{45} \textit{Ibid.} This situation would later with the expansion of the fur trade and non-aboriginal into their territories, all of what would create conflicts with their neighbours.
\item \textsuperscript{46} \textit{Ibid.} at 63.
\item \textsuperscript{47} Andrew Bear Robe, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including its Future Possibilities Within Canada." Research study prepared for RCAP (1994), in RCAP, \textit{Report vol. 1, supra} note 1 at 64.
\end{itemize}

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including not only the surface, but the subsurface, the rivers, the lakes, the ice, the shorelines, the marine environment and the air. According to their concept, land touches all aspects of life, including spiritual views, food, shelter, cycles of economic activities, forms of organization and systems of governance and management. 48

In their statements, Aboriginal people describe their spiritual relation to the lands where the creator placed them, by calling their lands their "mother" or "giver." They also acknowledge the responsibilities as well as the rights which derive from that relationship. Unlike most non-Aboriginal human centred philosophies, Aboriginal belief systems are cosmocentric. According to these beliefs, human beings are only a small part of the cosmos. Many parts of nature have souls and spirits. That is why there is a reverence for the natural order and a sense of wonder before natural phenomena, such as the sun in Blackfoot cosmology, or the great sea of the Inuit. 49

This spiritual connection to the land is revealed by a statement of the former head of the Assembly of First Nations, Ovide Mercredi, and Mary Ellen Turpel, an Aboriginal scholar, when referring to their people, the Cree:

We have always been here on this land we call Turtle Island, on our homelands given to us by the Creator, and we have a responsibility to care for and live in harmony with all her creations. We believe that the responsibility to care for this land was given to us by the Creator, the Great Spirit. It is a sacred obligation which means the First people must care for all of Creation in fulfilling this responsibility. We have carried this responsibility since long before the immigrants came to our homelands. The people of my origin, the Cree, lived close to the land as hunters and gatherers. The land provided and still provides, food for our peoples, and we lived in extended family networks, travelling seasonally to hunt and staying at our favourite camps. 50


49 RCAP, Report vol. 1, supra note 1 at 86-87. According to Dr. Bernardo Berdichewsky, tribal religions are known as natural religions and their cosmovision does not differentiate a cosmology as in complex society’s religions. For the tribal mind, according to Berdichewsky, deities and spirits are “Nature’s built in beings, and not external cosmic ones as in civilizations great religions.” That is why, according to the same author, the tribal systems of belief are magic-religious ones, where human beings can act upon - and not pray and implore - so influencing deities and spirits. Berdichewsky, supra note 14

Aboriginal concern for land can also be evidenced in the customs and laws which assigned the people the role of stewards of their lands and resources. According to these laws, Aboriginal peoples did not own their lands according to the concept of ownership that exists in western society. Rather, they could make use of the land in a respectful way, ensuring its preservation as stewards. Such concern is shown in the statements of an Aboriginal chief from what is currently Northern British Columbia:

You must recognize that although we exercised dominion over these lands prior to the coming of the foreigners, our values and beliefs emphasized stewardship, sharing and conservation of resources, as opposed to the foreign values of ownership, exclusion and domination over nature.  

Aboriginal governments.

Aboriginal social and political organizations varied according to the complexity of their societies and to the environments in which they lived. The simple kinship based organization of the Inuit, and the sophisticated political structure of the Iroquois confederacy, to which we have previously referred, provide a good example of the differences existing in these peoples’ forms of government in pre-contact time.

Despite these differences, there seems to have been many common elements in Aboriginal forms of organization and governing structures. Accounts reveal that most social structures were built around the nuclear and extended family, which were grouped into bands, clans or districts. These were many times part of a larger nation that might have belonged to a confederacy of nations or to a larger group. Another common characteristics of different peoples in pre-contact time was the decentralization of governance and the consensual nature of decision making processes. Aboriginal local units usually came together or sent representatives to the councils of a nation or confederacy, where individuals were equal, and deliberations continued until consensus was obtained.

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52 RCAP, Report vol. 1, supra note 1 at 87.
reached. Leaders tended to provide guidance and council and to speak on behalf of their people, and did not exercise authority to make unilateral decisions.\(^53\)

These characteristics are reaffirmed by different Aboriginal statements concerning their past. According to the vision of the Federation of Saskatchewan Indians, most of the First Nations governments were democratic, with power distributed among several individual or institutions. Power rested in the people, but for economic or military reasons it was necessary to delegate it to a higher governing council. Within the Cree for example, most decisions were made at the local level by the band government. This government was an informal council of the band's leading men, one of whom acted as chief. All the bands of a tribe came together at the same time every year.\(^54\)

**Sovereignty.**

It cannot be denied that Aboriginal peoples were self-governing sovereign nations long before the arrival of Europeans. According to Aboriginal perspectives, this was a common characteristic to different peoples.

The Mi'kmaq people from the Atlantic describe the relationship they had in the past with other peoples as proof of this sovereignty. A Mi'kmaq chief affirms this perspective:

The Mi'kmaq are used to dealing with other peoples. Prior to the arrival of the Europeans, we carried on relations with other indigenous peoples throughout North America, among other things for the purpose of trade, alliance, and friendship. All such dealings were based on mutual respect and co-operation, and formalized through the treaty making process. The Mi'kmaq called this international law, the law of Nikamanen.\(^55\)

\(^{53}\) *Ibid.* According to P. O. Dickason, probably an exception to this rule was that of the chiefdoms of some peoples of the northwest coast, where social organization was hierarchical. Dickason, *Founding Peoples,* supra note 4 at 46


The Union of British Columbia Indian Chiefs has also emphasized this sovereign nature of the peoples of the northwest coast:

Traditionally, First Nations practiced uncontested, supreme and absolute power over our territories, our resources and our lives with the right to govern, to make and enforce laws, to decide citizenship, to wage war or to make peace and to manage our lands and resources and institutions.\(^\text{56}\)

Similar statements about the sovereignty practiced by the Cree people in the prairie area have been made by the Federation of Saskatchewan Indians.\(^\text{57}\)

Legal orders.

An expression of sovereignty is the capacity of a people to make laws and develop institutions which rule the life of its members. There is evidence that Aboriginal peoples developed spiritual, political and social customs and conventions to guide their relationships. These customs became the foundations for many complex legal systems.\(^\text{58}\) Different Aboriginal peoples in Canada provide evidence of the existence of this manifestation of sovereignty. Peoples who had less complex social and political structures, such as the case of the Inuit, assert that this fact did not mean they did not have their own legal system:

That our people lead a nomadic existence in a harsh unforgiving Arctic environment may lead Qallunaat or others to conclude the Inuit did not have a sense of order, a sense of right and wrong and a way to deal with wrongdoers in their society. Inuit did posses this sense of order and right and wrong. The way it was practiced and implemented may never have been compatible with European civilization's concept of justice, but what worked for Inuit society in their environment was no less designed for conditions of life in the Arctic than that of Qallunaat was for conditions of their life.\(^\text{59}\)

\(^{56}\) Union of British Columbia Indian Chiefs, "Our land is Our Future. Aboriginal Title and Rights Position Paper" (Vancouver: UBCIC, 17th Annual General Assembly) [unpublished]

\(^{57}\) Federation of Saskatchewan Indians, supra note 51 at 2.


Other peoples, such as the Gitksan and Wet'suwet'en of the northwest coast, had more complex legal systems. They recently described their legal systems in a statement made to the Supreme Court of British Columbia in demand of their territorial and political rights. These systems, which have existed for a long time, not only include today's "property laws" concerning succession, natural resources, harvesting rights and activities, but also relate to family, including matters such as marriage, adoption, and divorce. Moreover, such systems provide evidence of the existence of institutions such as the Gitskan legislature, which has the power to legislate among this people; the Wet'suwet'en Supreme Court House, inhabited by a specialized judiciary charged with the duty of interpreting and applying the law; and the Gitksan policemen or Wet'suwet'en bailiffs who make their living enforcing the laws of these peoples. 

In the current language of Aboriginal leaders in Canada their peoples were, and continue to be, sovereign self-governing nations, exercising authority and jurisdiction among the people living in their territories, including those people from other nations. This may help to understand the current debate that is taking place regarding Aboriginal territorial and political rights in this country today.

2. CONTACT AND CO-OPERATION.

2.1. Early contacts.

Europeans had been visiting the Atlantic coast of what today is Canada periodically from long time ago. Prior to the fifteenth century, intermittent commercial contacts took place between Aboriginal peoples of that area and European sailors, including Basque, English, and French among others, who visited North America's Atlantic coast in search of natural resources such as timber, fish, fur, whale and bear. Little is known about these contacts.

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61 First meetings between Europeans and Aboriginal people of which there is acceptable record began with the Norse about AD 1000. Dickason, Founding Peoples, supra note 5 at 64.

62 RCAP, Report vol. 1, supra note 1, at 100. These contacts started much earlier, around 1200 AD, according to Ian Creery (See Ian Creery, supra note 38 at 105.)
In 1497, John Cabot, an English explorer commissioned to find a route to the Orient, sailed and landed on the coast of what they referred to as “New Found Land”, claiming the area for Henry VII of England.\(^{63}\) The Portuguese are thought to have established a settlement in Cape Breton Islands by 1521, with Mi'kmaq place names appearing in Portuguese maps by 1550.\(^{64}\)

In the 1530s, Jacques Cartier, a Frenchman, navigated and landed in the what are now the Maritimes, and explored the St. Lawrence river, reaching as far as Hocheelaga, where Montreal is located today. Cartier made three voyages to the area, the last one in 1541-1542, bringing the French into contact with different peoples, in particular the Iroquoian of Stadacona and the Hochelaga, in the Saint Lawrence area.\(^{65}\)

In 1602, France granted the Company of New France, a joint stock company based on the model of the English and Dutch trade companies, a complete monopoly of the Canadian fur trade. In exchange, this company was to settle 4,000 colonists within fifteen years and convert the Indians to Christianity. This company, and other companies that followed, failed to bring settlers to North America. French colonization agents only tolerated missionary activity in this area.\(^{66}\)

2.2. Aboriginal peoples’ first attitudes.

Although hostilities existed, the attitude assumed by Aboriginal peoples in their early relationship with the Europeans seems to have been generally that of cooperation, sharing and


\(^{64}\) R. H. Whitehead, "The Sixteenth Century: 1500 to 1599 A.D." in Dickason ed., *Native Imprint*, supra note 9 at 121.

\(^{65}\) RCAP, *Report vol.1*, supra note 1 at 100.

\(^{66}\) Mason Wade, "French Indian Policies," in Wilcomb E. Washburn ed., *History of Indian-White Relations*, Handbook of North American Indians vol. 4 (Washington D.C.: Smithsonian Institution, 1988) at 21. According to J. R. Miller, the need to support the fur trade and the missionary effort induced the French Crown to end in 1663 the administration of New France by a succession of commercial monopolies, and to establish it into a Crown colony. Troops were sent by the French to control the damage produced by the Iroquois to their fur trade. These efforts, nevertheless did not change the nature of French settlement, which remained a commercial colony rather than an agricultural settlement throughout the seventeenth century (J. R. Miller, *Skyscraper Hide the Heavens, A History of Indian-White Relations in Canada*, revised ed. (Toronto: University of Toronto Press, 1991) at 43-44 [hereinafter Miller, *Skyscrapers*]). According to Denys Delage, the French emigration remained minimal for a long period of time. Between 1608 and 1639, the number of colonists reached to 296, many of them related to the missions. After the efforts engaged in the mid seventeenth century to encourage settlement, in 1663 the number of French living in the Saint Lawrence valley raised to 3,035 (Delage, *supra* note 25 at 247).
respect. Numerous accounts exist in which Aboriginal peoples helped Europeans to survive in the harsh environment of North America. Examples of how they saved the newcomers' lives are found from early contacts. 67

Georges Sioui, an historian of Wendat (Huron) ancestry, states in his analysis of the Wendat-French relationship, that although seriously threatened by the wars and diseases brought by the newcomers, "all first-hand accounts state that the starving, frightened, intolerant people who began landing here in 1492 were received with respect and humanity...." 68

J. R. Miller describes the relationship among these parties during the first decades of contact as one of cooperation and mutual benefit which posed no threat to Aboriginal people, who were more numerous, and at home. According to this author, this treatment is in part explained by Aboriginal traditions of sharing and avoiding the coercion of others. Another important explanation he gives to this relationship was that trade with the newcomers allowed the continuation of Aboriginal traditional activities ("Indian ways"), especially fishing and hunting. 69 Finally, the author affirms that unlike the thirteen British colonies where farming would threaten Aboriginal control of the land, New France was more a commercial than an agrarian colony and it was sparsely populated. These were all factors which facilitated the early relationship between Aboriginal peoples and the French. 70

This is not to say that confrontation did not exist between these peoples and newcomers in this early period of contact. As Bruce Trigger affirms, Aboriginal hostilities in the area of Quebec City kept the French from travelling upriver until 1581. 71 Competition among different Aboriginal peoples in their attempts to gain control of trade with the French also triggered conflicts among

67 In one of the first voyages of Cartier, Frenchmen who were wintering at Stadacona were affected by a scurvy that killed almost one-quarter of them and left the remainder gravely debilitated. Native people living there saved them from illness and possible death by showing them how to make a tonic containing ascorbic acid from bark, cedar needles and water. Miller, Skyscrapers, supra note 66 at 27.

68 Sioui, supra note 25 at 13.

69 Miller, Skyscrapers, supra note 66 at 40.


71 Bruce Trigger, "Jesuits and the Fur Trade," [hereinafter Trigger, "Jesuits"] in Miller ed. Sweet, supra note 70 at 5. As this author affirms, nevertheless, these hostilities seem to have been motivated, at least in part, by the cruel treatment they received from Cartier and Frenchman.
themselves. According to Miller, it is more than likely that internal quarrels over access to trading spots along the St. Lawrence played an important part in the disappearance of the Laurentian Iroquois.\textsuperscript{72}

Peaceful Aboriginal attitudes changed quickly when the newcomers engaged in activities such as kidnapping Natives for sale in slave markets. As Francis Jennings affirms, when these events occurred, some Aboriginal peoples fought back, generally with disastrous consequences for them. Others tried to adapt to the new circumstances, engaging in trade and accepting protection or Christian missions.\textsuperscript{73}

Aboriginal peaceful attitude towards the newcomers is explained in the Gus-Wen-Tah or Two Row Wampum belts of the Haudenosaunee confederacy, to which we will refer later in this Chapter.\textsuperscript{74} However, Aboriginal attitude would later change during the seventeenth century (1609-1701) when the Haudenosaunee confederacy entered into war against New France and their allies.\textsuperscript{75}

\textbf{2.3. Impacts of newcomers on Aboriginal peoples.}

From 1603 on, the company of New France organized a series of expeditions in order to expand the French trading area. These expeditions, which were leaded by Samuel de Champlain, a geographer who is considered to be the founder of Quebec (1608), established contact with most of the Aboriginal peoples that would become allies of the French until the end of New France.\textsuperscript{76} Among these peoples were the Mi'kmaq, the Innu (Montagnais) and the Wendat (Huron).\textsuperscript{77}

\textsuperscript{72} \textit{Ibid.} at 6.

\textsuperscript{73} Francis Jennings, \textit{The Founders of America} (New York: W.W. Norton & Company, 1993) at 180-181. [hereinafter Jennings, \textit{Founders}]

\textsuperscript{74} RCAP, \textit{Report vol. 1}, supra note 1 at 103.

\textsuperscript{75} Dickason, \textit{Founding Peoples}, supra note 5 at 124.

\textsuperscript{76} Wade, \textit{supra} note 66 at 21.

\textsuperscript{77} The Iroquoian were not seen in the St. Lawrence area in the early seventeenth century when Champlian explored its shores for France due to their dispersal by the incursions of other Aboriginal peoples. Miller, \textit{Skyscrapers}, supra note 66 at 29.
2.3.1. The Mi'kmaq.

The Mi'kmaq developed early friendly relations with the French. At Port Royal, a post founded by the French in their territory, both peoples seemed to have helped each other in different ways. The Mi'kmaq seemed to have adapted quickly to the new context in which they were living. Before the arrival of the Europeans they depended primarily on marine resources, and secondarily on forest resources. This pattern soon reversed as they adapted to the fur trade. Their adaptability to this new reality is explained in part by their complex social organization - which has been described by anthropologists as midway between the levels of tribe and chieftainship - their geographical situation, and their experience as seamen. Mi'kmaq interacted with Europeans in both fisheries and fur trade. Their role as guerrillas in the British colonial wars ensured their survival in their traditional lands until the final defeat of the French.

The long lasting and friendly relations between the Mi'kmaq and the French can be explained by the English slave raids among the Aboriginal peoples of the Atlantic coast. Another explanation is found in religion. The presence of Catholic missionaries in the region greatly impacted the Mi'kmaq, who experienced an extensive conversion to Christianity. Catholicism would continue to link them with the French in the eighteenth century, after the British claimed their territory in 1713. It also explains their challenge to Protestantism as well as to British Crown dominion in their territories.

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78 The French provided the Mi'kmaq with muskets and steel-tipped arrows, which enabled them to undertake successful war against the Massachusetts people to the south. The Mi'kmaq adopted European objects, such as fishhooks, iron kettles and clothing, in return teaching the French the use of Tabasco, forest crafts and canoeing. When they had shortage of their traditional food, they were saved from starving by French provisions. Wade, supra note 66 at 21-22.

79 Dickason, Founding Peoples, supra note 5 at 84.

80 Ibid. at 84.

81 Ibid. at 85.

82 Miller, Skyscrapers, supra note 66 at 67
2.3.2. The Innu.

Others who entered into a close contact with the French because of their geographical position and political significance were the Innu and the Wendat. The Innu lived in the boreal forest zone of the Canadian Shield. At the time of contact, they were a hunting and gathering people who, in summer time, congregated in large gatherings at the St. Lawrence to fish, trade and renew their political bonds. Each fall they went back to the interior to start a new hunting and gathering cycle.

The Innu engaged early on in the fur trade with the French. Although European traders obtained Aboriginal clothing, canoes, snowshoes and other items for themselves, the most appreciated goods were beaver pelts, which could be sold in Europe as the raw material for felt hats, then in vogue among the middle class and the nobility. The fur trade served as an additional incentive for the Innu to gather along the St. Lawrence. Because of their strategically located summer camps, the Innu enjoyed a middleman status between the French traders who came there, and other Algonquin trappers in the interior.

When the French founded Quebec as a trading post in 1608, the Innu welcomed their protection from Mohawk raids. The French saw it as an opportunity to safeguard their interests from competing groups of traders and as a means of promoting free use of the St. Lawrence by their Indigenous trading partners. The Innu encouraged Champlain to accompany them up the St. Lawrence and Richelieu rivers on an expedition against the Mohawks. Unfortunately for the Innu, on that expedition the French established a closer contact with the Wendat. From then on, much of

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83 The Algonquian-speaking peoples who inhabited the region immediately north of the St. Lawrence and east of the Saguenay River were called Montagnais by the French, but they refer to themselves as Innu (human being) (RCAP, Report vol.1, supra note 1 at 106). Nevertheless, Innu is also the collective name used to denominate both the Montagnais of what today is Quebec and the Naskapi of Labrador (Dickason, Founding Peoples, supra note 5 at 79). In accordance to these authors usage, and in respect for their self-denomination as a people, we will use here the term Innu to refer to the Montagnais.

84 RCAP, Report vol. 1, supra note 1 at 106.

85 The furs obtained north of the St. Lawrence in the Innu territory were greater in number and of a better quality than those in the south. Ibid. at 108.

86 Ibid. at 109.
the trade with the French bypassed Tadoussac, an Innu trading centre, leaving them outside the trading circuits, and forcing them to return to their traditional life ways in the hinterlands. 87

2.3.3. The Wendat.

By the time of the Champlain expedition the Wendat had already become the centre of the intertribal trading network in the Great Lakes region. Although the beaver had become virtually extinct in Wendat territory by 1630, this people was able to obtain a sufficient number of furs from their trading partners in return for corn surpasses and European goods. 88 Champlain insisted that there would be no trade without missions. Consistent with this policy, the Recollets missionaries first, and the Jesuits later, arrived to Wendat territory and implemented different strategies with the same purpose: to convert the "pagans" to Catholicism. Wendat religion, similar to that of other Aboriginal peoples, permeated all aspects of life and made no distinction between the secular and the sacred. Upon conversion to Christianity, Wendat were obliged to give up not only their religion, but their identity as Wendat. 89

The rise in the number of converts had profoundly negative consequences for Wendat social and political cohesion. By the 1640's the tensions between the Christian converts and traditionalists resulted in factionalism that further undermined a confederacy already weakened by the loss of much of its population to European diseases. In 1649, the Mokawk and the Seneca nations took advantage of this situation, and attacked Wendat settlements, dispersing them from their traditional homelands. 90 As a consequence of these attacks, many of them fled to the west, settling in lands.

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87 Ibid. at 109.

88 The pelts, which have been estimated in 15,000 annually, were traded to the French in return for iron knives, awls, axes, copper and brass kettles, and glass beads. This commerce appears to have strengthened Wendat social organization, enhanced the power of hereditary chiefs, and generally enriched their culture. It also brought substantial profits to the French. Ibid.

89 Ibid. at 111.

90 These attacks are to be understood in the context of the Iroquois war, that was fought by the League of Five nations (Haudenosaunee) and New France and its allies, among them the Wendat, between 1609 and 1701. See Dickason, *Founding Peoples*, supra note 5 at 124.
now part of Michigan and Ohio. Others moved east to Lorette, a settlement near Quebec City. Others were adopted into Iroquois villages in what is now New York state.  

2.4. Nature of French settlement in Canada.

Of the four objectives - fish, fur, exploration and evangelization - that according to J. R. Miller drove the French exploration in North America, fur and evangelization became dominant.

2.4.1. Trade

The importance of the fur trade in the creation and growth of New France has been underlined by several authors. New France was born out of the fur trade. Quebec, Trois-Rivieres, and Montreal were fur-trading posts, with food provided by farming nearby lands. The lack of a diversified economy helps to explain the marginality of this settlement in relation to the Atlantic settlements. As we have seen in the cases the Mi'kmaq, the Innu and the Wendat, the fur-trade was also essential to the construction of alliances which enabled French colonization in North America. As B. Trigger affirms, it is clear that traders played a major role in forging productive working relations between Europeans and the Native people.

Although the French were not the only Europeans engaged in trade, they had a position of strength in the development of this activity. This strength, according to Delage, is explained by their excellent geographical position with access to the best furs, by their association with the most

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91 RCAP, Report vol. 1, supra note 1 at 111. Georges E. Sioui affirms that after the dispersal of the Wendat, a group of them settled on Île d'Orléans, near Quebec, in order to protect themselves from Iroquois raids. There, they developed a successful commercial business trading for furs the corn they had harvested. In 1651 the Jesuits acquired for the Wendat and other "Christians Indians" in Quebec a domain at Sillery (see Sioui, supra note 25 at 87-94).

92 Miller, Skyscrapers, supra note 66 at 27-28.

93 Delage, supra note 25 at 278; Wade, supra note 66 at 24; Miller, Skyscrapers, supra note 66 at 44.

94 Trigger affirms that, although it is true that New France did not invest in traders, not even when New France became more populous the fur trade became less vital for maintaining a system of alliances with Aboriginal peoples on which the French relied to ensure its military position in North America. Bruce Trigger, Natives and Newcomers, Canada's Heroic Age Reconsidered (Kingston: McGill-Queen's University Press, 1985) at 341-342 [hereinafter Trigger, Natives]
powerful Aboriginal confederations in the North East, and by their monopoly of trade with the Amerindian partners.\footnote{Delage, supra note 25 at 96.}

Fur trade was an activity that inevitably impacted Aboriginal peoples lives. Unequal patterns of exchange are said to have been imposed by the French from at least 1608 to 1663. As a consequence of this situation, these peoples became more dependent on European products. Their subordination to European economic powers also resulted in intertribal wars, as well as the destruction of their relationship with nature.\footnote{Ibid. 102-154. According to J. Wilson, the fur trade imposed by the French was a model of mercantile exploitation: The Europeans and their descendants exchanged a range of finished products for raw materials that were worth many times what he gave for them, and the natives had no choice but to barter on his terms. Wilson, supra note 63 at 9.}

Nevertheless, as it has been acknowledged by J. R. Miller, this activity allowed, at least for some time, the continuation of Indian ways and economy.\footnote{Miller, Skyscrapers, supra note 66 at 40.} It also allowed Aboriginal peoples to maintain the control and use of their traditional lands. This situation did not exist for Aboriginal peoples who lived in the territories that were settled by the English, which on many occasions were removed from their lands in order to create space for farming.\footnote{J. R. Miller ed., Sweet, supra note 70 at x.}

\subsection*{2.4.2. Missions.}

Evangelization and trade seems to have been equally important in New France. In the early seventeenth century, the Recollets, a branch of the Franciscan order, initiated the Christianization of Mi'kmaq in Acadia and of Iroquoians and Algonquians along the St. Lawrence and in the interior. In 1620 the Recollets were replaced by the Jesuits. While both were Catholic orders - New France was closed to Protestants - the Recollets believed in assimilation of Aboriginal people as a means of Christianizing them. The Jesuits, meanwhile believed that Christianization could be achieved without assimilation, and that some Aboriginal beliefs could be incorporated into Christianity. Moreover, Jesuit experience in New France persuaded them that contact with Europeans often debased the Natives they wanted to convert.\footnote{Miller, Skyscrapers, supra note 66 at 33-34.}
In order to convert the Natives into Christianity, the Jesuits had several intermediate goals. They hoped to gain the active support of political leaders in each Aboriginal group and to supplant the shamans as their religious leaders. For the same purpose the Jesuits recreated the major institutions of Catholicism, among them chapels, churches, and sacraments, ceremonies and services. Another mechanism used by the Jesuits in their efforts to convert Aboriginal people was the establishment of the reserves or "reductions." At the beginning of the seventeenth century in New France and Acadia, lands were set aside in order to allow the Jesuits to concentrate Aboriginal people and to instruct them in the Christian religion.

The first of the Jesuit reductions was Sillery, located three miles upstream from Quebec. This reduction, created in 1637, had Innu and Algonquian people as its first residents. These people lived in temporary bark wigwams or French houses. Contrary to Jesuits expectations, it was seldom inhabited year round. Smallpox, Iroquois raids, fires, and lack of agricultural experience in the Aboriginal people living there were the reasons for the failure, in a few decades, of this project.

In the following decades of that century, several other reductions were created by the Jesuits along the St. Lawrence or on nearby tributaries. Agricultural work in the cornfields, performed dominantly by women, remained as important as it had been in Sillery. Governments, backed by resident priests and often by soldiers, were rigorous, but not authoritarian. Languages spoken in the reductions were Native; housing was largely traditional; and dress was freely chosen from both cultures. Reduction economy allowed periodic male absences for war, trade and hunting. According to Axtell, through these reductions, the Jesuits' goal was to Christianize the "pagans" without "frenchifying" them.

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101 RCAP, *Report vol. 2*, supra note 48 at 472. According to D. Delage, these "reductions" as they were called, were modelled on earlier Jesuit missions implemented by them in South America, and particularly in Paraguay. They were aimed at protecting the converts from the perverting influence that could be exercised by French over Aboriginal people (Delage, *supra* note 25 at 291).

102 Axtell, *supra* note 100 at 61.

103 Ibid. at 62.
These reductions, some of which continue to exist as reserves, were not created in recognition of Aboriginal sovereignty or lands, but rather as a means of Christianizing Aboriginal people. It is also important to underline the close relationship that existed between trade and missionary activity implemented by the French in North America. Several authors have agreed that without trade, Christianization of the Aboriginal people would have been impossible.

2.5. Concepts behind French treatment of Aboriginal peoples.

There are different accounts of how the French regarded the Aboriginal population they found in North America as savage or uncivilized, people without law or religion. According to J. R. Miller, this initial perception would be reversed in some aspects after the French developed a closer relationship with the Natives, incorporating numerous aspects of Aboriginal cultures, such as corn, tabasco, canoes, snowshoes, etc. in their adaptation to the new world.

Whatever their initial perceptions were, the French relied on these peoples to develop their plans in the new world. Unlike English settlements in North America, where the early relationship with Native population was dominantly characterized by confrontation, French policies allowed for the development of alliances with Aboriginal peoples. The importance that these alliances had for the French in the fur trade has already been underlined. Good relations with Aboriginal peoples

\[\text{\footnotesize 104 Information of the current situation of some of these reserves can be found in Larry Villeneuve, The Historical Background of Indian Reserves and Settlements in the Province of Quebec, Revised ed. (Ottawa: Canada, Dept. of Indian and Northern Affairs, 1984) at 5-9.}\]

\[\text{\footnotesize 105 As J. R. Miller affirms, the Jesuits knew that they were dependent on the fur trade for their missionary activity. Without this trade, and without commercial voyages, the means for them to minister inland nations would not have existed (Miller, Skyscrapers, supra note 66 at 39). B. Trigger goes further in his analysis, affirming that the Jesuits not only recognized that the trading alliances, in this case between the Wendat and the French, were an essential basis for their work, but also exploited their increasing economic dependence in order to convert them. Due to this situation, although the Jesuits at some stages attempted to control fur traders, they cooperated with them (Trigger, Natives, supra note 94 at 341-342.).}\]

\[\text{\footnotesize 106 Axtell, supra note 100 at 12. This was not a perception that only Frenchmen had when coming to the new world, but rather an idea that was dominant among European people at that time. According to Francis Jennings, these ideas which were behind all the emerging nation-states of Europe, had its origin in the crusading mentality of Christianity. As this author expresses, "[t]he invaders of strange continents assumed an innate superiority over all these peoples because of divine endowment." (See Francis Jennings, The Invasion of America. Indians, Colonialism, and the Cant of Conquest (New York: W.W. Norton & Company, 1975 ) at 5 [hereinafter Jennings, Invasion]. France could not have been an exception to this rule.}\]

\[\text{\footnotesize 107 Miller, Skyscrapers, supra note 66 at 44.}\]
were also necessary to fulfil the Christianization plans that had brought the French to this continent. Reductions administrated by missionary orders, in particular by the Jesuits, were established for this purpose, becoming the main instrument of the French colonial policy towards Aboriginal peoples.

Aboriginal peoples’ assimilation into French society was another objective of the French colonial policy. As O. P. Dickason affirms, throughout the history of New France, the French policy towards the Amerindian was consistent: "treat them with every consideration, avoid violence (this was not always successful), and transform them into Frenchmen." A number of diplomatic techniques, such as presents, rewards, and invitations to join expeditions were used in New France for this purpose. Important efforts were also undertaken in order to win the hearts and minds of the Natives, including women and children.

Notwithstanding the criticism that has been made of early French attitudes towards Aboriginal peoples, the French proved to be more open to them than other colonizers. Aboriginal peoples were capable of becoming equals to the French as long as they were Christianized and assimilated to French society. French intermarriage with Aboriginal people in New France, and later in other parts of Canada, is also cited as an example of French openness to Aboriginal peoples in North America.

French policies seem to have been more ambiguous when it came to deciding the legal and political treatment of the Natives as peoples, and whether they should be treated as allies or as subjects of the French monarch. At the international level, especially when dealing with colonial rivals, the French consistently disclaimed responsibility for the behaviour of their Aboriginal allies on the grounds that they were sovereign. When the French dealt with them in their own settlements, officials were not always so clear of the course to take. Although French law was applied to Natives many times, there were several aspects, such as those relating to conscription in the militia,

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108 Dickason, *Founding Peoples*, supra nota 5 at 137.


110 Douglas Sanders, Professor of Aboriginal Law at the University of British Columbia, in personal communication to the author, Vancouver, February 1999.

111 The extent of this intermarriage is underlined by O.P. Dickason, in, *Founding Peoples*, supra note 5 at 143-147.

112 *Ibid.* at 139.
lands set aside for Native villages, or trade with the English, in which French laws were not enforced.  

Cornelius J. Jaenen attempts to explain this apparent contradiction. He states that while the French claimed sovereignty in terms of international law, they regarded Native nations as independent in the sense of retaining their own forms of social and political organization, customs and practices. According to the same author, there seems to have been no conceptual problem for the French in this regard. French distinguished between two notions of nationhood; the first understood in the international family of nations, where states were organized under sovereign governments possessing coercive powers to maintain order in their communities; and the second, where nationhood was understood locally, according to which collectivities organized as bands and tribes could conclude agreements, enter into alliances, and wage wars.  

Consistent with this conception, the French, as we will see later in this Chapter, entered into treaties and formed alliances with Indigenous peoples they met in Canada. This is not to say, as O. P. Dickason affirms, that the French did not apply their laws as much as they could, and that the process of making them into subjects was not under way from the moment the colony was established.

**French concept of lands rights.**

Another important aspect in which the relationship between the French and Aboriginal peoples was manifested was land rights. The dominant literature has traditionally asserted that the French had no concern for Aboriginal land rights in their North American exploration.  

According to Richard H. Bartlett, the development of the colony of New France afforded little regard for Aboriginal traditional land and no treaties were entered into that provided for the

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113 Ibid. at 140.


115 Dickason, Founding Peoples, supra note 5 at 140-141.

116 A description of that literature is contained in Jaenen, supra note 114 at 21-22. It is interesting to note that this perspective is dominant among Anglo-Canadian authors.
acquisition of the land. A similar perspective is shared by Dickason, who believes that France, in its first attempts to colonize the St. Lawrence, proceeded on the basis that this region was *terra nullius* or uninhabited land. Dickason also affirms that France never doubted her right to unilaterally pre-empt lands not already under Christian control, nor did it entertain the idea of Aboriginal rights. No great debates occurred in France at this time with regard to this issue. For the French, Native alliances were useful tools for the "peaceful occupation of lands" that had already been claimed by them through royal charters. Such alliances were also indispensable for the fur trade and in the colonial wars.

A different approach is that taken by Cornelius J. Jaenen when affirming that, although the "French claim to New France was based on concepts of Christian appropriation, settlement of vacant lands, and effective cultivation and 'policing'," different forms of Aboriginal land rights were recognized by them in North America. These rights included possessory and territorial rights as evidenced by the need to acquire property for emplacements for forts, missions, agriculturists etc., and usufructuary rights, specifically "unhampered" hunting and fishing rights.

Concurring with Jaenen, Brian Slattery underlines the pragmatic nature of the French conception of land rights in New France. Slattery affirms that recognizing Native possessory rights was the keystone of French sovereignty. According to this author, France's primary concern was to extend its dominion in North America by incorporating Native nations under its rule rather than by acquiring lands for European settlement or attempting to extinguish Aboriginal title. The same author asserts that through alliances and trading arrangements, the French hoped to "attach the Indian nations to the French Crown as subjects and vassals, and thereby obtain dominion over their territories." He concludes by stating that "the Crown's rights to the soil were to be held, not to the exclusion of the indigenous people, but through them."

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118 Dickason, *Founding Peoples*, supra note 5 at 150.


120 These rights, aside from self-rule, were recognized by the French to the natives only in what the author calls Amerindian lands, and not in the "Laurentian" colony of European settlement. Jaenen, *supra* note 114 at 37.

121 Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories" (Diss. Oxford University, 1979), in Jaenen, *supra* note 114 at 34 [hereinafter Slattery, "Land Rights"]
According to these and other authors' perspectives, it seems that the French in North America did not act according to a set of principles regarding Aboriginal land rights, but rather in accordance to their own interests. They recognized some possessory and usufructuary rights to Native people and entered into alliances with them as a means of expanding their dominions in North America, especially against their European rivals.

2.6. Early English presence in Canada.

Although John Cabot was among the first European visitors to Canada's Atlantic coast, English settlement in Canada would not materialize until one century after his trip. Early British settling efforts were centred to the south, in the colonies they established in Virginia, Massachusetts and Connecticut.\(^{122}\) Gradually, the English expanded their presence into two areas of what is today Canadian territory: Acadia in the Atlantic, and the northern territories, also known as Rupert's Lands. In both areas the British interacted with Aboriginal peoples, developing patterns of relations with them, some of which would continue to exist after confederation.

2.6.1 Acadia.

Among the first English incursions in the north Atlantic region the French named Acadia, were their raids aimed at capturing Aboriginal slaves. From the early seventeenth century these raids triggered the hostility of the Mi'kmaq people against the English. The Mi'kmaq fought initially for reasons of prestige and booty. They also fought to help their allies, the French, whose control of Acadia was threatened by the English. Mi'kmaq-English conflict persisted throughout much of the seventeenth and eighteenth centuries.\(^{123}\)

\(^{122}\) The wars in which this early English settlers (Puritans) engaged in the seventeenth century against the Aboriginal peoples they met in North America, including among others the Pequots, the Wampanoags, Massachusetts and Narragansetts, dispossessing them from their territories, are described in Jennings, Invasion, supra note 106 at 178-185.

\(^{123}\) O.P. Dickason, Founding peoples, supra note 5 at 85; The importance that English-French struggle for the control of Acadia had in the emergence of conflicts with the Mi'kmaq has been highlighted by L.F.S. Upton, Mi'kmacs and Colonists. Indian White Relations in the Maritimes, 1713-1867 (Vancouver, UBC Press, 1979) at 25 [hereinafter Upton, Mi'kmacs]
After the defeat of the French in 1710, the British settled in Acadia more permanently. Consistent with the dominant European view of conquest, which understood it as a concept dealing with territorial rights, Britain saw the Treaty of Utretch signed with France in 1713 as giving her clear sovereign title to Acadia. According to this perspective, since Acadia had been a French possession, France must have extinguished Aboriginal title and Britain did not have to repeat the process. The British were firm in their belief that whatever title the Mi'kmaq (or any other Acadian Aboriginals) might have had, it had been lost in the process of French colonization. They also believed that their defeat of the French absolved from the necessity of compensating the Aboriginal peoples in Acadia for their lands.124

This belief was not shared by the Mi'kmaq and their neighbours, who had welcomed the French and accepted their king and missionaries, but whose chiefs constantly reminded them that they had only granted the newcomers usage and usufruct of their land, which still belonged to them. The Mi'kmaq did not consider that their alliances with the French automatically implied their subjugation to the British.125

When the British took control of Mi'kmaq territory and proclaimed George I as king of Acadia, they asked the Mi'kmaq to be loyal to them, as well as to share their lands peacefully with the settlers they hoped would come. In return, they promised more generous annual gifts than those the French had given them, better truck houses (trading posts under government auspices), and freedom of religion. The Mi'kmaq, who were dominantly Catholic, were pleased to have religious freedom, but did not see why they had to accept the truck houses on their lands, or to be loyal to the British king (they had never declared their allegiance to the King of France). They wanted to continue living in their territories without fear of English encroachment.126 These requirements explain Mi'kmaq resistance to the British presence in Acadia until the fall of New France. Wars among Mi'kmaqs and English continued through the eighteenth century. In their last phase, between 1713 and 1760, there are records of Mi'kmaq having captured more than 100 English vessels. This activity peaked in 1722, the year when the so called “English-Indian War” broke out.

124 Dickason, *Founding Peoples*, supra note 5 at 85-86.


Revivals of lesser proportions took place after the establishment of Halifax in 1749 and the expulsion of Acadians in 1755.\footnote{127}{Ibid. at 84-85. An in-depth description of the wars engaged among Miꞌkmaq and English is contained in Upton, Micmacs, supra note 123 at 31-47}

In order to ensure peace with the Miꞌkmaq the English adopted the French practices of diplomacy. Annuities (in the form of regular gift distribution to be given by the English to Aboriginal people in Canada) first appeared in the Halifax Treaty of 1752, which was signed with the Shubenacadie band of Miꞌkmaq. The same treaty acknowledged the Miꞌkmaq freedom to hunt and fish as usual, as well as to develop trade to the best advantage. During the negotiations, Miꞌkmaq held that their people should be paid for the land in which the English had settled.\footnote{128}{Dickason, Founding Peoples, supra note 5 at 135.}

Notwithstanding the over exploitation of their resources as a consequence of fishing and fur trade, the Miꞌkmaq and other peoples in Acadia maintained their traditional lifestyle until the end of the colonial wars. Nevertheless, their population dropped to 3,000.\footnote{129}{Ibid., at 88.} This was not the case of their neighbours, the Beothuck of Newfoundland, who as a result of epidemics brought by the Europeans and of conflicts with those who settled in their territories, became extinguished at the beginning of the nineteenth century.\footnote{130}{According to L. F. Upton, the relationship between Beothucks and the Europeans who first visited and later settled in the Newfoundland was marked since the beginning (1500 approximately) not only by trade, but also by kidnapping, sporadic pillage and mutual retaliation. As a consequence of this situation, and of the impact of European epidemics, Beothuck population diminished quickly. Beothucks later moved (1612 approximately) to the interior lands seeking to protect themselves from the settlers who had established along the coast. There is evidence that confrontation between Beothucks and settlers, usually resulting in the killing of the first, continued to take place. Finally, beginning the middle of the eighteenth century, settlers moved to the interior where Beothucks had withdrawn. Confrontation, competition for resources and new epidemics provoked the final extermination of this people despite attempts by British officials to stop the process. See L.F.S. Upton, "The extermination of the Beothucks of Newfoundland" in Dickason ed., Native Imprint, supra note 9 at 309-330 [hereinafter Upton, "Beothucks"].}

2.6.2. Rupert's Lands.

The English also established their presence in the northern part of Canada. They first penetrated into northern Aboriginal territory in the early seventeenth century when Henry Hudson
(1610) and William Baffin (1615) explored the area of what is now Hudson Bay.\footnote{131} In 1670, Charles II of England chartered the Hudson's Bay Company (HBC), giving the company a monopoly in trade, and title to lands lying within the territory drained by waters flowing into Hudson Bay.\footnote{132} The HBC played a central role in English-Aboriginal relations in Canada from its constitution until the twentieth century. This company opened through its trading activities a vast area - which in the nineteenth century extended to British Columbia and the Yukon - inhabited by distinct Aboriginal peoples which had little or no contact with Europeans.

Aboriginal peoples requested the traders specific goods, in particular firearms and metal tools, textiles, etc., in exchange for beaver pelts. Exchange patterns imposed by the HBC were unequal. Records reveal that Aboriginal people repeatedly requested better prices for their goods, but this Company was unwilling to sacrifice the profits it made.\footnote{133} However, the HBC, in order to facilitate relations with Aboriginal peoples, incorporated their customs in its trading activities. Barter trade was preceded by an elaborate gift-giving ceremony of Native origin, which served to renew bonds of friendship between the Company and its Aboriginal partners.\footnote{134}

Since the late seventeenth century (1686), French competition for trade in the area led to a long struggle between the two powers aimed at controlling Hudson Bay. In this struggle, many posts would be destroyed, affecting Aboriginal peoples’ ability to meet their trade requirements.\footnote{135} In the 1760's, the North West Company (NWC) took over and expanded the network created by the French. The NWC introduced a new era of competition, which would only last until 1821, when the HBC recuperated its monopoly. The competition it created had profound impacts on Native-European relations, eliminating Aboriginal people as middlemen in a large area. It also had a very


\footnote{132} This vast region, named Rupert's Land, included the Hudson Bay lowlands, a large section of the Canadian Shield uplands, and portions of the Northern Great Plains. A. J. Ray, "The Hudson Bay Company and Native People," in Washburn ed., supra note 66 at 335.

\footnote{133} \textit{Ibid.} at 340.

\footnote{134} Ray, supra note 132 at 341.

\footnote{135} Dickason, Founding Peoples, supra note 5 at 136.
negative effect on the fur and game resources in the boreal and mixed forests due to over exploitation.\textsuperscript{136}

\section*{2.7. The Iroquois and the defeat of New France by the English.}

In their attempts to expand their control over the fur markets, both England and France made efforts to obtain the friendship of the Iroquois or Five Nations. The Iroquois were in a strong position, acting as middlemen for the western tribes of the Great Lakes region. The Iroquois sold their fur in Albany, where the English offered higher prices and a wider variety of trading goods. They also controlled a territory that was crucial for French expansion. The French, trying to stop the flow of fur to Albany, launched attacks to Iroquois villages. The Iroquois retaliated, entering into a war that would last the entire seventeenth century.\textsuperscript{137}

Iroquois attacks were devastating for the French, who for a time considered abandoning New France. By 1701, when all parts were tired of war, the Iroquois made peace with the French and the English, signing treaties in Montreal and Albany, which became known as the "covenant chain." Through these agreements, the Iroquois attempted to preserve their sovereignty and to remain neutral in the wars held between France and England.\textsuperscript{138}

By the mid eighteenth century, the English continued advancing into Iroquois territory. Mohawk complaints of the presence of English settlers in their territory led to the Conference of Albany in 1754, that called for an investigation of fraudulent purchases and grants. It also determined that future purchases of lands would have to be made "from the Indians in a body in their public Councils." This protectionist policy, which attempted to neutralize French influence among the Iroquois,\textsuperscript{139} would culminate years later in the Royal Proclamation.\textsuperscript{140} After years of war between England and France and its Aboriginal allies, New France finally fell into English

\footnotesize
\textsuperscript{136} Ray, \textit{supra} note 132 at 342-343.

\textsuperscript{137} Berger, \textit{Shadow, supra} note 31 at 58.

\textsuperscript{138} \textit{Ibid.} at 59-60. Although in the Treaty of Utrecht in 1713 France recognized British suzerainty over the Iroquois, in practice they did not obey any power, continuing to pursue their own interest, as they had always done (Miller, \textit{Skyscrapers, supra} note 66 at 65).

\textsuperscript{139} Wilbur R. Jacobs, "British Indian Policies to 1783," in Washburn \textit{ed.}, \textit{supra} note 66 at 9.

\textsuperscript{140} Berger, \textit{Shadow, supra} note 31 at 60.
hands in 1759. According to the Treaty of Paris, France ceded her title and claims to all territories in the northern part of North America, except for a portion of the Newfoundland shores. 141

According to Dickason, historians tend to agree that the French failure to form a stable alliance with the Iroquois was a major factor in their defeat of New France at the hands of the English in the 1760's. By trying to eliminate the Iroquois, the French forced them into the hands of the English. 142 The same author affirms that the defeat of France in North America was a disaster for many Aboriginal peoples, from the East coast to the Great Lakes and even westward. It not only deprived them of their bargaining position between two rivals, but it also cut their "presents." Aside from this situation, although Article 40 of the capitulation of the French at Montreal in 1760 guaranteed protection for the lands they inhabited, this quickly proved to be difficult to enforce due to the lack of will of colonial governments to evict squatting settlers. 143

2.8. English principles in the relationship with Aboriginal peoples in North America.

Like most European colonizers, the British did not consider the Aboriginal people in North America as their equals, but as inferiors. Since the first English settlements in this continent, the English dominantly saw the "Indians" as living in a state of savagery or barbarism. 144

According to missionaries who were among the first to settle in their American English colonies, it was necessary to civilize the so called "savages" before they could be converted to Christianity, and that in order to make them Christians, they must first be made "Men." 145 W. R. Jacobs, who analyzes British Indian policies to 1813, affirms coincidentally that the "American Indian" was regarded as a non-person. Consistent with this perception, in the sixteenth century, the English had no particular concern for "Indian" rights. Jacobs contends that the Indians "were part of

141 Miller, Skyscrapers, supra note 66 at 71.
142 Dickason, Founding Peoples, supra note 5 at 131.
143 Ibid. at 153.
145 Axtell, supra note 100 at 133.
the new land and could be courted as allies, beaten off as enemies, or tolerated as people whose land would be partly occupied by the English."  

The doctrine of discovery was adopted by England in this context to justify its occupation of the new lands. England made arguments for her claim to North America based on John Cabot's discovery of Newfoundland and the New England coast. Aboriginal people, Jacobs affirms, were relegated by imperial policy to the status of "subjects." An example of this policy can be found in the decision of Elizabeth I to give Sir Walter Raleigh freedom to "discover, search, find out, and view such remote, heathen and barbarous lands, countries and territories, not actually possessed by any Christian People" and liberty to "have hold, occupy, and enjoy" what he found. According to this doctrine, English kings made huge grants of lands in the new world to their favourite subjects and claimed territory from sea to sea, from the Atlantic coast to what was thought to be the "Island" of California. This notwithstanding its previous occupation by Aboriginal peoples.

One important difference existing between the English exploration in the Americas is underlined by Dickason. Unlike others who came as conquerors or traders, the English came as farmers, seeking to establish agriculturally based colonies in regions where Aboriginal peoples had long since made similar establishments. According to the author, this practice led the English to enter into a rivalry with these peoples focusing primarily on the control of land. It was precisely this rivalry that forced the English to change their initial policy of "discovery" and to negotiate with the different peoples they encountered. Negotiations in which the English engaged were also aimed at creating trading or political alliances with Aboriginal peoples. These alliances would allow them to expand their control over those territories which were claimed by other European nations, in particular by France.

146 Jacobs, supra note 139 at 6.

147 The assertion of discovery made by the English over the territories they early visited in North America is made by Henry VII on letter addressed to John Cabot and his sons in 1496. (See L. C. Green, "Claims to Territory in Colonial America," in L.C.Green and O. P. Dickason, The Law of Nations and the New World (Edmonton: University of Alberta Press, 1989) at 19). According to D. Sanders, discovery was cited by the English as a colonial right to territories they claimed in North America against other colonial powers. Sanders, supra note 110.


149 Jacobs, supra note 139 at 6.

150 Dickason, "Europeans", supra note 119 at 180.
As the Report of the RCAP affirms, in the early stages of the British settlement, the collision of British interests - based on agricultural development - with those of Aboriginal peoples resulted in warfare. It also led to the forcible dispossession of Aboriginal peoples from their lands in Virginia and New England. Due to this situation, many Aboriginal nations formed alliances with the French or retreated before the advance of the British colonists. Over time, in order to avoid further hostilities, a policy was developed by the English whereby lands required for settlement would ordinarily be secured from their Aboriginal owners by formal agreement. Thus, treaties specifically involving land cessions by Aboriginal nations became a common feature of the British-Aboriginal relationship.151

Nevertheless, this change in policy seems to have been more the result of a pragmatic approach of the English in their relationship with Aboriginal peoples than an ideological reflection. As Jacobs affirms, for the British, "[n]ative people were thus valuable as friendly neighbours, as fur trading allies, and as landholders." This practical policy can be seen in examining hundreds of conferences, treaties, gift exchange, promises, and wampum belt treaties.152

According to the RCAP, when New France was ceded to the British Crown in 1763 in the Treaty of Paris, two principles oriented their relationship with Aboriginal peoples. Under the first principle, Aboriginal peoples were generally recognized as autonomous political units capable of having treaty relations with the Crown. This policy was reflected, for instance, in royal instructions given to the governor of Nova Scotia by the Crown in 1719, which recognized the autonomous status of Indian peoples and envisaged the establishment of treaty relations with them.153 The second principle which emerged from English practice was the acknowledgement that Aboriginal nations were entitled to the territories in their possession unless, or until they ceded them away. This principle, that had to be restated periodically due to opposition by colonists, was articulated as early as 1664, when royal commissioners were appointed to visit the New England colonies to hear Aboriginal complaints. This commission censured Massachusetts law for providing that Indian people had "just right to any lands they possessed," as long as they improved these lands. The commissioners rejected this provision that implied that only lands being cultivated in the European

151 RCAP, Report vol. 1, supra note 1 at 113-114.
152 Jacobs, supra note 139 at 5.
153 RCAP, Report vol. 1, supra note 1 at 114.
fashion, but not their hunting and fishing grounds, would have been recognized to Aboriginal peoples. Instead, they acknowledged Indian title to lands, improved or unimproved, stating that the land was theirs until they gave it away or sold it.\textsuperscript{154}

\section*{2.9. Legal and political expressions of early European-Aboriginal relations.}

Probably the two most important manifestations of the early European relationship with Aboriginal peoples are the treaties signed between both parties, as well as the British Royal Proclamation of 1763.

\subsection*{2.9.1. Treaties.}

The French alliances with Aboriginal peoples - which were aimed at developing partnership in the fur trade or at providing mutual support in their armed conflicts - were concluded and renewed through formal protocols involving oral pledges and symbolic acts, and were sometimes recorded on wampum, but usually not written. Nevertheless, like written treaties, they created obligations for the parties, which were accepted or ratified through protocols such as gift giving.\textsuperscript{155} The first written treaties in which the French participated were those entered with the Haudenosaunee in 1624, 1645 and 1653 with the interest of renewing peace between nations at war. The last of these treaties was the Great Peace of Montreal of 1701 signed by the French and its Aboriginal allies and Haudenosaunee. This treaty established the neutrality of this confederacy in the conflict between England and France.\textsuperscript{156}

The English entered into treaties with Aboriginal peoples in the early seventeenth century in Virginia, Massachusetts Bay and Pennsylvania. The first treaties between the English and Aboriginal peoples in Canada were those of peace and friendship negotiated by representatives of the colony of Massachusetts with the southern members of the Wabanaki Confederacy, an alliance that stretched from Maine to the Maritimes and included members such as the Penobscot,

\textsuperscript{154} Ibid. at 115.

\textsuperscript{155} Ibid. at 123.

\textsuperscript{156} Ibid.
Passamaquoddy and Wuastukwiuk (Maliseet) nations. Representatives of the Mi'kmaq, who were allies of the confederacy, ratified these treaties between 1726 and 1728. Treaty relations between the British Crown and the Mi'kmaq continued into the middle decades of the eighteenth century, reaffirming matters addressed in old treaties and including new issues not dealt with before. After the British established in Halifax in 1749, they signed an important treaty in 1752. This treaty, which was aimed at stopping Mi'kmaq attacks to British settlements, included provisions concerning liberty of trade, and the establishment by the British of a truck house for that purpose. The parties also agreed to come back annually to discuss matters of mutual concern and to enter into new agreements.

The European view of treaties was different than that of Aboriginal peoples. According to Dickason, the English entered into European-style written treaties with Aboriginal peoples, assuming the presence of hierarchy and centralized authority among Aboriginal societies, what in most cases did not correspond to reality. Although for Aboriginal peoples these treaties were a manifestation of their sovereignty, it is not clear what legal status the English accorded to them.

**Aboriginal interpretation of treaties.**

Aboriginal understanding of the spirit and intent of early treaties can be discerned from the Haudenosaunee confederacy’s interpretation of the Two Row Wampum which their ancestors developed in their relationship with Europeans. According to this confederacy:

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157 Constant Mi'kmaq attacks to British settlements in the area were impeding the British to implement its plans. Moreover, Halifax was constantly in a state of fear. See Upton, *Micmacs*, supra note 123 at 54.

158 RCAP, *Report vol 1*, supra note 1 at 124-125. According to the same Report, the provision concerning annual meetings to debate matters concerning both parties has been revitalized by the Mi'kmaq in contemporary times. For this purpose they invite representatives of the Crown and governments to join them for the Treaty Day celebrations on the first day of October this year.

159 Dickason, *Founding Peoples*, supra note 5 at 151.

160 *Ibid.* Douglas Sanders affirms that, although these agreements were equivalent to other international treaties of the period, they could not have had the implications of such treaties. According to the same analyst, it should be considered that it was only at the end of the nineteenth century that international law notions had become formalized under positivism, recognizing only a limited number of states as subjects of international law. Sanders, *supra* note 110.

161 According to Iroquois oral tradition, a belt consisting of two rows of coloured wampum, which symbolized peace and friendship, recorded a treaty signed by the Mohawk and the Dutch in 1613, as well as subsequent agreements with the French and the British (See RCAP, *Report vol. 1*, supra note 1 at 123.)
When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestor and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize the two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel. The principles of the Two Row Wampum became the basis for all treaties and agreements that were made with the Europeans and later the Americans...

An interesting Aboriginal analysis of the early treaties in which the English were involved in Atlantic Canada is provided by James [sakej] Youngblood Henderson. For this author, these treaties, which he calls "Georgian treaties," were made according to Aboriginal protocols rather than European protocols. According to Henderson these treaties were conceived by Aboriginal peoples as living agreements rather than as documents. The sovereign status of Aboriginal peoples was recognized in them. In the same treaties, Henderson adds, First Nations did not validate or accept an inferior position under the imperial Crown or under colonial governments. The treaty process illustrates the intention to create a mutual partnership and genuine dialogue about shared development. Moreover, this author adds, Aboriginal worldviews and customary legal orders were protected under the treaty order, transforming inherent rights of an Aboriginal order into vested rights in the Constitutional law of Canada. Finally he believes that "[t]he treaties united the First Nations as freely associated states of the United Kingdom, not as part of any colony, province or dominion. Consequently, treaty federalism united independent First Nations under one Crown, but not under one law."

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163  James [sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 (2) *Saskatchewan L. Rev.* 241 at 248 [hereinafter Henderson, "Empowering"]. The author is an Aboriginal scholar affiliated to the Native Law Centre at the University of Saskatchewan.

164  Ibid. at 248-249.

165  Ibid. at 351.
The centrality of treaties in the nation to nation relationship of early years is described by Ovide Mercredi and Mary Ellen Turpel, who understand them as a "connecting thread" through the history of the relations between their peoples and the newcomers. According to them, in contrast with the Aboriginal-newcomer experiences which are characteristic of other parts of the world, First Nations in Canada were not "conquered" in a military sense. Consistent with the dominant view that Aboriginal peoples have of the early contact period, the relationship among both parties was remarkably peaceful, and treaties were important in achieving this type of relationship. When referring to the nature of the early treaties of peace and alliance, Mercredi and Turpel affirm that these treaties represent relationships between distinct peoples or nations reached after discussion and negotiation. Indeed, the treaty negotiation and ratification ceremonies reflected First Nations culture and tradition more than European approaches. These authors conclude that First Nations treaties can be compared to the treaties between sovereign nations that are entered into today.

2.9.2. Royal Proclamation of 1763.

Probably the most important document with regard to Aboriginal-European relationship at this stage was the British Royal Proclamation of 1763, which was released shortly after the fall of New France to the British. At this time, Great Britain was confronted with the problem of winning the friendship and trust of France's former Aboriginal allies. At the same time, it had to deal with the dissatisfaction of their own Aboriginal allies over incursions by American colonists in their lands. The principles supporting the Proclamation, which was a complex legal document, are summarized in its preamble as it follows:

And whereas it is just and reasonable, and essential to Our Interest and Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominion and Territories as, not having been

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166 Mercredi and Turpel, supra note 50 at 61.
167 Ibid. at 59.
168 RCAP, Report vol. 1, supra note 1 at 115.
According to the RCAP, the Proclamation articulated the basic principles governing the Crown’s relations with “Indian” nations. It also laid down the constitutions and boundaries of several new settler colonies, one being the colony of Quebec. Moreover, it portrays Aboriginal nations as autonomous political units living under the Crown’s protection and on lands that are already part of the Crown’s dominions. Aboriginal nations, according to the RCAP’s interpretation, hold inherent authority over their internal affairs, as well as the power to deal with the Crown by way of treaty and agreement.

Concurring with this perspective J. R. Miller affirms that the Proclamation provisions regarding land had as its immediate purpose to stop schemes that had previously been developed in the Thirteen colonies. According to these schemes, white lands developers purported to purchase lands from dependent and/or unrepresentative Indians, and then called on the colonial legislatures to make good their claim and protect the agricultural settlers who wanted to take the acquired lands.

From the perspective of Aboriginal peoples, this document is viewed as an early recognition of their title and rights to land as well as its sovereignty as peoples. An example of this perspective can be found again in Ovide Mercredi and Mary Ellen Turpel:

The Proclamation recognized that the First Nations were the rightful occupants of the territory now called Canada and instructed colonial officers to respect the rights of our peoples to govern ourselves without interference from the newcomers. This respect was not charity; it was required because we were recognized as distinct people living here before European settlement.

The Federation of Saskatchewan Indians shares this perspective:


170 Ibid. at 116-117.

171 This notwithstanding the more pragmatic goals of this document, that according to the same author attempted to prevent a full-scale “Indian” war in the interior Miller, *Skyscrapers*, supra note 66 at 73-74.

172 Mercredi and Turpel, *supra* note 50 at 30-31
This document is declaratory and confirmatory of aboriginal rights, as it recognizes capital indian title to land as having its source in Indian ownership from time immemorial. The Royal Proclamation establishes a procedure—the treaty making process—for all future land and political negotiations and transactions between the Crown and Indian people but does not interfere in the internal affairs of Indian Nations. In it, King George III states that the several Nations or Tribes of Indians live under his protection, and that they should not be molested or disturbed in the possession of their lands.\footnote{173}

The contradictions of this document are highlighted by Aboriginal legal scholar John Borrows. According to his perspective, although the Proclamation implies that no lands would be taken from First Nation peoples by the Crown without their consent, this document is an attempt by the British to exercise control over Aboriginal people. One example of this contradiction is the fact that the British inserted in this document statements that claimed "dominion" and "sovereignty" over the territories that First Nations occupied.\footnote{174} According to the same author, the Proclamation also reflects "the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights." These contradictions are explained by the different objectives that both parties had at this stage of their relationship. While Britain was attempting to secure territory and jurisdiction through the Proclamation, the First nations were concerned with preserving their lands and sovereignty.\footnote{175}

\section*{2.10. Conflicts and impacts of early contact period.}

According to the literature analyzed above, the Aboriginal relationship with the Europeans during this initial period of contact in Canada can be characterized as that of a nation to another nation. Aboriginal peoples were, to a large extent, able to maintain control of their own lives during

\footnote{173}Federation of Saskatchewan Indians, \textit{supra} note 51 at 9.


\footnote{175}Ibid. at 161 The same author affirms that for an understanding of this Proclamation, the treaty signed by First Nations with the British at Niagara in 1764 should be taken into consideration. At this gathering, which has been considered as the most representative of American Indians ever assembled, this document became a treaty because it was presented by the colonialists for affirmation, and was accepted by the First Nations.
this period. According to the same literature, and in particular to that containing Aboriginal perspective, this early contact period has been characterized as one of peace, cooperation and friendship between the Natives and newcomers. Although it is evident that cooperation among these peoples and newcomers in this period was important, and that both Aboriginals and newcomers learned and benefited from early contacts, these interpretations might not give an accurate idea of the nature of this stage, which was also characterized by conflict and warfare.\textsuperscript{176}

Aboriginal hostilities against the French in the St. Lawrence, the prolonged Mi'kmaq resistance against English settlement in Acadia, the confrontations between Beothucks and English settlers in what is now Newfoundland, are some examples of the conflicts between Natives and newcomers which took place during this period. Moreover, the conflicts which emerged among different Aboriginal peoples in their struggle to control trade with the French, should also be mentioned here.

Racial intolerance, mistreatment and disrespect from the Europeans towards the Aboriginal peoples which were manifested during this period are also important to mention. The imposition of Christian religion on peoples who already had their own spiritual beliefs, the settlement of Aboriginal peoples on reductions or reserves, the destruction of Aboriginal social and political organizations, and the involvement of the same peoples in wars which responded to the colonizers interests, should be underlined. As the RCAP recognizes, the relationship developed between the newcomers and Aboriginal peoples in this early stage was far from being perfect. It was often marked by profound cultural misunderstandings as well as by incidents of racism and outright hostilities.\textsuperscript{177}

A final mention should be made of the impacts that diseases brought by Europeans had on Aboriginal peoples. These diseases seemed to have been an important factor in the decimation of Aboriginal population in Canada. According to the RCAP report, as a consequence of diseases such as smallpox, tuberculosis, influenza, scarlet fever and measles brought by Europeans, as well

\textsuperscript{176} As Douglas Sanders affirms, this interpretation depicts Aboriginal societies as welcoming and supportive in contrast with the rapacity of the Europeans. They avoid the idea of pre-contact Aboriginal hostility and warfare, which we know existed. The author criticizes what he calls the myth of the peaceful relationship, an idea he believes has been constructed by Aboriginal people, and supported by non-Aboriginals, as a means to support the treaty relationship which emerged among both parties, a relationship which needed mutual respect, recognition and friendship to become possible. Sanders, supra note 110.

\textsuperscript{177} RCAP, Report vol. 1, supra note 1 at 130.
as of armed hostilities and starvation occurred during the first two or three hundred years of contact, Aboriginal population decreased from 500,000 at the moment of contact, to only 102,000 in 1871. These realities raise up some question as to whether this stage can be consistently characterized as being exclusively one of peaceful relations and cooperation among peoples and the European who settled in their territories.

3. DISPLACEMENT AND ASSIMILATION.

3.1. From cooperation to domination.

In the late 1700s and the early 1800s, several factors led to the introduction of changes in the relationship between Aboriginal peoples and Europeans in Canada. One of these factors was the rapid increase in the non-Aboriginal population, due to the influx of Loyalists after the American Revolution and immigration from the British Isles. Although parcels of land had been set aside for Aboriginal people, squatting on these lands inevitably occurred, especially in Upper Canada (Ontario) where reserves were fewer and where non-Aboriginal people outnumbered Native population by as much as 10 to 1.179

Another factor to be mentioned was the change of the colonial economic base. This change was a consequence of the decline of the fur trade in Eastern Canada, which ended the era of cooperative division of labour between Aboriginal and non-Aboriginal. It was also a consequence of the emergence of an agricultural and timber economy. Also to be considered is the normalization of relations between the United States and Great Britain after the War of 1812, which diminished the importance that Aboriginal peoples had previously had as military allies for the English.180

Adherence to the protectionist principles of the Royal Proclamation of 1763 seemed to have been maintained by British authorities in Canada for half a century after this document was

178 Ibid. at 13-14.
179 Ibid. at 137; Noel Dyck, What is the Indian "Problem" Tutelage and Resistance in Canadian Indian Administration (Saint John's, New Foundlan: Institute of Social and Economic Research, Memorial University of New Foundland, 1991) at 47.
180 RCAP, Report vol. 1, supra note 1 at 138.
During this period, the Indian Affairs Department of Upper Canada, which was created in 1755, recognized Aboriginal rights to lands and self-government. These principles led to a series of treaties signed by the colony with different peoples between 1815 and 1825, clearing the southern part of Upper Canada for settlement.

Over time, however, the relationship which existed between Europeans and Aboriginal peoples began to change. Several authors concur that after 1815 the British adopted a policy of "civilizing" Aboriginal peoples. As a consequence of different influences - including Protestant propaganda which stressed the need of Christianizing all men, humanitarians in Britain who advocated the need to protect and civilize the "Indian," and romantic writers on both sides of the Atlantic who protested against the policies that pushed the Indian further into the wilderness - the British began in the 1830's establishing Indian reserves in isolated areas, where Aboriginal peoples were encouraged to settle in villages. In these reserves, they were taught to farm, received religious instruction and education. As J. L Tobias affirms, according to these experiments, "[t]he reserve system, which was to be the keystone of Canada's Indian policy, was conceived as a social laboratory, where the Indians would be prepared for coping with the European."

3.2. Early protectionist legislation.

Consistent with the ideas referred to above, legislation oriented to the protection of lands reserved for Indians was enacted in colonial assemblies. Laws encouraging Aboriginal assimilation into the Euro-Canadian society were also enacted. In 1839, Upper Canada (Ontario) passed legislation declaring Indian lands, including the new reserves, as Crown lands upon which settlers

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181 This would explain the success of the British in maintaining Aboriginal peoples as their allies in their wars in North America according to J. L. Tobias (John. L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," in Miller ed., Sweet, supra note 70 at 128)


183 RCAP, Report vol. 1, supra note 1 at 142

184 Tobias, supra note 181 at 128; Dick, supra note 179 at 49ff; and Robert J. Surtees, "Canadian Indian Policies," in Washburn ed., supra note 66 at 88-89 [hereinafter Surtees, "Indian Policies"]

185 Tobias, supra note 181 at 129.
were forbidden to encroach. In 1850, further legislation dealing with the threat to Indian lands posed by settler encroachment would be enacted both in Upper and Lower (Quebec) Canada. According to this legislation it became an offence to deal directly with Indians for their lands; trespass on Indian lands was formally forbidden, and Indian lands were made exempt from taxation and seizure for debts, provisions that are still present in the Indian Act today.

As a consequence of Aboriginal peoples’ concerns of the existence of non-Aboriginal men who married Indian women on their reserves, the 1850 land protection acts defined the term Indian for purposes of residency on the protected reserve land base. Only a person of Indian blood or someone married to a person of Indian blood could be considered an Indian. Although aimed at protecting the reserve land base from the encroachment by non-Indians, for the first time in Canadian history legislation would define who was an Indian, introducing the notion of race as a determining factor.

By 1850, an assessment of the reserve system implemented in Canada until then led to the conclusion that it had been a failure as a laboratory for "civilizing" Indians. This failure was attributed to the fact that the reserves were isolated from centres of European civilization. The assessment concluded that in order to assure their success, reserves should be smaller and surrounded by settlements where Indians would become not only be civilized, but also assimilated, as it was previously demonstrated in an American experience in Michigan. This alteration in British policy also reflected, according to J. L. Tobias, the change in its goals, which from then were aimed at the assimilation of Aboriginal peoples into the colonial society.

This goal was clearly reflected in the "Act to encourage the gradual civilization of Indians" passed by the legislature of the United Canadas in 1857. This Act stipulated in its preamble its aim

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186 Ibid.

187 In Lower Canada (Quebec), where the "civilizatory" responsibility for Aboriginal people had been in the past in the hands of Catholic missionaries, some protection was granted in previous years to reserve and Indian lands, appointing a commissioner to supervise them (Ibid.).

188 RCAP, Report vol. 1, supra note 1 at 269. According to the RCAP Report, these provisions are still generally valued by Aboriginal people, who see them as a bulkwark against erosion of the reserve land base.

189 Ibid. at 270. In response to Indian concerns, this definition would be narrowed in Lower Canada one year later, excluding non-Indian men married to an Indian women. However, non-Indian women married to an Indian men were still considered Indian in law. Consequently, Indian status would be associated with the male line.

190 Ibid. at 130.
to remove all legal distinctions between Indians and other Canadians and to integrate them into Canadian society. It also defined who was an Indian, stating that such persons could not be given the rights of European Canadians unless they proved they could read or write either the French or English language, were free of debt, and of good moral character. If an Indian could meet such criteria, then that person was eligible to receive an allotment of twenty hectares of reserve land, to be placed on a one year probation to give further proof of being civilized, and then to be given the franchise.\(^{191}\)

3.3. Early XIX century treaties.

At the same time to the enactment of the laws referred to above, British colonial authorities entered into treaties with different Aboriginal peoples in Canada in order to allow the establishment of European settlers. These treaties became the basis for the introduction of the reserve system. It would be within the reserves where an important part of First Nations life would be confined until today.

From 1815 until the 1850's, hundreds of land transactions involving First Nations in Ontario, many of which had previously made treaties of alliance, peace or friendship with the Crown, took place. According to these transactions, the land was transferred to the Crown, whose purpose was to secure these lands for settlement and development.\(^{192}\) The Crown paid for these lands in goods delivered at the time the agreements were made, in the form of "annuities" or presents. Revenues from the surrender and sale of Indian lands paid for education, health, housing and other services received by Indian nations. After the initial purchase of land, there were invariably second and third purchases. Gradually, First Nations were confined to smaller tracts of lands, in areas that were less suitable for European settlement, agriculture and resource extraction. As a consequence, First Nations' economies were undermined.\(^{193}\)

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\(^{191}\) Ibid.; Surtess, "Indian Policies," supra note 184 at 89.

\(^{192}\) In many cases, First Nations understood that they were conveying their land to the Crown for the limited purpose of their protection from incoming settlers. (RCAP, Report vol. 1, supra note 1 at 155).

\(^{193}\) Ibid. at 156
These arrangements provided some patterns that were used in Ontario in the 1836 Manitoulin and Saugeen Treaties. In the first case, which involved Ojibwa and Odawa people, 607,000 hectares of land in the Lower Saugeen Peninsula were ceded to the Crown, and the people living there were moved to the Bruce Peninsula. In the same treaties, a large territory including the Manitoulin chain, was ceded to the Crown, which set aside the Manitoulin Island area as a reserve.194 Treaties of a different nature, not resulting in Aboriginal relocation, were entered again in 1850 in the area of Lake Huron and Lake Superior. These treaties, also known as the Robinson treaties, were entered into by the Ojibwa people with the Crown after a period of resistance to non-Aboriginal miners and surveyors who had entered their territories. After years of hostilities and negotiations, in 1850, Ojibwa chiefs succeeded in reserving their lands and in obtaining a provision that would give them a share of revenues from the exploitation of resources in their territories. Annuities, or cash payments were to increase as revenues increased. 195

These treaties are considered to have been part of the major policy of the British government of Indian removal to provide lands for settlement or to open the Canadian Shield for mineral exploitation.196

3. 4. The numbered treaties.

In the second half of the nineteenth century, important developments that seriously impacted Aboriginal peoples’ lives occurred in Canada. Among them was the British North American Act of 1867, which made Quebec, Ontario, New Brunswick and Nova Scotia into a confederation virtually independent from the United Kingdom. This Act was followed shortly, in 1880, by the incorporation to Canada of all British North American possessions, except Newfoundland. Other developments which occurred in this period were the acquisition by Canada of the vast western and northern holdings of the Hudson's Bay Company (HBC); the creation of the

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194 Only 1,000 to 1,400 Aboriginal persons moved to the island by 1850. Non-aboriginal pressure resulted later in opening the bulk of the island to their settlement in the 1860's (Ibid. at 156-158).

195 Ibid. at 158. Unfortunately, according to the same source, the provision for an increase in the extremely small annuities was adjusted only once in the 1870s.

196 Robert J. Surtees, "Canadian Indian Treaties," in Washburn ed., supra note 66 at 206-208 [hereinafter Surtees, "Indian Treaties"].
Northwest Territories by the Canadian government; and the federal government decision to link, via settlement and the construction of a railway, central Canada with the Province of British Columbia in the Pacific, which had been admitted to the union in 1871.

These developments required the government to make arrangements with Aboriginal peoples who until then occupied the vast territories that were being incorporated into Canada. Of particular importance were the obligations acquired by Canada with Aboriginal people as a consequence of the incorporation of Rupert's Lands (HBC). According to the Order in Council of June 23, 1870, "[a]ny claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect to them." Canada agreed to this condition requested by the HBC, suggesting that it intended to compensate Aboriginal peoples of this area following the treaty pattern linked to the Royal Proclamation of 1763. The effect of this legislation was to confirm that the principles of the Proclamation of 1763 applied to the lands surrendered by the HBC.

As a consequence of the developments here referred to, the treaty system, until then applied mainly in Ontario, continued to be applied in the newly acquired territories. The 1836 and 1850 treaties signed in Ontario provided the guidelines for the "numbered Treaties" which were signed from 1870 to 1920. These treaties covered a large part of the Canadian territory. Consequently, when negotiating these treaties with different First Nations, the Crown followed the pattern of requesting them to surrender large tracts of lands in return for annual cash payment and other

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197 Rupert's Lands and the North-Western Territory were admitted into Canada on July 15, 1870 by an Imperial Order in Council dated June 23 of that year. Upon their admission the province of Manitoba was created out of a small portion of the combined territories. The remaining territory was united under one jurisdiction which was entitled "The North-West Territories." Kent McNeil, Native Rights and the Boundaries of Rupert's Lands and the North-Western Territory (Saaskaton: University of Saskatchewan Native Law Centre, 1982) at 2.

198 Surtees, "Indian Treaties", supra note 196 at 207.

199 Condition 14, Order in Council of June 23, 1870, in McNeil, supra note 197 at 2.

200 Sanders, supra note 110. It should be noted here that Canada would argue this century that the Royal Proclamation of 1763 did not apply to the HBC charter territories (Rupert's Lands). The Supreme Court of Canada in Sigeareak Et Et v. The Queen agreed to Canada's claim in 1966. According to Kent McNeil, the result of this decision is that in Rupert's Land native claims which are not based on treaty must rely on the concept of Aboriginal title rather than on the Royal Proclamation. McNeil, supra note 197 at 3.

201 Surtees, "Indian treaties," supra note 196 at 207.
benefits. The negotiations were conducted in the oral tradition of First Nations. However, a written text was produced to give substance to the agreements. The written texts regarding lands, as we will see later in this Chapter, have produced fundamental misunderstandings between the parties that participated in them. First Nations understood they were sharing the land, not surrendering it.\footnote{RCAP, \textit{Report vol. 1}, supra note 1 at 159.}

Another important aspect of these treaties dealt with the tracts of "Crown" lands which were to be set apart and protected as reserves for Aboriginal peoples. Unlike the Robinson treaties, where lands were "retained" or "reserved" from the general surrender of Indian title, in the numbered treaties all the texts stated that all Indian title was "surrendered" to the Crown.\footnote{This surrender clause, notwithstanding the critiques from different Aboriginal peoples, will continue to be imposed by Canada to them when dealing with land rights until very recently as we will see later on this study.} The size of the reserved lands was based on a population formula. Aboriginal parties in possession of huge tracts of lands demanded an equitable exchange. Due to this claim, the Crown not only offered cash payments upon signing treaties and annually thereafter, but agreed to provide agricultural and economic assistance, schools and teachers, and other goods and benefits. Benefits such as ammunition and gunpowder for hunting, twine for fishing nets, agricultural implements (ploughs) and livestock (horses and cattle) were offered. Treaty 6, entered with the Crees and Plain Assiniboines, included the promise of assistance in the case of famine, and health care, in the form of a "medicine chest." The authority of Chiefs and headmen was recognized by gifts, medals and suits of clothes.\footnote{RCAP, \textit{Report vol. 1}, supra note 1 at 160.}

In terms of the size of the lands reserved for Aboriginal peoples, Treaties Nos. 1, 2 and 5 in Manitoba provided for reserves which allocated 160 acres per family of five.\footnote{Aboriginal peoples had demanded two-thirds of this province as a reserve. Alexander Morris, \textit{The Treaties of Canada with the Indians of Manitoba and the North-West Territories} (Toronto: Belfords, Clarke and Co., 1880; reprint ed. Toronto: Coles Publishing Company, 1971) at 19.} Other numbered treaties provided for reserves allocating one square mile (640 acres) per family of five. The larger area was first promised to Aboriginal peoples in Treaty No.3. Treaty No.8 extended over what is now northeastern British Columbia, northern Alberta, northwestern Saskatchewan and part of the Northwest Territories. Although mainly covering land not suitable for agriculture, this treaty

\footnote{Aboriginal peoples had demanded two-thirds of this province as a reserve. Alexander Morris, \textit{The Treaties of Canada with the Indians of Manitoba and the North-West Territories} (Toronto: Belfords, Clarke and Co., 1880; reprint ed. Toronto: Coles Publishing Company, 1971) at 19.}
followed the same patterns of the earlier treaties, where reserved lands did not exceed one square mile for each family of five members.

The text of Treaty No.11, which covered part of the Northwest Territories, where Aboriginal peoples lived by hunting, trapping and fishing, was written essentially in the same terms of Treaty No. 8.\(^{206}\) Aboriginal peoples who entered into this treaty stress the fact that they were granted freedom to continue with their traditional activities in their territory. Nevertheless, these activities became more difficult with the presence of a large number of white trappers in their hunting grounds supposedly protected by the treaty.\(^{207}\) Moreover, land allocations that were made by the government in the area of Treaty No.8 were seen by Aboriginals as a threat to their right to move freely through their ancestral lands protected by treaty.\(^{208}\)

Farming was the explicit objective of reserve lands in the case of Treaties Nos. 3, 5 and 6. However, aside from the agricultural use of lands, during the discussion of the treaty Indians were assured entitlement to the timber on reserves.\(^{209}\) Unlike the Robinson treaties, no express reference was made in these numbered treaties to mineral rights or royalties.\(^{210}\)

Treaties also assured Aboriginal peoples of the continuation of their traditional practices of hunting, trapping and fishing. Although it was only Treaties Nos. 3 to 10 which expressly provided the Aboriginal right to "pursue their avocations of hunting, trapping and fishing throughout the tract surrendered," this right was affirmed by government officials in the negotiations that preceded all treaties. It is important to clarify that this right was acknowledged not only on reserved lands, but over all the lands included in the treaties, at least, "till the land was needed" or "until the land is taken up" as commissioners affirmed.\(^{211}\)

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\(^{206}\) Bartlett, supra note 117 at 47-48.

\(^{207}\) Evidence of how these Aboriginal activities were affected by the presence of white trappers in the area of Treaty No 11 can be found in Rene Fumoleau, *As Long as This Land Shall Last. A History of Treaty 8 and Treaty 11. 1970-1939* (Toronto: McClelland and Steward, 1973) at 235 ff.

\(^{208}\) Several land allocations were made to Indians in the area covered by Treaty No 8 after a survey made by the government in 1913-1915. These lands were not considered reserves, but rather lands where Indians could built their houses.

\(^{209}\) Morris, supra note 205 at 272.

\(^{210}\) According to R. H. Bartlett, in the course of the treaty discussions, however, oral assurances were made to Aboriginal peoples by the commissioners that they would be entitled to interests in minerals found on the reserves (Bartlett, supra note 117 at 45).

\(^{211}\) Morris, supra note 205 at 29.
Treaties and reserves.

It is important to clarify here the relationship existing between treaties and reserves. Although many reserved lands would be a product of the numbered treaties previously referred to, not all of the reserve lands existing in Canada were a consequence of the treaty process. Those in Quebec, as we saw previously in this Chapter, were established by grants from the French Crown to the Jesuits. Later, in 1851, an Act was passed authorizing lands to be set apart for Indian Tribes in Lower Canada. Some reserves in Ontario were created by the purchase of lands outside the traditional territories of the Indian peoples (in 1788 the Six Nations were granted by the Crown lands originally purchased from the Mississuaga). There were even cases of Indian bands purchasing privately held lands using their own money, with the reserves then being held by the Crown for their benefit.

In the Atlantic region, it was considered that the Royal Proclamation did not require treating with the Indians for the surrender of Aboriginal title or the establishment of reserves. Accordingly, reserves were set apart by executive act, that is by the issuance of licences of occupation or reservation by order in council. Reserves were established in this area by colonial authorities as a result of Indians' petitions rather than by a policy defined by a central authority. In New Brunswick, a few reserves were set aside by licenses of occupation, confirmed by order in council, and granted to individual Indians on behalf of them and their families. A similar situation occurred in Nova Scotia, where lands were set aside for Indians by order in council. In Prince Edward Island, after a reserve was initially established on private lands, those lands were purchased using government funds and other reserves were created later.

In the case of British Columbia, as we will see in Chapter IV, William Douglas, governor of the Vancouver Island colony, entered into 14 treaties with Aboriginal peoples of the southern part of this island. Under these treaties, provisions were made for the creation of reserves in similar

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212 By 1854, a total of 230,000 acres of land within the borders of Quebec had been set apart for them by order in council. Bartlett, supra note 117 at 14.

213 RCAP, Report vol. 1, supra note 1 at 144.

214 Bartlett, supra note 117 at 14.

215 RCAP, Report vol 1, supra note 1 at 144.
terms to those in Ontario and later western and northern Canada. This reserve policy was hampered by a shortage of funds to compensate Indian peoples for their lands and a growing unwillingness among settler population to recognize their land rights. Later colonial authorities adopted a policy of allocating small reserves to Indian bands without treaties.  

3.5. Indian legislation after confederation.

According to J. L. Tobias, the principles of Canada's Indian policy - protection as the paramount goal, and assimilation the long-range goal - were well established by the time of the creation of the Canadian Confederation in 1867. Nevertheless, the priorities were changed shortly after in 1869 when the goals of civilization and assimilation were formally added by the passage of an "Act for the gradual enfranchisement of Indians." In these years the first Prime Minister of Canada, Sir John Macdonald affirmed to the Parliament that it would be Canada's goals "to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion."

This Act passed by the Parliament of Canada - which according to section 91 of the British North America Act of 1867 had exclusive legislative authority over "Indians, and Lands reserved for the Indians" - gave the governor-in-council power to impose elected local governments on an Indian band and to remove those governments considered unqualified. The elected band council was empowered to make by-laws on minor police and public health matters, but before such regulations could be enforced, they had to be approved by the superintendent general of Indian Affairs.

In 1876, the "Act to consolidate the laws respecting Indians," best known as the Indian Act of 1876 was passed, incorporating all protective provisions of previous legislation and adding requirements regarding non-Indian use and alienation of Indian lands. Although primarily

216 Ibid, at 144-145; Bartlett, supra note 117 at 15-17.
217 Tobias, supra note 181 at 131.
219 Tobias, supra note 181 at 131.
concerned with lands reserved for Indians, as Indian Acts in Canada have done throughout history, several of its provisions in practice encouraged Indian "civilization." The elective government system was no longer imposed but was only applied if the band requested it. Nevertheless, to encourage this system, band authority was increased. The Act mandated the superintendent general to survey the reserves into individual lots. The band council could then assign these lots to individual band members, who received as title a "location ticket" by the superintendent. Once receiving this ticket, which required previous proof of suitability, the Indian entered into a three year probatory period during which he had to prove that he would use the land as a Euro-Canadian. If he passed this test, he was enfranchised and given title to the land.

It is evident that through this legislation it was hoped that the Indians would disappear by taking away their share in the reserve. Once they were all enfranchised, there would be no reserves. The same legislation also contained provisions which established unequal treatment of men and women. In accordance with provisions contained in previous legislation (the 1850's legislation previously referred to and the 1869 Act), any Indian woman marrying a non-Indian would cease to be an Indian. The same thing happened to the children of such a marriage. The philosophy behind this Act was clearly stated in the annual report of the Department of the Interior in 1876, when affirming "[o]ur Indian legislation generally rests on the principle, that the aborigenes are to be kept in a condition of tutelage and treated as wards of the State..."

In 1880 a new branch of the civil service, to be called Department of Indian Affairs, was created. The opposition of eastern Indians, to whom previous legislation was applied, to adopting the elective system of band government or to granting location tickets led the Parliament to

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202 According to Douglas Sanders, all Indian Acts, except for early status in Nova Scotia and New Brunswick, are almost completely about the reserve system, and not about Indians. Sanders, supra note 110.

203 Tobias, supra note 181 at 132. According to Tobias in 1879, due to bands resistance to allot reserve lands to individual members, the power to allot reserve lands was taken from the band and given to the superintendent general.

204 Alternative ways of assimilation were also offered for Indians who earned a professional degree as minister, lawyer, teacher or doctor, who could be given a location ticket and enfranchised immediately without probation. Tobias, supra note 181 at 132; Surtees, "Indian Policies", supra note 184 at 90.

205 RCAP, Report vol. 1, supra note 1 at 278.

empower the superintendent general of this Department to impose these two measures as he saw fit.\footnote{225 \textit{Dyck}, supra note at 179 at 53; Tobias, \textit{supra} note 181 at 134.}

In an amendment introduced to the \textit{Indian Act} in 1881, western Indians were prohibited from selling their agricultural products without the appropriate permit from the Indian agent. The official rationale behind this law was the protection of Indian interest, preventing them from the exchange or barter of agricultural products for things that were not considered worthwhile, especially alcohol. Nevertheless, another motive behind it was the desire to reduce competition between Indian and non-Indian farmers.\footnote{226 RCAP. \textit{Report vol. 1, supra} note 1 at 294. According to the same Report this provision was retained on future versions of the \textit{Indian Act} until the present, although today it is apparently no longer enforced. It should be underlined that during the initial years of the reserve system, western Indian people were able to adapt successfully to agriculture in the reserved lands that were left to them. Due to this success, in the 1880s non-Indian farmers complained local Indian agents about the competition that they received from Aboriginal farmers, which was considered to be unfair because of government assistance to reserves. An interesting analysis of this period, the contradictions of government policies regarding Indian agriculture, and the Indian strategies to cope with the new conditions that were imposed to them in that part of Canada can be found in Sarah Carter, \textit{Lost Harvests Prairie Indian Reserve Farmers and Government Policy} (Montreal: McGill-Queen's University Press, 1990). According to her analysis, the restrictions imposed by the government to Indian farming in this area were determinant in its failure, consequently converting western reserves into pockets of rural poverty.}

In 1884, the \textit{Indian Advancement Act} was passed. This Act gave the superintendent general increased powers to direct the bands political affairs, including issues such as election regulations, size of band councils, and deposition of elected officials or leaders. The act also gave the superintendent general powers to call for band elections, band meetings, advise band councils, etc., and extended the powers of band councils beyond those of the \textit{Indian Act} by giving them power to levy taxes on real property of band members.\footnote{227 Surtees, "Indian Policies", \textit{supra} note 184, at 90. As Tobias affirms, most bands refused to come under the provisions of this Act and continued to elect their traditional leaders, even though these leaders were deposed by the government. In order to impede their re-election, a modification this Act was again modified in 1884 prohibiting persons deposed from office to stand for re-election. Tobias, \textit{supra} note 181 at 134.}

Since bands refused to approve the surrender of allocated lands to permit those who held location tickets to lease or sell their lands, modifications to the \textit{Indian Act} were introduced again in 1884 and 1894, allowing the superintendent general to lease Indian lands allotted for revenue purposes and without surrender. Years later, in 1898, another statute permitted the superintendent
general to impose regulations regarding health and policing on reserve when band councils refused to do this themselves, and to use band funds for their enforcement.\(^{228}\)

Finally, the pass system introduced in 1885 in western Canada should be mentioned. According to this system, Indians were prohibited from travelling off their reserves without written authorization of their agent. Its purpose was to "protect" Indian people from the corrupting whites, as well as to control Indian leaders within the reserves.\(^{229}\)

It is true that the early Indian legislation attempted to protect Aboriginal peoples from encroachment by non-Natives. As Douglas Sanders argues, reserve land base was vulnerable, and government Indian policy sought to protect these lands against non-Indian encroachment to avoid the need for government relief.\(^{230}\) Nevertheless, it is evident that legislation passed during this period also attempted to assimilate Aboriginal peoples into the mainstream Canadian society by controlling important aspects of Aboriginal life. Demonstrative of the orientation of Indian policy in Canada were the laws, not directly related to the Indian Act, passed in the west, where Canada had been expanding into Indian territory through the treaty system and other policies. Attempts of Aboriginal peoples of the Plains and British Columbia to preserve their traditional spiritual beliefs, despite pressures from missionaries and the government, resulted in the prohibition of their traditional practices, such as the sun dance, the potlatch and give away ceremonies in the final decades of the last century.\(^{231}\)

A policy implemented by the government, with the support of various churches, with similar assimilationist purposes, was that of residential schools for Aboriginal children. This tragic policy, whose consequences on Aboriginal lives are only now being disclosed,\(^{232}\) began in 1849. It

\(^{228}\) *Ibid.* at 135.

\(^{229}\) Miller, *Skyscrapers*, *supra* note 66 at 192.

\(^{230}\) Douglas Sanders, *First Nations and Canadian Law*, (Course Materials, Faculty of Law, University of British Columbia, Fall 1997) at 142. [unpublished] [hereinafter Sanders, *First Nations Law*]

\(^{231}\) Tobias, *supra* note 181 at 135; Surtees, "Indian Policies", *supra* note 184 at 92. Potlach and sun dance ban continued to be enforced until the 1920s.

\(^{232}\) The Report of the RCAP released in 1996 devotes a Chapter to the analysis of this policy and its devastating consequences on several generations of Aboriginal people in Canada. The Report calls for a public inquiry to investigate this policy and its abuses on Aboriginal people. It also recommended remedial actions by governments and responsible churches (RCAP, *Report vol. 1*, *supra* note 1 at 333-410). More recently, the government of Canada released a "statement of reconciliation" acknowledging its responsibility in the implementation of the Residential school system, the damage it inflicted in many Aboriginal people, and the need to work together with them on a healing strategy. Canada. Minister of Indian Affairs and Northern Development, *Gathering Strength Canada's Aboriginal* 203
resulted in the implementation of a program of boarding schools built close to the reserves, for children between ages 8 and 14, and a program of industrial schools, placed near non-Aboriginal urban centres, to train older children in a range of trades. According to this policy, Aboriginal children were deliberately separated from their parents for the purpose of impeding home influences and promoting changes in their habits, thus giving Canada, through the agency of the department and the churches, the responsibility of parenting them.\(^{233}\)

Although lack of resources, unsanitary conditions of the schools and child abuse affected this system, it continued to be implemented throughout this century until a few decades ago.\(^{234}\)

### 3.6. Laws and policies regarding Aboriginal peoples in the XXth century.

Additional laws concerning the protection of the Indian reserve land base continued to be enacted throughout the twentieth century. Laws and policies encouraging the assimilation of Aboriginal peoples into Euro-Canadian society and culture were also promoted by Canada during the same period. Nobody stated more clearly this last aspiration of the Canadian government than the long-serving superintendent of Indian Affairs, Mr. Duncan Campbell Scott, when he affirmed to Parliament in the 1920s that "[o]ur object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question."\(^{235}\)

According to different authors, amendments introduced to the *Indian Act* passed in the last years of last century and first years of the present century weakened the protection of lands reserved for Indians.\(^{236}\) In 1894, the superintendent general was given the power to lease reserve lands held by widows, orphans, or other Indians who could not cultivate their land. Neither surrender nor band approval was required. A new amendment introduced to this Act in 1906 facilitated the permanent

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\(^{233}\) RCAP, *Report vol. 1*, supra note 1 at 187.

\(^{234}\) Industrial schools were to be abandoned in the 1920s. After that period the emphasis would be placed only in boarding schools. *Ibid*.


\(^{236}\) Tobias, supra note 181 at 136-137; RCAP, *Report vol. 1*, supra note 1 at 282-285

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alienation of reserve lands by allowing the government to distribute up to 50 per cent of the proceeds of a surrender and sale among band members.\textsuperscript{237} In 1911, the government was given more powers, this time to lease Indian lands without surrender for the purpose of mineral exploration and to expropriate the same lands for highway and provincial railway rights of way.\textsuperscript{238} The same year another amendment to the \textit{Indian Act} allowed a judge to issue a court order to move a reserve within or adjoining a municipality when it was expedient to do so.\textsuperscript{239}

In 1917, in a new attempt to promote farming on western reserves so that Indians would become self-sufficient farmers, the superintendent general was authorized to use band funds to purchase farm machinery for individual Indians and to establish a fund from which loans might be made to allow Indians to purchase the same machinery.\textsuperscript{240} In 1918 the superintendent general power's to lease reserve lands without surrender was widened to include any uncultivated lands if the purpose of the lease was cultivation or grazing.\textsuperscript{241} In 1919, Indian control of their reserve lands was again weakened due to the authorization given to the governor in council to make regulations allowing leases of surface rights on Indian reserves in connection with mining operations. Compensation originally contemplated for occupants of lands over which leases might be granted was eliminated in 1938, two years after responsibility for Indian Affairs passed from the Department of the Interior to the Department of Mines and Resources.\textsuperscript{242}

Due to the failure of the enfranchisement laws to achieve the goals desired, new amendments on this topic were introduced in 1918 and 1920. According to the first amendment, Indians living off-reserve, including widows and women over the age of 21, could obtain enfranchisement. According to the second amendment, compulsory enfranchisement was reintroduced when granting the superintendent general the power to report on the "fitness of any Indian or Indians to be enfranchised" and to recommend this measure to any male or female over

\textsuperscript{237} RCAP, \textit{Report vol. 1}, supra note 1 at 282-283. As a consequence, much of the reserve lands, specially in the Prairies, were available for sale to non-Indians. (Tobias, \textit{supra} note 181 at 136-137)

\textsuperscript{238} Tobias, \textit{supra} note 181 at 137; RCAP, \textit{Report vol. 1}, supra note 1 at 285.

\textsuperscript{239} RCAP, \textit{Report vol. 1}, supra note 1 at 184. This provision was not repealed until 1951.

\textsuperscript{240} Tobias, \textit{supra} note 181 at 138; Surtees, "Indian Policies," \textit{supra} note 184 at 81. The powers granted to the superintendent contrasted with laws still in force which restricted Indian sale of agricultural products.

\textsuperscript{241} RCAP Report vol. 1, supra note 1 at 282.

\textsuperscript{242} \textit{Ibid.} at 285.
According to the RCAP by 1918 a total of 102 persons had been enfranchised. From 1918 to 1920, 258 Indian persons abandoned their status through enfranchisement.

In 1927, another amendment would be introduced to the Indian Act, this time obliging anyone soliciting funds for Indian legal claims to obtain a license from the superintendent general. Violators of this law would be punished. This amendment, which was repealed in 1951, was oriented at impeding Aboriginal organizations from getting legal assistance in their claims. This provision was applied to any person, Indian or non-Indian. Although it affected Aboriginal peoples all over Canada, it was particularly relevant in British Columbia, where the Allied Tribes of this province were especially active at that time in asserting their land rights through litigation. In fact, according to different analysts, this prohibition was aimed at preventing this Aboriginal alliance from British Columbia from getting to the Judicial Committee of the Privy Council in London with its land claims.

During the economic crisis of the 1930s and the war of the 1940s, little attention seems to have been paid in Canada to Aboriginal peoples. Indian Affairs appears to have had no policy. This situation changed after 1945, largely due to the participation of Aboriginal peoples in the second world war. As a consequence of the post war interest on Aboriginal peoples, a joint committee of both the Senate and the House of Commons was created in 1946 to study and make proposals on Canada's Indian administration and the revision of the Indian Act. The principal recommendation issued by this committee two years later was that Indian Act should be revised to facilitate the gradual transition of the Indian from wards up to full citizenship.

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243 Ibid, at 287-288. Although this provision was repealed two years later, it would be reintroduced in a slightly different way in 1933 until 1951. Modification made in 1951 retained until 1985, allowed compulsory enfranchisement for Indian women who married a non-Indian man.

244 Based on Statistics of the Department of Indian Affairs, Ibid. at 287. The number of Indians enfranchised, according to Tobias higher. Slightly more than 250 Indians enfranchised between 1857 and 1920, meanwhile within the two years that followed the passage of this amendment it included 500 new Indians (Tobias, supra note 181 at 137).

245 RCAP, Report vol 1, supra note 1 at 296.


247 Tobias, supra note 181 at 138.

248 For this purpose, it was recommended that Indian women should have a voice in band affairs, bands should have more self-government and financial assistance, bands might incorporate as municipalities, etc.. The guidelines for future Indian policy included easing of enfranchisement, cooperation with provinces in extending services to Indians,
A revised Indian Act was passed in 1951. According to this Act, the Minister's powers were reduced to a supervisory role but with no veto power. The Minister's authority to direct Indian band and personal matters required the band's approval. The individual bands, if they desired, could now run their own reserves. As many as fifty sections and subsections of previous Acts, including those related to aggressive civilization and compulsory franchisement, were deleted. According to several authors, however, no substantial changes were made to the existing legislation. This Act and the 1876 Act are similar in essential respects, including format, content and intent. Rather than changing the goals, what changed were the methods to be applied for this purpose. Moreover, the definition of Indian status and control of band membership were tightened by the introduction of an Indian register as a centralized record of those entitled to registration as an Indian, and consequently, to receive federal benefits. The register enabled federal officials to keep track of the reserve population and remove non-status Indians and others.

A comment should be made here regarding the right to vote. After this right had been granted in federal elections in 1917 to Indians active on military service, and later in 1944 to Indians (on and off reserve) that had served in the war, it was extended in 1950 to on reserve Indians who waived their Indian Act tax exempt status regarding personal property. Only in 1960 was this right granted unconditionally to all Indians. The right to vote in provincial elections was granted to Indians in British Columbia in 1949 and in Quebec in 1969.

In 1966 a comprehensive report requested by the government of Canada, known as the Hawthorn Report, described the situation of Indians as being generally and materially depressed when compared to that of other Canadians. The solution to the "Indian problem," according this

and education of Indian children with non-Indians. See Proceedings of the Joint Committee on Indian Affairs (1948), in Tobias, supra note 181 at 139.

249 This act was drafted initially by the Department of Justice. Due to Aboriginal protests, the bill was withdrawn, and a new draft was submitted by the government to a panel of Aboriginal leaders for its consideration. This gave rise to the modern tradition that changes to the Indian Act would not be done without prior consultation with Aboriginal peoples. Sanders, supra note 110.

250 Tobias, supra note 181 at 140.

251 Ibid.; RCAP, Report vol. 1, supra note 1 at 310; Surtees, "Indian Policies", supra note 184 at 94.

252 RCAP, Report vol. 1, supra note 1 at 311.

253 Ibid. at 299-300.
report, was to abandon assimilation as the formal goal of Indian policy. Instead, it proposed the concept of "citizens plus" whereby, in addition to ordinary rights and benefits to which all Canadians have access, Indians should be granted special rights as "charter members of the Canadian community." 254

Notwithstanding the recommendations made by this report, and the regional and national consultations held by the government with Aboriginal leaders in the following years, in 1969, the liberal government of Pierre Trudeau issued a "Statement of the Government of Canada on Indian Policy, 1969" recommending measures designed to achieve integration of Indian people and equality with the rest of Canadians. In this document, better known as the "White Paper," the federal government announced its intention to absolve itself from the responsibility for Indian affairs, to end the special status of Indian people, and to repeal special legislation for them (Indian Act). With the adoption of this policy, the ultimate goal of the Indian Act of 1867 - extirpation of Indians and Indian lands - would be realized.255

According to Alan Cairns, the underlying thesis of the White Paper was that separate Indian status contributed to economic backwardness, social isolation and retrogressive cultural enclaves. Cairns affirms that while this document can be viewed as a reversal of previous Indian policy and philosophy, in another sense it can be understood as an attempt to accelerate history. This, he argues, because the basic goal of all Indian policy had been Indian assimilation and their eventual disappearance as a distinct people as they became absorbed into the basic Canadian community.256 Aboriginal organizations in different parts of Canada, which saw the White Paper as a threat to their special status within Canadian society, strongly opposed this government's proposal.257 The Canadian government had to recognize that its initiative would not work without Aboriginal acceptance, and therefore, the Paper was officially shelved.258


255 Tobias, supra note 181 at 141. A similar interpretation of the White Paper and its implications can be found in RCAP, Report vol 1, supra note 1 at 191, and in Surtees, "Indian Policies," supra note 184 at 94.


257 The best known statement was that coming from the Indian Association of Alberta (IAA), also called "Citizens Plus." The IAA viewed this Paper as an attempt by the federal government to put an end to obligations and relationship established through treaties, seeing such attempts as being detrimental to Indian peoples. The IAA rejected changes to
3.7. Policies and laws concerning Metis and Inuit.

It is important to acknowledge the fact that several Aboriginal peoples in Canada were not directly affected by the Indian Act and its related legislation. Such is the case of the Inuit in the north and most of the Metis in the prairies, which were excluded from the application of this Act and from the reserve system. Nevertheless, they were deeply affected by different policies which were implemented by the Canadian government during this stage.

In the case of the Inuit, in whose territory (Quallunaat according to the Inuit language) the Europeans have only been present recently, Canadian laws and policies have been applied to them without consultation, ignoring their rights as a people. It was only in the early 1900s that Canada solidified its jurisdiction over the Inuit with the establishment of Royal Canadian Mounted Police (RCMP) posts in the Arctic. Nevertheless, there has been no coherent policy towards the Inuit and their lands, leaving education to the missionaries and social welfare to the traders.259

In the forties and fifties, several relocation initiatives affecting Inuit population were implemented by the Canadian state, obviously without their consultation. Among these initiatives, the relocation to the High Arctic of almost one hundred Inuit from Inukjuak, Quebec and Pond Inlet on the Baffin Island which took place in the 1950's, has been object of serious criticism by the Inuit and other concerned people.260 Due to the desperate situation the Inuit had reached in the late existing legal structures, stating that the recognition of Indian status was essential for justice, and recommended that it be reviewed to eliminate its paternalistic bent. Regarding claims and treaties, it proposed that a Claims Commission be established in consultation with Indian people, with mandate to modernize treaties, and that all treaties be incorporated in updated terms in an amendment to the Canadian Constitution. In Canada, Royal Commission on Aboriginal Peoples, Public Policies and Aboriginal Peoples 1965-1992 (Volume 2), Summaries of Reports by Federal Bodies and Aboriginal Organizations. (Ottawa: Minister of Supply and Services Canada, 1994) at 191 [hereinafter RCAP, Public Policies vol. 2]

258 Bradford Morse, "The Resolution of Land Claims," in Bradford Morse ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (First Revised Edition) (Ottawa: Carleton University Press, 1991) at 626. According to this author, certain aspects of this policy were actually implemented, and an Indian Economic Development Fund and an Indian Claims Commission were established. In addition, federal government negotiated the provision of services and programmes to status Indians on and off reserves with provincial governments, which were paid by the first government (Sanders, supra note 110).

259 Creery, supra note 38 at 112. It should be mentioned here that the Inuit in the Northwest Territories were asked by the government to sign treaty No. 11, but they refused (See Bartlett, supra note 117 at 48).

260 Canada, Royal Commission on Aboriginal Peoples, The High Arctic Relocation: A Report on the 1953-55 Relocation (Ottawa: Minister of Supply and Services, 1994) [hereinafter RCAP, High Arctic] Another important relocation affecting the Inuit in the same period was that which took place in Labrador between 1953 and 1965 including 115 communities and 7,500 people (See RCAP, Report vol. 1, supra note 1 at 423-425).
1940s as a consequence of epidemics, caribou migration patterns and other factors, the government of Canada embarked on a housing, health and educational program for their communities. It also promoted local "Eskimo" Councils in order to encourage the growth of local governments. Nevertheless, the policies implemented by the government seem to have made the Inuit more dependent, as has happened with other colonized peoples. These policies also contributed to Inuit's loss of control over their lives.\textsuperscript{261}

The Metis, in the prairie provinces, northwestern Ontario and northeastern British Columbia, emerged as a distinct people of mixed European and Aboriginal ancestry throughout the eighteenth and nineteenth century. The Metis ancestry can be found in two distinct mixed blood populations of the west: the French-speaking Metis who were associated mostly with the Montreal based Northwest Company and the English-speaking "half-breeds" aligned with the Hudson Bay Company. These two populations merged together during the last century, considering themselves a Nation. Metis people not only shared their mixed blood origin, but also a common language (Michif), and a distinctive mode of dress, cuisine, vehicles of transport, music and dance, forms of organization - democratic though quasi-military -, national flag, tradition, etc..\textsuperscript{262}

During the years in which the Canadian confederation was created, the Metis attempted to secure their continuity as distinct people, as well as to obtain recognition of their land base. The non-fulfilment of their land aspirations led the Metis to two rebellions. The first one occurred in 1869-1870 with the termination of the Hudson Bay Company as governing power in the northwest and the transfer of its lands to Canada.\textsuperscript{263} In this context, the Metis of the Red River settlement headed by Louis Riel, established a provisional government aimed at securing territorial and political interests in the new order established in Canada.\textsuperscript{264}

As a consequence of Metis resistance, negotiations took place in Ottawa. In these negotiations, a statute of the Parliament of Canada (the \textit{Manitoba Act}) as well as written and verbal promises from the government were made to the Metis. In accordance with these promises, full provincehood (rather than the mere territorial status claimed by the Metis for Manitoba) was

\textsuperscript{261} Creery, \textit{supra} note 38 at 113-114.

\textsuperscript{262} RCAP, \textit{Report vol. 1, supra} note 1 at 151.

\textsuperscript{263} Dickason, \textit{Founding Peoples, supra} note 5 at 280.

\textsuperscript{264} John E. Foster "The Plains Metis," in Morrison and Wilson ed. \textit{supra} note 9 at 423-432.
agreed. Protection for French language and Catholic schools was also established. With regard to Metis land claims, protection for settled and related common lands was agreed. Distribution of 1.4 million hectares of land to Metis children "towards the extinguishment of the Indian title to lands in the province" and to ensure the perpetuation of Metis communities in Manitoba were also established. Finally, the agreement granted amnesty to those who had participated in the resistance and formed the provisional government.\textsuperscript{265}

The \textit{Manitoba Act, 1870} was enacted by the Parliament of Canada. The Metis had many expectations for this Act and complementary promises that were made to them by Ottawa. Nevertheless, these expectations would be soon frustrated. Within ten years, political power in this area had passed to the newcomers. As a consequence of this situation, most of the Metis population in the Manitoba area moved to the north and the west, where they claimed lands too. Some lands were distributed to them in the Northwest Territories under the \textit{Dominion Lands Act of 1879}.\textsuperscript{266}

The second resistance, this time an uprising of the Metis community in Saskatchewan, again headed by Riel, occurred in 1885. It coincided with the completion of the Canadian Pacific Railway, which brought a large number of settlers into their territory, and the end of the buffalo as a subsistence base. This uprising was easily suffocated by Canadian forces and Riel was hanged, after being convicted of treason.\textsuperscript{267}

According to Olive P. Dickason, Metis land claims were never resolved. Of the 566,560 hectares set aside in Manitoba for the Metis, only 242,811 had been distributed to them by 1882.\textsuperscript{268} The same author believes that the scrip that Ottawa had introduced in 1874 to settle with the Metis, which provided for a specific amount of alienable land or its equivalent in cash, was far from the benefits which were granted to other Aboriginal peoples. Finally, she acknowledges that after all the confrontations over land, when it came to make a decision between cash or land, the overwhelming majority of the Metis chose the money.\textsuperscript{269}

\textsuperscript{265} Canada, Royal Commission on Aboriginal Peoples, \textit{Report of the Royal Commission on Aboriginal Peoples. vol. 4: Perspectives and Realities} (Ottawa: Minister of Supply and Services Canada, 1996) at 220-224. [hereinafter \textit{RCAP, Report vol. 4}]

\textsuperscript{266} \textit{RCAP, Report vol. 1, supra} note 1 at 153.

\textsuperscript{267} Dickason, \textit{Founding Peoples}, supra note 5 at 281; \textit{RCAP, Report vol. 1, supra} note 1 at 154.

\textsuperscript{268} Dickason, \textit{Founding Peoples}, supra note 5 at 289.

\textsuperscript{269} \textit{Ibid.} at 289-290.
As a result of these events, the Metis lands rights were not settled through the treaty process. According to the RCAP report, this failure was a consequence of their uncertain status in the eyes of the policy makers. According to Douglas Sanders, the Metis remained outside the treaty process because they did not identify themselves as Indians and were not collective or tribal people like Indians. Consequently, they did not want lands held collectively, and instead choose to obtain individual titles from the Manitoba Act and later the Dominion Land Act.

3.8. Aboriginal reactions and organization process.

3.8.1. Aboriginal organization process.

As we have seen in the analysis of Canadian laws and policies regarding Aboriginal peoples since Confederation until 1969, the goals that they pursued remained unchanged. Assimilation of Aboriginal people into Canadian culture, as well as the incorporation of their lands and resources into Canadian economy, continued to be the dominant goals behind the legislation and policies proposed by the federal government until the White Paper.

It should not be surprising then that Aboriginal reactions against these laws and policies were so strong during this period. Aboriginal peoples saw their social, cultural and sometimes physical subsistence threatened by the implementation of these laws and policies. On many occasions, such as in the case of band elections or restrictions imposed on their traditional ceremonies, they were able to resist their application. Aboriginal reactions, at the same time, triggered the enactment by Canada of new laws which attempted to tighten control over Aboriginal lives and resources. There is evidence of Aboriginal peoples’ resistance to the imposition of these laws since soon after confederation. In 1876, for example, Ononadaga chiefs made a presentation complaining against the imposition of such laws, the division that they were causing among their peoples, and expressing their desire to maintain their traditional laws and rules.

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RCAP Report vol. 1, supra note 1 at 151.
Sanders, supra note 110.

One example of early Aboriginal reactions against these laws can be found in a letter signed by 33 chiefs and member of the Six United Nations residing in several areas of Ontario, which was addressed to the Superintendent of Indian Affairs. In that letter the senders affirm that as allies and not subject of the British government they will follow...
This resistance increased throughout this period and motivated the creation of several organizations aimed at channeling Aboriginal discontent and protest. The same organizations stood in defence of Aboriginal people and their lands. In the early years of the century, different Aboriginal peoples formed the League of Indians, the first attempt to build a national Aboriginal organization. The aim of the League was to protect "all Indians of Canada" as well as their lands. Nevertheless, it failed to attract wide-spread support, and often faced government actions that were detrimental to their goals.\footnote{273}

Later, in 1944, the North American Indian Brotherhood was established as an Aboriginal lobby group, this time with the participation of Native representatives from eastern and western Canada and the United States.\footnote{274} Representation and internal administrative problems are said to have caused the organization to break into regional factions, leading to its collapse in the early 1950's.\footnote{275}

In 1961, a new organization, the National Indian Council, which represented the treaty and status people, non-status and Metis, was created. Its stated purpose was to promote "unity among all Indian people." Due to the difficulties it found in accomplishing this objective, this organization died in the late sixties. It was during these years also that new organizations representing different categories of Aboriginal peoples in Canada emerged. Among them, the National Indian Brotherhood, which represented the status and treaty Aboriginal people, and the Native Council of Canada, which gathered Metis and Non-Status, are to be mentioned.\footnote{276} With the revision of its basic structures in 1982, the National Indian Brotherhood became the Assembly of First Nations.


\footnote{274}{In 1945 Andrew Paul, a well known Aboriginal leader of British Columbia, became its president. Paul Tennant, \textit{Politics}, supra note 246 at 120. According to Douglas Sanders, the organization also affiliated Aboriginal peoples from the United States. Sanders, supra note 110.}

\footnote{275}{AFN, "Story," supra note 273 at 2}

\footnote{276}{\textit{Ibid}. at 2-3. At this time the federal government decided to start funding Aboriginal organizations, a fact that would result determinant in a new pattern of national, provincial and territorial Aboriginal organizations that has existed since then in Canada. Sanders, supra note 110.}
The AFN, an organization of First Nations government leaders and not of Aboriginal region representatives like the NIB, played a leading role in the next stage to be analyzed in this study.\(^{277}\)

In 1971, the Inuit in Arctic Canada, who had organized in local or regional entities in the sixties, formed a national organization, the Inuit Tapirisat of Canada.\(^{278}\) Aboriginal organizations also emerged at the provincial or territorial level. Such is the case of British Columbia, where different Aboriginal peoples formed the Native Brotherhood of British Columbia in 1931, probably the longest living Aboriginal organization in the province, and later, in 1969, the Union of British Columbia Indian Chiefs (UBCIC), an organization which still exists.\(^{279}\)

The proliferation of Aboriginal organizations in the sixties help to explain the explosiveness of their protest against government policies, in particular to the White Paper proposed in 1969. It is also crucial to understand the changes that would be introduced from then on by the Canadian government with regards to Aboriginal peoples and their rights, opening the gates for a "renewal and renegotiation" of the relationship that up to this point had existed between these peoples and the Euro Canadian society.\(^{280}\)

### 3.8.2. Aboriginal interpretation of the *Indian Act*.

According to the discourses that are dominant among Aboriginal peoples today, the *Indian Act* is perceived as the main tool that the Canadian state has used for their domination. In recent years, Aboriginal scholars have written extensively of the ethnocentric and paternalistic ideology behind this Act, as well as its cruel impacts on generations of Aboriginal peoples in Canada.

J. Y. Henderson has reflected on the relationship existing between treaties and the *Indian Act*. He believes that the implementation by the federal Parliament of the numbered treaties entered after confederation, which he calls "Victorian" treaties, was transformed into the colonization of

\(^{277}\) AFN, "Story," supra note 273 at 3.

\(^{278}\) Creery, *supra* note 38 at 115.


\(^{280}\) Term used by the RCAP report to describe the phase of Aboriginal Canadian relations which started since the 1960s until today.

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Aboriginal peoples by the Indian Act. Aboriginal consent in the treaties was ignored and forgotten, and Aboriginal peoples were treated as if they were "mentally incompetent savages." \(^{281}\) Henderson adds:

instead of viewing the Act as a consolidation of treaty obligations, the colonialists saw their obligation as a matter of race and culture. Under the guise of the white man's burden, the government assumed total control over the life of "Indians" and ignored the treaty obligations.\(^{282}\)

Other authors, such as Patricia Monture-Agnus, see the \textit{Indian Act} and Indian policies as a clear attempt made by the government to destroy Aboriginal cultures. According to her analysis, several provisions of this Act are based on the image of the "Indian" as a criminal, or a wild, or animal-like and savage.\(^{283}\)

A similar analysis of the \textit{Indian Act} and its implications for First Nations has been made by different organizations in the last decades. The Assembly of First Nations (AFN), which has become in recent years the largest Aboriginal organization in Canada, believes that through this Act "Indian people were persuaded (or forced if necessary) to give up their languages, their cultures and their traditional economic pursuits-and adopt the lifestyle and property concepts of Anglo society."\(^{284}\) The AFN affirms that the objective of the "[e]limination of Indian nations as distinct political and social entities" became evident with the Superintendent Campbell Scott statement in 1920.\(^{285}\) It also states that the 1927 amendment to the Act, in order to restrict the ability of First Nations to raise moneys for pursuing claims against Canada, "is a perfect example of the tension between the protective functions of the Act and the Department's use of the Act as a tool of control."\(^{286}\) Although the AFN acknowledges the amendments that have been introduced to the

\(^{281}\) Henderson, "Empowering", \textit{supra} note 163 at 278.

\(^{282}\) \textit{Ibid}.


\(^{285}\) \textit{Ibid}. at 11

\(^{286}\) \textit{Ibid}.
Act, ending the prohibitions established last century and early this century, it affirms that its central aspects remain the same as 120 years ago. The AFN finally affirms that despite the changes introduced to this Act since the 1950s, it has never been consented to by the Indian nations, but rather has been imposed on them.287

Similar perceptions of this Act are shared by other Aboriginal organizations. The Federation of Saskatchewan Indians, an organization that represents Aboriginal peoples in a treaty area, sees this Act as a "vehicle to control Indian Government, contrary to the spirit and intent of the treaties."288 The analysis of Union of British Columbia Indian Chiefs, the Nisga'a Tribal Council and the Gitksan and Wet'suwet'en peoples shares the same critical view of this Act and its related laws and policies implemented by Canada since last century.289

The criticism of the colonial and paternalistic approach of the Indian Act has been shared in recent times not only by Aboriginal peoples, but also by parliamentary and governmental commissions, such as the House of Commons Special Committee on Indian Self-Government (1983), and more recently the RCAP (1996).290 The same perspective is generally shared by non-Aboriginal academics. In the last decades these academics have written about this Act and its devastating impacts on First Nations, urging the government to remove it in order to allow a new relationship among Aboriginal peoples and the Canada.291

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287 Ibid. at 9

288 Federation of Saskatchewan Indians, supra note 51 at 17.


291 See specially Dyck, supra note 179; Miller, Skyscrapers, supra note 66; and Menno Boldt, Surviving as Indians. The Challenge of Self-Government (Toronto: University of Toronto Press, 1993). According to Bernardo Berdichevsky, the system imposed in Canada to Aboriginal peoples by the government since the last century until early post second world war, is that of an internal colonialism. Through the Indian Act and its related policies, Aboriginal peoples lost control of their lives and cultures at the hands of the government. Berdichevsky, supra note 14. It is important to note that the introduction of the concept of internal colonialism into social sciences came from Mexican political scientist Pablo Gonzalez C. This author applied this concept to describe the situation of Indigenous peoples in Mexico. (See Pablo Gonzalez C., Democracy in Mexico trans. Danielle Salti (New York: Oxford University Press, 1970) at 84). This concept has been used later by social scientists in Canada to refer to the relationship existing among Euro-Canadians and Aboriginal peoples. Such is the case of Beverley Gartrell who applies it to the relations of liberal democracies, including Canada, with Indigenous peoples. As Gartrell affirms:
The contradiction existing between Aboriginal analysis concerning the *Indian Act* here referred to, and the attitude assumed by Aboriginal peoples in practice when the subsistence of the Act has been threatened, must be highlighted. Notwithstanding Aboriginal critiques to the Act, the proposals made in the last decades by the federal government to remove or reform the Act have been strongly opposed by Aboriginal representatives. The Aboriginal reactions against Trudeau's White Paper in 1969 which was to end up with this Act was so strong that the government was forced to withdraw its proposal. Aboriginal peoples have continued to oppose, as we will see later in this Chapter, almost all attempts made by the federal government to modify the *Indian Act* until today.

As the RCAP report admits, there is a "profound ambivalence" among First Nations with regard to the *Indian Act*. The report states on this matter:

Despite being its harshest critics, however, Indian people are often extremely reluctant to see it (the Indian Act) repealed or even amended. Many refer to the rights and protection it contains as being almost sacred, even though they are accompanied by other paternalistic and constraining provisions that prevent Indian peoples assuming control of their own fortunes. This is the first and most important paradox that needs to be understood if the partnership between First Nations and other Canadians is to be renewed.\(^{292}\)

According to D. Sanders, Aboriginal contradictions in this matter are better understood when considering that the *Indian Act* is basically about the reserve system. Consequently, if this Act is repealed, Aboriginal people fear that they will lose their reserves, or at least the tax free status of the reserve. They also are afraid to lose the federal grants that, although are not made pursuant to the provisions of the *Indian Act*, have been long connected with the reserve and status system. According to Sanders, these fears make the *Indian Act* almost unrepealable in practice.\(^{293}\)

\(^{292}\) RCAP, *Report vol. 1*, supra note 1 at 259.

\(^{293}\) Sanders, *supra* note 110.
3.8.3. Treaty interpretation.

Several Aboriginal scholars and organizations have analyzed the nature and content of the treaties entered into by their peoples with Canada during this period, as well as the reserves they imposed.

J. Y. Henderson attempts to differentiate between the form and nature of the numbered treaties signed after 1871, which he calls Victorian, with that of the treaties developed in Atlantic Canada in earlier years, which he identifies as Georgian. According to him, the Victorian treaties are more European in style, and because of that, more readily accepted as treaties. Instead of being made with "nations and tribes of Indians", they are made with "Her Majesty's Indian subjects." Henderson affirms that these treaties recognize a union with the imperial Crown, not with the Canadian or provincial government, creating protected nations directly under the imperial Crown's foreign jurisdiction. ²⁹⁴ What is interesting in Henderson's analysis is his affirmation that the recognition of internal structures of First nations in the treaty negotiation process (these treaties were signed with chiefs and headmen) constitutes an acknowledgement of Aboriginal autonomy and choice in determining their political status. Because of this, he asserts that these treaties, like those of early colonial period, create a nation to nation relationship.²⁹⁵

The differences existing between Aboriginal and governmental interpretations of these treaties have been highlighted by the Federation of Saskatchewan Indian Nations. This organization sees the treaties as political arrangements with the Crown which allow them to live as Indian peoples forever, retaining their sovereign powers.²⁹⁶

Several Aboriginal organizations and scholars in the last years have been studying the treaties that involve their peoples based on the perspective of their elders.²⁹⁷ In the case of Treaty

²⁹⁴ Henderson, "Empowering", supra note 163 at 249.

²⁹⁵ Ibid. at 250-256.

²⁹⁶ According to its statements, the principles that were guaranteed to the Natives included sovereignty over their people lands and resources, both on and off reserves, subject to some shared jurisdiction with the appropriate government bodies on the lands known as unoccupied Crown lands; an ongoing relationship with the Crown in social and economic development in exchange for lands surrendered; tax revenue sharing between the Crown and Indian Nations; a political protocol for annual reviews of the progress of the treaties; and the fact that Indian interpretation supersede other interpretations (Federation of Saskatchewan Indians, supra note 51 at 11).

²⁹⁷ Among these studies, that undertaken by the Elders of Saskatchewan in relation to Treaty 4 (See Federation of Saskatchewan Indians, "Elders Interpretation of Treaty 4. A Report on the Treaty Process" [no publishing information provided], in Federation of Saskatchewan Indians, supra note 51 at 12), that developed by the Treaty 7 Elders and
No. 7, the elders of that area and their Tribal Council have attempted to investigate the true "spirit and original intent" of the treaty. In this research the elders interviewed affirm that this was a peace treaty. None of them remember any mention of a land surrender. They instead remember that they would be "taken care of," that they would be given an education and provided with medical care and annuity payments. As they affirm in their conclusions, they remember promising that they would "share" the land with the newcomers, and in return, they would be provided with the benefits that the new society could offer them, such as assistance in agriculture and ranching. They also remember that they would have freedom to continue to fish and hunt and gather as they had always had, and to choose the lands on which they would live.  

In the case of Treaty No.6, Sharon Venne refers to the criticism that has been made by the elders to its written version. The elders main criticism deals with the language that is used with regard to lands. The written version contains the wording "cede, surrender and forever give up title to the lands." The elders maintain that these words were not included in the original treaty. "The Chiefs and Elders could not have sold the lands to the settlers as they could only share the lands according to the Cree, Saulteau, Assiniboine, and Dene laws." In the same analysis Venne refers extensively to the requests made to Aboriginal peoples by the Commissioner at the time of the treaty, which according to the elders only included "use of the land to the depth of the plough for the Queen's subjects to farm, trees to construct houses, and grass for the animals brought by the settlers." She also provides details of what the elders recall were the promises that were made to their ancestors by the Commissioner, which included health care, education, water, fishing, hunting and trapping, police, reserves, mountains, birds, social assistance, minerals, Indian Agent, farm instructor, treaty money and respect for their citizenship.

It is interesting to highlight the fact that these interpretations are essentially shared by the RCAP report in its analysis of the confederation treaties. According to the RCAP, like in pre-confederation treaties, there are fundamental misunderstandings about what the parties assumed

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Tribal Council with respect to the same treaty (See Treaty 7 Elders and Tribal Council, *The True Spirit and Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996)), and that done by the Aboriginal scholar Sharon Venne, with the participation of the Elders of Treaty 6 (See Sharon Venne, *supra* note 54) merit mention.

298 Treaty 7 Elders and Tribal Council, *supra* note 297 at 324.


when they entered into these treaties, particularly with regard to lands. For Aboriginal peoples it
was difficult to understand the legal and real estate concepts behind the treaties. Based on their own
cultural traditions, they understood that they were sharing the land, not surrendering it.301 The
RCAP also affirms that Aboriginal peoples thought that their way of life and traditional economies
based on hunting, fishing, trapping and gathering, would not be affected by the treaties. The same
report states that First Nations did not agree to have their lands taken over by the Crown, nor did
they agree with coming under its control.302

3.8.4. Non fulfilment of treaties.

Finally, another issue that has been raised from an Aboriginal perspective is the non-
fulfilment by the Canadian government of the promises contained in the treaties. As Ovide
Mercredi and Mary Ellen Turpel express in their analysis of this sensitive issue for their peoples:

Especially in this century, the Crown has acted in a seemingly wilful manner to
undermine the treaties. Even though the treaties were the product of negotiations
and consent, the governments of Canada have passed legislation and acted in ways
that are contrary to their treaty obligations, without even consulting us. This has led
to serious unrest and injustice. It has also caused First Nations to lose respect for
Canada as a nation because governments are seen as unwilling to keep their word
and honour their solemn commitments.303

This situation has also been recognized in the RCAP report when it acknowledges the lack
of commitment that the Canadian government has to the treaty relationship and to fulfilling their
obligations. Among the factors which according to the RCAP contributed to this situation are the
Crown's failure to establish laws to enforce the treaties it signed, the fact that no government

301 RCAP, Report vol. 1, supra note 1 at 159.

302 Ibid. at 159-160. The idea that Aboriginal peoples of the Northwest Territories never intended to surrender lands
but rather to share them when entering into treaties Nos. 8 and 11 is documented by Fumoleau (see Fumoleau, supra
note 207 at 100; 212). According to D. Sanders, the Canadian government has accepted that these treaties, covering
part of this territory, did not extinguish Aboriginal title, because Aboriginal peoples did not understand them to do so.
As a result of this position, comprehensive land claims, as we will see later in this Chapter, were negotiated by Canada
in this area, acknowledging that the treaties were not valid land cessions (Sanders, supra note 110).

303 Mercredi and Turpel, supra note 50 at 63.
department was given responsibility to fulfil the treaties, leaving this important task to civil servants without adequate knowledge, and the financial situation of Canada after confederation. 304

3.8.5. Other Aboriginal peoples' perspectives.

The imposition of Canadian laws and policies in Inuit territory is evidenced in the statement of current Inuit leaders. According to Josepi Padlayat, of the Inuit Committee on National Issues:

When the Qyallunaat, or White people, began coming to our land in great numbers, we shared our land and our resources with them; and suddenly our homeland became a jurisdiction governed by someone else's laws. Our children were taught to speak a different language from that of our people, and we were immersed in a whole new way of life, whether we liked it or not. 305

The same perspective is shared by Rosemarie Kuptana, President of the Inuit Tapirisat of Canada:

the essence of the relationship between the Inuit and Canada [which] is an unequal power relationship in which Inuit rights have often been ignored and Inuit powers have been usurped by governments not of our making. 306

In the case of the prairie provinces, a strong criticism of the Canadian relationship with the Metis during and after their rebellions, is made by the Metis scholar Howard Adams. In his analysis, Adams sees Canada as an imperial state which practiced violence and terrorized the Metis in Red River and Batoche. As a result, Metis families were forced into submission and silence. He sees no difference between these military actions and military campaigns against other conquered people. According to this author, for 150 years, the "imperial state" of Canada and its policing forces have been exercising absolute power over the Metis, as they have done with the Inuit and Indians. Finally, he sees the welfare bureaucracy implemented by the Canadian state for the Metis

304 RCAP, Report vol. 1, supra note 1 at 176.


306 In RCAP, Report vol. 4 supra note 265 at 431.
as a mechanism to generate political conformity and subservience to ideological authority, as well as a form of terror.\textsuperscript{307}

Clem Chartier, a Metis lawyer and leader, believes that the government's real intention when dealing with the Metis was to dispossess them of their land. They knew that by accepting the scrip scheme of land disposition the Metis would lose their land rights. With the Metis out of the way, settlement could proceed. According to Chartier this is an injustice Canada has yet to address.\textsuperscript{308} The dispossession of Metis from their lands throughout this stage, and up until now, is one of the central problems addressed by the RCAP report with respect to this people.\textsuperscript{309}

4. NEGOTIATION AND RENEWAL.

As we saw previously, the organizational process experienced by different Aboriginal peoples since the post war period, and in particular during the 1960s, gave them the strength to stop Trudeau's White Paper in 1969. The same strength helped to push the federal government into the construction of a new relationship between the two parties, that the RCAP report has denominated as "negotiation and renewal."\textsuperscript{310}

Aboriginal demands from the White Paper until today have triggered important reforms to the long-standing Indian policies of the Canadian government. Although the main piece of legislation dealing with Aboriginal peoples, the \textit{Indian Act}, and many of its assimilationist provisions still remain in force, significant changes in the legal and constitutional order would be introduced throughout this period as a consequence of Aboriginal pressure. Moreover, court decisions in cases brought by Aboriginal peoples in different parts of the country opened the gates for a new interpretation of Aboriginal and treaty rights which would result fundamental in the deconstruction of the colonial order imposed to them in the past.

\textsuperscript{307} Howard Adams, \textit{A Tortured People The Politics of Colonization} (Pentincton BC: Thytus Books Ltd., 1995) at 200-201. According to Bernardo Berdichewsky, the attitude assumed by the Canada in the case of the Metis is also characteristic of the system of internal colonialism. Berdichewsky, \textit{supra} note 14.


\textsuperscript{309} See section on Metis perspectives contained in RCAP, \textit{Report vol 4}, \textit{supra} note 265 at 199-386.

\textsuperscript{310} RCAP, \textit{Report vol. 1}, \textit{supra} note 1 at 202.
Due to the role played by Aboriginal peoples in the last three decades in the shaping of this new relationship, we will frame this period's analysis in the demands asserted and strategies implemented by them, rather than in the chronology of legal accounts. In using this approach, we hope it will enable a better understanding of this period. In the last part of this section, we will also attempt to analyze recent government initiatives, in particular those dealing with self-government, which have emerged in this changing context. We will also analyze Aboriginal reactions to them.

4.1. Foundations of Aboriginal demands.

Aboriginal peoples' demands throughout this period have been a reaction to the policies implemented by Canada in the last two centuries affecting their land and resource rights. More specifically, the non-fulfilment of treaty rights and the need to obtain recognition of Aboriginal title in those areas where treaties were not signed, have led First Nations, Inuit and Metis people to assert their rights over lands and resources in recent decades. 311

The explosion of Aboriginal claims for lands and resources during the last decades can also be explained by the expansion of Canadian "frontier" into Aboriginal territories through development initiatives. These developments have increasingly been proposed by non-Aboriginals on lands claimed by Aboriginal peoples. The same initiatives, which on many occasions have been implemented without Aboriginal consultation or genuine consent, have had deep impacts in the economies, ways of living and cultures of many Aboriginal peoples. The James Bay Hydroelectric project in Quebec, which seriously threatened Cree and Inuit traditional territories and hunting grounds, the logging activities undertaken by forest companies in British Columbia and the Atlantic provinces affecting Aboriginal lands and peoples, and the oil, gas and mining projects affecting the First Nations and Inuit in the north, constitute examples of the developments before referred to. 312

311 The concept of "Aboriginal Title" has been a matter of intensive debate. Aboriginal organizations and leaders have had since the 1980s a coincident perspective with regard to its contents. Most of them agree that this concept comprehends a vast number of distinct rights which include not only land and resources, both renewable and non-renewable, and rights to language and culture, but also the right to self-govern as sovereign peoples. This perspective can be seen in First Nations organizations such as the Federation of Saskatchewan Indians (See Federation of Saskatchewan Indians, supra note 51 at 44). This perspective is also shared by Metis and Inuit. See perspectives of Metis leader Clem Chartier and of Inuit leader John Amagoalik in Michael Asch and Norman Zlotkin "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Asch ed., supra note 54 at 215.

312 Aboriginal analysis of these and other development projects in Canada affecting their lands and resources in this period can be found in Richardson ed., supra note 55. An important document regarding one of these development projects, the Mackenzie Valley Pipeline, and its impacts on Aboriginal peoples was written by Thomas Berger in the

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Self-government is another demand that has been central to Aboriginal peoples in Canada during the last decades. The emergence of this demand is related to the frustrations caused by the inability of different peoples to control their lives as a consequence of the Indian Act, as well as to the non-fulfilment of treaties by the Canadian government. Another explanation for this demand can be found in the constitutional debates leading to the patriation of the Constitution which took place in the 1980’s and later in the constitutional conferences. The debate which has taken place in the last decades in the United States, Greenland and other countries, as well as at the international forums dealing with Indigenous peoples’ rights, has also influenced the incorporation of this right in the domestic agenda of Aboriginal leaders in Canada.

4.2. Aboriginal strategies.

Aboriginal peoples have used different strategies to assert their Aboriginal title and rights over their lands and resources, as well as self-government. Litigation in courts has been one of the principal mechanisms used by different peoples for this purpose. Although litigation was initially used to demand recognition of Aboriginal peoples lands and resources, more recently, since the Delgamuukw case, it has also been used to assert Aboriginal jurisdictions and self-government.

Negotiation with governments - including both the federal and the provincial governments - has been another strategy used by Aboriginal organizations during this stage. Based on the guidelines provided by court decisions on Aboriginal title cases and by international instruments

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313 Aboriginal peoples in Canada have played an important role in persuading international forums such as the United Nations to have Indigenous rights, including self-determination, recognized. They have also demanded the application of these international standards at the national level (RCAP, Report vol. 1, supra note 1 at 202). An Aboriginal leader from British Columbia, George Manuel, former president of the National Indian Brotherhood and of the Assembly of First Nations, played a leading role in the struggle for Aboriginal self-determination at the international level. For this purpose he attempted to unite Indigenous peoples of different parts of the world, helping to found in 1975 the World Council of Indigenous Peoples. Manuels became the first president of this international Indigenous organization. (See George Manuels & Michael Posluns, The Fourth World. An Indian Overview (Don Mills, Ontario: Collier-MacMillan Canada, 1974)).
concerning Indigenous peoples' rights, and on a case by case basis in accordance with the policies implemented for this purpose by the government (comprehensive and specific land claims policies), different Aboriginal peoples have come to the negotiating table in order to settle their claims. These negotiations have also been developed by Aboriginal organizations at a national level, with the purpose of obtaining recognition of the same rights. Such is the case with the debate that took place during the patriation of the Constitution to Canada at the beginning of the 1980's, and with the later debate held at the First Minister Conferences regarding Aboriginal right to self-government.

4.2.1. The litigation strategy.

According to Douglas Sanders, the courts in Canada have historically argued that Aboriginal peoples had no rights unless they were recognized in the Indian Act, other legislation or the constitution. Treaties had no legal force in Canadian law, and Aboriginal rights claims were part of an ancient dreamtime. A long standing jurisprudence had rejected Aboriginal rights claims based on this doctrine.\(^{314}\)

It was not until the sixties that this position would start to change within the Canadian judiciary. In 1967, the Nisga'a Tribal Council, representing the Nisga'a people of northern British Columbia, sued the provincial government asking the court to declare that their Aboriginal title had never been lawfully extinguished (Calder v. Attorney General of British Columbia). In 1973, after years of litigation, the Supreme Court of Canada made what has been called a "landmark decision" which would alter the framework for Aboriginal rights in Canada. According to the analysis made in the RCAP Report, in this decision the Supreme Court affirmed that Canadian law recognizes Aboriginal title as encompassing a range of rights of enjoyment and use of ancestral land that stem not from any legal enactment, but from Aboriginal occupancy.\(^{315}\)

\(^{314}\) In Sheldon v Ramsay in 1852 an Ontario Court held that the Six Nations had no legal rights to reserve; the same ideas were used by another Ontario Court in 1921 in Sero v Gault to deny rights emerging from treaties with the Mohawks; in 1929 a Nova Scotia Court ruled in Regina v Syliboy that a treaty between the Mic Mac and England was a nullity because it had been made with a "handful of Indians", implying that they had no political rights or legal organization; and in 1964 the Supreme Court of Canada decided in Regina v Sikyea to reject treaty hunting rights on the base that they were not recognized by statute or by the constitution. Douglas Sanders, "The Supreme Court of Canada and the "Legal and Political Struggle" over Indigenous Rights" (1990) 22 Canadian Ethnic Studies 122 at 123-124 [hereinafter Sanders, "Supreme Court"]

\(^{315}\) RCAP, Report vol. 2, supra note 48 at 560.
However, the complexities of this decision have given origin to different legal interpretations which should be addressed here. According to Thomas Berger, the lawyer representing the Nisga'a in this case, even though the case was technically lost, six of the seven Court judges supported the view that the English law in effect in British Columbia when colonization began had recognized Indian title to land. The seventh judge held against the Nisga'a on a technicality. Nevertheless, according to Berger's interpretation, for the first time Canada's highest Court had unequivocally affirmed the concept of Aboriginal title. According to Douglas Sanders, although a majority of Supreme Court judges rejected the Indian title on procedural grounds, two divided judgements made in this case must be considered to understand its implications. Mr. Justice Judson, supported by two other judges, grounded Indian rights in Indian organization and occupation, but did not actually rule that historic Indian control of territories meant they had legal rights to their lands. According to Judson's argument, any rights they might have had were lost as a result of general land legislation enacted in the colony of British Columbia before the Union with Canada in 1871. Mr. Justice Hall, also backed by two other judges, argued that the Royal Proclamation of 1763 applied to British Columbia, upholding Nisga'a title. He also argued that Nisga'a property rights could only be taken away by legislation showing a clear and plain intention to extinguish the Indian title, and that the pre-confederation legislation in British Columbia did not meet that requirement.

The relevance of this case is that it would open the door for different Aboriginal peoples to sue the government asking the courts to recognize their Aboriginal title. In cases decided after the entrenchment of existing Aboriginal and treaty rights by section 35 (1) of the Constitution Act, 1982, the judiciary further developed the concept and contents of Aboriginal title, acknowledging rights previously denied to these peoples.

In 1983 the Supreme Court said that statutes dealing with Indians should be "liberally construed and doubtful expressions resolved in favour of the Indians." In 1984 in Guerin v The Queen, a case involving the Musqueam band in British Columbia, the court held that the federal

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316 Berger, Shadow, supra note 31 at 152.

317 See Sanders "Pre Existing Rights, supra note 6 at 1000-1002. According the same author, the precise nature of the Indian interest was left open by Hall (See Sanders, First Nations Law, supra note 230 at 183)

318 Sanders, "Supreme Court", supra note 314 at 125.
government was responsible for the mismanagement of surrendered lands on the basis that Indians had rights to their reserves basis on Aboriginal title to their traditional territories. In 1985, in *Simon v. The Queen*, the Court ruled that treaties between the Crown and Aboriginal nations ought to be construed in light of their historical character "not according to the technical meaning of [their] words but in the sense that they would be naturally understood by Indians." While denying that a treaty was a treaty in international law terms, it acknowledged that they were "sui generis" agreements.

In 1990 in *Sparrow v The Queen*, where again the Musqueam band was asserting their Aboriginal rights, this time the right to fish, the Court ruled that "[t]he relationship between the Government and Aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." In the same case the Court further developed the doctrine of Aboriginal rights as "sui generis" rights stating that "[c]ourts must avoid the application of the traditional common law concepts of property as they develop their understanding of...the sui generis nature of aboriginal law." The Court also noted that Aboriginal rights to engage in particular practices and activities associated with lands and resources are collective and protect integral aspects of Aboriginal identity. It also stated that these rights are not frozen in time, but instead evolve with the changing needs, customs and lifestyles of Aboriginal peoples.

With respect to Aboriginal title to unceded lands, the Courts have affirmed in two cases, *Baker Lake v. Minister of Indian Affairs and Northern Development* [1979] and *Ontario (A.G.) v. Bear Island Foundation* [1991], that claimants are required to prove that they and their ancestors

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319 *Ibid.* According to D. Sanders, in this case for the first time in Canadian history the Supreme Court had upheld an Indian right on the basis of Indian law, and of rights in existence before British colonialism. According to the RCAP, the Court also held in the same case that the Crown owes a fiduciary duty to Aboriginal peoples in its dealings with Aboriginal lands and resources.


321 Sanders, "Supreme Court", supra note 314 at 126

322 RCAP, *Report vol. 2*, supra note 48 at 561. According to D. Sanders, the Court ruled in this case that Aboriginal rights could only be taken away by clear and explicit legislation, what had not occurred here (Sanders,"Supreme Court" supra note 314 at 126).

have been members of an organized society which has occupied the territory in question since the assertion of British sovereignty. 324

Notwithstanding the tendency of the Supreme Court rulings above described, decisions made by this Court in the last years have also rejected Aboriginal claims. One example can be found in the Jack case in 1985, where the Court rejected an Indian religious claim, disbelieving the religious significance of the activity involved. In the same year in the Dick case, the Court reaffirmed previous decisions denying hunting rights in non-treaty areas. In 1990, in the Horseman case, the Court rejected a liberal interpretation of the Constitution Act, 1930, holding that it took away treaty protected commercial hunting rights. 325

The Delgamuukw Case.

An important challenge to the Canadian legal system was made in 1984 by the Gitksan and Wet'suwet'en peoples of the northwest coast of British Columbia, in the case known as Delgamuukw. As the claimants expressed in their initial statement to the Supreme Court of British Columbia, unlike in the Calder case of the Nisga'a, they were not seeking the recognition of Aboriginal title, but rather "their right to ownership and jurisdiction over their territory." 326 These peoples argued that in the absence of any settlement of the relationship between themselves and the colonial, provincial or federal governments who have come into their territories, or conquest of their peoples or territory in a just war, their rights have never been extinguished. They also argued that the rights they claimed were recognized by the common law, proclaimed in the Royal Proclamation of 1763, and now entrenched in section 35 of the Canadian constitution. 327

One of the interesting aspects of this case is that it is the first time that the courts were challenged not from the perspective of the common law, but also from Aboriginal worldviews and laws, based mainly on oral evidence. As the claimants stressed:

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324 Ibid. at 560.
325 Sanders, "Supreme Court", supra note 314 at 128.
326 Gisday Wa and Delgam Uukw, supra note 60 at 21.
327 Ibid. at 71.
The challenge for this Court in understanding the nature of Gitksan and Wet'suwet'en validation of facts and in accepting Gitksan and Wet'suwet'en history as real, is part of the Court's task in treating Gitksan and Wet'suwet'en societies as equals.\textsuperscript{328}

After years of litigation, the Supreme Court of Canada made its decision in this case on December of 1997, defining what Aboriginal title means, how it can be proved and how section 35 of the \textit{Constitution Act, 1982} protects this title. The Court also provided guidance on the powers of governments to infringe on Aboriginal title, as well as the contents of meaningful consultation, compensation and extinguishment. The Court acknowledged the desirability of negotiations between First Nations and governments. The Supreme Court also decided that a new trial would be necessary to determine the Aboriginal title and self-government rights of the Gitksan and Wet'suwet'en peoples.\textsuperscript{329}

The nature of the concept of Aboriginal title contained in the Supreme Court decision in \textit{Delgamuukw} is analyzed by legal expert Brian Slattery. According to Slattery, who affirms the decision made in this case is probably the most important judicial pronouncement ever made in the long history of Aboriginal rights in Canadian Courts, the distinctive character of Aboriginal title has at least three dimensions. The first is inalienability, meaning that lands held under this title cannot be transferred, sold or surrendered to anyone other than the Crown. The second is the recognition by the Court that this title arises from the prior occupation of Canada by Aboriginal peoples, that is from the historic occupation of the land prior to the assertion of British sovereignty. The third is the fact that this title is held communally.\textsuperscript{330}

Regarding the content of Aboriginal title, Slattery states that Chief Justice Lamer makes two striking and important rulings. The first ruling is that it includes the right to exclusive occupation for a variety of purposes, not necessarily those of an Aboriginal group's culture at the time of contact or any other historical time. In other words, he affirms that an Aboriginal group is

\textsuperscript{328} \textit{Ibid.} at 41.

\textsuperscript{329} Legal analysis made by the First Nations Summit of British Columbia, in First Nations Summit, "Analysis, Strategy and Statement on Delgamuukw" \textit{In First Nations Summit Meeting, April 14, 15, 16 1998} (North Vancouver, 1998) at 1 [unpublished].

\textsuperscript{330} Brian Slattery, "The Definition and Proof of Aboriginal Title" in Pacific Business and Law Institute eds., \textit{The Supreme Court of Canada Decision in Delgamuukw} (Pacific Business and Law Conference, Vancouver, April 1998) at 3.1-3.5 [unpublished] [hereinafter Slattery, "Definition"].
free to use the land in ways that are different from the ways in which it traditionally used its lands. This means, according to Slattery, that Aboriginal peoples would be capable of developing and exploiting mineral resources on its lands without necessarily having to surrender the land to the Crown for this purpose, as long as the exploitation does not involve transfer of the land to third parties. The second ruling is that the uses that an Aboriginal group makes of its lands must not be fundamentally inconsistent with the nature of the group's attachment to the land. As a consequence, uses of land that affect the continuity of Aboriginal relationship with land over time are excluded from the content of Aboriginal title.  

Slattery also affirms that the Supreme Court holds that Aboriginal title is an Aboriginal right recognized and affirmed by section 35 (1) of the Constitution Act, 1982, and as such is protected by this section. Since Aboriginal title existed under Canadian common law prior to the enactment of section 35 (1), it is clearly one of the "existing aboriginal rights" which the section covers according to Slattery. According to the same legal expert, the Supreme Court holds in this case that for an Aboriginal group to establish Aboriginal title to land, it must prove that the group was present on the lands in question at the time that the Crown gained sovereignty over them; that this historical presence amounted to occupation of the lands; that if present occupation of the lands is relied on as a proof of occupation at the advent of the Crown sovereignty, there must be continuity between the two periods; and that the group's occupation of the lands must have been exclusive at the time the Crown gained sovereignty.

Finally, another important aspect of this decision that should be highlighted, is the fact that it gave validation to Aboriginal oral history as evidence in courts as demanded by the claimants. The Court ruling, and in particular that of Lamer C.I.C, emphasized the necessity for such evidence and the importance of adjusting the law of evidence, where necessary, in order to ensure its admission. He also commented on the need to accord oral history independent weight in the balance of probabilities.

331 Ibid. at 3.6-3.9.
332 Ibid. at 3.11.
333 Ibid. at 3.14.

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Aboriginal interpretation of court decisions.

Although it has taken the Canadian courts a long time to incorporate these principles into the concept of Aboriginal title, the developments are, in general, considered to be positive by Aboriginal peoples. Aboriginal academics have reflected upon them, acknowledging the progresses they represent and the challenges they bring to the legal system.

Aboriginal academics have made an analysis of the "sui generis" nature of Aboriginal rights and treaties affirmed by court decisions. James Henderson understands the principles stipulated by the Supreme Court of Canada regarding the sui generis nature of treaties as "an attempt to affirm and enhance Aboriginal worldviews and cognitive diversity within the Constitution of Canada." Nevertheless, he addresses the difficulties that will exist in the enhancement of this diversity, because it will force the courts to challenge the assumptions of colonization, to interpret treaties flexibly to promote the new constitutional order of Canada, and to refuse to relieve Parliament of its treaty obligations and responsibilities towards Indians.

John Borrows shares this perspective in his writings on this subject. One of the aspects on which Borrows remarks is the challenge that the “sui generis” doctrine imposes on the courts. He affirms that courts will have to take First Nations’ laws into consideration in order to give meaning to Aboriginal rights. When doing this "...courts can approach Aboriginal rights cases on a more principled and global basis, while retaining a fact and site specific content." The decision in the Delgamuukw case has dominantly been interpreted by Aboriginal peoples as a historic decision favouring their rights. Gitksan Chief negotiator Mas Gak (Don Ryan) affirmed that this was an historic judgement which the Gitksan people have worked toward for 130 years. Phil Fontaine, National Chief of the Assembly of First Nations called it "one of the most important decisions in Canadian legal history." The same reaction can be found in the First Nations Summit. The hopes it raised among the Aboriginal peoples that are part of this


336 Ibid.

337 See Borrows, "With or Without," supra note 58 at 646.

organization led the Summit to deliver a statement to the federal and provincial Ministers of Indian Affairs. In their optimistic statement they express their view of the implications this decision had for the negotiating process in which they are involved:

The First Nations Summit is placing the Crown on notice that we are re-establishing our communities, our economies and our laws on our title lands. Our Aboriginal title has been acknowledged as being on equal footing with the Crown's title, in the same way that our governments and institutions are on equal footing with the Crown and its institutions. We are now reassuming our rightful place as Nations with Aboriginal title to control of our lands. We are also calling on Canada and British Columbia to signify their good faith by immediately bringing their policies into the line with the requirements of Delgamuukw following the joint process put forward by the First nations Summit. 339

A more critical analysis of the Supreme Court decision in Delgamuukw has been made by Aboriginal legal scholar John Borrows. According to his analysis the Supreme Court did not substantially depart from the previous courts’ reliance on assertions of British sovereignty in grounding its discussion of Aboriginal title.340 As Borrows affirms, "[a]s in the past centuries, sovereignty is once again put forward as a reason for diminishing anothers possessions."341 Furthermore, he states that the court did not recognize or affirm Gitksan and Wet'suwet'en ownership and jurisdiction over their territories.342

Borrows also analyses the implications that this assertion has throughout the decision on this case, affirming that the Courts extension of its procedural rules consolidate the Crown's jurisdiction over Indigenous legal systems. He adds that the Court becomes the final interpreter of facts, and subjects Aboriginal history to non-Aboriginal authentification. He believes that the Court's description of Aboriginal title compels Aboriginal acceptance and reconciliation with the colonization and development by other peoples. He finally affirms that the Court puts the burden of the proof in demonstrating occupancy and exclusivity on the Aboriginal community rather than

339 First Nations Summit, supra note 329 at 20.

340 In Delgamuukw the Supreme Court stated that "Aboriginal title is a burden on the Crown's underlying title... the Crown did not gain this title until it asserted sovereignty over the land in question." See Delgamuukw v. The Queen para 145 in John. Borrows, "Because it Does Not Make Sense: A Comment on Delgamuukw v. the Queen " (Faculty of Law, UBC, 1998) at 4 [unpublished draft cited with author permission][hereinafter Borrows, "Delgamuukw"]

341 Ibid. at 4.

342 Ibid. at 14.
on the Crown, and in the case of self-government, holds Aboriginal sovereignty to stricter scrutiny and higher standards of proof than Crown sovereignty.\textsuperscript{343}

The implications of this decision will be seen in the near future. Nevertheless, it seems evident that negotiation will be reinforced as the means to settle Aboriginal claims to lands, resources and self-government. If frustration by Aboriginal peoples participating in this process is to be avoided, the governments will have to introduce substantial changes in the framework of the negotiating process currently in place, which as we will see later, is characterized by serious constraints and limitations.

4.2.2. The negotiation strategy.

Outside the courts important progress has been achieved by Aboriginal peoples through negotiation of their rights and claims with the federal and provincial governments. This negotiation has included the participation of Aboriginal organizations at a national and provincial level. It has also included tribal councils in representation of specific peoples at the local level.

a. Negotiations through the land claims policy.

The political implications of the \textit{Calder} decision in 1973 became visible soon after when Minister of Indian Affairs and Northern Development of that time, Mr. Jean Chretien, issued a new policy dealing with land claims of Indian and Inuit people in August 1973.

This policy dealt with two distinct situations. The first, called "comprehensive claims policy," dealt with claims and proposals for the settlement of Aboriginal long-standing grievances relating to the loss of land in certain parts of Canada (British Columbia, Northern Quebec, the Yukon and Northwest Territories) where Indian title to land was never extinguished by treaty or superseded by law. The government stated that it was aware that these claims were not only for money, but involve the loss of a way of life, and that settlement through negotiation would contribute positively to a lasting solution of cultural, social and economic problems that for too long kept Indian and Inuit people in a disadvantaged position within Canada. The agreements

\textsuperscript{343} \textit{Ibid.} at 5-6.
reached through this processes were to be enshrined by legislation enacted by Parliament, having consequently the binding force of law.\footnote{Claims that dealt with other areas of the country where no treaties of surrender were entered into, such as southern Quebec and the Atlantic Provinces, although examined by the government were considered of a different character, and therefore, not included in this policy. The policy also ignored the possibility of Aboriginal title claims arising anywhere else in Canada (See Morse, supra note 258 at 630-631).}

The second dealt with the settlement of Indian peoples' claims related with governmental maladministration of Indian lands and other assets ruled by \textit{Indian Act} and other regulations. It also dealt with those claims related to the non-fulfilment of promises made within treaties and disagreements concerning the proper interpretation of the same documents or other arrangements. This became known as the "specific claims policy."\footnote{\textit{Ibid.} at 631.} Through these policies the government attempted to provide an alternative to courts to decide upon the validity of land claims. The government also was promoting the participation of Aboriginal peoples in the resolution of their land claims and allowing more flexibility in the use of historical documentation that could not be admissible in court.\footnote{Negotiations were undertaken directly between DIAND and the claimants. DIAND provided funding to Indian and Inuit involved to research and develop their claims leading to the submission of formal claims to the Minister. Additional grants and loans were made to them for the negotiation of claims. In order to implement this process, DIAND established the Office of Native Claims in 1974. \textit{Ibid.} at 632.}

The topics included in the negotiation of comprehensive claims were stated by the government in 1978. According to the government, this process was intended to translate the concept of "Aboriginal interest" into concrete and lasting benefits in the context of contemporary society. The government officially stated that such benefits could be varied, including lands, hunting, fishing and trapping rights; resource management; financial compensation; taxation; Native participation in government structures; and Native administration of the settlement itself. The government policy was based on the argument that "final settlements confirms these benefits in legislation, to give them stability and binding force of the law." However, according to the same policy, negotiations on the same claims could not be reopened at some time in the future.\footnote{Office of Native Claims. \textit{Native Claims: Policy, Processes and Perspectives}, (Ottawa: Supply and Services Canada, 1978) at 4, in Morse, supra note 258 at 632.}

In 1981, in a context where a large number of Aboriginal peoples were attempting to solve their claims through the comprehensive claims, the government of Canada issued a revised version
of this policy. According to the government, this revised policy was aimed at the "settlement of claims in a manner which will allow Aboriginal people to live the way they wish." The policy was to allow the exchange of undefined Aboriginal land rights for concrete rights and benefits guaranteed in settlement legislation. The document also defined more precisely the benefits that were negotiable, including lands, wildlife, subsurface rights and monetary compensation. Other settlement provisions could include the establishment of corporate structures, taxation, authorities, and social and economic programs. All these elements were seen as related to the overall governmental objective of achieving final and fair settlement which would allow for "relative autonomy of Aboriginal peoples while respecting the rights of other Canadians."348

Claims of a third kind were acknowledged by the federal government in 1993. Such claims, according to the RCAP Report, were intended to attract administrative solutions or remedies to grievances that were not suitable for resolution, or that could not be solved through the specific claims process. They are really a subset of this last category of claims. 349

These policies, with few modifications, continued to be implemented until today. According to information released by the Department of Indian and Northern Affairs (DIAND) in March 1996, DIAND had received 743 specific claims since the creation of this program. Of these claims, 256 were under review and 95 in negotiation. The remaining 392 had been resolved as follows: 151 claims, with a total value of approximately $368,939,294, had been settled; 98 files had been closed; 76 had been rejected; and 27 resolved through administrative referrals.350

According to the same Department, by March 1996 ten comprehensive claim agreements had been settled with the participation of federal and provincial governments and different Aboriginal peoples. This included the James Bay and Northern Quebec Agreement (JBNQA) signed by the Cree, Inuit and Naskapi in 1975 and the Northeastern Quebec Agreement signed by the same people in 1978; the Inuvialuit Final Agreement signed by the Inuit in the western Arctic in 1984; the Gwich'in Agreement signed by the Gwich'in from the Northwest Territories and Yukon

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348 Department of Indian and Northern Development, In all Fairness: A Native Claims Policy (Ottawa: Minister of Supply and Services, 1981), in RCAP, Public Policies vol.2, supra note 257 at 53-54.

349 No definition of what kind of claims might fall into this category has been done according to the RCAP (RCAP, Report Vol 2, supra note 48 at 548).

350 Canada, Indian and Northern Affairs, "Specific Claims" (Ottawa:Indian and Northern Affairs, Information Sheet No 12, March 1996) [hereinafter DIAND, “Specific”].
in 1992; the Nunavut Land Claims Agreement signed by the Inuit of the eastern Arctic in 1993; the Yukon First nations signed by the Council of Yukon Indians in 1993; the Sahtu Dene and Metis Agreement signed by these peoples in northwestern Canada in 1994; and the Nisga'a Agreement in Principle signed by the Nisga'a in British Columbia in 1996.\footnote{Canada. Indian and Northern Affairs, "Comprehensive Claims (Modern Treaties) in Canada" (Ottawa: Information Sheet, March 96) at 3-4 [hereinafter DIAND, "Comprehensive"]. The Nisga'a Agreement in Principle was finalized in August of 1998 and constitutes today the Nisga'a Final Agreement.}

The scope of rights and benefits that have been settled in these agreements has been broad, usually including full ownership of certain lands in the area covered by the settlement; guaranteed wildlife and harvesting rights; participation in land, water, wildlife and environment management throughout the settlement areas; financial compensation; resource revenue-sharing; measures to stimulate economic development; management of heritage resources and parks in the settlement areas.\footnote{Ibid. at 2.}

A special mention should be made of the negotiations that have taken place in British Columbia. In this part of Canada, where no treaties were signed in the past, First Nations, Canada and the province established the British Columbia Treaty Commission in 1993 to facilitate the negotiation of land and other Aboriginal claims. By 1996, 48 statements of intent to negotiate, involving the participation of 70 per cent of the First Nations in British Columbia, had been presented to this Commission.\footnote{Ibid. at 3.} Although negotiated outside of the BC Treaty Commission, one settlement has been reached in this province after years of negotiation. The recently signed Nisga'a Final Agreement involves the Nisga'a people as well as the federal and provincial government. This agreement is the first modern treaty to deal both with Aboriginal land and self-government rights in Canada. It is also the first to find alternatives to the concept of "surrender" that until now had been introduced by governments in all treaty settlements concerning land rights reached through the comprehensive claims policy.\footnote{Negotiations in this case preceded the creation of the BC Treaty Commission as we will see in-depth in Chapter IV.}

Due to the importance that these agreements or modern treaties have, we will look at some of them in greater detail.
i. The James Bay and Northern Quebec Agreement (JBNQA of 1975) and the Northeastern Quebec Agreement (NEQA of 1978).

Signed in 1975 and 1978 respectively, the signatories to the JBNQA were the Grand Council of the Crees of Quebec, the Northern Quebec Inuit Association, the government of Canada, and of Quebec, the James Bay Development Corporation, the James Bay Energy Corporation and Hydro Quebec. The NEQA of 1978, which amended the first treaty, was signed by the same non-Native parties and the Naskapi Band of Quebec. Both agreements, considered to be the first modern treaties with Aboriginal peoples in Canada, were designed to resolve conflicts over the construction of an hydroelectric project in northern Quebec, which Aboriginal peoples feared would negatively impact their land rights. \(^{355}\)

The total population which benefited from these agreements was 19,000.\(^{356}\) Under the JBNQA, the James Bay Cree and northern Quebec Inuit obtained the recognition of rights over 1.164 million square kilometres, including: Category I lands (14,000 square kilometres) in ownership, to be administered by local and regional Cree and Inuit councils and boards, for the exclusive use of the Cree and Inuit; Category II lands (150,000 square kilometres) under provincial jurisdiction and administration, where Cree and Inuit do not have occupancy rights but may use the land for hunting, fishing and trapping; and Category III lands (1 million square kilometres) where Cree and Inuit have exclusive trapping right and outfitting priority, but otherwise public access is permitted. The Agreement also considered an initial monetary compensation payment of $ 225 million from the government of Canada, the government of Quebec and Hydro Quebec. This compensation was to be paid over 20 years and was non taxable. Of this amount the Cree received $ 136.3 million, and the Inuit $ 88.4 million. Additional funds of $ 205.5 million to the Cree, and $ 71 million to the Inuit were granted according to agreements signed in 1978, 1986, 1988 and 1990.\(^{357}\)

\(^{355}\) RCAP, *Report vol 2, supra* note 45 at 721

\(^{356}\) Indian and Northern Affairs, *supra* note 318 at 3.

Under this agreement there was no specific provision for self-government. The Inuit do however control municipal corporations under the Quebec law and exercise delegated aspects of self-government through the creation of the Kativik Regional Government which is responsible for the local administration and government public services such as police, transportation and communications. At a local level, village corporations have the power to administer public security, health, town planning, municipal roads, recreation, and cultural matters. The Makivic Corporation was established under this agreement to administer and invest the compensation moneys received and to attend to economic development for the region. For the Cree, three levels of administration include the Grand Council of the Cree; the Cree regional Authority which attends to administration, education and Cree culture; the Cree Board of Compensation which is responsible for the use of compensation funds under the agreement; and the Cree Regional Economic Enterprise Company (CREECO) which manages business and development.\textsuperscript{358} Under the JBNQA, two advisory committees were set up to deal with social and environmental issues, including the participation of representatives appointed by the federal and provincial governments and Aboriginal peoples. These are the James Bay Advisory Committee for the area south of the 55th parallel, and the Kativik Environmental Advisory Committee for the area north.\textsuperscript{359} 

In 1984 the federal government enacted the \textit{Cree-Naskapi (of Quebec) Act} which replaced the \textit{Indian Act}. The Act recognized local Native government powers and set up a system of land management. This legislation also gave the Naskapi approximately 4,144 square kilometres within Inuit allocation.\textsuperscript{360} Bands now have the power to pass by-laws concerning several matters, including the administration of band affairs, the maintenance of public order, environmental protection, local taxation, land and resource use and planning. Nevertheless, resource management activities and regional planning are reported to be virtually non-existent.\textsuperscript{361} With the JBNQA a vast administrative institutional structure emerged, leading to several complications and overlaps in jurisdiction. Nevertheless, both the government and the Makavik Corporation make the

\textsuperscript{358} Ibid. Appendix G at 3

\textsuperscript{359} Ibid. Appendix G at 6

\textsuperscript{360} RCAP, \textit{Report vol 2, supra} note 48 at 721.

\textsuperscript{361} The ARA Consulting Group, \textit{supra} note 357 Appendix G at 3.
observation that JBNQA is evolutionary, and that the new realities require new approaches. The Inuit are proposing new forms of regional government to respond to this reality.\textsuperscript{362}

i.i. The Nunavut Agreement.

In 1976 the Inuit Tapirisat of Canada (ITC), a national Inuit organization, proposed that a new territory in northern Canada be created. The ITC viewed the new territory as necessary for the settlement of Inuit land claims in the Northwest Territories (NWT). Nunavut - "our land" in Inuit language - would include a vast area comprising the Mackenzie Delta, Beaufort Sea region of the western Arctic and the Yukon north slope. Parallel to that, the Dene and Metis made proposals to divide and restructure the government of the NWT.\textsuperscript{363} In 1982 a referendum held in the NWT approved the idea of dividing the territory. Later in 1987, the Inuit, the Dene and the Metis reached an agreement on the precise boundaries between their respective areas of settlement, boundaries that were approved in a second referendum in 1992.\textsuperscript{364}

An Agreement in Principle to settle the Nunavut Land Claim Agreement was finalized in April 1990. In December 1991 negotiations were finalized on many issues, including the creation of Nunavut. In 1992, the Inuit voted to ratify the land claim settlement by a vast majority (85 per cent), leading to the signature of the final agreement by government and Inuit representatives (Tungavik Federation of Nunavut) in May 1993.\textsuperscript{365} The Agreement deals with Inuit land claims and the creation of a new territory. The general provisions of the Nunavut Land Claim Agreement state that the Inuit assert an Aboriginal title to the area covered by the settlement, and that the Constitution Act, 1982 recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. In return for the complete surrender of the Inuit rights to land and resources, the Nunavut agreement grants back to the 17,500 Inuit specific rights, including fee

\textsuperscript{362} Ibid. Appendix G, 3-4.

\textsuperscript{363} According to Indian and Northern Affairs, these made in 1981 proposals to ensure their presentation in the legislative assembly of a new western territory, to be called Denendeh. (see Canada, Indian and Northern Affairs, "Creating the New Territory of Nunavut" (Ottawa: Indian and Norther Affairs Information Sheet No 55, March 1996) at 2) [hereinafter DIAND, "Nunavut"].

\textsuperscript{364} Ibid. at 1-3.

\textsuperscript{365} Ibid. at 3.
simple title to 350,000 square kilometres of land (subject to certain access rights for non Inuit), and financial compensation of $1.17 billion over 14 years. The agreement also considers the right of Inuit to share resource royalties, hunting rights, and a greater role in the management of land and environment.\(^{366}\)

The agreement also committed the federal government to a process that divides the NWT and creates the new territory of Nunavut. The Nunavut territory and government, which was established on April 1, 1999, has jurisdictional powers and institutions similar to those of the territorial governments. As part of the public government, there is an elective Legislative Assembly, a Cabinet, a territorial court and a Nunavut public service. The *Nunavut Act*, which received Royal assent on June 10, 1993, establishes the legal framework for the new government.\(^{367}\) Even though this Agreement does not create a special form of Aboriginal self-government, the new territory of Nunavut constitutes a public form of government controlled by Inuit people who compose the vast majority - about 80 percent - of the population living in the area.\(^{368}\)

i.i.i. Umbrella Final Agreement (UFA) between the Council for Yukon Indians, the Government of Canada and the Government of Yukon.

This agreement is the result of twenty years of negotiation initiated in 1973. The basis of the claim from the Aboriginal perspective was the illegality of non-Aboriginal occupancy and resource use in their traditional territories and the need to address injustices arising from the impact of industrial society on their lives. From the government’s perspective, the interest in settling the Yukon claim stemmed from concerns regarding social justice, the need to avoid litigation of Aboriginal title and to provide certainty of land tenure for resource and mega project development.\(^{369}\)

\(^{366}\) DIAND, “Comprehensive”, *supra* note 351 at 4.

\(^{367}\) DIAND, “Nunavut,” *supra* note 363 at 3.

\(^{368}\) For additional information see Tungavik and Minister of Indian Affairs and Northern Development, Canada, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Ottawa: Tungavik and Minister of Indian and Northern Affairs, 1993).

\(^{369}\) The Ara Consulting Group, *supra* note 357, Appendix E at 1.
After an agreement in principle had been reached in 1984, the package was rejected due to Aboriginal concern over the surrender of Aboriginal rights. When negotiations were restarted in 1985, Yukon First Nations, under the coordination of the Council for Yukon Indians, recognized that their divergent interests could not be addressed in one agreement. Rather, agreements specific to each First Nation should be negotiated under a broad umbrella agreement. In 1993, the Council for Yukon Indians Umbrella Agreement (UFA) was reached. This agreement was signed by fourteen Yukon First Nations, with a population of approximately 7,000, and the governments of Canada and Yukon. In 1994, four final individual agreements were reached with different First Nations in the area.

Under the UFA direct ownership of 41,439 square kilometres of lands including 25,899 square kilometres of category A lands with both surface and subsurface rights, and 15,539 square kilometres of category B lands with surface ownership only, were granted to all Yukon First Nations. The term used to describe the nature of these lands in the UFA was "equivalent to fee simple." This term was used intentionally by First nations to avoid extinguishing any Aboriginal rights. Cash settlements of $242,673,000 are to be allocated between Councils and Nations of the Council for Yukon Indians under provisions of final financial agreements. Each first nation will receive annual equal payments over 15 years. Over the next five years Canada will also pay approximately $165 million of financial transfer agreements. Canada will pay a share of government royalties in resource development equal to 50% of the first $2 million collected by government on category A lands, and 10% thereafter, subject to conditions.

The UFA entitles the Yukon First nations to negotiate separate self-government powers in a range of areas, including community development and social programs, health and education, economic development, administration of justice and maintenance of law and order, financial payments and direct taxation, etc., many of which are similar to the responsibilities of the territorial

370 Ibid Appendix E at 2

371 Those include the Vuntut Gwich'in, the Na-cho Ny'aak Dun, the Champagne and Aishihik First Nation and the Testil Tinglit Council. RCAP, Report vol. 2, supra note 48 at 726.

372 Ibid. at 727; The ARA Consulting Group, supra note 357, Appendix E at 2. In, the Preamble of the Agreement the parties acknowledge explicitly that First Nations wish to retain Aboriginal rights and titles with respect to settlement lands.

373 The ARA Consulting Group, supra note 357, Appendix E at 2.
government. Under self-government, each of the fourteen nations will be a law-making body, with a very extensive jurisdiction if they choose to have it. These law making powers include use and occupancy in settlement lands. The powers acknowledged to First Nations also include the authority to manage, administer, allocate, and regulate harvesting rights on the same lands.

Finally, the UFA also considers First Nations participation in resource and land use decision making throughout the Yukon, through organizations such as the Yukon Land Use Planning Council, Regional Land Use Planning Commissions, Yukon Development Assessment Board, Fish and Wildlife Management Board, etc.

Critiques to the land claims policies.

Many Aboriginal peoples in Canada have been involved one way or another in this negotiation process. Nevertheless, after more than two decades of involvement, their criticism with regards to these policies and the way they have been implemented by the government is strong.

The Assembly of First Nations, in a document addressed to the government in 1990 with regards to the specific claims program, affirms that this policy "developed unilaterally by the federal government, reflects no effort whatsoever to ensure that a remedy is provided in all cases where a government has violated a legal obligation toward First Nations." According to the same document, claims based on wrongs committed prior to Confederation are excluded, as are those related exclusively to hunting and fishing rights. The AFN adds that the government in this process acts as a defendant as well as judge and jury on claims made against it. It also criticizes the speed with which the claims are being reviewed: while more than 500 claims have been submitted since 1973, they have been settled at a rate of 3 per year. Due to this analysis, the AFN proposes the creation of a new independent process which should operate in an impartial manner guided by principles of law, equity and fairness.

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374 Ibid. Appendix E at 4-5.
375 RCAP, Report vol. 2, supra note 48 at 727.
376 The ARA Consulting Group, supra note 357, Appendix E at 5.
Criticism of the comprehensive claims policy and the agreements reached through it are also significant. A good example of this criticism is that made by the Grand Council of the Cree to the JBNQA. In a recent statement they show their frustration with the way in which the negotiations leading to this agreement were held, as well as with the results of its implementation: The Crees and Inuit were forced to sign the 1975 agreement after a long negotiation in which we were placed under extreme duress and were opposed by powerful and wealthy entities that did not hesitate and bully us. For the twenty years since then, the governments have used the 1975 agreement to favour hydroelectric and other resource exploitation and suppress Cree rights. All this has erode Cree confidence in the JBNQA.  

Probably the aspect of these policies that has been most criticized is that related to the extinguishment clause which has been included in the comprehensive claims settlements. Extinguishment, as it has been understood in the written versions of many historic treaties and comprehensive claims agreements, implies that Aboriginal parties agree to "cede, release and surrender to Her majesty in Right of Canada... all their aboriginal claims, rights, titles and interest, if any, in and to lands and waters" in return for specific benefits. Most Aboriginal peoples have had problems in accepting the extinguishment clause in the land claims settlements. Although they recognize the need to achieve certainty with respect to their title and rights after agreements with the government are reached, they express concern because many equate legal certainty with extinguishment.

With regard to this topic the Assembly of First Nations affirms, "[s]o when we hear the federal government insisting upon 'certainty', we must ask-certainty for whom? Certainty to exclude the First Nations for all time to come?" Hon. A. C. Hamilton affirmed in 1995 in his report on the extinguishment issue that for Aboriginal peoples the surrender requirement undermines fundamental rights far beyond the land itself. They see surrender as an attempt to

378 Grand Council of the Crees (Eeyou Astchee), Never Without Consent. James Bay Crees' Stand Against Forcible Inclusion into an Independent Quebec (Toronto: ECW Press, 1998) at 119. The second phase of the James Bay hydroelectric project, Great Whale, was proposed by Hydro-Quebec in recent years. The project to be constructed in Cree and Inuit territory, was postponed due to Aboriginal litigation.

379 Asch and Zlotkin, supra note 311 at 210.

extinguish their identity, beliefs and ways of life. For them extinguishment is inconceivable, and "certainty" is understood as the recognition of their Aboriginal rights. The same report acknowledges the problems that have been faced by Aboriginal peoples who have already signed an agreement containing the extinguishment or surrender clause. According to this report, many Aboriginal peoples do not understand that concept and remain unhappy until today with its results. The report also acknowledged that in the James Bay and Northern Quebec Agreement the use of this clause had resulted in the split of communities and even families.

The removal of this clause within the framework of the comprehensive claims policy, which was one of the main factors that delayed the Nisga'a Final Agreement, constitutes one of the central demands of Aboriginal organizations until today. The need to find a solution to this problem has been addressed by Phil Fontaine, the new National Chief of the Assembly of First Nations.

The RCAP report shares in essence the criticisms that Aboriginal peoples have for the claims policies. It affirms that these policies continue to perpetuate procedures that are dilatory, adversarial and unsatisfactory to all concerned, and that the settlements do not address original grievances or assertions. The need for structural changes is urgent. According to RCAP, these changes require mutual respect, "not a return to failed policies of assimilation based on the surrender or extinguishment of Aboriginal title."

b. Constitutional entrenchment of Aboriginal rights.

In the late seventies and early eighties, several statements were made by Aboriginal organizations in Canada concerning their land claims and title, the need for a new federal-Aboriginal relationship and the recognition of their right to self-government, among other topics. The need to entrench Aboriginal rights in the Canadian legal order was underlined by these

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381 Hamilton, supra note 380 at 41-42.
382 Ibid. at 52.
383 In AFN, Claims, supra note 377 at 21-22.
384 RCAP, Report vol. 2, supra note 48 at 556.
organizations.\textsuperscript{385} The federal government started confronting this issue in 1978 when it released a document related to constitutional reform entitled "A Time for Action." This document included Aboriginal rights as one of the principles to guide the renewal of the Canadian federation. Although this government - due to opposition coming from the provincial governments and Aboriginal pressure - had an ambivalent position on this issue between 1979 and 1982, it was finally unable to remove Aboriginal rights from the constitutional table, thus leading to their entrenchment in the Constitution Act of 1982.\textsuperscript{386}

The \textit{Constitution Act, 1982}, contained several provisions regarding aboriginal peoples rights. Section 25 guaranteed that the Canadian Charter of Rights and Freedoms would not

\begin{quote}
...abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
(a) any rights or freedoms that have been recognized by the Royal proclamation of October 7, 1763; and
(b) any rights or freedoms that may have been acquired by the aboriginal peoples of Canada by way of land claims settlement.
\end{quote}

Section 35 stated that

\begin{quote}
(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.\textsuperscript{387}
\end{quote}

Section 37 provided for a single constitutional conference to identify and define those Aboriginal rights and for the participation of Aboriginal peoples' leaders and territorial government representatives.

The first of the First Minister Conferences (FMC, 1983) included the participation of nine provinces, two territories and four Aboriginal organizations. As in future conferences, its purpose was to fulfil the promise made by Canada's eleven governments to work out the meaning of


\textsuperscript{386} Boldt, supra note 291 at 301- 302.

\textsuperscript{387} RCAP, \textit{Report vol. 1}, supra note 1 at 207.
"existing aboriginal and treaty rights." The Conference agreed that three further FMC dealing with constitutional matters directly affecting Aboriginal peoples of Canada, including the participation of their representatives, would be convened before April 1987. It also agreed to establish an equal guarantee in the Constitution of "existing aboriginal and treaty rights" to males and females. Finally, it agreed in the recognition as treaty rights of rights or freedoms acquired through both existing and future land claims settlements. In accordance with this agreement, the 1983 Proclamation Amending the Constitution of Canada included the following provisions:

1. Paragraph 25 (b) of the Constitution Act, 1982 is repealed and the following substituted therefore:

   (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

2. Section 35 of the Constitution Act of Canada is amended by adding thereto the following subsections:

   (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

   (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The amendment also included provisions concerning two other constitutional conferences to be held regarding issues directly affecting Aboriginal peoples of Canada. Aboriginal participation in them was to be considered. According to different analysts, these amendments were introduced to give constitutional protection to the rights acquired through the modern treaty process. They were also introduced to ensure that the treaties would not constitute a basis for sexual discrimination.

**Following First Minister Conferences on Aboriginal issues.**

No agreement came out of the following FMCs held in 1984, 1985 and 1987. The main issue approached at these conferences was the constitutional recognition of Aboriginal peoples

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389 RCAP, *Report vol 1, supra* note 1 at 208.
right to self-government. Two contradictory positions on the nature and scope of this right impeded any agreement on this subject. Indian leaders held that their people had a pre-existing right to self-determination, which they demanded be entrenched in the constitution. The First Ministers stated that this right was subject to complete control by federal and provincial legislatures.

In the 1985 FMC the federal government presented a proposal known as "contingent right," according to which the principle of an Aboriginal right to self-government was to be constitutionally entrenched, subject to the condition that the definition of this right would be worked out through tripartite negotiations (federal, provincial and Aboriginal), and would have to be approved by Parliament and the respective provincial legislatures. The agreement failed because it was not supported by Indian leadership (Metis and Inuit representatives had approved it). The final FMC held in 1987 also failed in reaching an agreement on the same issue due to similar reasons. Aboriginal representatives insisted that a "third order of government" in Canada, with a constitutionally mandated inherent jurisdiction, should be accepted. 390

The Charlottetown Accord.

In 1992 an agreement in principle to reform the Constitution was reached between the federal-provincial governments and Aboriginal leaders in the "Charlottetown accord". The accord was a product of what was called the Canada Round, a series of consultations called by the Canadian government after the failure of the Meech Lake accord (1987-1990) focusing on the redistribution of federal and provincial powers. It included among its provisions a specific agreement dealing with Aboriginal peoples. 391 Although it was never entrenched in the Constitution due to its rejection by vote on a referendum, it constitutes the most extensive and

390 Boldt, supra note 291 at 287-288.

391 The Meech Lake accord was an agreement between the federal and provincial governments dealing specifically with the recognition of Quebec as a distinct society within Canada. It failed to be entrenched in the constitution due to its rejection by an Indian member of the Manitoba legislature. Aboriginal leaders had no problem in bringing Quebec into Canadian constitutional fold, but opposed this accord because its provisions would have impeded the recognition of a "third order" of Indian government. It also ignored that Indigenous peoples were too distinct societies (Ibid. at 291). The incorporation of Aboriginal peoples in the Canada Round, and in a specific section of the Charlottetown Accord was a consequence of a political manoeuvre by the federal and provincial governments to ease Quebec's political domination of the political agenda.
progressive agreement produced dealing with the right to self-government of Aboriginal peoples within Canada.\textsuperscript{392}

The accord included extensive changes to the relationship of Aboriginal peoples in the constitutional order. Among the provisions dealing with Aboriginal peoples that were accepted by all parties and became part of this agreement, the following are to be mentioned here: (1) The accord proposed entrenching a third order of Aboriginal government based on an inherent right of self-government. Aboriginal peoples, accordingly, were removed from the jurisdiction of federal and provincial governments to the extent that they assumed jurisdiction over themselves; (2) Separate representation in the House of Commons was supported; (3) Aboriginal peoples were guaranteed Senate representation; (4) Aboriginal peoples were granted a limited role in the preparation of lists of candidates to the Supreme Court appointments. The creation of an Aboriginal Council of Elders that could make submissions to the Supreme Court when it considered Aboriginal issues was to be considered; (6) The Metis people came under federal jurisdiction of s. 91(24); (9) Aboriginal exemption from the \textit{Charter of Rights and Freedoms}, already provided in s. 25, was extended by ensuring that nothing in the Charter "abrogates or derogates from... in particular any rights and freedoms relating to the exercise or protection of their languages, cultures and traditions," (10) Aboriginal governments were exempted from the Charter democratic rights in order to allow traditional Aboriginal practices of leadership that would otherwise violate the Charter; (11) Four FMCs on Aboriginal matters to be held before 1996 were proposed; (12) The philosophy behind this accord was expressed in the Consensus Report description of Aboriginal governments authority within their jurisdiction as being (a) to safeguard and develop their languages, cultures, economies, identities, institutions and tradition, and (b) to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.\textsuperscript{393}

\textsuperscript{392} Alan C. Cairns sees this agreement as of a special significance because it constitutes the first time that an attempt is made to accommodate Quebecois and Aboriginal nationalism in a same package (Cairns, \textit{supra} note 256 at 246). Menno Boldt, who is more critical of this accord, believes that the Aboriginal "inherent right to self-government" agreed to be entrenched in the Constitution was as an undefined principle, an "empty box" with provisions involving future negotiations to determine the exact meaning of this right. If no agreement resulted from this negotiation, the Court could be asked to interpret the content of this right (principle) and impose a solution (Boldt, \textit{supra} note 291 at 105-106).

\textsuperscript{393} Cairns, \textit{supra} note 256 at 246-248

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It is important to mention that this Accord was rejected in a referendum by the general electorate, both in French and English Canada, including reserve-based status Indians, whose votes were separately counted.\textsuperscript{394}

**Aboriginal reactions to the constitutional process.**

At the initial stage of this process, Aboriginal peoples were concerned that the patriation of the Constitution to Canada would result in the termination of their rights protected by the Crown. An example of this perspective is found in a statement made by the Union of British Columbia Indian Chiefs (UBCIC) in 1980 expressing its fears that the patriation process would release Canada from all administrative responsibilities toward "Indian" nations performed on behalf of British government.\textsuperscript{395}

J. Y. Henderson, again, provides us with an interesting critical perspective of the constitutional process and its implications for Aboriginal peoples. According to his analysis, after the *Constitution Act, 1982* affirmed Aboriginal and treaty rights, Prime Ministers Trudeau and Mulroney refused to implement them, in what constituted a rejection of the new constitutional vision and a violation of the fundamental human rights of Treaty Aboriginal First Nations. In the constitutional amendment conferences, Henderson affirms, the First Ministers ignored fundamental contexts of constitutional rights when they assumed unilateral authority to select delegates for the Aboriginal peoples, to fill any gaps in treaty federalism and to determine Aboriginal peoples' destiny. \textsuperscript{396} Moreover, the conferences attempted to force the Aboriginal lobby groups that participated in them to choose between imposed self-government and administrative domination. Henderson affirms that by this decision First Nations were "not given the right to self-

\textsuperscript{394} *Ibid.* at 246.

\textsuperscript{395} On its statement the UBCIC criticized the lack of participation of Indian people in the process, and stated that traditional Indian rights and freedoms could be considered discriminatory and therefore illegal under Canadian constitution. It recommended that representatives of Indian nations, Britain and Canada entered into an internationally supervised discussion to define, among other issues, boundaries of Indian nations and Canada, mechanisms for solving future conflicts, financial aid, and measures for exercising full self-government (Union of British Columbia Indian Chiefs, "Indian Nations: Self-Government or Termination," in RCAP, *Public Policies vol. 2*, supra note 257 at 223-225 [hereinafter UBCIC, "Termination"]).

\textsuperscript{396} Henderson refers to the fact that instead of allowing the representatives of the thirty distinct Aboriginal Nations that signed treaties with the Crown, First Ministers selected what he calls "four federally-funded Indian lobby groups" to speak for Aboriginal peoples of Canada (Henderson, "Empowering", *supra* note 163 at 302-303.)

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determination." According to him, this circumstance explains the failure of the constitutional conferences.397

It has to be noted that this critical interpretation of the constitutional process previously referred to and its implications for Aboriginal people has not only been made by Native people but also by respected non-Native analysts. It is interesting to highlight here the analysis made on this matter by Dr. Sally Weaver, a political anthropologist who has written extensively on Aboriginal rights and policies in Canada. According to this author's analysis, FMCs failed to define Aboriginal rights and self-government. Moreover, she affirms that there has been a great deal of disdain within the government towards section 35 constitutional rights. According to her interpretation, this disdain is related to the fact that the provinces and many key units within the government were not involved in shaping section 35 rights in the constitutional deliberations. She concludes that these rights have not been legitimated by the institutions of Canada, and consequently, that they are essentially not rights, but only provide Aboriginal peoples with a bit of political leverage.398

4.3. Self-government and other proposals concerning Aboriginal rights in Canada in recent years.

As a consequence of Aboriginal pressure, as well as of Parliament and Royal Commissions statements concerning Aboriginal rights,399 the federal government has launched and implemented in recent decades, and particularly in recent years, new policies and guidelines allowing Aboriginal peoples a broader control of their own internal affairs as well as of their lands and resources.


399 A special mention should be made here to the Report on Indian Self-Government released in 1982 by Keith Penner M. P. (Penner Report). This Report recommended the establishment of a new relationship based on the constitutional and legal recognition of Indian self-government. The scope of powers to be exercised by Aboriginal governments should include jurisdictions currently occupied by federal and provincial governments. Indian governments would negotiate these powers, but would retain the right to enter into arrangements for program/service delivery with federal and provincial governments. The Report also supported the idea that First Nations should determinate their own membership, and choose whether they wished to be constituted as an Indian First nation government. With regards to economic foundations of self-government the Committee identified land and resource base, the settlement of claims, and the correction of deficiencies in community infrastructure (see Canada. House of Commons, *supra* note 162).
Although initially oriented toward the decentralization of Aboriginal services rather than toward allowing real self-government, these policies have been changing substantially, allowing at least some Aboriginal peoples an increasing control over important aspects of their lives and resources. Among these policies and guidelines the following should be highlighted:

4.3.1 The devolution policy.

As a result of First Nations criticism toward the Indian Act provisions granting the federal government control over their communities, in the mid-1960s, the Department of Indian Affairs implemented a policy of devolution aimed at allowing bands and First Nations organizations to exercise more powers. Initial transfers dealt with the responsibility for managing and delivering program such as social assistance, child care, education and community infrastructure and operation to individual bands. The Department's budget initially showed a fast increase in the funds that were administered by bands, going from $34.9 million dollars, representing 16 per cent of total budget in 1971, to $526.6 million, representing 50 percent of the total budget in 1982/83. In addition to the funds related to service delivery, bands also received core funding to cover administrative expenses.400

The initial implementation of this policy was criticized because it had transferred only the delivery of services to the band level, but control over programs, policies and budget remained with the Department. While the Department referred to this policy as "strengthening band government on Indian reserves," First Nations organizations criticized the policy for its failure to transfer real control to their people.401

Despite these critiques, the federal government has continued its implementation until today. According to the same Department's statistics, the number of band-operated schools increased from 53 in 1975/76 to 353 in 1992/93. In 1992/93 the Social Assistance Program for Aboriginal individual and families was administered by 538 out of 574 eligible bands (93.7 per cent), with funding provided through various contribution arrangements. The Alternative Funding

400 Ibid. at 20.
401 Ibid. This Report (Penner) affirmed that the legal framework (Indian Act) remained intact, limiting the Department's implementation of this policy, because it was not intended to provide opportunities for Indian administration.
Arrangements (agreements established by DIAND with Indian bands or tribal councils providing new and more flexible financial arrangements in which the primary accountability of the band council is to band members) grew from $23,612,274 in 1987/88, representing 1.3 per cent of the total Indian and Inuit Program expenditures, to $531,740,877 in 1992/93, representing 17.4 per cent of the total Program expenditures.\textsuperscript{402}

In recent years, the Department has shown its will to continue with the devolution policy. On 1994, a framework agreement was concluded by the First Nations communities in Manitoba (Assembly of Manitoba Chiefs) with the purpose of dismantling the operations of the Department of Indian Affairs in that province, and to restore First Nations jurisdiction through their governments.\textsuperscript{403} According to A. Doerr, this ten year agreement establishes, among other things, a kind of co-management approach to regional office operations until Aboriginal control is established.\textsuperscript{404} According to federal government information, the administration of funding directed to Aboriginal peoples, has today largely been devolved to them. In 1996/97, 82 per cent of DIAND’s funding was administered by First Nations and Inuit.\textsuperscript{405}

Much of the criticism that was made of this program by the Penner Report in the 1980’s due to the control that the federal government maintained over bands, continues to exist. Other critiques deal with the fact that service delivery on First Nations communities involve both a greater political risk and workload for their leaders, giving them little incentive to become involved in this program. Critiques are also focused on the fact that there does not seem to be adequate training programs for Aboriginal administrators.\textsuperscript{406} However, it is evident that the devolution policy has granted back to Aboriginal communities increasing levels of self-management of basic

\textsuperscript{402}Canada. Department of Indian Affairs and Northern Development, Basic Department Data 1993 (Ottawa: Minister of Government Services Canada, 1993) at 44; 65; 81 [hereinafter DIAND, Data 1993]

\textsuperscript{403}RCAP, Report vol.2, supra note 48 at 205.

\textsuperscript{404}According to Audrey Doerr, the impact of the program will depend on the political will of the Manitoba Aboriginal leaders to carry this experiment to the fullest potential in developing self-government institutions and assuming responsibility for jurisdictional and programmatic matters. Audrey D. Doerr, “Building New Orders of Government- The Future of Aboriginal Self Government,” in (1997) 40 No. 2 Canadian Public Administration 274 at 285.

\textsuperscript{405}Indian and Northern Affairs Canada, "Aboriginal Funding" (Backgrounder, Indian and Northern Affairs) [unpublished information sheet] [hereinafter DIAND, "Funding"]

\textsuperscript{406}Weaver, supra note 398 at 111.
social programs. These programs can be very helpful in training their communities for future self-government experiences.


More recently, in 1995, after the failure of the constitutional debate on Aboriginal self-government, the liberal government Minister of Indian Affairs, Ronald A. Irwin, as a response to an electoral promise, and in order to avoid litigation in the courts, released a proposal containing a federal policy guide recognizing "the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982." The document affirmed that the government has developed a more flexible approach to implement this right that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms (constitutional recognition).  

It also acknowledged that Aboriginal peoples of Canada "have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources." Nevertheless, the policy guide limited Aboriginal self-government to internal matters when affirming that it "does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states." Consequently, it excluded from the law-making power of Aboriginal peoples matters related to Canadian sovereignty, defense and external relations. Moreover, it also excluded their ability to legislate on matters of "national interest," which included among others, fiscal and monetary policy, banking, intellectual property, maintenance of national law and order and substantive criminal law, protection of health, postal services, etc.

According to this policy, Aboriginal governments and institutions currently exercising this right would operate within the framework of the Canadian Constitution, and therefore would have

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408 Ibid. at 4.

409 Ibid. at 6-7.
to work in harmony with jurisdiction exercised by other governments. The *Charter of Rights and Freedoms* binds all governments in Canada, and therefore, self-government agreements have to provide that the Charter applies to Aboriginal governments and institutions in relation to all matters within their jurisdiction. This acknowledgement also applies to its section 25 which must be interpreted in a manner that respects Aboriginal and treaty rights, including the inherent right to self-government. According to this proposal, the Charter is designed to ensure a balance between "individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada."\(^{410}\)

Under this approach, the range of matters of self government, including legislative and administrative powers, which are subject to negotiation by the federal government with Aboriginal peoples include, among others, the establishment of governing structures, leadership selection and group membership, language, culture, religion, education, land, and a range of authorities in areas such as health and social services, law enforcement and administration, housing, taxation, policing, local transportation, licensing, regulation and operation of Aboriginal business. Excluded from negotiations are powers related to Canadian sovereignty, defense and external relations, as well as other areas of national interest. Self-government does not mean automatic exclusion of federal or provincial laws. Agreements have to be clear about how Aboriginal laws relate to other laws. Where provincial or territorial jurisdiction or interests are affected, the federal government proceeds only with their involvement.\(^{411}\)

This policy affirmed that different Aboriginal peoples in Canada can exercise self-government in different ways in accordance with their contexts. Arrangements with First Nations (Indians) recognize the authority of their governments and replace the *Indian Act* with a modern partnership. Where parties agree, rights contained in self-government agreements could be constitutionally protected under section 35 of the *Constitution Act, 1982*. For Inuit communities, the federal approach contemplated self-government arrangements in a public government context, although it does not preclude other arrangements at some future date. With regards to Metis and Indian groups residing off a land base, the government affirmed it was prepared to enter into negotiations with them and provincial governments looking at various approaches to self-

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\(^{410}\) *Ibid.*

\(^{411}\) *Ibid.* at 5-8.
government, including public governments, devolution of programs and services, the development of institutions providing services, and other arrangements where feasible. 412

Among the mechanisms for self-government implementation, this proposal considered treaties, legislation, contracts and memoranda of understanding. For those treaties and agreements that already exist and have no self-government provisions, including those settled through the land claims policy, the government stated that rather than reopening them, it is prepared to negotiate agreements on self-government building on the base of the existing relationship. 413 The proposal also affirmed that the fiduciary relationship of the Crown with Aboriginal peoples, rather than disappearing with the recognition of self-government, will evolve as a consequence of this new relationship and of the Crown's diminished control and authority in relation to them. 414

Finally, the proposal saw self-government funding as a shared responsibility of the federal, provincial and Aboriginal governments. Negotiations would consider among other issues related to funding the existing levels of support, programs assumed by Aboriginal governments, ability of these governments to raise its own revenue, the need for stable and flexible funding arrangements, the avoidance of duplication in funding. It also saw Aboriginal governments as politically and financially accountable for the authorities they exercise. Provisions to ensure this accountability would have to be set out in self-government agreements. 415

From the reading of these guidelines, the possibilities that it seemed to provide Aboriginal peoples were interesting. Bands until then ruled by the Indian Act could constitute new forms of governments controlled by their own members. At least from its wording, the proposal seemed to be particularly interesting for Metis and Indians living off reserve, as well as for Inuit, that have historically have been excluded from government policies. Unfortunately, it has not had no real implications for these peoples so far. 416

412 Ibid. at 17-22.
413 Ibid. at 8-10.
414 Ibid. at 12.
415 Ibid. at 14-15.
416 According to Douglas Sanders, Metis and off-reserve Indians could not be excluded from this proposal. Nevertheless, the focus of Aboriginal policy in the last decades has supported reserve communities, not them. Consistently, nothing has happened with Metis or off-reserve Indians, except for a few not very significative initiatives concerning them implemented in some parts of Canada. Sanders, supra note 110.
This proposal has been criticized by Aboriginal organizations. The Assembly of First Nations critiques had to do with the lack of consultation with Aboriginal peoples prior to its release, as well as to the concept of self-government it contains, which differs from theirs. Other Aboriginal critiques of this policy have dealt with the application of the provisions of the Charter of Rights and Freedoms to Aboriginal governments to be created in accordance with this policy guide. The application of the Charter is seen by different Aboriginal peoples as a threat to their traditional forms of government or institutions by the western democratic principles that are entrenched in its provisions. Another critique deals with the application of Canadian criminal laws to Aboriginal governments, which will impede them from assuming the administration of justice in a matter which is central to their communities.

This policy has not produced any significant impact on the land claims process, which continues to be implemented according to the framework established by the government in previous years. It has not resulted in the acceleration of the treaty process either. The only relevant agreement reached including Aboriginal right to self government since this policy was released has been the Nisga'a Treaty, an agreement which had been at the negotiating table for several years prior to 1995.


Two crucial statements have been released in the last years containing proposals oriented towards restructuring Aboriginal-Canadian relationship. The first document, the Royal Commission on Aboriginal Peoples Report, did not emerge from the government, but from an independent body created by the federal state. We will consider it here, however, due to the importance of its recommendations for the future of Aboriginal peoples in Canada. It is interesting to note that the second document, Canada's Aboriginal Action Plan, although having emerged from the federal government as a response to the RCAP report, is a consequence of a process of negotiations held by this government with the Assembly of First Nations.

417 Ovide Mercredi, National Chief of the AFN, letter addressed to the Prime Minister Jean Chretien on July 31, 1995 [unpublished]

418 Other Aboriginal organizations, nevertheless, were excluded.

The Royal Commission on Aboriginal Peoples (RCAP) was created in 1991 in the context of the constitutional debate regarding the future of the Canadian Federation and of the Oka (Mowhawk) conflict outside of Montreal.\(^{419}\) The federal government asked the Commission to investigate the evolution of the relationship existing between Aboriginal peoples, the Canadian government and Canadian society.\(^{420}\) The RCAP was composed of seven members, including four of Aboriginal origin, who worked for a period of five years to fulfil its mandate in a process of consultation which involved large number of Aboriginal peoples and organizations. Although previous statements and analysis had been released by this Commission,\(^{421}\) its final and most important Report was released in 1996. The Report is contained in five extensive volumes that deal with a broad scope of issues affecting Aboriginal peoples in Canada, including First Nations (Indians), Inuit and Metis peoples, in the past and the present. For "a new beginning" the RCAP's basic recommendation is the need to rebalance political and economic power between Aboriginal nations and other Canadian governments. Unless there is rebalancing, no progress can be made and the status quo will be perpetuated.\(^{422}\) For this purpose, the RCAP see the following as essential themes to confront:

- Aboriginal nations have to be reconstituted, because they have been divided by policy and legislation (Indian Act) into bands. Bands are too small for effective self-government, so the RCAP proposes a process through which Aboriginal communities join together in new institutions to seek recognition of their status as modern nations;

\(^{419}\) The Oka conflict of 1990 was an uprising of a Mohawk community in the surroundings of Montreal in defense of their land which got an important media coverage.

\(^{420}\) See mandate in RCAP Report vol. 1, supra note 1 at 1-3.

\(^{421}\) Among them it is important to mention Partners in Confederation. Aboriginal Peoples, Self-Government and the Constitution (Ottawa: Minister of Supply and Services Canada, 1993) [hereinafter RCAP, Partners], and Bridging the Cultural Divide. A Report on Aboriginal People and the Criminal Justice in Canada (Ottawa: Supply and Services, 1996) [hereinafter RCAP, Criminal Justice]

- A process must be established for defining and transferring powers from other orders of
government to Aboriginal nations, first within their present territory, and later through a treaty
process in which full jurisdiction over an extended land base is negotiated with other Canadian
governments;
- There must be a fundamental reallocation of lands and resources for Aboriginal peoples. To do
justice to their spirit and intent, treaties with respect to sharing the land and resources have to be
honoured. Aboriginal nations cannot survive if they remain without resources, confined to parcels
of land left over from settlement. They expect to be treated fairly, in a manner that recognizes their
relationship to the land and their right to share in its resources;
- Aboriginal people need education and crucial skills for governance and economic self-reliance.
Educational reforms go hand in hand with self-government;
- Finally, economic development must be addressed if the poverty and despondency of Aboriginal
people are to be changed. With access to resources, to development capital, and appropriate skills,
Aboriginal people can participate successfully in the economy.\(^{423}\)

In terms of implementing these principles, the RCAP recommends that "the Sovereign issue
a Royal Proclamation" containing the principal elements of the new relationship and an outline of
its central institutions, that should be complemented by legislation defining those institutions.\(^{424}\)
The Proclamation would recognize Aboriginal nations because only nations have a right to self-
determination. Only at the nation level will Aboriginal people have the number necessary to
exercise a broad governance mandate. The RCAP recommends that companion legislation should
be enacted specifying the criteria of nationhood, establishing procedures, and setting out the
consequences of recognition. It would also provide for assistance to Aboriginal nations involved in
the process of nation building.\(^{425}\)

In this Proclamation the foundations for the treaty process should be laid. Negotiations
would be triggered by the request of an organized Aboriginal nation. Negotiations should be done
in good faith and include the participation of provincial and territorial governments. Nevertheless,
due to constitutional powers of the federal government, if some provinces or territories refuse to

\(^{423}\) Ibid. at 2-3.

\(^{424}\) Ibid. at 4.

\(^{425}\) Ibid. at 5-6.
participate, the federal government should continue with negotiations. The RCAP recommends as complementary legislation an Aboriginal Treaty Implementation Act providing the framework under which treaty commissioners would be established as well as guidelines for the reallocation of lands and resources. An Aboriginal Lands and Treaties Act would create a tribunal to deal with specific claims and assist the treaty process.\(^{426}\)

The RCAP suggests that the federal government should delineate Aboriginal title principles in the same Proclamation, including among them; that Aboriginal land rights do not need to be extinguished to achieve a settlement of land claims or implement new treaties, that this title is a real interest in the land, and the need to reconcile the interest of the broader society with the same title. The government should also state its commitment to resolve questions of redistribution of land and resources in an expeditious way. While Aboriginal nations can invoke the treaty process as a means of resolving virtually all claims through negotiations, certain claims regarding relatively defined issues (specific claims) might be submitted to an independent tribunal for binding determination. The process to solve these claims should be accelerated, and interim measures should be established by this tribunal in order to impede the destruction of those lands which are claimed during the process.\(^{427}\)

The RCAP recommends an amendment of the Constitution Act to provide Aboriginal peoples greater certainty, recognizing in an explicit way Aboriginal peoples' inherent right to self government. As institutional amendments to the Constitution, the Report adds, among others, Aboriginal participation in the Senate, and House of Commons, the creation of an Aboriginal House of Parliament, the incorporation of at least one aboriginal member in the Supreme Court, the creation of an Aboriginal province, and the formal recognition of the participation of Aboriginal peoples in the amending procedure of the Constitution Act.\(^{428}\) Finally, the Report proposes a 20 year program for Aboriginal peoples, with an investment of $2 billion per year, in order to finance these reforms and to allow Aboriginal peoples to take control of their lives, ending the economic dependency that is characteristic of many of their communities today.\(^{429}\)

\(^{426}\) Ibid. at 7-8.

\(^{427}\) Ibid. at 8-9.

\(^{428}\) Ibid. at 125-130.

\(^{429}\) Ibid. at 55-64. The Report estimates that the political, social and economic conditions that Aboriginal peoples are currently facing impose Canada a cost of $7.5 billion per year, and is likely to increase in the future reaching to $11
The reactions to this RCAP report were initially limited. According to D. Sanders, although the Assembly of First Nations called on the government for its implementation, reaction from local and regional Aboriginal organizations has been limited, due to the extensive length of the report and to their involvement in land claims, program deliveries, self government and other issues. The government was critical of it. Minister of Finance Paul Martin reacted saying that estimated he the cost of the RCAP recommendations at 30 billion dollars. Indian Affairs Minister Ron Irwin commented by saying that current policies were achieving change, adding he did not favour large expenditures recommended by the report.\(^{430}\)

It is important to acknowledge that most of the RCAP report recommendations have not yet been implemented today, three years after it was released.

**b. The federal government apology and Action Plan for Aboriginal Peoples (1998).**

In January of 1998, the federal government made public a document in response to the Royal Commission on Aboriginal Peoples Report released in 1996.\(^{431}\) This document, containing an "action plan" oriented to renew the relationship with Aboriginal peoples of Canada, was drafted with the active participation of the Assembly of First Nations, the largest Aboriginal organization in Canada.\(^{432}\) It begins with a "statement of reconciliation" where the federal government acknowledges the contributions of Aboriginal peoples to Canada's development and formally expresses to them its profound regret for past actions undertaken by it which have contributed to difficult pages in the history of their relationship.\(^{433}\)


\(^{431}\) Minister of Indian Affairs and Northern Development, *Gathering*, supra note 232.

\(^{432}\) Demonstrative of Aboriginal involvement in this statement is the fact that it was released in January of 1988 in an act with the participation of Jane Steward, Minister of Indian Affairs, and Phil Fontaine, National Chief of the Assembly of First Nations. "To Aboriginal Canadians: Our Profound Regret", *Globe and Mail*, January 8, 1998, A 19.

\(^{433}\) Minister of Indian Affairs and Northern Development, *Gathering*, supra note 232, at 4-5. The document refers in particular to the legacies of the Residential School system (a fund of $350 million oriented to heal the wounds of those who suffered from this experience was announced together with its release). It also acknowledges the sad events culminating in the death of Metis leader Louis Riel, as well as the contribution of Metis people to Canadian history.
The document also looks to the future, in a "statement of renewal" that expresses a vision of shared future for Aboriginal and non-Aboriginal people in Canada. This statement outlines four key objectives for action, including the need of bringing about meaningful and lasting change in the relationship with Aboriginal peoples; supporting these peoples in their efforts to create effective and accountable governments, affirming treaty relationships; negotiating fair solutions to their claims; arriving at financial arrangements with Aboriginal governments and organizations which will help foster self-reliance; and strengthening Aboriginal economic development. 434

Specifically with regards to self-government, the plan addresses the need to work together with Aboriginal people, the provinces and the territories in building governance capacities, affirming the treaty relationship and continuing to address claims in a fair and equitable manner. 435 With regards to the existing land claims process, the government affirms that it is open to discuss its current approach to the comprehensive claims policy in order to respond to Aboriginal concerns, as well as to provide certainty for all parties. It also affirms that it has been working with First Nations in order to constitute an independent claims body which can decide on the acceptance or rejection of claims. 436

Many critiques have been made of this initiative. Among them is the fact that it came out two years after the RCAP report was released and that it did not address the issues and proposals that were contained on this report. This Plan has also been criticized for the insufficiency of the resources allocated for its implementation in comparison to these peoples' needs, and for the fact that it does not acknowledge the problems and situation of the Inuit people. Nevertheless, at least the Assembly of First Nations accepted the federal government apology and considered it to be a significant advance for Aboriginal peoples in Canada. 437

Whatever interpretation is made of this statement, the fact is that for the first time in Canadian history, the federal government formally expresses its "profound regrets" to Aboriginal people.

434 Ibid. at 6 ff.

435 Ibid. at 15.

436 Ibid. at 19. A joint initiative continues to be worked out with the participation of the federal government and Aboriginal organizations for this purpose.

people for the damages inflicted to them in the past. The acknowledgement made by the government in this document of the need to build a new relationship with Aboriginal peoples in order to overcome the many problems they still face, must be valued.

5. FINAL COMMENTS.

As we have seen throughout this Chapter, the experiences lived by Aboriginal peoples in Canada during the last 500 years would have substantial impacts on their existence. After a long period of living independently as self-governing sovereign nations in accordance with their own laws and spiritual beliefs, on a vast territory that extended from ocean to ocean, they saw the coming of the European and their settlement in their homelands. Though the initial Aboriginal relationship with the European was one of one nation to another nation, based dominantly, but not exclusively, on peace and friendship, racial intolerance on the side of the newcomers resulted in time in the imposition of European institutions, religions and patterns of trade and development on these peoples.

Notwithstanding the protectionist laws passed by the British in North America, whose principles were clearly stated in the Royal Proclamation of 1763, and the treaty relationship that emerged from this document, Aboriginal peoples were confined in reserves on small parcels of land where they were forced to become agricultural farmers and abandon their traditional resource based economies. Moreover, legislation promoted their assimilation into the Euro-Canadian society, established control over all relevant aspects of their lives, and converted them into dependent peoples subjugated by Canada. The negative impact - both physical and psychological - that these laws and policies had on their lives are still present in Aboriginal communities all over Canada.

Several events which occurred in the last decades in the context of the democratization of Canadian society help to explain the replacement of this dark era in the history of the relationship among Aboriginal peoples and Canada, and the emergence of a new stage characterized by a growing mutual recognition and respect. Through different strategies, including litigation and negotiation, Aboriginal peoples have been able to obtain the recognition of important rights they claim to be entitled to as founding peoples of Canada. Among them, the acknowledgement of their Aboriginal and treaty rights by court decisions and by the Constitution Act, 1982, the recognition by the federal government of self-government as an existing right of Aboriginal peoples under the
same constitution, and the negotiation of these rights on a case by case basis with First Nations, Inuit and Metis are to be mentioned. Moreover, Aboriginal peoples have been able to create awareness within vast sectors of Canadian society and political class of the legitimacy of their claims, and of the need to redress the wrongdoing of the past and build a new and more respectful relationship. This awareness can be exemplified in the recent apology statement made by the federal government to Aboriginal peoples in 1998.

Although criticized at the domestic level as insufficient, the achievements obtained by Aboriginal peoples in Canada have few parallels in the world today. Also important to note, the political and territorial rights that have been acknowledged to some of these peoples through the modern treaty process, generally meet the standards which have been set in recent years by international forums preoccupied with these peoples' rights.

5.1. Problems affecting Aboriginal peoples in Canada today.

The achievements previously referred to by no means imply that there are no problems in the relationship between the Canadian state and society with Aboriginal peoples.

5.1.1. Legal constraints.

At the legal level, the main piece of legislation applied to Aboriginal peoples since the last century, the Indian Act, to which we have extensively referred in this Chapter, continues to be in force. Notwithstanding the implementation by the government of the devolution policy, and the settlements reached in recent years through the treaty process with some Aboriginal nations, a large number of them in Canada are still being affected by an Act which has historically been resisted due to its paternalistic perspective and the restrictions it imposes on their lives.

The inadequacy of the Indian Act for the contemporary Aboriginal situation in Canada has been stressed in recent years not only by Aboriginal organizations, but also by the federal government. In a statement released in 1993 concerning alternatives to this Act, it acknowledged that although this Act has been amended on a number of occasions, "it does not reflect modern realities and is stifling the social, economic and political development of First Nations people." It also affirmed that the Act describes "a paternalistic relationship that prevents First Nations people
from exercising the kind of control over their lives that other Canadians have long taken for granted.\textsuperscript{438} According to this government, among the manifestations of this control, are the requirement that the Minister of Indian Affairs supervise elections and hear appeals, approve or disallow First Nations by-laws, manage moneys belonging to First Nations and manage Indian lands. The same Act continues to give the Minister authority and discretionary power over many matters of a local nature as it did one century ago.\textsuperscript{439}

It is true that efforts involving First Nations and the federal government to reform this Act have been made recently. Nevertheless, the different approaches existing on both sides on how to confront this issue have impeded an agreement. This situation can be exemplified in the case of the 1996 federal initiative to reform this legislation, a proposal that according to the AFN, included 63 amendments to the Act, almost half of the Act, most of which were prejudicial to First Nations interests. In its analysis, the AFN compared this proposal with the White Paper of 1969 calling it a "termination policy."\textsuperscript{440}

Another initiative to reform the \textit{Indian Act}, the \textit{Land Management Act} (Bill C-49), has been implemented in recent years involving the federal government and a group of thirteen First Nations from different parts of Canada. This initiative is aimed at enabling these First Nations to establish land management codes and regimes which will allow them to exercise the rights of an owner in relation to their lands, grant interests and licenses concerning it, manage their natural resources, and receive or use moneys acquired by or on behalf of the First Nation under its land code.\textsuperscript{441} Again, this legislation has been criticized by Aboriginal organizations. The AFN sees this Act as tailor-made legislation that will only benefit a select group of First Nations who had previously signed in 1996 a Framework Agreement on this matter with the government, and who had been exercising land management powers under section 53 and 60 of the current \textit{Indian Act}.\textsuperscript{442}

\textsuperscript{438} Department of Indian and Northern Development, "Indian Act Alternatives" (Information Sheet, Ottawa, 1993) at 1 [hereinafter DIAND, "Alternatives"].

\textsuperscript{439} Ibid.

\textsuperscript{440} AFN, "Red Alert. Special Chiefs Assembly: Canada's Termination Policy and DIAND'S Proposed Amendments to the Indian Act" (September 1996) [unpublished]. Due to Aboriginal critiques, the Bill was dropped by Minister Jane Stewart soon after she became Minister. Sanders, supra note 110.

\textsuperscript{441} \textit{Land Management Act}, Bill C-49, Canada, House of Commons, First reading, June 11, 1998, s.14. This Act has now been passed by the House of Commons. Sanders, supra note 110.

\textsuperscript{442} AFN, "Indian Act", \textit{supra} note 284 at 26.
Among the amendments to this Act that should be considered is one aimed at ending its discriminatory sex-based provisions that continue to affect Aboriginal woman and their descendants, despite the changes introduced by Bill C-31 in 1985.\textsuperscript{443}

Other substantial issues that according to the AFN should be considered in an amendment to this Act, are its relationship with treaty and Aboriginal rights, the relationship between its section 91(24) authority and the Crown's trust, fiduciary and treaty obligations, and the relationship between the same provision and the inherent right of self-government.\textsuperscript{444}

Such amendments or the replacement of the \textit{Indian Act}, however, will not be possible without a different attitude from both the federal government and Aboriginal peoples. The first should make more efforts to meet in its proposals the matters that are stressed as central by Aboriginal peoples today. The latter should also make efforts to overcome the ambivalent relationship they have had with this Act in the past. If this does not happen, it is likely that the \textit{Indian Act}, with its paternalistic provisions and the restrictions it imposes to Aboriginal communities, will continue to exist.

Other insufficiencies that affect Aboriginal peoples at the legal level should also be addressed. One example of these insufficiencies is that concerning the criminal justice system. From an Aboriginal perspective, Canadian criminal justice is an alien system imposed by the dominant white society, as was affirmed by a provincial authority in recent years:

The current criminal justice system has profoundly failed Aboriginal people. It has done so in failing to respect cultural differences, failing to address overt and systematic biases against Aboriginal people, and in denying Aboriginal people an effective voice in the development and delivery of services. This must end.\textsuperscript{445}

\textsuperscript{443} This Bill was a consequence of a case (Lovelace \textit{v} the Government of Canada) in which Canada was condemned by the UN Human Rights Committee for violating the Covenant on Civil and Political Rights. It offered the possibility of reinstating status to any person who lost or was denied status because of discriminatory sections of previous Act, among them Indian woman who lost status because they married a non-Indian. Despite this amendment, still a large number of Indians affected by previous discriminatory Act provisions have not been able to meet the new criteria and reinstate their status. Moreover, children of Indian women restored to status under this amendment generally fall under a category of Indian status which has disadvantages in terms of their ability to transmit their status through marriage (RCAP, \textit{Report vol 1. supra} note 1 at 302-303).

\textsuperscript{444} AFN, "Indian Act", \textit{supra} note 284 at 27.

\textsuperscript{445} Robert Mitchell, QC, Minister of Justice and Attorney General of Saskatchewan, "Submission to RCAP," at 27 in RCAP, \textit{Criminal Justice, supra} note 421 at 28.
The failure of the criminal justice system is also evident when analyzing the over-representation of Aboriginal people in the prison system. According to a report from 1988 based on government figures, which generally underestimate the number of prisoners who consider themselves Natives, almost 10 per cent of the federal penitentiary population is Native, compared to 2 per cent of this population nationally. This figure increases in the Prairie provinces, where Natives make up about 5 per cent of the total population but represent 32 per cent of the penitentiary population. 446

This situation explains why Aboriginal peoples, as well as recent independent reports on this matter, have been addressing the need for introducing substantial reforms to the existing criminal justice system, enabling their participation and allowing the incorporation of their values and practices in it. These changes should be understood as part of the efforts to make possible Aboriginal self-government in Canada. 447

At the Constitutional level, although Indian, Inuit and Metis were recognized as Aboriginal peoples, and their Aboriginal and treaty rights were acknowledged, there still has been no explicit recognition of their "inherent right to self-government" as demanded by their organizations in the context of the constitutional debate previously analyzed. The acknowledgement of self-government as an existing right within section 35 of the Constitution Act, 1982 on the Federal Policy Guide on Aboriginal Self-government released in 1995, although accepted in practice by some Aboriginal leaders and advocates, continues to be inadequate and restrictive according to Aboriginal peoples due to the limitations of the self-government concept it contains. 448

The jurisprudence that has emerged in the last decades from Canadian court decisions with regard to Aboriginal and treaty rights to which we referred previously, has evidently been helpful in the progress made in the definition of Aboriginal title rights. It has favoured, on many occasions, Aboriginal interpretation of rights in opposition to the government's interpretation. Nevertheless, it is important to acknowledge that not even in the decision made by the Supreme Court in the Delagamuukw case, which is considered by many as the most progressive statement of the judiciary


447 RCAP, Criminal Justice, supra note 421 at 1-11; 309-315.

448 Mercredi, supra note 417.
in Canada on Aboriginal rights, were the rights to self-government demanded by the Gitksan and Wet'suwet'en people in this case, addressed. The Supreme Court affirmed in this case that Aboriginal rights to self-government, if they existed, could not be framed in excessively general terms, and suggested that the difficult conceptual issues surrounding the recognition of self-government should be determined at trial. 449

5.1.2. Policy insufficiencies.

A comment should be made regarding the policies that have been implemented in the last decades by the government with regard to Aboriginal peoples, including First Nations, Inuit and Metis, in response to its legal and constitutional obligations, to Aboriginal land claims, or to its broader fiduciary responsibilities with them.

The lack of commitment by the federal and provincial governments to fulfill their constitutional obligations with Aboriginal peoples, has been previously highlighted. The need to legitimize Aboriginal constitutional rights in the institutions of Canada for this purpose is still pendent. The limitations of the devolution policy, which more than self-government enable First Nations and Inuit self-management in the delivery of government programs and services to their communities, has also been addressed. The problems that have characterized the land claims negotiations through the policies that the federal government has implemented for this purpose, have been extensively dealt with in this Chapter. Notwithstanding the improvements made in the last settlements, especially in the Nisga'a Treaty, which will be analyzed later in this study, the insufficiencies in the way in which this process continues to be implemented by the governments, as well as of the contents of the settlements reached, continue to preoccupy Aboriginal peoples.

The problems affecting Metis people and urban Aboriginal people, sectors that represent an important percentage of the total Aboriginal population in Canada, are probably the most serious. 450 Many of these problems are attributed to the lack of governmental policies existing with regard to them, or to the limitations that are characteristic of those that exist.

449 Borrows, "Delgamuukw", supra note 340 at 40.

450 Metis population was estimated by the RCAP report in 150,000. Of this population, 90,000 was urban and the remaining population was rural. Urban Aboriginal population was estimated by the same report in 320,000, representing 45 per cent of the total Aboriginal population in Canada. According to the RCAP, this population was composed of 148,500 status Indians, 77,800 non-status Indians, 90,100 Metis and 8,000 Inuit (RCAP, Report vol. 4,
The case of the Metis is probably one of the most complex. By contrast to First Nations, most Metis communities do not have a land base, nor are they subject to the Indian Act.\textsuperscript{451} Due to this situation, the acknowledgement of their lands and resources has constituted one of the central demands of Metis in recent years. Metis claims, nevertheless, have generally not been resolved, with the exception of Metis Settlement in Alberta, where a substantial land area was transferred to the Alberta Metis Settlement General Council in fee simple in 1990,\textsuperscript{452} and of the Metis of the Mackenzie Valley, which according to the agreement signed by them and the Sahtu Dene with the government of Canada in 1993, had some lands and resources acknowledged to them on their traditional territories.\textsuperscript{453}

In terms of self-government, most of the communities where Metis people reside are also ruled by public governments of a municipal type. These governments, although not affected by the restrictive provisions of the Indian Act, are subject to the same regulations as other rural municipalities. Their delegated powers from the province leave much to be desired in terms of achieving community control over local resources and economic development projects, again with the exception of the Metis Settlements in Alberta.\textsuperscript{454} Self-government demands of Metis people on their land bases have only been dealt with at a provincial level. Such is the case of the initiatives developed in Alberta in recent years, where a series of framework agreements between the provincial government and the Metis Nation of Alberta have been reached in order to promote joint planning and action directed to confront social and educational problems.\textsuperscript{455}

\textsuperscript{451} RCAP, Report vol. 2, supra note 48 at 810.

\textsuperscript{452} Ibid.

\textsuperscript{453} DIAND, “Comprehensive”, supra note 351 at 4. Metis claims have been particularly difficult to resolve due to the historical circumstances previously referred to. According to D. Sanders, Metis right claims are only being resolved in two exceptional situations: the Metis settlements of Alberta, which he describes as a reserve system in effect, and in the Northwest Territories. In this last case, people identified as Metis are included in Aboriginal title settlements, as non-status had been involved in other Aboriginal title settlements in regions where Metis was not in use to describe that section of the population. Sanders, supra note 110.

\textsuperscript{454} RCAP, Report vol. 2, supra note 48 at 808-812.

\textsuperscript{455} Foster, supra note 264 at 440.
A similar situation affects urban Aboriginal people. As the RCAP Report affirms, non-Aboriginal governments tend not to recognize urban communities in their policies or programs. The federal government has largely denied responsibility for these communities unless they include registered or status Indians who have moved recently from a reserve or are living away from one temporarily. Usually, responsibility for services for other urban Aboriginal people has fallen on the provinces. For most parts, urban Aboriginal people have used agencies and programs designed for the general population. While provincial governments argue that Aboriginal people, or at least registered Indians and Inuit, are a federal responsibility, and consequently, the cost of Aboriginal programs should be covered or at least shared by the federal government, the federal government argues that the provision of services is a provincial responsibility anywhere outside the reserve boundaries.\(^{456}\)

These governmental approaches to urban Aboriginal peoples have clearly resulted in the breach of the Crown's fiduciary obligation with respect to them. As a result of this situation, urban Aboriginal population today is considered to be one of the socially and economically most disadvantaged communities within Canada.\(^{457}\)

5.1.3. Social and economic discrimination.

A study of Aboriginal peoples rights in Canada today could not be completed without making reference to the social and economic discrimination that they continue to suffer. This discrimination is evidenced by all the existing statistical information that compares their situation to that of other Canadians. It is also evident to everyone who looks at their living conditions on the streets of major cities of Canada as well as on their reserves.

Economic inequalities are highlighted by the RCAP report. According to the RCAP, in 1991, 57.0 per cent of the adult Aboriginal population (over 15) was part of the labour force, in contrast with 67.9 per cent of the adult Canadian population. In the same year, 24.6 per cent of the

\(^{456}\) RCAP, Report vol 2, supra note 48 at 816.

\(^{457}\) On a recent analysis of urban Aboriginal situation in British Columbia, Viola Thomas, president of the United Native Nations, highlights the contradictions of governmental policy with regard to this population, as well as the negative social impacts these contradictions have had for them. See Craig Spence, "Forgotten Natives," The Vancouver Courrier Vol 89 No 86, October 28, 1998 at 1-4.
same Aboriginal labour force was unemployed, in contrast with 10.2 per cent of the Canadian adult population. This unemployment grew to 30.8 per cent in the case of Indian on-reserve labour force. In terms of incomes received by these populations that same year, while 54.2 per cent of Aboriginal labour force earned less than $10,000 of annually, only 34.0 of the non-Aboriginal labour force earned less than this amount a year. This situation was even worse in the case of on-reserve Indian labour force, 64.2 per cent of which earned less than that amount annually.

Aboriginal dependency on social assistance programs is also shown by statistical information. In 1990, 28.6 per cent of Aboriginal population over 15 was receiving some form of social assistance. DIAND estimates that this number grew for on-reserve Indians from 37.4 per cent in 1981, to 43.3 per cent by 1992. Meanwhile the rate of non-Aboriginal population receiving the same services grew from 5.7 per cent to 9.7 per cent in the same period.

Other indicators coming from official sources show the social inequalities that affect Aboriginal peoples in Canada. According to DIAND, life expectancy for First Nations men was 66.9 years, and for women 74 years, compared to the life expectancy of 74.6 years and 80.9 years for all Canadian men and women respectively. Although the infant mortality rates of First Nations fell from 28 to 11 per 1,000 live births between 1979 and 1993, the national rate fell from 11 to 6 in the same period. Health indicators for First Nations people show that they had 6.6 times greater incidence of tuberculosis, are 3 times as likely to be diabetic and 2 times as likely to report a long-term disability than the Canadian population in general. Suicide rates of registered Indian youth from ages 15 to 24 are eight times higher than the national rate for females and five times higher for the rates for males. Finally, although the percentage of Aboriginal people (over

\[458\] RCAP, Report vol. 2, supra note 48 at 803.

\[459\] Ibid.

\[460\] Ibid. at 801

\[461\] DIAND, "Social Development", in Backgrounder (Ottawa, DIAND, 1998) at 1 [Information Sheet]

\[462\] Ibid.

\[463\] Ibid. (Information provided by MSB, Health Canada).

\[464\] Ibid.
15 years or older) that had less than a grade 9 education diminished from 37 per cent in 1981 to 18 per cent in 1991, their education still lagged behind that of other Canadians. 465

This situation is a consequence of the long standing inequalities that these peoples have suffered as a result of laws and policies applied to them by the Canadian government. It is also a consequence of the racial and cultural discrimination and intolerance that, according to many Aboriginal people, continue to exist within some sectors of Canadian society. 466

5.2. Future challenges.

When considered from an historical perspective, the changes in the situation for Aboriginal peoples in Canada in the last decades are significant. Nevertheless, the challenges of overcoming the many legal and social problems that still affect them are as significant as these changes.

One of these challenges consists of the removal, or at least the substantial reform, of the colonial legislation that still is being imposed on First Nations in Canada. It is a contradiction for the Canadian state to affirm that self-government is currently a right recognized by the Constitution, and to continue at the same time implementing legislation that, although reformed, is still based on premises of racial superiority and tutelage. The urgency of this change is related to the fact that this Act in many ways still continues to rule the lives of a significant part of First Nations people, in particular those living on reserves. 467 The removal of the Act constitutes a first step to enable them to assume effective control of their lives and make possible self-government at the community level. 468

Another urgent challenge is the recognition of the lands and resources that Aboriginal peoples have been claiming in Canada in recent years. Notwithstanding the progress made through litigation in the definition of Aboriginal title rights, and that made through the treaty process on this matter, the reality is that many Aboriginal peoples in Canada continue to lack the land and

465 Ibid. at 2.

466 This perception is present in, among other Aboriginal authors, Patricia Monture, supra note 283, and Howard Adams, supra note 307.

467 First Nation people living on reserve in 1991 were 254,600, representing 58.1 per cent of the total First Nation population. RCAP, Report vol.1, supra note 1 at 15-16.

468 Weaver, supra note 398 at 111.
resources that they claim belong to them, as well as need for their economic and cultural survival. A response to Aboriginal demands in this area will not only allow the Canadian government to repair serious past injustices, but also enable Aboriginal economic independence that it has been seeking.

According to recent events, the way in which self-government and land and resources rights might be achieved by Aboriginal peoples in Canada, will probably be through negotiation on a case by case basis. The convenience of negotiations for this purpose has been underlined by the Supreme Court of Canada in its decision on the Delgamuukw case. The Assembly of First Nations has clearly favoured this strategy after the election of Phil Fontaine as its National Chief.\textsuperscript{469} However, if the Canadian government wants to avoid the frustration of these negotiations, the obstacles that have been present in the treaty process until now - such as the slow pace at which Aboriginal claims are being settled, the role of assumed by the federal government as part and judge on the negotiations, and the shortcomings of the settlements arrived on this matter - will have to be addressed.

The need to confront the serious social and economic problems that affect Aboriginal population, both urban and rural, also constitutes an urgent challenge in Canada. For a country that praises itself for having one of the best economic standards and quality of life in the world, it is morally inconsistent to maintain these social and economic inequalities which are discriminatory toward Aboriginal peoples. Moreover, as the RCAP has affirmed, the economic burden that Aboriginal socio-economic backwardness imposes on Canadian society as a whole will increase if this situation is not adequately confronted soon.

It is important to underline here the risks that exist when confronting Aboriginal social and economic backwardness. One of the risks to be highlighted is that of future Aboriginal economic dependency. Although dependency emerging from the Indian Act system as well as from other policies implemented by Canadian government towards Aboriginal peoples in the past has been addressed by their leaders and organizations, it is not so clear that many of them are aware that similar dependency might arise from fiscal arrangements contained in modern treaties signed by them in recent years. State funding for the implementation of self-government agreements reached in Canada in the last years has been at the request of Aboriginal peoples involved in them.

\textsuperscript{469} Robert Matas, "AFN Chief to Seek Wider Alliances", \textit{First Nations Drum} (September-October 1997) at 9.
Nevertheless, the experience of Aboriginal peoples in other parts of the world, where state funding has created economic dependency from those with respect to whom self-government is asserted, should be taken into consideration.\textsuperscript{470}

Finally, the many problems that today affect the maintenance of Aboriginal languages, beliefs and ways of understanding life, as well as the legacies of past abuses, such as those that were inflicted on Aboriginal children who were taken away from their homes to attend residential schools, also have to be confronted. This challenge is probably one of the most difficult, but at the same time important, that Aboriginal peoples face today in Canada if they want to overcome not only their legal, but also, their cultural subjugation within Canadian society.

The problems that Aboriginal peoples face today in Canada are many. The hope that a new and more just relationship between them and Canada will be achieved lies in the perspective shared by both parties today that the solution to these problems cannot be found without mutual cooperation and respect.

\textsuperscript{470} The Home Rule system of the Inuit of Greenland is generally considered to be one of the most successful experiences of Aboriginal autonomy worldwide. Nevertheless, some concerns have been expressed in recent years with regard to their growing economic dependency on Denmark (see Mark Nuttal, "Greenland: Emergence of an Inuit Homeland", in Minority Rights Group ed., \textit{supra} note 38 at 11).
CHAPTER IV

CASE STUDIES:
THE PEHUENCHE PEOPLE OF THE ALTO BÍO BÍO (CHILE)

INTRODUCTION.

In the analysis of Indigenous peoples’ rights in Chile and Canada made in previous Chapters we have attempted to give an overall view of these peoples' histories and present situations in both contexts. However, this general analysis does not allow us to understand the specificity of their pre-contact cultures and social organizations, or of their relationships with non-Indigenous people who settled in their territories. Nor does it allow us to comprehend the challenges that each one of these peoples is facing today.

In order to make possible a broader understanding of these peoples past and present situations, we include here an analysis of a case study in each context. The peoples to be included here are the Pehuenche of the Alto Bio Bio in Chile and the Nisga'a of the Nass Valley in Canada.

As mentioned in Chapter I, there are several factors that explain why these peoples have been chosen to be included as a case study. Although their situations today differ substantially one from the other (while the Pehuenche people's future is currently being threatened by a large development which is being implemented by a private enterprise in their traditional territory, the Nisga'a people have recently signed a treaty with Canada and British Columbia which acknowledges important political and territorial rights), the peoples here referred to have a common history of oppression and dispossession by the societies that became dominant in the states where each of them live. Both peoples have a long history of struggle in defense of their lands and resources which have been gradually appropriated by non-Indigenous people in the last few centuries. Both of them, too, have been involved in recent years in events that are crucial for the future of their communities. Finally, due to the relevance of these events, these peoples are considered to be a symbol of Indigenous-state relations in the countries where they live.
As in previous Chapters, we will provide information of these two peoples from pre-
contact time until today with the purpose of understanding their background as peoples, their
struggles throughout history, and the specificity of their current situation and future challenges.
Consistent with the perspective assumed in this study, we will include, as much as possible, the
views of these two peoples regarding their own past and the struggles in which they are presently
involved.

1. THE PEHUENCHE PEOPLE OF THE ALTO BÍO BÍO, CHILE.

1.1. The origins of the Pehuenche people.

According to archaeological data, small bands of hunters and gatherers, possibly the
ancestors of the Pehuenche people, were inhabiting the surroundings of the Bio Bio river in the
southern Andes approximately in the year 1,200 of our era.\(^1\) The traditional territory of the
Pehuenche people coincided with the habitat of the Araucaria pine (Araucaria Imbricata or
Pehuen) in the Andean cordillera located between latitudes 37 and 40 South.\(^2\) According to
different authors, nevertheless, this territory is said to have been much more extended than that
of the Araucaria pine, including a total of 350 kilometres from north to south and 450 from east
to west.\(^3\)

Information concerning the past of this people is scarce. What is known is that they were
a distinct people, with physical characteristics, a culture and a language that differed from that of
their neighbors, as well as from the culture they have today as a result of Mapuche and Spanish

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\(^1\) Little archaeological research has been done in Pehuenche territory up until today. The data referred to
corresponds to the area of lakes Alumine and Moquehua, located in the eastern range of the Andes, in what today is
Argentinean territory. In Ximena Navarro and Leonor Adán, "Algunos Antecedentes para Situar las Antiguas
Ocupaciones del Territorio Pehuenche," in Roberto Morales et al., Ralco. Modernidad o Etnocidio en Territorio
Mapuche (Temuco: Universidad de la Frontera, 1988) at 34.

Civilizations, Handbook of South American Indians vol. 2 (Washington DC: Smithsonian Institution, 1946) at 762.

\(^3\) Sergio Villalobos, Los Pehuenche en la Vida Fronteriza (Santiago: Universidad Católica de Chile, 1989) at 17.
Coinciding with Villalobos, Molina and Correa affirm that Pehuenche traditional territory included a vast area going
from the current cities of Talca to Lonquimay in the western range of the Andes and from the Diamante river to the
Neuquen river in the eastern range. See Raul Molina and Martin Correa, Territorio y Comunidades Pehuenche del
Alto Bio Bio 2nd ed. (Santiago: CONADI, 1998) at 12. The authors, a geographer and a historian respectively, have
extensively researched and written about the Pehuenche people in Chile.
influence. Unlike the Mapuche, the Pehuenche of the past did not cultivate the soil, but were fundamentally hunters and gatherers. They are said to have been excellent hunters of guanaco, deer, puma, birds and other abundant fauna of the area. They lived a semi-nomadic life, moving seasonally in groups from the lowlands in winter time (invernadas) to the mountains in summer time (veranadas) where they collected the Araucaria nut which was an important part of their diet. This nut was also bartered by the Pehuenche with the neighbouring peoples in exchange for clothes or food. Due to the importance that the Araucaria pine had in their existence, this people were called by the Mapuche as Pehuenche, which in their language means people of the Araucaria.

The transformation of the Pehuenche culture is said to have been a long process which started in the seventeenth century with the expansion of the Mapuche eastward. Since the arrival of the Spanish to the Araucanía, the Mapuche sought refuge in the Pehuenche Andean valleys. There, they seemed to have had a peaceful relationship with the Pehuenche, mixing with them and influencing their language and culture. Mapuche expansion in this direction was also a consequence of a military and economic strategy. To obtain the horses they needed to resist Spanish conquest, the Mapuche made frequent raids to the pampas or plains east of the Andes where abundant quantities of them lived in wild herds. Later, when no wild horses were left, Mapuche raids were aimed at capturing horses from the estancias which had been established by the Spanish in the abundant grazing lands of that area.

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4 The Spanish chronicler Mariño de Lobera related that on an expedition to the southern Andes made in 1563, they found a type of people who differed from that of Chile in being taller and thinner and in subsisting on nuts from the Araucaria pine nuts or piñón. The same author cites a criminal trial held in 1658 in Mendoza, in what today is Argentinean territory, where some Pehuenche who testified under oath spoke their own language and had no knowledge of Araucanian or Mapuche language. See Canals Frau, supra note 2 at 762-763.

5 Information provided by different early Spanish chroniclers, including Jerónimo de Bibar and Nuñez de Pineda in the XVI and XVII century respectively, in Villalobos, supra note 3 at 26-35; Navarro and Adán, supra note 1 at 34-35. According to Mariño de Lobera, the Pehuenche made bread, wine and dishes out of Araucaria nut. Mariño de Lobera, Cronica del reino de Chile Col. Hist. Chile, vol. 6 (Santiago: 1865) (Written in 1594) at 268 in John Cooper, "The Araucanians," in Julian H. Steward ed. supra note 2 at 759.

6 Canals Frau, supra note 2 at 762-763.

7 Molina and Correa, supra note 3 at 13.

8 Horse raids were known as malones by the Mapuche. In Holdenis Casanova "La Alianza Hispano-Pehuenche y sus Repercusiones en el Macro-Espacio Fronterizo Sur Andino (1750-1879)," in Jorge Pinto ed., Araucanía y Pampas. Un Mundo Fronterizo en América del Sur (Temuco: Universidad de la Frontera, 1996) at 76.
The constant transit of Mapuche in two directions, eastwards towards the pampas and westwards back to their homeland in the Araucanía, had an important impact on the Pehuenche culture. Chronicles of the early XVIII (1729) noticed that Mapuche influence in the Pehuenche living at both sides of the Andes was significant, to the point that their language and customs were not different than that of the first. The cultural transformation of the Pehuenche by the Mapuche is known as the Araucanización or Mapuchización of the Pehuenche. From this time these people have been identified as a subgroup of the Mapuche or also as Mapuche Pehuenche.

Contact with the Spanish since the mid sixteenth century is also said to have strongly influenced the culture of the Pehuenche. The use of horses gave greater mobility and military strength to them. It also shortened the distance between their different communities allowing closer contact among them, and altered their diet. The horse also acquired a great significance in their ritual ceremonies and social life, becoming a symbol of prestige and an object of exchange. It also influenced the practice of herding.

1.2. Pehuenche culture after Mapuche influence.

Since this time of cultural encounters and fusion, the Pehuenche took not only language but also the culture of their Mapuche neighbours. Most of their social and political institutions, as well as religious beliefs and practices became those of the Mapuche people. Only some

9 Pietas, a Spanish chronicler wrote at that time that "(t)he Pehuenches are located at both sides of the mountains, speak the same language than the Mapuche, follow the same rituals and customs: they only differentiate in the food." Geronimo Pietas, Noticias sobre las Costumbres de los Araucanos (1729), in Claudio Gay, Historia Física y Política de Chile. Documentos I (Paris: Maulde and Renau, 1846) at 500, in Holdenis Casanova, supra note 8 at 77 (trans, by the author).

10 Canals Frau, supra note 2 at 762; Molina and Correa, supra note 3 at 13. We will denominate this people Pehuenche in accordance to the way they identify themselves today.

11 First contacts with the Spanish took place as early as 1550. Several Spanish expeditions entered into Pehuenche territory the Andes in 1552, 1553 and 1563. Some of these expeditions crossed the Andes to identify the Indigenous people living there and to find salt. Other expeditions were aimed at capturing Native people which later were to be sold as slaves. See Villalobos, supra note 3 at 27-30.


13 See description of Mapuche culture in Chapter II.
elements of the culture of their Andean ancestors, mainly those related to the influence of their habitat, were maintained by them. One of the distinctive aspects of their culture dealt with their nutrition patterns. Although new products, such as corn, wheat and horse meat were introduced by the Mapuche Pehuenche in their meals, the Araucaria nut continued to be a central product in this people's diet.\(^{14}\)

Another aspect which differentiated them from the Mapuche was their semi-nomadic existence. Chronicles written in the eighteenth century provide evidence of how this people continued with their seasonal movements that had been characteristic of their culture in the past. The Pehuenche are said to have moved from lakes or rivers shores located in the lowlands where they lived in winter, to the mountain valleys where their animals grazed in the spring and summer time, to the highlands where piñon was gathered by the end of the summer and autumn. To make these seasonal movements possible, the Pehuenche lived in toldos, a light construction made of leather, which they transported with them in their movements.\(^{15}\) Another interesting characteristic of Pehuenche culture, was the distribution of the gathering sites within the Araucaria forest or piñalerías. According to chroniclers accounts, Araucaria forests were distributed among Pehuenche different kinship groupings. The property and use of these forests was transmitted from one generation to the other through inheritance.\(^{16}\)

Finally, although Pehuenche assumed the religious beliefs of the Mapuche, some adaptations to these beliefs were introduced by them. The Araucaria, which was considered as a giver by the Pehuenche, continued to have a central role as a magic and religious symbol to them.\(^{17}\) This resulted in the introduction of some changes by the Pehuenche to the Mapuche

\(^{14}\) Villalobos affirms that the introduction of these new products in Pehuenche diet substantially decreased the collection or gathering of nut or piñon (see Villalobos, supra note 3 at 65). This claim is contradicted by the importance that this activity, as well as the importance of piñon as a food source, has in Pehuenche communities up until today.

\(^{15}\) Gerónimo Pietas, supra note 9 at 500, in Casanova, supra note 8 at 78. These toldos, are said to have been constructed with guanaco leather in earlier days. After they were built with horse leather (Villalobos, supra note 3 at 69). According to Casanova, the winter camps or tolderios, nevertheless, seemed to have been considered as their home by the Pehuenche. It was in these tolderios where they developed their social, political and religious life.


\(^{17}\) Manuel Dannemann and Alba Valencia, Grupos Aborigenes Chilenos. Su Situación Actual y Distribución Territorial (Santiago: Instituto de Investigaciones del Patrimonio Territorial de Chile, Universidad de Santiago de Chile, 1989) at 28.
nguillatun ceremony, where the Araucaria was used as a totemic symbol.¹⁸ The performance of the choique or the puel dance was also introduced by the Pehuenche on this ceremony.¹⁹

1.3. The Pehuenche people during the colonial regime.

As a consequence of their privileged geographical position which enabled them to control the mountainous passages, and to act as middlemen between the peoples living on both sides of the Andes, the Pehuenche became experienced traders. It was them who provided the Spanish of the southern part of the colony with piñones, salt, horses, furs, ostrich feathers, ponchos and baskets.²⁰ The importance that trade between the Pehuenche and the Spanish acquired during the eighteenth century helps to explain the peaceful relationship that existed between them at this stage of history. The mutual benefits they obtained from commerce are considered to have given origin to what has been called an "Hispanic-Pehuenche alliance."²¹

Peaceful relationship between the Spanish colonial authorities and the Pehuenche were sealed through parlamentos. The Pehuenche living west of the Andes participated in the parlamento of Laja in 1756 during administration of governor Manuel Amat. The alliance among both parties was manifested in a series of actions of mutual collaboration, including military assistance to fight Pehuenche enemies to the south, the Mapuche Huilliche.²² The need to obtain

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¹⁸ Ibid.

¹⁹ Gregorio Alvarez, "El Pehuen Mapu Neuquina en su Función Social e Histórica," in Primer Congreso del Área Araucana Argentina (Buenos Aires: Provincia de Neuquén and Junta de Estudios Araucanos, 1963) at 264. Choique is the Pehuenche word for the ostrich or ñandu that is found in the plains east of the Andes. Puel means east in Mapuche language.

²⁰ Villalobos, supra note 3, 73-80. Salt was extracted by the Pehuenche from the abundant natural deposits located in the plains east of the Andes. Horses and cattle were captured in raids (malones) made to the estancias of the humid plains in Buenos Aires and Cuyo, and later conducted, through Andean passages to Chile where they were sold to the Spanish colonists. These and other goods were bartered by the Pehuenche in exchange for European products, among them wine, hats, clothes, and silver objects (see Casanova, supra note 8 at 83-86). Fairs where the Pehuenche sold their products were held annually in different cities of central Chile (see Juan Ignacio Molina, Compendio de la Historia Civil del Reino de Chile vol XXVI Colección de Historiadores de Chile (Santiago: Elzeviriana, 1901) at 264-265, in Villalobos, supra note 3 at 79-80.

²¹ Casanova, supra note 8 at 87. Nevertheless, trade was, according to the same author, not only a commercial activity aimed at obtaining material benefits, but also a mechanism used by the Spanish for the "pacification" of Indigenous peoples in Chile.

²² Ibid. at 89. In the case of the Pehuenche living in Cuyo, to the northeast of the Andean range, the alliance would be materialized later in 1780. This last alliance also resulted in collaborative action undertaken by both Spanish and Pehuenche to repeal Huilliche attacks.
Spanish support to confront the Huilliche people also explains Pehuenche participation in the parlamento of Nascimiento held in 1764.\textsuperscript{23} Peaceful relationship, nevertheless, was broken in the coming years as a consequence of the frontier wars held between the Spanish and the Mapuche. Pehuenche people, whose territory was located in the frontier lands, were inevitably involved in this conflict, fighting sometimes on the side of the Mapuche, and sometimes on the side of their commercial allies, the Spanish.\textsuperscript{24}

Spanish attempts to settle the Pehuenche in the pueblos de indios or Indian towns in 1766 would also result in their rebellion against the Spanish. As a consequence of this initiative aimed at encroaching their territories and controlling their lives, this people joined the Mapuche of the Araucanía creating a military alliance. Missions created within Pehuenche territory were destroyed by this alliance.\textsuperscript{25}

The Pehuenche participated later in the parlamento of Tapihue called by colonial authorities in 1774. Peace and mutual protection were agreed with the Spanish once again.\textsuperscript{26}

**Missions.**

Peace achieved through trade, and later ratified through parlamentos, opened the doors for missionaries who entered into Pehuenche territory. The efforts to convert this people to Christianity were initiated by the Jesuits in the early eighteenth century. Rather than establishing permanent posts, the Jesuits implemented their work through circular missions in an attempt to contact different Pehuenche groupings which lived dispersed throughout their territory. As a consequence of the 1756 parlamento entered by the Pehuenche with governor Amat, a more permanent mission for this people was founded in Santa Barbara, in the northern entrance to their

\textsuperscript{23} On that occasion, the Pehuenche demanded the right to be protected by the Spanish from Huilliche attacks. As a consequence of this parlamento, the Spanish decided to establish troops within the Pehuenche territories to protect their reducciones and animals. They also decided to reduce the Pehuenche into pueblos de indios (see Villalobos, supra note 3 at 124-125). The real motives behind these actions by the Spanish were to impede Huilliche settlement in the frontier lands, which would have been harmful to their commercial interests.

\textsuperscript{24} Casanova, supra note 8 at 88.

\textsuperscript{25} Ibid. at 91. Villalobos describes the Spanish plans to create these pueblos de indios in the northern part of the Pehuenche territory. He also refers to the strong resistance that this plans encountered in a people that had a nomadic tradition (see Villalobos, supra note 3 at 117-122).

\textsuperscript{26} Molina and Correa, supra note 3 at 14.
territory. Also, two posts were established inside their territory, in Rucalhue and Lolco respectively.27

Missions among the Pehuenche were also undertaken by the Franciscans. With the support of the colonial governor (Amat), this Catholic order founded a missionary school based in Chillan in 1756, which was aimed the conversion and pacification of the Pehuenche.28 Despite the missionaries’ efforts to change the Pehuenche's customs and to convert them into Christianity, the impacts that they had on them were not more effective than those achieved with the Mapuche. As historian Villalobos affirms, on their missionary activities the priest baptized preferentially children. They also provided material and spiritual assistance to those who were dying, "but could not change the customs and the ideas of adults."

Nevertheless, as the same author affirms, the missionaries’ work contributed to the expansion of Christianity, as well as to Spanish-Pehuenche relations, helping to soften differences and conflicts.30

**Pehuenche population.**

Different estimations of Pehuenche population were made during the colonial period. According to Molina and Correa, at the end of the eighteenth century (1796) the Pehuenche Butalmapu or territory at both sides of the Andes was composed of ten aillarehues or groupings with a population of approximately 10,000. According to the same authors, most of this population was located in the valleys and mountains surrounding the Bio Bio river, where they continue to live until today.31

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28 Casanova, *supra* note 8 at 91.


30 The missionary work was seriously affected by the general Mapuche rebellion of 1766 in which the Pehuenche were involved. By the end of the eighteenth century it was reduced to Santa Barbara, a fort and mission located on the Bio Bio river and administered by the Franciscans (*Ibid.* at 108; 134).

31 More than 5,000 Pehuenche lived in mountains and valleys south of the Bio Bio and 1,667 in the area of Santa Barbara. The rest of them lived east of the Andes mountains in what today is Argentinean territory (see Molina and Correa, *supra* note 3 at 16).
Commercial activities between Pehuenche and Spanish were maintained until the first decades of the nineteenth century when Chile became independent from Spain.\(^{32}\) These activities resulted in concentration of wealth among some Pehuenche caciques or chiefs. As a consequence of this phenomenon, a new form of social organization, the cacicazgo or chiefdom, emerged in Pehuenche society. By the end of this century, two chiefs, Purrán and Shayhueque, both from Neuquen, in Argentinean territory, concentrated enormous wealth and power. Such wealth and power was acknowledged by the colonial society both in Chile and Argentina, who constantly negotiated peace with them.\(^{33}\)

1.4. The Pehuenche under the Chilean Republic.

1.4.1. The annexation of Pehuenche territories.

The Pehuenche people supported the Chilean army in the wars of independence against Spain in the early nineteenth century.\(^{34}\) According to Pehuenche oral history, in exchange for this support, their leaders requested the recognition of their communal ownership over traditional territories from the Chilean militaries who enrolled them in the campaigns for independence. They also requested from them protection from their encroachment by non-Native people.\(^{35}\)

Some Pehuenche were later involved, presumably against their will, in Spanish or royalist

\(^{32}\) *Ibid.* at 16. Moreover, Pehuenche at both sides of the Andes are said to have maintained their loyalty to the Spanish until independence, and even after this event in some cases.

\(^{33}\) Casanova, *supra* note 8 at 86. According to Dr. Bernardo Berdichewsky, it is important to highlight that the wealth accumulated by the paramount chiefs who headed the chiefdom did not became their personal private property, but a collective group property of the tribe, or at least of the kinship group. Accumulated wealth in a classless-stateless tribal society, or even in an a ranking stratified tribal confederation, follows the principle of redistribution, which permits the flow of the produce from the common people - the producers or appropriators -, to the upper echelons' ranks that hold the power. Then it is redistributed back to the people, not without leaving substantial amount of products under the control of the upper kinship groups. An example of an institution used for the redistribution of wealth can be found in the potlatch which is common among the chiefdoms of the Pacific northwest coast of America. We will refer to this institution later in this Chapter when dealing with the Nisga'a people. Bernardo Berdichewsky, personal communication to the author, Vancouver, April 24, 1999.

\(^{34}\) Pehuenche are said to have fought for Chile's independence in 1818. Molina and Correa, *supra* note 3 at 16.

resistance against the Chilean authorities which took place until 1822. They were also involved in actions undertaken by the Pincheira brothers, royalist bandits whom during the 1820's and 1830's robbed towns and farms of central Chile, devastating the area.

Later, in the 1860's, the Mapuche sought the alliance with their Andean brothers (Pehuenche) to confront the plans of the Chilean state to occupy the territories south of Bio Bío that were not yet under its control. Chilean authorities attempted to impede this alliance by using different strategies. In 1865, the most representative Pehuenche caciques or chiefs of the Alto Bio Bío area attended a meeting called by Domingo Salvo, a high ranking Chilean military based in the frontier area. On this occasion the Chilean representative requested the Pehuenche to maintain as neutrals in the conflict with the Mapuche, and warned them not to join them in their military campaigns.

Meetings with Pehuenche leaders were called by the republican military authorities whenever the Mapuche people showed resistance to Chilean expansionist plans in the frontier. An example was a gathering called by these authorities in 1869 due to the fears of a Pehuenche invasion existing among the citizens of Antuco, a town located in the northern entrance of the Pehuenche territory.

The loyalty of the Pehuenche was crucial not only for the Chilean government's plans to occupy the Araucanía, but also for the Argentinean expansionist plans in the southern part of that territory. In order to obtain this loyalty, and ensure that the Pehuenche would not support Indigenous rebellions against the newborn states, both Chile and Argentina signed treaties with the Pehuenche in the early 1870's. The first of these treaties was signed by Purrán, the general chief of the Pehuenche, as well as by several other Pehuenche chiefs, and General Urrutia in

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36 Ibid. at 17-18.

37 Gladys Varela and Luz M. Font, "La Erradicación Indígena y el Nuevo Poblamiento en el Noroeste Neuquino," in Jorge Pinto ed., supra note 8 at 203. These bandits sought refuge among the Pehuenche in the vast territories located east of the Andes. After their defeat in 1832, the Chilean army established several forts inside Pehuenche territory in order to exercise control over this part of the country (see Molina and Correa, supra note 3 at 19).

38 José Bengoa, Historia del Pueblo Mapuche (Santiago: Sur, 1985) at 93; Molina and Correa, supra note 3 at 20.

39 Molina and Correa, supra note 3 at 21.

40 Purrán was at that time the most powerful Pehuenche leader. The fact that Purrán lived in Neuquén, in Argentinean territory, should be highlighted. His power as a chief was, nevertheless, not restricted to Argentinean territory, but extended all over the Pehuenche territory.
representation of the Chilean government, in the city of Angol in 1870. In this treaty, the Pehuenche declared themselves to be loyal friends of the Chilean government. They accepted to assist this government whenever their help was requested. They also committed themselves not to aid Indigenous rebellions of which they were aware. Finally, they agreed to protect Chilean individuals and haciendas at the eastern range of the Andes. In order to compensate the Pehuenche for their services, wages in Chilean pesos were to be paid to their chiefs. Chile agreed to continue to protect the Pehuenche tribes in general as well as their trade relations with Chilean citizens in particular.41

A similar treaty was signed later in 1873 by Purrán and other Pehuenche chiefs with representatives of the Argentinean government. In this treaty signed in the city of San Rafael, Mendoza, Pehuenche chiefs who were present committed to maintain peace with the government and people of Argentina. In exchange they received protection of their peaceful residence, as well as that of their tribes, in the territories they possessed in the area between the Neuquen river to the east and the Andes to the west. The Pehuenche chiefs acknowledged Argentinean sovereignty over their territories. They also committed to impede any invasion against the territories or populations of Argentina. The Argentinean government acknowledged the authority and jurisdiction of Purrán as principal chief of the Pehuenche. It also committed to pay for the education of 18 Pehuenche youngsters to be selected by the chiefs. Wages were to be paid by the government to the Pehuenche chiefs that signed the treaty. Clothing corresponding to their authority was given to them by the Argentinean government. The treaty lasted for a period of five years.42

Unlike the case of the treaty entered by the Pehuenche with the government of Chile, where nothing was said about Pehuenche territories, this last treaty acknowledged Pehuenche possession of the territories identified as belonging to them. Also, the jurisdiction of Pehuenche chiefs, in particular that of Purrán, within this territory, was acknowledged.

These treaties were evidently strategic for the governments of Chile and Argentina, more linked to their plans to occupy lands at that time under Indigenous control than to their desire to acknowledge the Pehuenche as a distinct and sovereign people. However, they help to illustrate

41 Meinrado Hux, Caciques Pehuenches (Buenos Aires: Marymar, 1991) at 50-51.

42 Ibid. at 52-55.
the importance that these peoples had in the political and military life of the frontier within both states at this stage of history.

Unfortunately, none of the rights that apparently had been acknowledged to them through these treaties - possessions, jurisdiction, etc. - were maintained in the future. A few years later, in the early 1880's, Pehuenche territories at both side of the Andes were occupied by the armies of Chile and Argentina as part of the campaigns they undertook to take control of Indigenous territories. In the case of Chile, as it was described in Chapter II, the Andean valleys where the Pehuenche lived were occupied by the army immediately after the military campaigns that ended with the defeat of the Mapuche in the Araucania in 1881. Expeditions to the Pehuenche territory were undertaken by the Chilean army in 1882 and 1883. These expeditions established several forts within this territory in an attempt to protect Chilean sovereignty in an area where Argentinean soldiers had frequently entered in persecution of the Indigenous survivors of the eastern range of the Andes.43

In the case of Argentina, as it was also described in Chapter II, the wars undertaken by the government of that country against Indigenous peoples in the same period, had a devastating effect on the Pehuenche population. A special military campaign, which is known as the “campaign of the Andes”, was undertaken by the Argentinean army in the summer of 1882-1883. As a consequence of these actions, an important number of Indigenous people, including Pehuenche, were killed or made prisoner.44 Many of those who survived these actions sought refuge on the Andean valleys within Pehuenche territory in Chile. In its attempts to exterminate Indigenous population of the area, the Argentinean army would penetrate into these valleys, killing those they found in their way.45

After Indigenous territories were militarily occupied and controlled, the Pehuenche lost the political relevance they had in the past in the frontier world. Consistent with this situation, no more treaties were signed with them in the future. In the case of Chile, no special treatment was given or rights acknowledged to them by the government. The laws enacted to promote the

43 Molina and Correa, supra note 3 at 25 to 27.

44 Curapil Curruhuinca and Luis Roux, Las Matanzas del Neuquen. Crónicas Mapuches (Buenos Aires: Plus Ultra, 1984) at 165-168. According to these authors, the campaign of the Andes ended up with the death of 354 natives, and the capture of 1,721 natives by the Argentines.

45 Oral histories of Pehuenche elders concerning these events can be found in Molina and Correa, supra note 3 at 23-27.
settlement of Mapuche people in reducciones were applied to them. Laws of general application were also imposed on them.

Similarly in Argentina, no land rights were acknowledged to the few Indigenous people who survived extermination. Many were relocated from their traditional lands to other parts of the country. Others remained on the small plots of fiscal lands that were set aside for them as reserves. 46

1.4.2. The encroachment upon Pehuenche territory.

a. Fraudulent land purchases in the Alto Bío Bío.

The appropriation by non-Natives of the Pehuenche lands in the Alto Bío Bío was initiated in the 1870's. Using different legal fictions, such as acquisition of rights and shares (acciones y derechos), leases, etc., hacendados of the frontier area acquired important tracts of lands that had been used and possessed by the Pehuenche from time immemorial. 47 Nevertheless, it was in the 1880's when most of the lands of that area were fraudulently appropriated. Within a decade, numerous big fundos or farms were established in the area. 48 The methods that were used by unscrupulous non-Natives for this purpose were varied. Among those that were most common in contracts concerning Pehuenche lands made during this period were the use of interpreters that did not adequately translate the expressions of those who sold their lands. Mandate contracts extended by Pehuenche without the formalities requested by law to acquire their lands, were also common. Finally, the inclusion in these contract of areas that were much larger than those

46 Curruhuinca and Roux, supra note 44 at 222 ff. It was not until the 1960's that the government of Neuquén granted the Natives title over the few lands that were left to them last century after their defeat by the Argentinean army.

47 In those years, non-Natives made contracts with Pehuenche people acquiring a significant lands in the Queuco valley, one of the two agricultural valleys existing in the Alto Bío Bío. The Queuco fundo or farm, one of the largest non-Native properties which exists today within the Pehuenche territory, would be created at that time. Molina and Correa, supra note 3 at 28.

48 In 1880, non-Natives acquired the lands of the Pehuenche community of Callaqui. In 1881, the lands of the community of Ralco were appropriated by another non-Native. The fundo Ralco was created in these lands. Also that year, several non-Natives acquired, among other lands, those of Guayaly and Trapa Trapa, all of which belonged to the Pehuenche. Ibid.
Pehuenche had intended to sell was also used by non-Natives to appropriate their lands.49

Unlike the case of those purchases concerning Indigenous lands located south of the Bío Bío river, where, in accordance with the protectionist laws and decrees dictated in the 1850's government authorization was required, most of Pehuenche lands were located north of this river. Consequently, no government approval was needed when transactions concerning these lands were made. This situation also facilitated the signing of abusive contracts concerning Pehuenche lands.50 Moreover, in the case of the Alto Bío Bío, the state did not implement its policy aimed at declaring as state property those lands where Indigenous people did not prove possession. This circumstance also facilitated the appropriation of Pehuenche lands by non-Natives.51

b. The establishment of reducciones.

After having petitioned land entitlement to the government, in 1919 and 1920 three reducciones were established in the Alto Bío Bío. These reducciones, among the last to be established by the state on Mapuche territory, were located in the Queuco river valley. The first was established in 1919 through a title issued to the chief of Cauñicú (Anselmo Pavián) and a group of 269 Pehuenche individuals who composed this community. The total lands allocated to this community was 4,134 hectares.52 A second reducción was created that same year through a title granted to the chief of Malla Malla (Antonio Marihuan) and a group of 174 individuals members of that community. The lands allocated to this community were equivalent to 3,444 hectares.53 Finally, a third reducción was established in 1920 in the lands of the community of Trapa Trapa. The title was granted to the chief (Antonio Canio) and other 240 people that were part of that community. The lands acknowledged to them totaled 8,430 hectares.54

49 Ibid. at 29

50 According to Molina's and Correa's interpretation, although the formalities required by the 1850's protectionist decrees were needed in the case of purchases made by non-Natives to the Pehuenche of Alto Bío Bío, they were not practiced (Ibid. at 28).

51 Ibid. at 29.

52 Ibid. at 182-183

53 Ibid. at 200-201.

54 Ibid. at 215.
These land entitlements were extended by the government's commission responsible for Indigenous settlement (Comisión Radicadora de Indígenas) in accordance to the laws enacted in 1866 and its modifications (1874 and 1883) to which we referred to in Chapter II. Lands were held communally by the members of the community in accordance to the same legislation. Although important as means to acknowledge their rights over their ancestral possessions, the reducciones created in the area also contributed to the encroachment of Pehuenche territories. Important lands that had been possessed by their ancestors, and that were being used by them at the time the government commissioners visited the area, were not acknowledged to them. Such is the case of the Araucaria forests located in the highlands where Pehuenche people gathered their food in summertime and fall.\(^{55}\) Similarly to what had happened in the Araucanía, where the hunting and gathering grounds of the Mapuche were not acknowledged by government commissioners, these forests, essential to Pehuenche subsistence, were not included within the reducción boundaries.

Moreover, the land rights of a large part of the Pehuenche population in this area was not acknowledged by the government. Such is the case of the Callaqui, a community where Indigenous lands were surveyed by government commissioners in 1920, but where no title was granted to them.\(^{56}\) It is also the case of the Ralco, a community located in the Bio Bio river valley. Despite the claims made by their leaders since 1907, their lands were never visited by the commissioners in charge of Indigenous settlement.\(^{57}\)

c. The encroachment of Pehuenche lands in Lonquimay.

Although this Chapter focuses on the Pehuenche of Alto Bio Bio, a mention should be made to other Pehuenche communities living within Chilean territory. We refer to those living in

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\(^{55}\) Ibid. at 31.

\(^{56}\) Ibid. at 55. Members of this community talk of the existence of a title in which the Pehuenche of Callaqui were acknowledged a total of 187,2 hectares. Unfortunately, this title has never been found.

\(^{57}\) Ibid. at 84-85. According to Molina and Correa, there is evidence that the Pehuenche of Ralco requested their entitlement to the government after attempts of eviction against them were made by non-Natives who had appropriated their lands. These "legal" owners lobbied the commission responsible for this entitlement, impeding their visit to the area.
the area of Lonquimay, an Andean area located approximately 100 kilometres south of Alto Bio Bio. 58

Once the occupation of the Araucanía was completed by the Chilean army, the government declared the lands of Lonquimay, which were also part of the ancestral domains of the Pehuenche, as state property. This declaration was made in accordance to the Indigenous laws of 1866 and 1883. In the following years (1887 and 1889) the rich grazing lands existing in this area were leased to non-Native settlers who devoted them to cattle breeding. Later, in the last years of the nineteenth century some of these lands would be granted in property to national settlers. Since 1911, the state also sold the remaining lands in public auctions, giving origin to large farms which occupied most of the Lonquimay territory. 59

The Pehuenche of Lonquimay were settled by the government in nine reducciones, including 954 people and occupying a total area of 20,950 hectares of land. A large part of the Pehuenche population of this area was never given title to their lands. Consequently, they became landless people living in what were considered either state or non-Native property. This circumstance explains, at least in part, the uprising of Ranquil which occurred in the 1930's. In this uprising, which was suffocated by military troops sent by the government of the time, many national settlers and Pehuenche would find death fighting for the acknowledgment of their land rights.60

The total Pehuenche population of this area has been estimated in 3,222.61 When considered altogether, then the total Pehuenche population in Chile today can be estimated in approximately 10,000.

58 The area of Lonquimay is sometimes identified as Alto Bio Bio too due to the fact that it is there where the Bio Bio river is born (lakes Icalma and Galletue). We will identify this last area as Lonquimay, not only to distinguish it from the area of Alto Bio Bio to which we refer in this Chapter, but also in order to respect the distinctions that Pehuenche people make when denominating their territories.


60 Ibid. 22-23.

d. Impacts of the logging companies in Pehuenche territory.

Land conflicts in the Alto Bio Bio did not end with the establishment of reducciones. Throughout this century, Pehuenche who were not entitled lands in those reducciones created in the area by the state, were subject to evictions (or threads of eviction) by non-Natives who had appropriated their lands. They also witnessed the devastation of their forests by logging companies who started to operate in the area. Pehuenche chiefs systematically demanded of Chilean authorities, including the President of the Republic, the recognition of their land rights, most of the time without being heard.

Those who lived in reducciones, were involved throughout this period in litigation against non-Natives who alleged rights over their lands. Through this litigation Pehuenche sought to defend the scarce lands that had been acknowledged to them by the state. Moreover, the Pehuenche living in reducciones also confronted non-Natives who settled in the farms created in the area with the purpose of ensuring material possession over them or exploiting their forest resources for their legal owners.

The precarious situation of Pehuenche land rights in the area can be best exemplified when analyzing the problems that affected the communities of the Bio Bio river valley as a consequence of the activities undertaken by logging companies since the 1950's. In the late 1940's and the early 1950's, a logging company purchased most of the lands materially possessed and claimed by the Pehuenche communities of Ralco and Callaqui.62

From then until the late 1960's, the rich temperate rainforests of the area, which aside from the Araucaria included several species of nothofagus, were exploited by this enterprise and its legal successor, Maderas Ralco S.A..63 Despite the strong opposition of the Pehuenche to this

62 The farms Bio Bio (ex-Callaqui), Pitrilón and Ralco, were sold to Forestal La Leonera, a national forest company, by previous legal owners who had fraudulently acquired them in the past from the Pehuenche. Ralco alone, totaled more than 30,000 hectares, including a vast part of the Pehuenche territory (Molina and Correa, supra note 3 at 51;89; 101)

63 This last enterprise was created in 1963 as a consequence of the association of previous national capitalists with a foreign investor (Forestal La Leonera with Dallas Investment Corp. from Panama). Ibid. at 102.
activity, most of these forests, in particular those of Araucaria, which had a higher commercial value, were destroyed.\textsuperscript{64}

The impact that this company had on Pehuenche traditional gathering activities was enormous. Araucaria forests became scarce. Access to those that were preserved was limited by this enterprise. The cultural impact produced within the Pehuenche communities with the construction of roads in areas where contact with the Chilean society was not common, was also significant. Moreover, a sawmill was established in lands claimed by the community of Callaqui. Although some Pehuenche were hired to work in its operations, most of the people working there were non-Natives. After the exploitation activities finished, in the late 1960's, these non-Native workers remained in the area living in lands claimed by Callaqui.\textsuperscript{65}

e. Agrarian reform and counter agrarian reform and their implications for Pehuenche land rights.

In the early seventies, in the context of the agrarian reform process which was implemented in the country at that time, all of the big farms located in the Alto Bio Bio were materially occupied (tomados) by non-Native settlers who were living in them as a means to encourage their expropriation by the government.\textsuperscript{66} These farms were expropriated later by CORA (Agrarian Reform Corporation) in accordance to the agrarian reform law of 1966. Nevertheless, those who benefited from this decision were the non-Native settlers referred to above and not Indigenous people who had long standing claims over the same lands.\textsuperscript{67}

Also during this period, the Ralco National Park, including 12,000 hectares of Araucaria forests, was established by the government on the expropriated lands.\textsuperscript{68} This park, administered

\textsuperscript{64} According José P. Paine, a Pehuenche who witnessed the destruction of their forests, this enterprise used fire as a mean to "clear" mountains and open the access to Araucaria pine. Other forest species, less resistant than Araucaria, were burned by fire. \textit{Ibid.} at 58.

\textsuperscript{65} \textit{Ibid.} at 68.

\textsuperscript{66} \textit{Ibid.} at 31.

\textsuperscript{67} \textit{Ibid.} at 32. For an analysis of the agrarian reform process and its implications on Mapuche communities see Chapter II of this study.

\textsuperscript{68} The park was created by Law No. 17,699 of 1972.
by the government forestry agency (CONAF), was created on lands that were claimed by the communities of Ralco Lepoy and Quepuca Ralco. The creation of this park protected Araucaria forests from being logged. However, it made more difficult and even impeded on some occasions, Pehuenche gathering activities within its lands.\textsuperscript{69}

After the military coup of 1973, a significant part of the lands expropriated in previous years were given back to their former landowners through the counter agrarian reform process promoted by the new authorities. This decision frustrated Pehuenche expectations to recuperate the lands they claimed. Some of the expropriated farms were kept by different state agencies who administrated them for several years. Pehuenche settlement within these farms, nevertheless, was allowed. In the late seventies and early eighties, the government, in accordance to the individual allotment policy prevailing at that time, mandated INDAP, a government agency dependent on the Ministry of Agriculture, to transfer these lands to the Pehuenche.

In the late 1980's and early 1990's, the community of Callaqui was restored approximately 4,300 hectares corresponding to part or the totality of four farms they claimed.\textsuperscript{70} In the same period the community of Pitril was restored approximately 14,000 hectares of land corresponding to parts or the totality of three farms they claimed.\textsuperscript{71} Finally, in the same years the communities of Quepuca Ralco and Ralco Lepoy were entitled approximately 24,000 hectares corresponding to the former farm Ralco.\textsuperscript{72}

\textbf{f. Pehuenche claims.}

Pehuenche people manifested a strong opposition to the individual land entitlement promoted by the military regime. Due to their pressure, in 1986, the chiefs of the different Pehuenche communities of Alto Bío Bío, together with regional authorities and representatives of the Catholic church, signed a document (\textit{Acta de Ralco}) concerning the nature of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{69} In 1987 the status of this park, which included approximately 12,000 hectares, was changed to that of a forest reserve. This decision enabled Pehuenche people to have access to the Araucaria forests within this protected area. Molina and Correa, supra note 3 at 108-109.
\item \textsuperscript{70} \textit{Ibid.} at 63 to 62.
\item \textsuperscript{71} \textit{Ibid.} at 166-169.
\item \textsuperscript{72} \textit{Ibid.} at 108-113.
\end{itemize}
\end{footnotesize}
entitlements to be made by the government in the area. In this document, it was agreed that their communities, and not the government, were to decide whether these entitlements would be made communally or allow the incorporation of individual property. According to this document, nevertheless, the veranadas or highlands were entitled to Pehuenche communally.\footnote{\textit{Ibid.} at 110.}

During these years Pehuenche leaders became involved with Mapuche organizations, in particular with \textit{Ad Mapu}, that were attempting to stop the division of Indigenous communal lands. The Mapuche movement was very influential in activities undertaken by the Pehuenche during this period in defense of their land rights. It was also influential in the coordination which emerged during the same period among Pehuenche chiefs aimed at confronting the economic and social problems that were common to all of their communities.

As a result of this coordination, a statement was addressed in 1989 by several Pehuenche chiefs to the coalition of democratic forces (\textit{Concertación de Partidos por la Democracia}) which assumed power through elections in 1990. On this statement, the most important chiefs of Alto Bío Bío denounced the threats they had received from the military government agents requiring them to accept individual land entitlements. They also demanded from this coalition the acknowledgment of communal ownership of their lands. Finally, they addressed the need to obtain government support in order to confront the many social, economic and cultural problems that their communities were facing.\footnote{Domingo Piñaleo et al., "Demandas de las Comunidades Indígenas del Alto Bío Bío," November 29, 1989, in José Aylwin and Enrique Besnier, comp., \textit{Demandas de Los Pueblos Indígenas de Chile en la Transición Democrática} (Santiago: Comisión Chilena de Derechos Humanos, 1990) at 41.}

Despite the agreement signed by the Pehuenche in 1986, their claims were not respected. Land entitlements made to them by the government in the invernadas (lowlands) were in individual plots. Collective ownership demanded by the Pehuenche was only respected in their veranadas (highlands), where the division in individual plots made no sense. It should be acknowledged that the three \textit{reducciones} created by the state at the beginning of the century (Cauñicú, Malla Malla and Trapa Trapa) were able to resist the division of their lands. Their communal lands were among the few in southern Chile that were not divided during the military regime, remaining as communal property until today.
By 1993, Pehuenche communities continued to demand the cancellation of individual entitlements of their lands. These communities claimed that such entitlements were opposed to the communal form of tenure and use of the land that was traditional of their people. According to Pehuenche demands, these entitlements had not solved their land problems. They also alleged that some community members had not been acknowledged their lands and that non-Natives had been assigned lands within their communities. Moreover, they continued to claim property over lands that were still being occupied by non-Native farms in the area. Government support to obtain their restitution, through litigation or through the land fund that was to be created by law, was asserted by Pehuenche leaders.

Land claims continue to be central to Pehuenche people due to the insufficiency of their current lands to satisfy the needs of the growing population of their communities. Pehuenche estimate those who compose their communities in the Alto Bio Bio in 7,000. Molina recently estimated those Pehuenche living in the seven communities of the Alto Bio Bio today in 5,600.

1.5. The Bio Bio hydroelectric project and the Pehuenche people.

Since the 1960's ENDESA (National Energy Enterprise), a state enterprise privatized during the military regime, has been planning the construction of several hydroelectric dams in the Bio Bio river. According to ENDESA, whose plan was theoretically designed to respond to the growing power demand coming from national industries, six dams were to be constructed along the Bio Bio river, four of them located in the Alto Bio Bio in lands owned or claimed by the Pehuenche. In total, the dams proposed have the capacity to generate 2,680 MW of power. The area to be covered by water was of approximately 22 thousand hectares. Water rights needed

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75 Summary of Pehuenche demands by 1993 contained in Molina and Correa, supra note 3 at 245-247.

76 Nine farms then claimed by the Pehuenche included a total area of approximately 26,000 hectares. No information is available concerning the area of other nine farms that were also claimed by them. Ibid. at 255-256.

77 Ibid.

78 Piñaleo et al., in Aylwin and Besnier, supra note 74 at 41.

79 Molina, supra note 59 at 81-86.
for this purpose were to be requested by ENDESA from the state in accordance to the law.\textsuperscript{80}

In the late eighties, ENDESA initiated its activities leading to the construction of Pangue, the first of the dams planned in the area. Pangue, with a capacity to generate 450 MW of power, was finished in 1994, flooding an area of 500 hectares. This dam was constructed in lands that were legally owned by non-Natives, but historically claimed by the Pehuenche of Ralco.\textsuperscript{81} Moreover, a total of 100 persons (ten to twelve families), most of them Pehuenche,\textsuperscript{82} were relocated as a consequence of the flooding of their lands.

At a time when in Chile there was no legal protection for Indigenous land rights or for environment threatened by these kind of developments, Pangue was constructed with no consultation with Pehuenche communities and no serious concern for its social and environmental impacts. The lack of compliance of the Pangue dam with the World Bank's environmental and social requirements, in particular those dealing with Indigenous peoples and involuntary resettlement, was stressed by an Independent review prepared in 1997 for the International Finance Corporation (IFC), an entity that had financially supported this project.\textsuperscript{83} It was also denounced by Pehuenche people, who dominantly opposed this project due to the threats that it posed on their land rights, as well as due to the social and cultural it would have on their communities.\textsuperscript{84}

Opposition to the construction of Pangue dam triggered the creation, in the early 1990's, of the Centro Mapuche Pehuenche del Alto Bio Bio, an organization which affiliated the chiefs and members of the seven Pehuenche communities of the Alto Bio Bio. Although this organization was unsuccessful in its attempts to stop the construction of the Pangue dam, it was

\textsuperscript{80} Information extracted from ENDESA's documents, in Grupo de Acción por el Bío Bío, El Proyecto Hidroeléctrico del Alto Bío Bío: Una Amenaza para el Medio Ambiente y el Pueblo Pehuenche de Chile. (Santiago: GABB, 1992) at 12-14.

\textsuperscript{81} Formal claims over the lands to be flooded with the construction of Pangue have been made through litigation and administrative petitions by the Pehuenche of this community since the 1930's (see Molina and Correa, supra note 3 at 85-98).

\textsuperscript{82} Jay D. Hair et al. (Pangue Audit Team), Pangue Hydroelectric Project (Chile): An Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements (April 4, 1997) at 79 [unpublished]; Grupo de Acción por el Bío Bío, supra note 80 at 18.

\textsuperscript{83} Hair et al., supra note 82 at 87-93.

\textsuperscript{84} Piñaleo et al., in Aylwin and Besnier, supra note 74 at 41-42; Grupo de Acción por el Bío Bío, supra note 80 at 21-23
able to generate a process of ethnic revival and mobilization without precedent in Pehuenche society. It also implemented several initiatives aimed at providing Pehuenche communities sustainable development alternatives to those proposed by ENDESA. Finally, this Pehuenche organization also contributed to generate important sensitivity within sectors of Chilean society, in particular among human rights and environmental advocates, which resulted in the creation of a non-Native movement in defense of the Bio Bio and its peoples threatened by the dams.

In 1994 ENDESA announced its plans to construct Ralco, a second dam in the Bio Bio river. Unlike Pangue, Ralco, with an investment of approximately US $ 500 million, and a capacity to generate 570 MW of power, would flood an area of approximately 3,500 hectares, mainly composed of lands which had been legally entitled to Pehuenche. Moreover, Ralco would require the relocation of a large population (approximately 675 persons), 500 of which were Pehuenche of the communities of Quepuca Ralco and Ralco Lepoy.

This project, however, was to comply with the requirements established in the 1993 Indigenous law as well as with the environmental protection law of 1994. The first law, as explained in Chapter II, established that Indigenous lands may not be sold except among communities or individuals belonging to a same ethnic group. According to the same law, exceptionally these lands may be exchanged for non-Indigenous lands of a similar commercial value with authorization from CONADI (National Corporation for Indigenous Development). The second law mandates that an environmental impact assessment is to be undertaken prior to the implementation of projects which may cause environmental impact, including within these impacts those that result from relocation or from the alteration of life systems and customs of human groupings or communities. Moreover, this law also ensures the right of the communities

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85 Among these initiatives, those aimed at improving the quality of the animals they bred, mainly cattle, goats and sheep, to the production and commercialization of traditional crafts, and to self-managed tourism within their territory, are to be mentioned.

86 The Grupo de Acción por el Bio Bio (GABB), a non-governmental organization which gathered different sectors of Chilean society, was created for this purpose in 1990. The author has participated in this NGO from its creation.


88 Article 13, Law No. 19,253 of 1993.
affected by these project to be heard by CONAMA, the environmental agency, before any decision concerning them is taken.\(^89\)

The majority of the members of the two communities directly affected by Ralco initially manifested their opposition to this initiative due to the many and significant social and cultural impacts Ralco would have on them. Among the main criticisms made by them of this project were the fact that the cemeteries where their ancestors were buried would be flooded and that they did not want to be relocated from their traditional lands. Moreover, they argued that they could not identify other lands which had the geographic characteristics and resources (invernadas and veranadas, Araucaria forests, waters, etc.) that are necessary to maintain their economy and culture. They also argued that the lost of their traditional lands and the cultural impact that would be produced by this project could not be materially compensated or mitigated. Finally the same communities demanded instead, governmental support which could enable them to continue to live in their traditional lands and improve their living conditions.\(^90\)

In order to reverse this opposition and gain Pehuenche acceptance to Ralco, ENDESA implemented a strategy aimed at obtaining individual agreements with each of the approximately one hundred Pehuenche families to be relocated. As a consequence of the material offerings which were made by ENDESA, which included new houses, lands located both in invernadas (lowlands) and veranadas (highlands), employment opportunities, as well as of the manipulation of information with regards to the approval of this development,\(^91\) a significant number of Pehuenche families directly affected by the dam (84) signed individual contracts with this enterprise. In these contracts they agreed to exchange the lands they owned, needed for the materialization of Ralco, by other lands offered by ENDESA.\(^92\)

\(^89\) Articles 11; 26 to 31, Ley de Bases del Medio Ambiente No. 19,300 of 1994.

\(^90\) This opposition was expressed in letters that were addressed by chiefs and members of the communities of Quepuca Ralco and Ralco Lepoy to the Director of CONAMA, the environmental agency, in June of 1996, in the context of the environmental impact assessment of Ralco (see Maria A. Relmuan, "El Proyecto Central Hidroeléctrica Ralco en el Alto Bio Bio: La Visión de las Comunidades," in Morales et al, supra note 1 at 222-228). A similar position was expressed in the same context by the Centro Mapuche Pehuenche del Alto Bio Bio in a letter addressed to the Director of CONAMA.

\(^91\) ENDESA agents represented to Pehuenche families that the project had already been approved by the government (Ibid. at 206). The same agents warned the Pehuenche that if they resisted signing the proposed land swaps, they risked loosing their lands (Information provided to the author by different Pehuenche families affected by this dam in the Alto Bio Bio area in 1996).

The absence of the Chilean state in the area helps to understand the acceptance of ENDESA’s offerings by Pehuenche families affected by Ralco. Pehuenche people lack adequate access to basic social services, such as health and education. Job opportunities are almost nonexistent in the area. It is not surprising in this context that many Pehuenche families ended giving up to ENDESA’s pressure, accepting to exchange their ancestral lands by those offered by this enterprise. Nevertheless, a total of 10 families whose lands are needed by ENDESA to go on with this project, continue to oppose any agreement with this enterprise. These families have manifested their intention to stay in their current lands in any event, in what is seen as an open challenge to this the Ralco project. As one of the Pehuenche who lives in the area to be flooded by the dam has affirmed, "I was born on this land and I want to die in this land.... How can I abandon my grandparents and my great grandparents."

President Frei’s support of Ralco, since it was made public by ENDESA in 1994, helps to explain the approval given to this project by the National Commission on Energy, as well as by CONAMA, the environmental agency. The authorization that CONADI has to give, in accordance to the 1993 Indigenous law, to the land swaps that are required by ENDESA to continue with this initiative, has been more complex. For an entity that is mandated by law to protect Indigenous lands, it has not been easy to approve land swaps which are seen by the Pehuenche and public opinion in general as a violation of Indigenous land rights. As explained in Chapter II, two Mapuche National Directors of this entity were removed from their position by the President of the Republic due to their open criticisms to this project. After the appointment of a third Director, in this case a non-Native, the National Council of this entity proceeded to analyze the land swaps and rights of ways concerning Indigenous lands requested by ENDESA. In a session held in January of 1999, without the participation of Indigenous representatives that

93 Relmuan, supra note 90 at 205.

94 José A. Curriao, President of the Centro Mapuche Pehuenche del Alto Bio Bio, and former chief of the community of Quepuca Ralco, in oral interview with the author performed in Alto Bio Bio, October 7, 1998.


96 This last entity had initially decided to reject the Ralco project due to its social and environmental impacts (see José Aylwin,"El Aylwin que Critica el Gobierno" Que Pasa, October 17, 1998). Nevertheless, after presidential pressure, it changed its resolution concerning approving the project with some conditions (see Chile, CONAMA, supra note 87).
are part of this body, 64 of the 84 land swaps and rights of way submitted to its analysis were authorized by this entity, 9 were rejected, and 7 left for a later analysis.97

With CONADI's decision, the construction of the road to the dam site, which had been paralysed for several months, was reinitiated by ENDESA. Protests against this project from Pehuenche families who oppose the land swaps, from members of the Centro Mapuche Pehuenche, and Mapuche and environmental organizations, have continued to take place.98 Nevertheless, everything indicates that the Ralco project will materialize. The situation of those families who refuse to leave their ancestral lands will probably end up being decided by the Supreme Court. Due to economic interests involved, and government's support to this project, it is unlikely that a decision made by this Court will favour the Pehuenche.

If Ralco is constructed, Pehuenche lands in the Alto Bio Bio will continue to be encroached. In the name of the economic "progress" of Chile, the participatory and land rights of the Pehuenche people, this time acknowledged to them by the Indigenous law enacted in 1993 by the Chilean Congress, will once again be violated.

The consequences that this project could have on Pehuenche people and its communities are alarming. Its territory will be fragmented. Its communities divided. Its culture threatened. As the Instituto de Estudios Indigenas of the Universidad de la Frontera affirmed on this matter, "the future of the communities affected (by Ralco) is in danger due to the threat that this project will impose to their ancestral lands, their cultural patterns as well as their forms of traditional organization."99

The threats imposed to the Pehuenche people by this project have been denounced not only at the national level, but also internationally. A Report recently released by the International Federation of Human Rights (FIDH), a well known human rights NGO based in France, after a mission to Chile, acknowledges that important rights internationally recognized to Indigenous

97 El Mercurio, supra note 92.

98 A demonstration held in Alto Bio Bio on February of 1999 by Pehuenche people and supporting groups in protests for the initiation of the Ralco dam works, was severely repressed by police agents. As a consequence of this demonstration, 28 people, including several Pehuenche, were detained (see Carolina James and Fredy Palomera, "Conflicto Mapuche a la ONU. Pediran Relator Especial," La Tercera, February 22, 1999. Available from Internet at http:// www.latercera.cl, accessed on February 28, 1999).

99 Instituto de Estudios Indigenas, Universidad de la Frontera, "Evaluación Social del Estudio de Impacto Ambiental del Proyecto Hidroeléctrico Ralco" (Report addressed to CONAMA, Temuco, 1996), in Morales et al., supra note 1 at 190 (trans. by the author).
peoples today are not being guaranteed by this project. The same report encourages the Chilean government to take all the steps that are necessary to ensure that these rights are protected to the Pehuenche in the case of Ralco, a case which is seen by its authors as a template of what could happen in the future to other Indigenous peoples in the country.  

1.6. The 1993 Indigenous law and its implications for the Pehuenche.

Aside from the Ralco case before referred to, in which CONADI initially became involved in an attempt to protect Pehuenche land rights threatened by this development, this law has had until now little implications in the Alto Bio Bio. The remoteness of Pehuenche communities, most of which are located on isolated mountainous areas, as well as the precarious conditions of the roads to access them, have weakened CONADI’s presence in the area. These circumstances have made more difficult this entity's ability to implement its policies and programs in the area in compliance with the 1993 law provisions. Pehuenche people have strongly criticized this situation. José A. Curriao, President of the Centro Mapuche Pehuenche del Alto Bio Bio (CMPABB) affirms when referring to the absence of the government, in particular of CONADI, in their territory that "nothing has changed for the Pehuenche until now. There seems to be no democracy for the Pehuenche. The current administration has been almost the same as the military government to us." CONADI's absence in Alto Bio Bio has also been witnessed by social scientist who have worked in the area in recent years.  

100 Federación Internacional de los Derechos Humanos, "Los Mapuche-Pehuenche y el Proyecto Hidroeléctrico de Ralco, Un Pueblo Amenazado" (1997) [Unpublished]. The authors of this report include Claude Katz, French lawyer and Secretary General of the FIDH and Thomas R. Berger, Canadian lawyer and Indigenous rights advocate previously cited in this study.  

101 According to this law (article 38), the Alto Bio Bio area is part of the jurisdiction of CONADI's offices in Cañete, a city located in the province of Arauco, distant 200 kilometres from the nearest Pehuenche community.  

102 José A. Curriao, supra note 94 (trans. by the author)  

103 An analysis prepared in 1996 by a US anthropologist, Theodore E. Downing, for the International Finance Corporation, acknowledges that at the time of the study, the Pehuen Foundation, an entity established by ENDESA to mitigate the social impacts produced on Pehuenche communities by the Pangue dam, had a considerably superior presence in the Pehuenche territory than CONADI itself. (See Theodore E. Downing, *Una Evaluación Interin de la Fundación Pehuén con la Participación de los Afctados* (Independent Assessment prepared for the International Finance Corporation, 1996) at 73 [unpublished]. The same situation has been perceived by the author in different visits made to the area during the last years.
Among the few initiatives that CONADI has undertaken among the Pehuenche people is the support to the legal recognition of its traditional communities. Resource allocation by CONADI's development fund in support of initiatives aimed at improving Pehuenche living conditions also has to be mentioned. However, these resources, mainly designed to support agricultural and forestry activities that are central to Pehuenche economy, have been insufficient in relation to the many needs of the Pehuenche people, the majority of whom live in a condition of poverty. Moreover, as Pehuenche themselves have criticized, these resources have been usually allocated to a small number of community members, usually those living in areas that are more accessible by road, reducing their beneficial impacts. Legal actions aimed at obtaining restitution of lands claimed by the Pehuenche, including those that were flooded by Pangue, has also been among the actions undertaken by CONADI in defense of Pehuenche rights.

The most important initiative undertaken by CONADI in the Alto Bio Bio has been its support to the creation of the Indigenous Development Area Pehuenche (IDA) of Alto Bio Bio. After funding a study for the demarcation of this area in 1995, and promoting its creation within government entities, this IDA was established in 1997 by decree of MIDEPLAN (Planning Ministry). According to this decree, an area including the seven Pehuenche communities of the Alto Bio Bio and surrounding lands, not owned but used by them in their traditional gathering activities, was declared as an IDA in accordance to article 26 of the 1993 Indigenous law. According to the same decree, this IDA objective was the coordination of government

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104 Most of the Pehuenche communities have been legalized in accordance to the 1993 law provisions in recent years. Unfortunately, the creation of these new legal entities among these communities has resulted on many occasions in their internal fragmentation. This situation is especially evident in those communities directly affected by the Ralco project. It can be generally explained by the election of young leaders, usually those who have had access to Chilean education, who tend to substitute the role played in the past by traditional leaders or elders.

105 Among the projects implemented with CONADI's support in the area are those destined to improve house roofs, improve livestock pastures, fencing lands, promote apiculture, salmon farming, providing water and construct bridges on different communities (Jose A. Curriao, interview with the author, supra note 94). It has not been possible to determinate the exact number of projects supported or funds allocated in the Alto Bio Bio by CONADI.

106 Criticism contained in Grupo de Investigación TEPU, Plan de Desarrollo Pehuenche para el Area de Desarrollo Indigena del Alto Bio Bio (Study prepared for CONADI, Santiago, 1998) at 29-31 [unpublished].

107 Information of the legal actions undertaken by Pehuenche families with CONADI's support claiming lands flooded by Ralco can be found in Jay D. Hair et al., supra note 82 at 88.

agencies aimed at promoting the development of the Pehuenche of the Alto Bio Bio. Unlike what Pehuenche people expected, nothing was said about Indigenous participation.

It was only in 1998, in the context of the conflictive situation of the Ralco dam project, that this IDA was activated by the government. Early that year, a working committee composed by different government entities with presence in the area, including regional, provincial and municipal governments, MIDEPLAN and CONADI, was established. An investment plan of $1.5 million pesos (approximately US$ 3 million) was announced by the government. These funds were used in activities such as road improvement, bridge construction, forestry and soil management, benefiting not only the Pehuenche population, as mandated by the 1993 law, but also the non-Indigenous population living in the area.

Up until now, the only initiative concerning the IDA of Alto Bio Bio undertaken considering Indigenous participation, has been the elaboration, at the request of CONADI, of a "Pehuenche Development Plan." In this plan, based on demands made by the Pehuenche people, livestock and tourism were defined as the main economic activities to which the development of their communities should be oriented. The need to expand their insufficient land base as a means to make this development feasible was also stressed in this plan. As part of this last claim, lands historically belonging to Pehuenche that non-Natives appropriated in the past, should be returned to them. Lands that today constitute a Forest Reserve were also claimed by them. Additional lands and water rights should be given to Pehuenche people through CONADI’s land and water fund. Finally, Pehuenche insisted in the need to establish mechanisms to enable their participation within the IDA, an entity aimed at benefiting their people, and where therefore, their communities should be represented.

Pehuenche people expected that the IDA of Alto Bio Bio would result in economic aid for their communities. They also expected to become involved in decisions concerning their

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109 The inclusion of non-Indigenous lands within this IDA was challenged in court in 1997 by several landowners of the area. The claimants in this legal action sought, unsuccessfully, to declare this decree unconstitutional due to its threats to their private property.

110 The relationship between the conflict created in the area with the Ralco dam project and the activation of this IDA was recognized to the author by a high ranking government authority who requested confidentiality of his name in oral interview held in Santiago on September 30, 1998.

111 Information provided to the author by a high ranking government official, supra note 110.

112 Grupo de Investigaciones TEPU, supra note 106 at 64-72.
future and to gain control over their territory and resources. Unfortunately these expectations have been frustrated. Little or no financial support has reached their communities until now. Moreover, Pehuenche people have not been called by the government to integrate this IDA, a limitation unofficially acknowledged by the government. Finally, the continuation of the Ralco project after their territory was declared as an IDA, constitutes a paradox difficult to understand for the Pehuenche. Several Pehuenche leaders express serious doubts that a Pehuenche development can coexist with the hydroelectric dams that are being built in their territory.

Everything indicates then that CONADI is not fulfilling its legal mandates in the Alto Bío Bío. The rights entrenched in the 1993 law have not been sufficiently enforced in the area. Consequently, they have continued to be breached by the outside society and even by the government in the last years.

1.7. Final comments.

The recent history of the Pehuenche people is a history of land dispossession and encroachment. After having lived as an independent people in a vast territory which covered the southern Andean cordilleras and the large areas surrounding them east and west, and controlling trade between the peoples located at both sides of this range, they have been confined in the last two centuries to a reduced area limited to the Andean valleys and mountains of the Alto Bío Bío and Lonquimay in Chile and the province of Neuquen in Argentina.

The lands that were acknowledged to them by the government of Chile after the occupation of the Araucanía were limited to a few reducciones comprising a small percentage of their traditional territories. The remaining Pehuenche population was left landless, living mainly in areas that were fraudulently appropriated by non-Natives from late last century. In recent years, after the agrarian reform process, these lands were transferred to them by the Chilean state.

113 This situation is denounced by Atilio Pereira, chief of Trapa-Trapa, in Ibid. at 6.

114 The lack of participation of Pehuenche communities within the working committee created by the government to coordinate the IDA of Alto Bío Bío, and the need to integrate their representatives in the future, was acknowledged by a high ranking government official, supra note 110.

115 Nicolasa Quintreman, Domingo Piñaleo and Mariano Purrán in Grupo de Investigaciones Tepu, supra note 106 at 11-14.
The entitlements made to them, nevertheless, did not respect their traditional forms of communal ownership, imposing them instead private ownership over their lands. Within this reduced land base, they were obliged to abandon their nomadic lifestyle of the past and become sedentary people as other Chilean peasants who settled in the area. Notwithstanding the many adversities they had to face in their new restricted habitat, the Pehuenche were able to maintain their distinct culture and adapt it to the new context in which they were living. Moreover, they were able to develop a self-sufficient economy based on the sustainable use of resources existing in their lands.\textsuperscript{116}

The Pehuenche’s growing population, and the scarcity of the land, has resulted through time in the impoverishment of their communities. According to the Chilean government’s (MIDEPLAN) statistics, which consider, among other social indicators, access to housing, employment, education and incomes, by 1995 the seven Pehuenche communities of the Alto Bío Bío lived in a condition of extreme poverty. Statistics referred to the three Pehuenche communities directly impacted by the Panguine dam (Callaqui, Pitril and Quepuca-Ralco) show that 34 per cent of the households could not adequately satisfy their basic needs, and that 99 per cent of the households lived in a condition of poverty.\textsuperscript{117}

The fact that Pehuenche people have already been confined to a minimal part of their territories does not seem to be a concern for the private investors who are proposing the construction of hydroelectric dams in their current lands. Nor does it seem to be a concern for the Chilean government, who has openly supported Ralco, an initiative that will result in further displacement and encroachment of Pehuenche people.

Pehuenche history of encroachment helps to understand the rejection that the Ralco dam had among the communities to be directly affected by this project when it was proposed. Despite the efforts and manipulations that this enterprise has made to revert this opposition, there are still

\textsuperscript{116} A description of the sustainable use that the Pehuenche make of resources existing in their \textit{invernadas} or lowlands or \textit{veranadas} or highlands, is contained on a study prepared by two agronomist of the Universidad de la Frontera in the communities Quepuca Ralco and Ralco Lepoy. This study highlights the richness of Pehuenche traditional knowledge, and the ways in which this knowledge is manifested in their agricultural and forestry practices (see Claudia Barchiesi and Aliro Contreras, "Sustentabilidad del Sistema Productivo Pehuenche," in Morales et al., \textit{supra} note 1 at 111-122). Coincidentally with this study, José A. Curriao affirms that in the past every Pehuenche had its own animals, cultivated its land, and food was sufficient (in oral interview with the author, \textit{supra} note 94).

\textsuperscript{117} Downing, \textit{supra} note 103 at 45.
many who view this project as another step in the confinement of their people by the outside society.

Naturally, when threatened by the outside society, the Pehuenche have strengthened their ethnic identity and organization in defence of their rights. It has been recently, in the years in which the Pangue dam was being constructed, that an organization representing the different Pehuenche communities, the Centro Mapuche Pehuenche del Alto Bio Bio, was created. It has also been during the last years that representatives of the same communities have started to gather and define common strategies to confront the problems they face today, much as their ancestors did in the past. It has also been in this context that common demands have emerged from their communities. Although Pehuenche demands are not as elaborated as those which have emerged from Mapuche organizations in the Araucanía in recent years, they are clear in affirming the need to achieve control over the lands, resources and people living within the territories that were part of their jurisdiction at the time of their encroachment by settlers and the Chilean state.\footnote{Summary of Pehuenche claims, in Molina and Correa, supra note 3 at 255. As José A. Curriao affirms, "I believe that one day the Pehuenche will be able to govern within our own territories." (Jose A. Curriao, interview with the author, supra note 94 (trans. by the author)).}

What has become clear in the last years is that the 1993 Indigenous law does not provide sufficient protection to the rights Pehuenche people claim. Their right to participate on basic decisions concerning their future has not been respected, at least in the case of the Ralco project. Neither it has been respected in the case of the IDA of Alto Bio Bio recently created. Their resource rights have not been protected either. The disassociation existing in this law, as well as in the national legal framework in general, between land rights and rights to resources such as water, forests, minerals, etc., has enabled ENDESA to appropriate the waters it needs to proceed with its projects in the Alto Bio Bio. Moreover, the shortcomings of this law, are allowing ENDESA to appropriate the lands currently owned by the Pehuenche which are required for the materialization of Ralco.

The need to amend the law in order to establish an effective protection for these rights claimed by the Pehuenche is urgent. So is the need to introduce changes to the existing legislation to impede Indigenous involuntary relocation from their traditional lands.\footnote{Provisions aimed at impeding involuntary resettlement, or at least guaranteeing Indigenous participation and compensation when it occurred, were included in the law proposal sent by the government to the legislature in 1991. They are also included in the provisions of Covenant No. 169 of ILO which was also sent to Congress at that time.}
The future of the Pehuenche people is uncertain. According to all the information that is available, the construction of the Ralco dam, which is now almost approved by the government, including CONADI, would result in a serious threat to the cultural survival of the Pehuenche people of Alto Bio Bio. It is not by chance that social scientists have denounced that this project and its relocation plan will result in the ethnocide of the Pehuenche people, claiming consequently that its implementation should be impeded.\textsuperscript{120}

Whether the Ralco project will trigger a process that will end up in Pehuenche ethnocide is unknown. What is evident is that this people once again is not being respected by Chilean state. As Jose A. Curriao affirms:

It seems that the current administration does not want to respect the law, nor the Indigenous peoples of Chile. The government wants to sell everything, not only the Pehuenche, but all Indigenous peoples in Chile. It does not want to take us into consideration... Government authorities should acknowledge, with their hand in their hearts, that we do not come from a foreign country, that we are the primitive inhabitants of this land, that we belong to this land, we were born and raised here, in our country, in our Pehuenche community.\textsuperscript{121}

If Chilean society had acknowledged that Pehuenche people were the original inhabitants of the Alto Bio Bio, and had recognized to them the rights which derive from this circumstance, probably the history of this people would have been different than that we have here described. Unfortunately for the Pehuenche, it did not do so.

| 120 | According to Raul Molina, the Ralco dam "does not ensure the sustainability of the Pehuenche families, threatens their permanence in their territory and constitutes the principal agent of destruction of the conditions that can enable the survival and development of the Pehuenche culture." Raul Molina, "Proyecto Ralco: Un Impacto Irreversible sobre Comunidades Pehuenche" (1998) XIII No 2 Medio Ambiente y Desarrollo 19 at 21 (trans. by the author).
| 121 | Jose A. Curriao, supra note 94 |
2. THE NISGA'A PEOPLE OF THE NASS, CANADA.

2.1. Nisga’a story since time immemorial.

According to Ayuukw Nisga’a\textsuperscript{122} as told today by Nisga’a elders, for more than 10,000 years, since the last great ice age, the Nisga’a people have traveled, fished and settled along the Nass River and its tributaries in what today is the northwest of British Columbia, Canada.\textsuperscript{123} The Nisga’a people believe that they were placed in the Nass valley, which they called, Ginsk’eexkw, by K’amligihahlhaahl, their supreme God. The work of K’amligihahlhaahl would be continued later by his messenger, Txeemsim, who was sent to bring the Nisga’a some guiding principles in order to live in harmony with creation.\textsuperscript{124}

Nisga’a story talks of a flood which occurred long time ago, when the glaciers of the ice age were melting, to which the Nisga’a survived by riding out the fierce of the turbulent waters in their large canoes. To prevent their canoes being carried away by the winds and current, Nisga’a ancestors tied them to the four highest mountain peaks within their territory. After the waters had subsided, they were able to return to the Nass River homeland.\textsuperscript{125}

The Nisga’a people obtained all what they needed from the rich environment of the Nass River valley. The Nass supports five species of Pacific salmon. Salmon were harvested in a manner that allowed the Nisga’a to build their villages and develop a trading empire that reached into the interior and ranged up and down the coast. Aside from salmon, the Nass is also the home to the steelhead and oolichan. This last species, because of its many uses - oil for candles and grease for food, among others - was central to Nisga’a culture and trade.\textsuperscript{126}

\textsuperscript{122} According to the Nisga’a, Ayuukhl Nisga’a is primarily the record of one nation, its mythology and its image of the world. It is Nisga’a story as told by Nisga’a themselves. It is also, as we will see later, a set of laws that rule Nisga’a institutions and conduct. Nisga’a Tribal Council, Nisga’a People of the Nass River (Vancouver: Douglas and McIntyre, 1993) at 4 [hereinafter, Nisga’a Tribal Council, People]

\textsuperscript{123} Frank Calder, “Introduction,” in Ibid. at 1 [hereinafter Calder, “Introduction”]

\textsuperscript{124} Nisga’a Tribal Council, People, supra note 122 at 125.

\textsuperscript{125} Nisga’a Tribal Council, Lock, Stock and Barrel. Nisga’a Ownership Statement (New Aiyansh B.C.: Nisga’a Tribal Council) at 95 [hereinafter Nisga’a Tribal Council, Lock]. According to the Nisga’a, this event occurred after young people, ignoring the warning of the elders, were needlessly killing animals and fish, which had supra natural powers. As a consequence, it begun to rain, and waters rose until they covered all the world, and many people perished (Nisga’a Tribal Council, People, supra note 122 at 5).

\textsuperscript{126} Calder, “Introduction,” supra note 122 at 1.
Nass was such that it was shared with other neighbouring peoples to whom the Nisga’aa were related. Such is the case of the Gitksan and Tsimshian, who came to fish the oolichan after their long winters.127

Aside from fish, the Nisga’aa relied on several other resources to sustain their living. Among them, the wildlife which they trapped and hunted, and the berries they picked in summer and fall. Because of the diversity of resources existing in their territories, the Nisga’aa frequently moved during the year, making temporary settlements near hunting grounds, shellfish beds or berry patches. Nevertheless, families kept their main residence in their villages.128

The Nass valley was also rich in forests. The giant red cedar tree enabled the Nisga’aa, as well as other coastal peoples, to have large dug-out canoes which allowed them a full use of their environment, and the exploitation of areas extensive enough to provision sedentary winter villages. These canoes also permitted their communication with other peoples along the coast. Cedar was also used in the construction of houses which permitted a large number of people to live under one roof.129

Like other Aboriginal peoples, Nisga’aa lived closely connected to their lands and resources, from which its culture and beliefs were originated. The Nisga’aa for example, believed that salmon were born with the reincarnated souls of salmon who had died before.130 Nisga’aa

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127 Nisga’aa Tribal Council, Lock, supra note 125 at 6. According to Paul Tennant, anthropologists use to refer collectively to the Nisga’aa, Gitksan and Tsimshian tribal groups who have closely connected languages. The three groups, however, do not regard themselves as one people. Paul Tennant, Aboriginal Peoples and Politics. The Indian Land Question in British Columbia, 1849-1989 (Vancouver: University of British Columbia Press, 1990) at 6.


129 Tennant, supra note 127 at 6-7. According to Tennant, the cedar tree was central in the creation of the complex and sophisticated civilizations of the coastal peoples.

130 That explains why Nisga’aa people were careful to either burn, or put back in the water, the bones of any salmon they had eaten. If they did not, that salmon might be born without the part of its body that was not returned. The salmon’s spirit would be unhappy and might never come back to the river again. In Nisga’aa Language and Culture Department, School District No 92 (Nisga’a), From Time Before Memory. The People of the K’amligihahlhaahl (Altona, Manitoba: Friesen’s Yearbook Division, 1996) at 165 [hereinafter Nisga’aa School District 92, Time Before]. This connection to land continues to exist today. As Nisga’aa people affirm:

We eat the roots of one plant, the leaves of another. We make medicine from the roots of the trees. We eat what comes from the hemlock, spruce, jack pine and balsam, for medicine. All the trees and different leaves in the Nass we use...

Nisga’a Tribal Council, People, supra note 122 at 7.
stewardship of their lands ensured the sustainability of their resources, at least until the arrival of non-Aboriginal peoples to their territory.

Like other peoples of the northwest coast, the Nisga'a had a complex and sophisticated social organization prior to the arrival of the Europeans. According to Nisga'a stories of creation, K'amligihahlhaahl placed four lodges in the Nass valley which would become known as the Eagle tribe, Wolf tribe, Killer Whale tribe and Raven tribe.\(^{131}\)

The basic unit of the Nisga'a was the wilp or house, a matrilineal group that included several households. Each wilp was named after its highest ranking chief, who had stewardship and control over its possessions. The wilp had its own crests, dances, ceremonial privileges, legends, songs, names, fishing, hunting and gathering territories, a Sim'oogit (headman) and a matriarch. The wilp also owned an adawaak or myth which validates the right to display a crest and expresses its claims to its territories. When one wilp possessed sufficient land, it could be sub-divided into several semi-independent huwilp or houses, each one of which would have its own territories. Traditionally large matrilineages often occupied more than one dwelling, in front of which pts'aan or wooden totem poles displaying their crests were erected.\(^{132}\)

Wilps held frequent ceremonies and feasts which were central to Nisga'a social and political organization. These ceremonies, the Nisga'a called yukws, but would be more known as potlatches in Chinook jargon, were practiced not only by Nisga'a, but by different coastal peoples in the area. They were convened on different occasions, such as the birth of a child and the funeral of a chief, among others. They were used to pass names to members of the house. They served to legitimize political rank and authority and to ensure circulation of wealth. The prestige and rank of the chiefs was maintained by giving away wealth rather than by accumulating it.\(^{133}\)

\(^{131}\) Nisga'a Tribal Council, People, supra note 122 at 125. Although these tribes (pdeek) persist until today, they have acquired throughout time new crests (symbols) that identify them. According to the Nisga'a, today the Wolf are associated with the Bear, the Eagle with the Beaver, the Raven with the Frog, and the Killerwhale with the Owl. The single crest animals became inadequate to express Nisga'a societal evolution. In Nisga Cultural Infusion Resource School District 92 (Nisgha), The Treasured Legacy of the Nisga (Terrace, B.C.: Totem Press Terrace Ltd., 1982) at 5; 19 [hereinafter Nisgha School District 92, Treasured Legacy].

\(^{132}\) Raunet, supra note 128 at 29; Nisgha School District 92, Treasured Legacy, supra note 131 at 11-12.

\(^{133}\) Nisgha School District 92, Treasured Legacy, supra note 131 at 31; Raunet, supra note 128 at 29; Tennant, supra note 127 at 7-8.
Nisga'a houses were ranked within the larger *pdeek* (tribe) according to the wisdom and charisma of the individual chieftain.\textsuperscript{134}

It is important to acknowledge that Nisga'a's social structure was composed of different ranking strata. The main strata in which Nisga'a society was divided were the nobles, which included a small elite group made of chiefs and its close family, the common people, and the slaves, which were dominantly composed of neighbouring Tlingit people who were made captives in war.\textsuperscript{135}

A central element in Nisga'a culture was the *Ayuukhl Nisga'a*, a code of laws which has been gathered from the legends and stories of the past, from the examples that *Txeemsin* gave them, and transmitted orally throughout time.\textsuperscript{136} *Ayuukhl Nisga'a* covered all relevant aspects of Nisga'a life, including its social and political organization, inheritance, penalties in case these laws were breached, and distribution of lands and resources.\textsuperscript{137}

Access to lands and resources were also carefully regulated by *Ayuukhl Nisga'a*. According to Nisga'a tradition, lands in the Nass valley were allocated and its use delineated so that all members of the nation were aware of which *wilp* owned it. This ensured that all people could use that territory through right or privileged access. Land could not be bought or sold. All

\textsuperscript{134} Apparently at the time of contact Nisga'a political structure was in transition from a tribal system to a chiefdomship. Though among the Nisga'a there was no institutionalized office of *pdeek* (tribal) chief, it seemed that the chief of the highest ranking in the winter village had the support accorded to the tribal chief. In some cases, a dynamic chief would have the support not only of his own *pdeek*, but also of other *pdeeks* as well. The concept of nationhood had developed and tribal structure was changing to accommodate the concept of Nisga'a "Nation" or "Unity." In Nisgha School District 92, *Treasured Legacy*, supra note 131 at 4


\textsuperscript{136} Nisga'a Tribal Council, *People*, supra note 122 at 125.

\textsuperscript{137} According to Nisga'a elder Bert MacKay among the principles of *Ayuukhl Nisga'a* that the Nisga'a still observe and honour as holy are: Respect, including respect for Nisga'a laws; education, which was the responsibility of parents and grandparents and concerned among other central aspects, the preservation of life; the laws governing the chieftainship and the matriarch, according to which it was through the female that the line of inheritance was passed on; the "Settlement of the Estate" which were followed when a person died, which included laws concerning chieftainship and property rights; marriage, which for the Nisga'a has been a sacred institution because it is through the home that family values are maintained, as in the western tradition; divorce, which was a very strict law which allowed annulment of marriage by ruling of the chieftain; laws concerning war and peace; laws concerning trade, which was traditionally a very important activity for the Nisga'a; and finally those concerning penalties, one of which was restitution or *Ksiiskw*. Imbedded in these ten laws, according to Mackay, was the concept of compassion, that is considered by the Nisga'a as a great gift. *Ibid.* at 125-129.
members of the wilp worked on its territories. Others outside that wilp had privileged access to the resources. A man could help out on the territories of his wife's family. Wives often picked berries on their husband's lands. A man could hunt or fish on his father's territories, even after his father had died. He would not, however, pass this right on to his son or heir. When the owners had taken enough resources for their own use, others could ask for permission to harvest from this area. In return he would receive a gift of gratitude (gkayhl). During the oolichan season each wilp moved to its cabin at the fish camp. All Nisga'a had the right to fish oolichan. Those who did not have cabins, Nisga'a or non-Nisga'a, brought gifts to their hosts (huuts'a). Aside from the land owned by the wilps, there was some land not owned but used by all the people in common.\(^{138}\)

The respect and observance of Ayuukhl Nisga'a by Nisga'a people helps to understand the significant development of their culture at the time of contact with Europeans navigators in the late eighteenth century.

2.2. Contact.

2.2.1. Navigators and traders.

The first documented contact between the Nisga'a and Europeans occurred in 1793, when Captain George Vancouver navigated Nisga'a waters in search of a northern passage to the Atlantic Ocean.\(^{139}\) For years, navigators of different nationalities, including Spanish, Russian, American and British sailed the waters of what is now northern British Columbia attempting to control maritime fur trade with coastal peoples, including the Nisga'a. Early in the nineteenth century Russians and Spanish left the area, moving north and south respectively, leaving to the British and the Americans the monopoly in the fur trade with these peoples. Trade with Europeans in this area was dominated by the Haida of the Queen Charlotte Islands. Nevertheless,

\(^{138}\) Nisgha School District 92, Treasured Legacy, supra note 131 at 30-31.

\(^{139}\) On that encounter, which appears to have been friendly, several Nisga'a visited the Vancouver's ships and invited his crew to visit their village, where trade was made. Raunet, supra note 128 at 21-25.
on the mainland, the Tsimshian and Nisga'a acted as middlemen, controlling the movement of furs from the interior.\textsuperscript{140}

In the 1820's the Nass river area became one of the major centres of trade in the northern Pacific. That explains why in 1831 the Hudson Bay Company (HBC), to which the British Crown had granted official monopoly over trade along the coast, built Fort Simpson in the mouth of the Nass River, close to where today the village of Kincolith is located.\textsuperscript{141} The Nisga'a seemed to have taken advantage of the location of this Fort in their territory, becoming until its removal to the Tsimshian Peninsula three years later, the exclusive intermediaries in the trade with the British.\textsuperscript{142}

Although with the removal of the HBC post the Nisga'a lost their position in the trade relationship with the British, it sheltered them from direct contact and political subjugation to the newcomers for some time.\textsuperscript{143} In spite of this circumstance, the impact that diseases brought by the European had on their population in this period of early contact was immense. Between the late 1700s and the mid 1800s, the Nisga'a, like other Aboriginal peoples of the northwest coast, were devastated by diseases such as smallpox and measles, which resulted in the reduction of its population from 30,000 to about 800.\textsuperscript{144}

2.2.2. Missionaries.

Following the traders, in the 1860s Christian missionaries arrived to the Nisga'a territory. Inspired in the utopian experience that William Duncan was implementing with the Tsimshian at Metlakatla, the Anglicans (Church Missionary Society) established in 1864 a mission at

\textsuperscript{140} Ibid. at 36.


\textsuperscript{142} Raunet, supra note 128 at 39.

\textsuperscript{143} Ibid. at 42. Due to the impacts that the establishment of Fort Simpson by the HBC had on the Tsimshian people (epidemics, alcoholism, social disintegration), in the 1860s, William Duncan, an Anglican Missionary, convinced many of them to leave this place founding the Christian utopian city of Metlakatla. There, many sought refuge until 1887, when Duncan and his followers (seven hundred) left to Alaska in an act of resistance to the imposition of the reserve system. Ibid. 42-46, 85.

Kincolith on the Nass River. The goal of their work among the Nisga'a, as expressed by them, was to change them "from ignorant bloodthirsty cruel savages into quiet useful subjects of our Gracious Queen."  

In 1877 the Methodist church established in Lakalzap, where Greenville is located today. The Methodists were the first to create a permanent Christian community in the Nass valley. In 1883, after the failure of early Anglican initiatives to convert the Nisga'a, they established Aiyansh as a mission up the Nass River. This village was also modeled on the experience of Metlakatla. By the end of the century Aiyansh was considered by the Anglicans to be a model community, whose ultimate goal was not merely evangelization, but the complete reconstruction of Native society. Consequently with this purpose, the missionaries attacked the potlatch as central institution of the Nisga'a. They also attacked Nisga'a marriage and divorce practices, attempting to impose British laws. They finally confronted the traditional network of solidarity of the clan system by creating mutual societies.

Looking back to nineteenth century missions from today, it is clear that the churches were successful in the religious conversion of the Nisga'a. Modern day Nisga'a are generally practicing Christians. Despite the missionaries' attempts to destroy Nisga'a culture, this people developed a religious syncretism which has enabled them to maintain their traditional religious beliefs, and accommodate Christianity to them. Moreover, different authors have

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145 Tomlinson to Trutch, 25 January 1870, Tomlinson to Archdeacon Woods, 31 October 1871, CMSA, in Fisher, supra note 141 at 136-137.

146 This fact is explained by Raunet in the tactics of this church, which seemed to have been less totalitarian than those of the Anglicans. Instead of attempting to create a new social organization among the Nisga'a, they concentrated on the spiritual aspects of their mission (Raunet, supra note 128 at 58-60). The mission seemed to have been accepted by the Nisga'a due to the benefits it brought, particularly in terms of medicine, education and new economic activities.

147 Fisher, supra note 141 at 137.

148 At the end of the century, Aiyansh had a school, a choir and a band organized by the Anglicans. The Church had 125 members according to its own estimates, and services were conducted both in English and Nisga'a. The village was administered politically by a parish council composed of seven chiefs. The missionaries also built a sawmill, a small printing press, a dispensary, roads, boardwalks and some single-family cottages. Raunet, supra note 128 at 70-72.

149 Ibid. at 73.

150 An example of this perception can be found in Rod Robinson's statements regarding this complex issue. Robinson, a leader of the Nisga'a community and member of the Anglican church, sees no contradiction between Nisga'a ancient beliefs and contemporary Christianity. On the contrary, he points parallels between the Bible and Ayuukhl Nisga'a and draws spiritual strength from both. Nisga'a Tribal Council, People, supra note 122 at 8.

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acknowledged that missionaries in British Columbia in general, and in the Nisga'a territory as well, became instrumental in the defense of Aboriginal people against the government and non-Native settlers who attempted to encroach on their lands.\footnote{151}{Robin Fisher affirms that they often became advocates of the Indians' right to a fair treatment over the land question (see Fisher, \textit{supra} note 141 at 144).}

As Daniel Raunet affirms in relation to the Church role on the Nisga'a territory:

> from an instrument of oppression, the Church thus developed into one of defence, acting as a model organization and support group in the fight for land. In a way, the Nisga'a "indianized" the new religious institution and adapted it to their own needs.\footnote{152}{Raunet, \textit{supra} note 128 at 73.}

### 2.3. The imposition of the reserve system.

Vancouver Island was declared a British colony in 1849 and the Mainland a colony in 1858.\footnote{153}{Both colonies were united into the colony of British Columbia in 1866. Later, in 1871 they joined Canada.} Governor James Douglas signed fourteen treaties with Aboriginal people on Vancouver Island between 1850 and 1864, purchasing territory. The so called Douglas treaties acknowledged Aboriginal occupation of traditional lands, though they only covered approximately 576 square kilometres or about 3 per cent of the total land mass of the Island.\footnote{154}{Christopher Mckee, \textit{Treaty Talks in British Columbia. Negotiating a Mutually Benefitial Future} (Vancouver: UBC Press, 1996) at 12-13; Fisher, \textit{supra} note 141 at 151-153; Tennant, \textit{supra} note 127 at 17-25.}

The same governor encouraged the creation of Aboriginal reserves before European settlement occurred, so that they could maintain their villages, agricultural land, and sacred areas. Although there is no consensus on the size of these reserves, a minimum of ten acres per family was established.\footnote{155}{Mckee, \textit{supra} note 154 at 16-17} Moreover, Douglas policy left the way open for Aboriginal people to acquire additional lands outside reserves, through the pre-emption of unoccupied lands which they could farm.\footnote{156}{On the Island a married couple was allowed to pre-empt 200 acres and 10 more for each child. Tennant, \textit{supra} note 127 at 35.}
Following governors, nevertheless, had a different approach to the land question. Douglas successors left this matter in the hands of subordinates who explicitly denied the existence of Aboriginal title to lands in this colony.\(^\text{157}\) As a consequence of this approach, no other treaties were entered from that time in the province with Aboriginal peoples. This except for Treaty No. 8 signed in the northeast of British Columbia in 1899-1900, but without participation of the province. The size of reserves previously constituted and those to be created in the future were limited to a maximum of ten acres per family. Pre-emption of "unoccupied" lands was restricted for non-Aboriginals who settled in them.\(^\text{158}\)

In accordance to this policy, Peter O'Reilly, member of the Indian Reserve Commission created by the provincial government, visited the Nisga'a territory on several occasions, the first time in 1881, and the last in 1896, with the purpose of establishing reserves.\(^\text{159}\) Nisga'a opposition to the reserve system was strong. According to Ayuukhl Nisga'a the Nass River valley was owned by the Nisga'a nation, and different wilps had occupancy rights over most of its lands in accordance to ancient traditions. The intrusion of Europeans who pretended to "grant" them lots of land in the name of the Queen was something they did not understand or accept. According to Nisga'a oral tradition, in 1881 O'Reilly arrived in the middle of the fishing season, so villages were half-deserted. He did not explain the real purpose of his work, and asked innocuous questions about ownership of certain buildings.\(^\text{160}\) Frank Calder, founder of the Nisga'a Tribal Council, recalls elders stories according to which the Nisga'a of Gitlakdamix had

\(^{157}\) Joseph Trutch, who became Chief Commissioner of Lands and Works until 1871, believed that Aboriginal peoples were "uncivilized savages." He emerged as a dominant policy maker in this matter. In McKee, \textit{supra} note 154 at 18.

\(^{158}\) Tennant, \textit{supra} note 127 at 39-54. The author characterizes the attitude of the government in relation to Aboriginal peoples between 1864 and 1887 as one of "segregation and suppression."

\(^{159}\) At the mouth of the Nass he established several small collective reserves for the use of the tribe, including Kincolith and Stoney Point, in 1881. This last reserve was assigned in common for the Nisga'a and Tsimshian in order to prevent disputes among them. In Kennet Brealey, "Travels from Point Ellice: Peter O'Reilly and the Indian Reserve System in British Columbia" (Autumn/Winter 1997/98) No. 115/116 \textit{BC Studies} 180 at 212-213. At that time the Nisga'a population had been estimated in 867 and had been assigned 9,954 acres of unsurveyed land, or about 11 acres per person (Raunet, \textit{supra} note 7 at 80). In 1888 O'Reilly allotted 19 new reserves totalling 5,405 acres on the upper Nass and Observatory Inlet. In 1896 he allotted one more reserve on the Nass River (Brealey, at 202-203; 217). In total Nisga'a finally "received" recognition of 7,590 hectares from the Crown, half of one per cent of their former territory (Raunet, \textit{supra} note 128 at 138).

\(^{160}\) Raunet, \textit{supra} note 128 at 80.
expelled a group of surveyors that entered into their territories with the purpose of establishing the reserves lines.161

As a way to express their discontent with the imposition of reserves, as well as their concerns with the settlement of non-Natives in their territory, a Nisga'a delegation traveled to Victoria in 1881. They came back with no response from provincial authorities.162 A new delegation was sent to Victoria in 1886. This delegation, which traveled together with Tsimshian leaders, met with the Premier and O'Reilly, among other provincial authorities. According to Paul Tennant, the claims expressed by these peoples at that meeting dealt with Aboriginal title and Indian self-government, although this last matter was not expressed in those terms.163 They also urged the government to have treaties through which they could retain for themselves sufficient lands and resources for self-sufficiency.164

A government commission visited Nisga'a territory in 1887 as a consequence of their land claims. On this occasion sub-chief of Lachkaltsap Charles Russ expressed to the government agents:

In the first place we did not like the name 'reserve'... [B]ut if we have reserves, there is one thing we want with them, and that is a treaty. We have no word in our language for 'reserve', but every mountain, every stream, and all that we see, we call our forefathers' land and streams. It is just lately the white people are changing the name. Now it is called the Indian reserve, instead of the Naas people's land... The change [of name] was made by white people, and 'treaty' is to come from them too.165

Little happened with the commission's visit, and the reserve policy continued to be implemented by the government.166

161 Ibid. at 83.

162 Tennant, supra note 127 at 55. The Provincial Superintendent of Indian Affairs, Mr. Powell, did not receive them on that occasion. Raunet, supra note 128 at 79-80.

163 Barton, a Nisga'a leader expressed on that meeting Nisga'a desire "to be free on the top of this land." In British Columbia, Legislature, Sessional Papers 1887, at 264, in Tennant, supra note 127 at 57.

164 Ibid. at 57.

165 Brealey, supra note 159 at 214.

166 According to Tennant, the Commissioners Planta and Cornwall dismissed Aboriginal demands for Aboriginal title, treaties and self-government. Nevertheless, they supported the need of larger reserves. See Tennant, supra note 127 at 63.
The creation of reserves coincided with the appearance of canneries in the Nisga'a area, affecting the fishing rights which they had enjoyed from time immemorial. Nisga'a concerns of the shortening of salmon supply due to non-Aboriginal fishing in the Nass area were expressed as early as 1881. Expropriation of Nisga'a fishing grounds was later achieved by Ottawa when introducing fishing permits allowing non-Aboriginals to fish in their waters. Moreover, a distinction between Native and commercial fisheries in British Columbia was made official in 1888 by federal regulations, limiting the use of nets or other apparatus without license from government. The same regulations ensured Aboriginal liberty to fish, but for the purpose of providing food for themselves, not for sale or barter. The Nisga'a challenged these and other regulations which severely limited their access to an activity which was central to their culture and economic subsistence. Nevertheless, they were subject to these discriminatory provisions until recent years when the Aboriginal right to fish for commercial purposes was acknowledged by the Supreme Court of Canada on different cases brought by Aboriginal peoples in the province.

In 1907 the Nisga'a Chiefs created a Nisga'a Lands Committee, an organization representing clans and local communities in the Valley, the first of its type in British Columbia. In 1909 it promoted a gathering of coastal peoples out of which the Indian Rights Association would emerge.

After their land claims had been rejected in Victoria and Ottawa, in 1913 the Nisga'a sent a petition to the Privy Council in London. The petition contained a declaration of Nisga'a land ownership and of political sovereignty. It also contained an affirmation of Nisga'a acceptance of

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167 Raunet, supra note 128 at 113.
169 According to Douglas Sanders, it should be acknowledged, nevertheless, that the Supreme Court of Canada has not upheld in these cases a general Aboriginal right to fish for commercial purposes, but rather a right limited to those cases where its historical-legal test could be met (Douglas Sanders, personal communication to the author, May 14, 1999). The historical-legal test here referred to is that which was established by the Supreme Court of Canada in the R. v. Sparrow decision in 1990, and later developed in the Gladstone, Van Der Peet and NTC Smokehouse decisions, according to which "Aboriginal rights are rights which were, and continue to be, an integral part of the distinct culture of a claimant group." This is a fact that, according to the decisions here referred to, has to be proven by the claimant. (Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 The Canadian Bar Review 36 at 42).

170 The origins of this organizational process were attributed by the government to the influence of churches. It is more likely that this organization was connected to the emergence of a first generation of neo-traditional leaders. Tennant, supra note 127 at 87.
British sovereignty on the basis that their land ownership was to be respected in accordance to the principles of the Royal Proclamation of 1763. Although the Nisga'a claims were not accepted by either the Privy Council, Canada or British Columbia, this petition had a great influence on Aboriginal peoples of the province, becoming a symbol of land struggle. It was after its rejection that these peoples gathered strength in defence of their land rights and in recognition of their title. An example of this was the creation in 1916, with the participation of the Nisga'a, of the Allied Tribes of British Columbia, an organization which represented Aboriginal peoples from all over the province.

Notwithstanding the commissions created by the governments to deal with Aboriginal land claims and reports emerging from them during this period, no substantial changes were introduced to the policies until then implemented by Canada. On the contrary, further legislation was passed in order to achieve greater control of Aboriginal cultural manifestations and land claims. In 1914 and 1918, under the rule of Scott as superintendent general of Indian Affairs, the anti-potlatch provision of the Indian Act of 1884, which had only sporadically been enforced, was amended to expand the definition of Indian activities covered by it. Later in

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171 Ibid. at 90. In the "Statement of the Nishga Nation or Tribe of Indians" which accompanied the petition, the Nisga'a made clear their claims to this authority:

From time immemorial the Nishga Nation or Tribe of Indians possessed, occupied and used the territory generally known as the Valley of the Naas River, the boundaries of which are well defined. The claims which we make in respect of this territory are clear and simple. We lay claim to the rights of men. We claim to be aboriginal inhabitants of this country and to have rights as such. We claim that our aboriginal rights have been guaranteed by Proclamation of King George Third and recognized by Acts of the Parliament of Great Britain. We claim that holding under the words of that Proclamation a tribal ownership of the territory, we should be dealt with in accordance with its provisions, and that no part of our lands should be taken from us or in any way disposed of until the same has been purchased by the Crown.

By reason of our aboriginal rights above stated, we claim tribal ownership of all fisheries and other natural resources pertaining to the territory above mentioned.

"Statement of the Nishga Nation or Tribes of Indians," January 22nd, 1913, in The Nisga Petition to His Majesty's Privy Council (Friends of the Indians of B.C., 1915) at 1.

172 Tennant, supra note 127 at 96.

173 The McKenna-McBride Royal Commission, although acknowledged in 1916 the need of adding lands to the existing reserves, also recommended to cut-off some valuable land from them. The British Columbia Indian Lands Settlement Act (Bill 13) was signed in 1920 authorizing federal government to implement this Commission's recommendations. In 1927 a special joint Committee of the Senate and House of Commons was established to inquire the claims of the Allied Indian Tribes of British Columbia. In its report released the same year these claims were unanimously rejected. Ibid. at 96-113.

174 Ibid. at 101.
1927, punishment was established for any person that without the consent of Indian Affairs requested funds for the prosecution of Indian claims, in a clear attempt to discourage Aboriginal land claims against the governments.\textsuperscript{175}

The impact that these legislation had on the Nisga'a was considerable. Although potlatch and other Nisga'a ceremonies continued to be practiced,\textsuperscript{176} and pressure in pursue of their land claims would be maintained in time through both regional organizations (Native Brotherhood of British Columbia created in 1931) and local organizations (the Nisga'a Tribal Council created in 1955), the years after 1927 were difficult for the Nisga'a.\textsuperscript{177} As Frank Calder affirms, from 1927 to 1960 there was a complete "doldrum" due to the restrictions imposed on Indian participation in the land question and to the potlatch system.\textsuperscript{178} In accordance with government policy, Nisga'a children were taken away from their homes and sent to residential schools where contact with their parents and culture was discouraged. Indian agents controlled almost all aspects of Nisga'a life, generating among them a deep frustration. As Daniel Raunet affirms referring to Nisga'a life before the changes introduced to the \textit{Indian Act} in the post-war period, "[b]arred from the polling station, from the banks, and from the bars, he was comparable in status to a minor."\textsuperscript{179}

It was also during this period that Nisga'a territory was opened to logging enterprises that initiated the extraction of its forests. In 1948 the British Columbia government granted what is now called the Tree Farm License No. 1 over two million acres of land including the watersheds of the Nass and the Skeena rivers to the Columbia Cellulose Company, a subsidiary of a U.S. multinational corporation. Although lands continued to belong to the Crown, exclusive rights over these lands entitled the company to cut the timber it wanted free from interference. From 1948 to 1964, this company built up a total holding of 7,284 square kilometres, more than a third of it on Nisga'a territory. Valleys and hills were clear-cut. The timber was then taken by a road

\textsuperscript{175} \textit{Ibid}, at 111-112.

\textsuperscript{176} Chief James Gosnell affirmed in 1981 that Nisga'a people never obeyed the potlatch laws and were able to carry out their traditions all the time. According to him, this was possible in part, because of the isolation of Nisga'a territory, that until 1958 could only be accessed by the Nass River. In Daniel Raunet, \textit{supra} note 128 at 128-129.

\textsuperscript{177} Tennant, \textit{supra} note 127, 114-150.


\textsuperscript{179} Raunet, \textit{supra} note 128 at 169.
constructed in 1958 to Terrace, or floated down to Prince Rupert on the coast, where the logs were sawed or transformed into pulp for export.\(^{180}\)

Nisga'a were not consulted prior to the initiation of the logging. Neither were they allowed to share the benefits it generated, except as employees of logging companies or when reserve timber was harvested.\(^{181}\) For years they witnessed the theft and destruction of their forests, being unable to stop this activity encouraged by the province. A recent study requested by the Nisga'a from Price Waterhouse estimates the economic losses suffered by them as a consequence of the activities undertaken by forest companies in their territories from $1,254 to $3,025 million.\(^{182}\)

2.4. The *Calder* case and the negotiation of Nisga’a rights.

Frustration caused by the lack of response to Nisga'a petitions from both governments and by the poverty existing on their communities, lead Nisga' Tribal Council to think of a different road to obtain the recognition of their land rights. This situation explains why in 1964 the Nisga’a decided to sue the government of British Columbia alleging that Aboriginal title had never been lawfully extinguished in the province (*Calder vs British Columbia*). British Columbia argued that Aboriginal title was a concept unknown to the law, and that, even if such title had existed, it had been extinguished by the Colony of British Columbia before it became a province of Canada in 1871.\(^{183}\) The case was lost both at the trial judge and at the British Columbia Court of Appeal. The case went to the Supreme Court of Canada, where although it was technically lost by the Nisga'a, the Court was divided equally on the question of whether the Nisga'a had Aboriginal title to their traditional territories. Despite this fact, this was considered to be a landmark decision, which altered the framework of Aboriginal rights in Canada and opened the

\(^{180}\) Ibid. at 180-181.

\(^{181}\) Sanders, *supra* note 169.

\(^{182}\) Price Waterhouse, “Nisga'a Tribal Council. Executive Summary, February 1995” (Calculation of Loss Report) [unpublished]

doors for the negotiation of settlements concerning Aboriginal land claims.  

Notwithstanding the decision made by the Supreme Court in this case, the governments refused to negotiate Nisga'a land rights for several years. It was only in 1976 that negotiations, including the federal government and the Nisga'a Tribal Council, were initiated. In April of that same year the Nisga'a Tribal Council released a statement to the negotiating parties containing a twenty one point proposal. According to this document, which constituted their negotiating platform, land rights, hunting, fishing and trapping rights and self-government rights on their traditional territories should be acknowledged to the Nisga'a in a final agreement. The agreement should also ensure that the Nisga'a receive all the rights normally given to other Canadians, and additionally to be put in a plus position ("Citizens Plus") because of the minus position where they had been forced to be for a long time.

Another central aspect of the Nisga'a position in the negotiating process was their refusal to cede, release and surrender their rights to land and resources in exchange for defined rights and benefits set out in the agreement.

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184 An analysis of the different legal interpretations of the Supreme Court decision in this case, as well as its legal and political implications for Aboriginal peoples' rights in Canada, can be found in Chapter III of this study.

185 The British Columbia government was absent from the negotiation process until 1990, when due to Aboriginal pressure and political changes, it assumed a more open attitude towards Aboriginal rights issues. Also influential in the BC government decision on this matter was the involvement of different provinces on land claims negotiations in various parts of Canada. For a broader understanding of provincial government attitude with regards to Aboriginal land claims see Tennant, supra note 127 at 227-237.

186 Nisga Tribal Council, Citizens Plus. The Nisga People of the Nass River Valley in Northwestern British Columbia, Revised Edition (New Aiyansh, B.C.: Nisga Tribal Council, 1980), 16-19. [hereinafter Nisga Tribal Council, Citizens] In this statement the Nisga'a asserted to the negotiating parties, among other rights, the following: With regards to hunting, fishing and trapping rights, they proposed an amendment to the existing legislation in order ensure their protection. They also affirmed that they did not want tracts of land set aside for these activities, such as in the James Bay Agreement, but were asking for complete and unrestricted rights on their own land without governmental intervention; Economic development programs were envisaged by the Nisga'a within their territory in cooperation with the two levels of government and with private enterprise. These programs should involve Nisga'a participation and control; Regional self-government by the Nisga'a of their own territory was proposed, along with the school district the Nisga'a already controlled; Controls were to be imposed during the negotiation process to the logging operations in their territory, as well as river damming prohibited. No new resource extraction should be allowed until a final agreement was reached, and no economic development should be accepted without Nisga'a agreement. Nisga'a ownership of resources should be recognized; Compensation should be provided for the extraction of timber, mineral and fish occurred during the past hundred years; The government would be asked to upgrade roads, improve telephone, hydro, educational and medical services during the negotiation process; Culture and the maintenance of their language within the Nass was to be promoted. The return of their cultural artifacts which had been taken outside their lands was to be negotiated.

187 Jim Aldridge, legal advisor of the Nisga'a in the treaty negotiations, oral statement on Aboriginal and Treaty Rights Course, Faculty of Law, University of British Columbia, Spring 1998.
After twenty years of difficult negotiations, an Agreement in Principle containing the basis for a future agreement was reached by the negotiating parties, including the Nisga'a, Canada and British Columbia. This agreement expressed the consensus existing among them on important issues including the Nisga'a and the Constitution Act, 1982, lands and resources, fisheries, wildlife, Nisga'a government and administration of justice, taxation, financial transfers and fiscal arrangements, among others. However, it left the definition of some specific topics on these matters to a final agreement to be arrived in the future.¹⁸⁸

2.5. The Nisga’a Final Agreement

After its ratification by the Nisga'a people and the federal and provincial governments, difficult negotiations were undertaken for two years, enabling the parties to reach the Nisga'a Final Agreement (NFA) or treaty on July 15, 1998.¹⁸⁹ The treaty is contained in an extensive document which includes a Preamble and 22 Chapters, 13 Appendixes and 714 pages (Appendixes included). It is a quite comprehensive document in comparison to prior treaties and to the Indian Act. It covers a wide range of matters concerning Nisga'a life and its relationship with Canadian legal system. It is the first modern treaty entered with Aboriginal peoples in the province of British Columbia. It is also the first modern treaty which considers together in a same document Aboriginal lands and resources and self-government, a long term aspiration of the Nisga'a. Due to its length, it would be impossible to cover here all the matters it includes. Consistent with our interest on territorial and political rights of Aboriginal peoples, we will focus in this Chapter on the following matters which are included on the NFA:¹⁹⁰


¹⁹⁰ The summary here presented is based on the Nisga'a Final Agreement of August 4 1998 published by the three parties involved on this treaty (Canada, British Columbia and Nisga'a Nation, supra note 189) as well as in two briefs that have been distributed by the Ministry of Aboriginal Affairs of British Columbia; "The Nisga'a Treaty" (August 1998) and the "Nisga'a Final Agreement in Brief" (September 1998).
2.5.1. General provisions and constitutional status.

The NFA will be a lands claim agreement and a treaty under Section 25 and 35 of the Constitution Act, 1982. The NFA reaffirms the Nisga'a Nation as an Aboriginal people of Canada. The Canadian Charter of Rights and Freedoms applies to Nisga'a Government, bearing in mind its "free and democratic nature." The NFA will be a full and final settlement between the three parties involved in respect to Aboriginal rights and title of the Nisga'a. Nisga'a Aboriginal rights under Section 35 of this Constitution are "modified" into treaty rights. To the extent that any Aboriginal rights or title that the Nisga'a have, or may ever have, differ from those set out in the treaty, those rights are released by the Nisga'a. All parties agree that if any part of the NFA is found by a Court to be invalid or not enforceable, the provision will be severed and the reminder of the treaty will be enforceable by all parties. The general rule is that amendment of the NFA must be agreed by all parties. Rights of other Aboriginal peoples will not be affected by the NFA. The Criminal Code of Canada will be applied on Nisga'a Lands. Federal and Provincial laws of general application will continue to be applied to Nisga'a and Nisga'a Lands unless varied by the NFA. The Indian Act will no longer apply to the Nisga'a except for determining who is a Status Indian as defined in the Indian Act and transition provisions.191

2.5.2. Lands and resources

a. Lands.

The NFA acknowledged two categories of lands to the Nisga'a; the Nisga'a Lands and the Nisga'a Fee Simple Lands. The first (Nisga'a Lands) comprise 1,992 square kilometres (sq. km.) of land in the lower Nass Valley area, including 1,930 sq. km. of provincial Crown land and 62 sq. km. of 56 former Nisga'a Indian Reserves, including the four villages of New Aiyansh, Canyon City, Greenville and Kincolith, which will cease to be Indian reserves. This land will be owned by the Nisga'a as fee simple property. It will include forest resources, subsurface

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191 Chapter 2, Articles 1 to 69.
resources and gravel. The Nisga'a will be able to sell or lease to any person (Nisga'a or non-Nisga'a) parcels of land. Nisga'a Lands will not cease to be such as a result of any change in ownership of an estate or interest in a parcel. The provincial park and ecological reserve within Nisga'a Lands will remain under provincial ownership and jurisdiction. Nevertheless, Nisga'a will be involved in their management. Nisga'a Lands do not include existing fee simple lands, lands subject to the existing woodlot license and agricultural leases, submerged lands and Nisga'a Highway. Existing legal interests on Nisga'a Lands, such as rights of way, will be continued under replacement tenures issued by the Nisga'a. Existing traplines, guide outfitter and angling guide tenures on Nisga'a Lands will remain under provincial jurisdiction. Nisga'a Lands can be public, private or village lands. Public lands are those not committed by the Nisga'a government to particular uses. The public (including non-Nisga'a) will have a reasonable access to Nisga'a public lands for non-commercial activities (hunting, fishing) and recreation. Private lands are those in which Nisga'a government creates an exclusive interest or required for uses that are incompatible with public access. The second (Nisga'a Fee Simple Lands), comprise those lands located outside Nisga'a Lands. These include Category A lands, which consist of 18 Nisga'a Indian Reserves, that will cease to be such, to which Crown land has been added, totalling 25,0 sq.km, and Category B lands consisting of 15 parcels of Crown land totalling 2,5 sq.km that have been transferred to the Nisga'a Government to provide economic development opportunities. These lands will be subject to provincial laws. The Nisga'a will have the ability to bring or register some or all their land into the provincial land title system (Torrens system). The Land Title Act will apply to those lands brought into the system.

b. Water.

Under the NFA the province will retain full ownership of and regulatory authority over water. Up to one per cent of the annual flow of the Nass River will be reserved for the use of

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192 Chapter 3, Articles 1 to 121; Chapter 6, Article 2; Chapter 7, Articles 1 to 10. It is important to highlight that the total land claimed by the Nisga'a during the negotiations was of 24,000 sq. km. This contrasts with the 2,020 sq.km acknowledged to them on the NFA.

193 Chapter 4, Articles 1 to 17.
Nisga'a for domestic or agricultural or industrial purposes. The Nisga'a will be able to reserve an allocation of water in the tributaries of the Nass River for hydro purposes.\textsuperscript{194}

c. Forests.

The Nisga'a will own all forests resources on Nisga'a lands. Existing licenses (Tree Farm Licenses) will continue to harvest timber on Nisga'a lands for a five year transition period, paying their stumpage to the province. British Columbia will provide Nisga'a with these payments and license fees generated on Nisga'a Lands, ensuring that Nisga'a will receive the full benefits of ownership from the beginning of the NFA. The Nisga'a may establish rules and standards which meet or exceed provincial standards to govern forest practices on Nisga'a lands following the transition period, or for Nisga'a harvesting operations during the transition period. At the end of the transition period the Nisga'a will determine, collect and administer fees relating to forest resources on Nisga'a Lands. Volumes of maximum timber extraction on Nisga'a Lands are determined by the NFA for the transitional period and following years to ensure sustainability of forest resources.\textsuperscript{195}

d. Fisheries.

The Nisga'a will have an annual allocation of salmon which will, on average, comprise approximately 17 per cent of the Nass River total allowable catch. Sale of salmon will be subject to laws of general application and not allowed in years when commerce of salmon is restricted. Nisga'a are entitled to harvest other species, including steelhead for domestic purposes, if stocks can support that harvest. Nisga'a ability to sell steelhead will be subject to laws of general application. The Nisga'a may harvest other fish species for domestic needs, including a non-exclusive right to harvest intertidal bivalve shellfish, and exclusive right shared with other Aboriginal peoples to harvest oolichan in the Nass Area. The NFA provides mechanism for determining future allocations for species such as halibut, crab and herring. In addition, the

\textsuperscript{194} Chapter 3, Articles 122 to 144.

\textsuperscript{195} Chapter 7, Articles to 74.
Nisga'a will have an allocation of sockeye and pink salmon (equivalent to approximately 9 percent of the Nass total allowable catch) for domestic and commercial purposes under a harvest agreement outside the treaty. Canada and the province will continue to manage the fisheries. A Fisheries Management Committee, with equal representation of Canada, the province and the Nisga'a, will be established to help plan and conduct Nisga'a fisheries and enhancement activities for Nass salmon stocks. The Nisga'a will have authority to regulate and manage their own fisheries once the Ministers responsible have approved a Nisga'a annual fishing plan. Canada and the Nisga'a will establish a trust (Lisims Fisheries Conservation Trust) with equal representation of both parties to promote conservation and stewardship of the Nass fish stocks. The Nisga'a will receive $11.5 million to purchase commercial vessel licenses to allow the Nisga'a to participate in the commercial fishery. Canada will contribute with $10 million and the Nisga'a with $3 million to the Lisims Trust.

**e. Wildlife Management**

A Nass Wildlife Area, consisting of Nisga'a Lands and surrounding Crown lands, will be established allowing the Nisga'a to exercise their treaty right to hunt. The planning and conduct of Nisga'a hunting and wildlife management in this Area will be developed by a Wildlife Committee composed of four Nisga'a representatives, four from the province and one from Canada. The Nisga'a will provide an annual management plan to this Committee, setting out the Nisga'a hunting activities for the year, including harvest levels (total allowable harvest), method and timing of the hunt. Recommendations on conservation may also be made. The plan has to be approved by the Minister responsible after its revision and approval by the Committee. Once the plan is approved by the Ministry, Nisga'a will have the authority to manage the hunting under this plan, the provincial *Wildlife Act* and laws of general application. The Nisga'a will receive a commercial recreation tenure covering several areas in the Nass Wildlife Area. This

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196 Chapter 8, Articles 1 to 117.

197 This Area, which is identified on Appendix J of the NFA, is of approximately 16,000 square kilometres, a surface eight times larger than the Nisga'a Lands. The Area's boundaries are defined in Canada, British Columbia, and Nisga'a Nation, Appendices, *Nisga'a Final Agreement. Appendices* (Canada, Nisga'a Nation and British Columbia, 1998) at 403. The estimation of its total surface is made by Nisga'a Chief Joseph Gosnell in Dianne Rinehart, "Gitanyow to Use Ruling Against Nisga'a," *The Vancouver Sun*, March 14, 1999. It should be highlighted that this Area corresponds to a large extent to the territory historically claimed by the Nisga'a.
tenure allows for non-exclusive commercial/recreational use of the land and does not deny others access. Nisga'a cannot sell wildlife they hunt, but can continue to trade or barter among themselves or with other Aboriginal peoples.\footnote{Chapter 9, Articles 1 to 99.}


The Nisga'a will have shared authority with Canada and British Columbia for environmental assessment of development proposals on Nisga'a Lands. If Nisga'a decide to have primary responsibility on this matter on Nisga'a Lands, an agreement should be made for this purpose. The standards developed by the Nisga'a must meet or exceed provincial or federal standards. The NFA sets out consultation requirements among the Nisga'a, Canada and the province in order to protect their interests and ensure that all parties are heard. Nisga'a government may legislate in respect to the environmental assessment of projects on Nisga'a Lands. In the event of conflict between this law and federal or provincial laws, these last will prevail to the extent of conflict.\footnote{Chapter 10, Articles 1 to 19.}

2.5.3. Self-government.

The NFA acknowledges that the Nisga'a Nation has the right to self-government, and the authority to make laws in accordance with its provisions.

a. Nisga'a Government.

The Nisga'a Nation will exercise this right through the Nisga'a Lisims Government or central government and four Village Governments in accordance to the Nisga'a Constitution and laws. The NFA also considers the existence of three Nisga'a Urban Locals on areas where Nisga'a citizens currently live outside Nisga'a Lands, including one on Greater Vancouver, one on Terrace and another on Prince Rupert/Port Edward. Nisga'a Lisims Government will be
composed of at least three officers elected by the Nisga'a Nation on general election, the elected members of the Nisga'a Village Governments (four), and one representative elected by the Nisga'a citizens of each Urban Local. Nisga'a Constitution will among other things, provide for the duties, composition and membership of Nisga'a Government. It also should ensure that they are democratically accountable to Nisga'a citizens, in particular through elections to be held every five years, and by guaranteeing that all Nisga'a citizens are eligible to vote on Nisga'a elections. Non-Nisga'a residents on Nisga'a Lands may participate in Nisga'a public institutions which may directly and significantly affect them (such as school or health boards). They should also be consulted and may seek review of decisions that affect them in the same way.

b. Nisga'a legislative authority.

Nisga'a Lisims Government and Village Governments, respectively, have the principal legislative authority and jurisdiction in respect to Nisga'a Government, including its administration, management and operation; Nisga'a citizenship; Nisga'a culture and language; Nisga'a Lands, including property, regulation, administration and expropriation of Nisga'a Lands; and Nisga'a assets. In case of inconsistency or conflict between Nisga'a laws and federal or provincial laws on these matters, Nisga'a laws will prevail to the extent of the inconsistency or

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200 Nisga'a Government will consequently be dominated by the Village Government's councillors. According to Douglas Sanders, this ensures a focus on individuals living in the homeland area, but not as exclusively as in previous settlements. According to the same author, the provisions on non-resident voting intend to comply with the standards on equity rights which have been established with the Batchawana case (Batchawana v Canada). This case was raised by off-reserve members of the Batchawana Band, Ontario, in 1990 who alleged the right to vote in band government elections. The Federal Court of Appeal in 1997 ruled that the provisions of the Indian Act requiring members to be ordinarily resident on reserve in order to vote contravened section 15 of the Charter of Rights and Freedoms. It also ruled that there was no Aboriginal right to exclude non residents from voting (Douglas Sanders, ""We Intend to Live Here Forever" An Analysis of the Nisga'a Treaty" (Vancouver, April 6, 1998) [to be published, University of British Columbia Law Review, 1999] at 12-13 [hereinafter Sanders, "We Intend"]). Cited with author's approval). This decision was recently upheld by the Supreme Court of Canada in a unanimous decision made in the same case in May, 1990. This Court decision argued that "[b]y denying them the right to vote and participate in their band's governance, [the Indian Act] perpetuates the historic disadvantage experienced by off-reserve band members." (Erin Anderssen, "Supreme Court Rewrites Native-Voting Ruling" The Globe and Mail, Ottawa, May 21, 1999 at A2

201 Chapter 11, Articles 1 to 14.

202 Chapter 11, Articles 19 to 23.
conflict, except in the case of Nisga'a assets where federal or provincial laws of general application will prevail.\textsuperscript{203} Nisga'a Government may also make laws with respect to public order, peace and safety on Nisga'a Lands, an authority that does not include criminal law; accommodation of Nisga'a culture in employment and industrial relations; human resource development; buildings, structures and public works on Nisga'a Lands; traffic and transportation; solemnization of marriages; social services; health services, Aboriginal healers; child and family services; child custody; adoption; pre-school to grade 12 education and post-secondary education; gambling and gaming and intoxicants; and devolution of cultural property. In the event of a inconsistency or conflict of laws on these matters, federal or provincial laws of general application will prevail over Nisga'a laws to the extent of the inconsistency and conflict, except for those laws related to Aboriginal healers, child and family services, adoption, education where Nisga'a laws will prevail.\textsuperscript{204} Nisga'a Government may provide for penalties, including fines, restitution, imprisonment for the violation of Nisga'a laws within the limits of summary conviction offenses in the \textit{Criminal Code} of Canada or the BC \textit{Offense Act}.\textsuperscript{205} In case of inconsistency or conflict between the NFA and Nisga'a law, the NFA prevails to the extent of the inconsistency or conflict.\textsuperscript{206}

c. Administration of Justice.

As part of the self-government provisions, the NFA establishes that the Nisga' Government may:

i. The Nisga'a government may provide policing services on Nisga'a Lands by making laws to establish a Nisga'a Police Service, or enter into agreements under which some or all of the policing will be provided by police services (RCMP).\textsuperscript{207} Nisga'a Police service will only come

\textsuperscript{203} Chapter 11, Articles 32 to 58.

\textsuperscript{204} Chapter 11, Articles 59 to 120.

\textsuperscript{205} Chapter 11, Article 128.

\textsuperscript{206} Chapter 11, Article 33.

\textsuperscript{207} This is a responsibility that is assigned to municipalities with a population over 5,000 under the British Columbia \textit{Police Act}. In British Columbia, Ministry of Aboriginal Affairs, "The Nisga'a Treaty," August 1998, \textit{supra} note 190.
into effect if the provincial Cabinet approves that it meets the conditions for municipal police forces under the *Police Act* of British Columbia.\(^{208}\)

i.i. Nisga'a Government will be able to establish by law a Nisga'a Court to hear cases under Nisga'a laws and review administrative decisions of Nisga'a public institutions. Nisga'a Government will appoint its judges. The Nisga'a Court will come into effect only if the province has approved the Court's structure, procedures and method of selection of judges. Final decisions of the Nisga'a Court may be appealed to the British Columbia Supreme Court. The Nisga'a Court will also have jurisdiction over non-Nisga'a persons accused of violating Nisga'a laws. However, where the potential penalty includes a jail term, the accused person may choose to be tried in a provincial Court.\(^{209}\)

i.i.i. Nisga'a government may appoint one or more persons to provide community correction services in respect to persons charged with or convicted of offenses under Nisga'a laws.\(^{210}\)

### 2.5.4. Other provisions.

Among other relevant provisions included in the NFA, the following are to be mentioned here:

**a. Funding.**

**i. Fiscal transfers.**

The Nisga'a will receive $190 million paid over a 15 year period, for which Canada will contribute $175.6 million and British Columbia will contribute $14.4 million.\(^{211}\) Canada and British Columbia will equally contribute $11.5 million to allow Nisga'a to purchase commercial

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\(^{208}\) Chapter 12, Articles 1 to 22.

\(^{209}\) Chapter 12, Articles 30 to 51.

\(^{210}\) Chapter 12, Article 24.

\(^{211}\) Chapter 14, Note 1 to Schedule A. It is important to acknowledge that according to the NFA, the Nisga'a will have to repay during the same period of time the loans that were made to it by Canada during the negotiation process which amount at least $12 million up to date.
fishing vessels and licenses and Canada will additionally contribute $10 million to a fisheries trust.\(^{212}\)

i.i. Fiscal relations.

Canada, British Columbia and the Nisga'a will share responsibility for funding public services and programs on Nisga'a Lands at a level generally compatible to services provided by other local and regional governments in northwestern British Columbia. The NFA requires the three parties to negotiate five year fiscal agreement detailing the contribution that each party will make for this purpose.\(^{213}\) For the first five years, provincial and federal contributions will reflect current annual funding to the Nisga'a, plus an additional $16.1 million over five years.\(^{214}\)

i.i.i. Taxation

Nisga'a will have the authority to levy taxes on Nisga'a citizens residing on Nisga'a lands. Under the Agreement, the Nisga'a Government will not be able to tax non-Nisga'a residents on Nisga'a Lands. In the future federal or provincial governments may delegate to Nisga'a Government the power to tax non-Nisga'a on Nisga'a Lands. Under the NFA, the tax exemptions that the Status Indians living on reserves and Indian bands had in accordance to the Indian Act will be phased out for Nisga'a citizens in eight years for sales taxes and in twelve years for all other taxes. Nisga'a government will be exempt from paying several taxes, such as those related

\(^{212}\) Chapter 8, Article 111-112, Schedule G No. 1; Article 107-109, Schedule F No. 1.

\(^{213}\) Chapter 15, articles 3 to 13.

\(^{214}\) British Columbia, "The Nisga'a Treaty," August 98, supra note 190. According to the same source, these agreements will require the Nisga'a to pay a higher proportion of the cost of public services, decreasing provincial and federal contribution, as the Nisga'a generate more of their own revenue from sources such as resource development, taxes and interests on capital payments. According to Douglas Sanders, to the total payment of $312 million to be made to the Nisga'a by the governments of Canada and BC in accordance to the NFA, $107 million, corresponding to the estimated value of the land (British Columbia contribution), $41 million corresponding to the highway from Terrace into the Nass valley, and $23 to 28 million, corresponding to the purchase of fisheries and forestry rights should be added. Consequently, the total cost of the treaty will be of $500 to 550 million, an amount that does not include the cost of the negotiations and advertising campaigns run by the province. Sanders, supra note 200 at 9.
to goods and services, social services, motor fuel and income tax on non-profit government activities.\textsuperscript{215}

\textbf{b. Cultural artifacts and heritage.}

The NFA acknowledges the integral role and sacred connection that Nisga'a artifacts have on Nisga'a culture values and traditions. Museums identified will return all or a percentage of their artifacts to them. The Nisga'a will build a Museum facility to display these artifacts. Although provincial legislation for the protection of heritage sites will continue to apply on Nisga'a Lands, the Nisga'a may develop their own legislation to protect them within the same Lands.\textsuperscript{216}

\textbf{c. Dispute resolution.}

If disputes arise on the application, implementation or interpretation of the NFA, the parties will try to resolve them through co-operative negotiations and a variety of mediation options. If those efforts fail, parties will have the recourse of arbitration or the British Columbia Supreme Court.\textsuperscript{217}

\textbf{d. Enrolment.}

The NFA establishes that a person is a beneficiary of this treaty if he or she is of Nisga'a ancestry, an adopted child of a Nisga'a, or is a person married to a Nisga'a and has been adopted by one of the four Nisga'a tribes in accordance to Ayuukhl Nisga'a. An enrolment Committee will be responsible for determining who is eligible to enrol under the treaty.\textsuperscript{218}

\textsuperscript{215} Chapter 16, Articles 1 to 23.

\textsuperscript{216} Chapter 17, Articles 1 to 43.

\textsuperscript{217} Chapter 19, Articles 1 to 45.

\textsuperscript{218} Chapter 20, Articles 1 to 17.
2.6. Post Nisga’a Final Agreement events.

In accordance to the NFA provisions, the Nisga’a Nation officially ratified this agreement last November by referendum. On this occasion, 61 per cent of Nisga’a eligible voters approved the NFA.\(^{219}\) On that same occasion, the 73 per cent of the Nisga’a eligible voters approved the Nisga’a Constitution.\(^{220}\) The Nisga’a Constitution, aside from dealing with matters related to responsibilities, duties, composition and membership of the Nisga’a Government,\(^{221}\) explains the connection existing between the Nisga’a traditional laws and values (Ayuukhl Nisga’a or Ayuuk) and the government system they will have in accordance to the NFA.\(^{222}\) The Constitution also establishes mechanisms and institutions for the interpretation and implementation of Nisga’a laws and values.\(^{223}\)

In order to become valid, the NFA has to be ratified by Canada and British Columbia, both of which have to sign it by the corresponding Minister of the Crown and enact settlement legislation giving it effect. British Columbia legislature started its debate of the treaty on November 1998. It was approved by the legislature of British Columbia, not without difficulties, in April of 1999.\(^{224}\) These difficulties were related to the strong criticism that the NFA generated.

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\(^{219}\) Information distributed by the Nisga’a Ratification Committee on November 13, 1998. Available from Internet at http://www.ntc.bc.ca, accessed on November 1998. According to the NFA, the Nisga’a required simple majority of eligible voters to ratify the agreement.

\(^{220}\) Ibid. The NFA requested the Nisga’a Constitution to be approved by 70 per cent of the Nisga’a eligible voters.

\(^{221}\) According to Nisga’a Constitution, Nisga’a Lisims Government is divided into a legislative house known as Wilp Si’ayuukhl Nisga’a and the Nisga’a Lisims Government Executive (Article 31), which will be elected in accordance to the NFA provisions and Nisga’a laws (Article 28). Nisga’a Nation, The Constitution of the Nisga’a Nation, October 9, 1998.

\(^{222}\) Among these fundamental values, the Constitution states on its Article 2 that the Nisga’a revere K’amligiikahlhat who created their lands and placed Nisga’a people as stewards on them, endowing each person with a unique spirit; cherish and celebrate the spirituality of their people; honour the traditions of their ancestors, the authority of their Ayuuk, and the wisdom of their elders; practice the principle of the common bowl, and respect the dignity of each person.

\(^{223}\) The Constitution affirms that Simgigat, Sigidimhaanaq and Nisga elders will nurture the spirit of the Nisga’a Nation, provide guidance to the interpretation of Ayuuk, advise Nisga’a Government on matters related to the traditional values of the Nisga’a through a Council of Elders, and contribute to the unity of the Nisga’a Nation (Article 3).

\(^{224}\) The governing New Democratic party had to invoke closure to pass the treaty in the BC legislature due to its rejection by opposition representatives. Craig McInnes and Jim Beatty, "NDP Halts Debate, Passes Nisga’a Deal," The Vancouver Sun, April 23, 1999, A1-A2.
within conservative sectors in this province.\textsuperscript{225} According to Douglas Sanders, public criticism to the NFA has been dominated by non-Aboriginal voices. Among the main arguments that according to this legal analyst have been made against the treaty, is the fact that it establishes systems of rights which are "race based," and therefore comparable to apartheid. That the constitutionally protected self-government system it creates constitutes a shift in Canadian constitutional architecture, and as such, either requires or deserves a public referendum. Finally, that non-Nisga'a living on Nisga'a lands will become second class citizens, denied the right to vote or hold public office in the local government which affects parts of their lives.\textsuperscript{226}

2.7. Nisga'a interpretation of the treaty.

2.7.1. Nisga'a official perspective.

For the Nisga'a, whose current population is estimated in 6,000,\textsuperscript{227} the treaty represents the culmination of a long struggle in which their leaders have been involved for generations. A struggle for their land rights and for self-determination. Also, a struggle for their recognition as a distinct people within Canada.\textsuperscript{228} It is also the end of a long process of subjugation by the Euro-Canadian society. The end of the \textit{Indian Act} era and external control of their lives, the end of

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\textsuperscript{225} Two separate court challenges to this treaty have been launched since it was signed by the three parties last August; one by the Fisheries Survival Coalition and a federal Reform MP, and another by the provincial Liberal party. Both challenges allege that the treaty amends the Constitution, and therefore, would need a provincial referendum to be approved. Glen Clark, the province's Premier, has dismissed these allegations arguing, on the base of constitutional experts' opinions, that the treaty does not modify the Constitution, and therefore, does not need to be approved on a referendum. Office of the Premier, British Columbia, "Clark Rejects Nisga'a Court Challenges" (News release, October 9, 1998), available from internet at http://www.aaf.gov.bc.ca/aaf/, accessed on November 1998.

\textsuperscript{226} Sanders, "We Intend," \textit{supra} note 200 at 2-3.

\textsuperscript{227} Of this number, 2,500 live in the four villages within the Nisga'a territory, and 3,500 live elsewhere in Canada and around the world. In Calder, "Introduction," \textit{supra} note 123 at 1. Nisga'a population living outside Nisga'a territory concentrate on Greater Vancouver, Terrace and Prince Rupert/Port Edward, where, according to the NFA, Nisga'a urban locals will be established.

\textsuperscript{228} The Nisga'a have made clear on their statements that, as in the past, they are not seeking international sovereignty, and that their aspiration is to have their rights recognized within Canada. These aspirations are reflected in Joseph Gosnell words at the treaty initialling ceremony when affirming "[t]oday we join Canada and British Columbia as free citizens..." Gosnell, "Joseph Gosnell's Speech at the Nisga'a Treaty Initialling Ceremony" (August 4, 1998), available from internet at http://www.ntc.bc.ca, accessed on November 1998. [hereinafter Gosnell, "Initiating"]
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their racial, cultural and economic discrimination. In the words of Chief Joseph Gosnell, it is "the end of more than a century of humiliation, degradation and despair." 229

The treaty also represents for the Nisga’a a concrete possibility for the implementation of their own form of government and for enhancing economic development and self-reliance within Canada. As Chief Gosnell has also affirmed:

Under the Treaty, we will no longer be wards of the state. We will no longer be beggars in our own lands. We will own our lands... We will once again govern ourselves by our own institutions, in the context of Canadian law. We will be allowed to make our own mistakes, to savour our own victories, to stand on our own feet... Clause by clause, the Treaty emphasizes self-reliance, personal responsibility and modern education. It also encourages, for the first time, investment in Nisga’a lands and resources, and allows us to pursue meaningful employment from the resources of our own territory, for our own people. It gives us a fighting chance to establish legitimate economic independence... 230

Nisga’a statements acknowledge the important compromises made with the governments in order to make this treaty possible. This compromises are evident when comparing the NFA provisions with the initial claims made by the Nisga’a to the governments. 231 One of the mayor compromises made by the Nisga’a dealt with the lands to be set aside for them. From an initial claim of 24,000 sq. km. of land, the Nisga’a finally agreed to the 2,020 sq. km. that were recognized on the NFA as Nisga’a Lands. The rights acknowledged in the same treaty over a larger area (Nass Wildlife Area) which composed their traditional territory, were limited to hunting and fishing rights and co-management. Another important compromise made by the Nisga’a was that related to the form of government to be established on Nisga’a Lands. After demanding the recognition of a Nisga’a traditional government, the Nisga’a compromised on a western style democracy, with some elements of Nisga’a traditional government. 232 Another

229 Gosnell, "BC Legislature," supra note 144.


231 The Nisga’a are proud of their tradition as peaceful and negotiating people. As their Chief Gosnell affirms today, they are convinced that it is through "negotiations and not lawsuits not roadblocks, not violence" that Aboriginal issues have to be solved in Canada. Gosnell, "Initialling" supra note 228 at 3.

232 Nisga’a negotiator Ed Wright recognizes, that although initially they looked at returning to the clan system of the old days, "[o]ur people told us we should continue along the basis of the Western European type of structure. Not to go back to our aboriginal ways, but to enrich [democracy] with our culture and our language, and the guidance of our chieftains and matriarchs." In Steward Bell, "Nisga’a Treaty Empowers Band," The Vancouver Sun (July 25, 1998) A 16. Douglas Sanders has a different view on this matter, expressing his doubts as to whether
important compromise made by the Nisga'a was related to their economic claims. As previously mentioned, compensation for the extraction of timber, mineral and fish occurred during the past hundred years was an important item in their initial agenda. According to the estimations made by Price Waterhouse at the request of the Nisga'a, the losses suffered by the Nisga'a due to the past extraction of these and other resources by non-Aboriginals totals between $2,130 and $4,319 million.²³³ This amount substantially exceeds the funds that will be transferred to the Nisga'a by Canada and British Columbia according to the NFA.

Notwithstanding their compromise on significant matters, it has to be acknowledged that the Nisga'a did not negotiate one issue which was central to them. This was the exclusion from their treaty of the extinguishment clause ("cede, release and surrender" Aboriginal rights in exchange for other rights) that until now had been incorporated in different manners in all land claim settlements in Canada.²³⁴ The opposition of the Nisga'a to include this clause forced the governments of BC and Canada to agree on a different wording, including the use of the term "modification" of Aboriginal rights, to ensure certainty in the treaty.²³⁵

In summary, for the Nisga'a the treaty is a symbol of "sharing" and of "reconciliation," of a new understanding between different cultures in Canada.²³⁶

²³³ Price Waterhouse, supra note 182.

²³⁴ Aboriginal peoples' critiques of the use of the extinguishment clause in modern treaties were described in Chapter III. As mentioned before in this Chapter, according to Jim Aldridge, legal advisor of the Nisga'a in the treaty negotiations, the elimination of the extinguishment wording, with its negative consequences for Aboriginal people, was a crucial non-negotiable point for the Nisga'a throughout the treaty negotiations with Canada and BC. Oral statement made by Jim Aldridge to participants on the Aboriginal and Treaty Rights Course (Vancouver, Spring 1998, Faculty of Law, University of British Columbia) September 25, 1998. See also Justine Hunter, "Clark Cranks up Effort to Reach Land-Claim Deal," The Vancouver Sun (March 9, 1998) A-2.

²³⁵ The idea that Nisga'a rights on this treaty are modified but not extinguished is found on Articles 23, 24 and 25 of Chapter 2. Certainty is also ensured by the treaty on Article 22 of the same Chapter when affirming that the NFA constitutes a final settlement in respect to Aboriginal rights, including Aboriginal title, of the Nisga'a Nation. According to Douglas Sanders, although the Nisga'a rejected the extinguishment language used in previous treaties of this kind, the language used in the NFA accomplishes the same thing. Sanders, supra note 169.

²³⁶ This is expressed by Joseph Gosnell when affirming:

by reconciling the aboriginal rights of the Nisga'a Nation with the sovereignty of the Crown, the Treaty is intended to be a just and equitable settlement of the Nisga'a land question that spells out a new relationship based on mutual recognition and sharing.

Nisga'a hopes of the possibilities that the treaty will bring to their people are clearly expressed on the Declaration of the Nisga'a Nation contained on their Constitution. As this Declaration affirms:

The Nisga'a Nation will prosper as a self-reliant society with a sustainable economy;

Nisga'a culture, self-determination and well-being will be preserved and enhanced for generations to come;

The traditional role that Simgigat and Sigidimhaanak', and respected Nisga'a elders, as recognized and honoured in Nisga'a culture from time immemorial will be respected;

Nisga'a elders ... will continue to provide guidance and interpretation of the Ayuuk to Nisga'a Government;

Nisga'a spirituality will thrive and prevail in this land that K'amligihahlhat gave us; and

The Nisga'a Nation will flourish as a free and democratic society.  

2.7.2. Nisga'a critical perspective.

It has to be acknowledged that Nisga'a people do not have only one perspective with regards to the treaty. As it occurs within any given society, there are different opinions within the Nisga'a of what their people should have achieved through the treaty process. Aside from the opinion of the Nisga'a Tribal Council, which had the leading role in the negotiating process, some Nisga'a people, sometimes identified as traditionalists, have strongly opposed the treaty. These people have generally criticized the treaty arguing that it does not sufficiently protect Nisga'a rights and that, in accordance to its provisions, the Nisga'a have renounced to an important part of the traditional territory which belongs to different clans. They also assert that the treaty does not guarantee the sustainability of Nisga'a culture nor the economic development of their people for the generations to come.  

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237 Declaration of the Nisga'a Nation, in Nisga'a Nation, The Constitution of the Nisga'a Nation, supra note 221 at 1.

238 Frank Barton, from Kincolith, one of the Nisga'a who opposes the treaty, objects that in accordance to its provisions, the Nisga'a gave up 15,000 sq. km. claimed by the Kincolith band. This led him and James Robinson in the past to file a request for an injunction of the Nisga'a Agreement in Principle arguing that the Nisga'a had not been properly consulted about the treaty before it was signed on their behalf. In Dianne Rinehart, "Close Vote on Nisga'a Deal "disappointing," The Vancouver Sun (November 12, 1998), B 6. The author of this study heard
The internal opposition existing within the Nisga'a to the treaty was also manifested in the referendum held last November, where only 61 per cent of the voters approved the treaty. 239

2.8. Other Aboriginal peoples’ perspectives.

Aboriginal opinions with regards to the NFA have been divided. Phil Fontaine, National Chief of the Assembly of First Nations has expressed the support of his organization to the NFA on the basis that it represents what the Nisga'a people want.240 The First Nations Summit of British Columbia, a coalition representing Aboriginal peoples involved in the British Columbia Treaty Process, has also supported the NFA on similar terms, congratulating all three parties involved. According to the Summit, the "agreement clearly recognizes and affirms the existence of Aboriginal rights title in BC" that they have been advocating for years.241 Nevertheless, chiefs of the same organization have warned that they will not accept the NFA or any other model to be imposed on any tribal group or nation.242

A more critical analysis has been made by the Union of British Columbia Indian Chiefs (UBCIC).243 Saul Terry, head of the UBCIC at the time the NFA was signed, expressed his opposition to the treaty by characterizing the agreement as "state assisted suicide."244 On a more similar criticisms from several Nisga’a individuals during a visit made to the Nisga’a territory made on April-May of 1998, responding to an invitation of the Nisga’a Tribal Council to attend to their 41st Annual Convention.

Moreover, according to the Nisga’a who are critical of the NFA, the fact that only 2,389 Nisga’a were registered to vote in comparison to the 3,000 who are over 18, reflects the opposition that exists within sectors of the Nisga’a Nation to the treaty. Frank Barton, in Dianne Rinehart, Ibid.


243 The Nisga’a were part of the UBCIC until the 1970. It was in that period that the Nisga’a, as well as other Aboriginal peoples in British Columbia, left the Union favouring negotiations as a strategy for their recognition of Aboriginal title.

244 Paul Barnsley, "Nisga’a People Say Yes," Raven’s Eye, Vol 2, No. 7 (November 1998) at 1.
in-depth analysis of the NFA, the UBCIC develops its critical argumentation against this modern treaty.\footnote{Union of British Columbia Indian Chiefs, "Modern Land Claim Agreements Through the Nisga'a Looking Glass," September 1998 [unpublished]}

The UBCIC grounds its opposition to the treaty on Aboriginal peoples' rights to self-determination and de-colonization.\footnote{According to the Union, the Nisga'a treaty and others that are being negotiated in BC today will not be international agreements made between sovereign powers as they should be. Instead, they "are domestic contracts that will be interpreted in domestic courts according to Canadian laws." \textit{Ibid.} at 2.} The Union questions the treaty's attempts to provide certainty. It argues that although the traditional language of extinguishment is changed, the effects produced by the wording of the treaty continue to be the same. The Union believes that Aboriginal rights and title will be transformed into contractual treaty rights, and no Aboriginal rights, except for those listed in the treaty, will survive.\footnote{\textit{Ibid.} at 3-4.} It also affirms that Aboriginal title rights over lands will be transformed into fee simple rights and limited to a reduced percentage of Nisga'a traditional territory (8 per cent). According to the Union submerged lands are excluded and mineral rights will be limited to Nisga'a lands.\footnote{\textit{Ibid.} at 5.} Non-Aboriginal rights to access had to be guaranteed in the treaty. In the treaty, almost 800 hectares of Nisga'a Lands will be granted to BC or public entities as rights of way.\footnote{\textit{Ibid.} at 6.} The Union argues that under the treaty, Canada and BC have left out the necessity of meaningfully consult the Nisga'a over land use decisions in the Nisga'a former traditional territory. They only have to notify the proposed plans and consider Nisga'a comments.\footnote{\textit{Ibid.} at 9.} All past claims for compensation, and any future compensation, are reduced in the terms of the treaty.\footnote{\textit{Ibid.} at 11.}

Moreover, according to this organization, the governments view Aboriginal rights to resources as equivalent to the right to eat, and restricts Aboriginal peoples to "domestic" use of resources. Nisga'a recognize Canada and BC's ownership and jurisdiction of the resources, and in turn get an "allotment" of these resources (for instance fish and wildlife).\footnote{\textit{Ibid.} at 12, 14.} Water continues
to be under the jurisdiction of BC. Finally, with regards to Nisga'a Government, the Union affirms that, instead of self-determination, the Nisga'a will have right to self-government and self-administration, understood as a right to implement and administer laws and programs as allowed by federal or provincial governments. Consistently, this organization believes that the treaty will not establish a separate form of government, which acknowledges the Nisga'a as a self-governing people within the Canadian Constitution, but rather will incorporate them into Canada in a position much the same as a municipality. Indigenous governance powers, according to this entity, will be the hybrid combination of an Indian Band and a BC municipality, with land ownership equivalent to a private citizen.

Finally, a mention should be made to the criticisms that the NFA has generated among neighbouring peoples due to the overlaps which exist between the territories whose ownership they claim and those acknowledged by the treaty as Nisga'a Lands and as Nass Wildlife Area. Both the Gitskan and Gitanyow people have expressed their concerns for the implications that the treaty might have for their land claims, currently in negotiation within the BC Treaty Commission. Moreover, the Gitanyow, have gone to court to defend their land rights threatened by the NFA. In March of 1999 they won a court victory in British Columbia which they hope could be the first step to nullifying portions of the NFA which they believe gave away 84 per cent of their lands.

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253 Ibid. at 12.
254 Ibid. at 16
255 Ibid. at 17.
256 A recent publication has been released containing the arguments made by the Gitskan and Gitanyow people claiming ownership to the lands of the Nass watershed included in the NFA as Nisga'a Lands or Nass Wildlife Area. See Neil J. Sterrit et al., Tribal Boundaries in the Nass Watershed (Vancouver: University of British Columbia Press, 1999).
257 Justice Paul Williamson of the BC Supreme Court ruled on that occasion that the Crown is legally required to negotiate in good faith with Aboriginal peoples. Gitanyow chief negotiator, Glen Williams, affirmed that his people hoped that the ruling would put pressure in the government to force the Nisga'a to negotiate with them. If the land dispute with the Nisga'a is not resolved, the Gitanyow will ask the courts to rule that the federal and provincial governments acted in bad faith when they excluded them from negotiations with the Nisga'a over the disputed lands. Dianne Rinehart, "Gitanyow," The Vancouver Sun, March 24, 1999, supra note 197. Chapter 3 of the NFA includes a section which establishes a procedure to resolve boundary disputes which may arise.
2.9. Governments' perspectives.

The government of Canada as well as the government of British Columbia have expressed their satisfaction for having reached this modern day treaty with the Nisga'a. For the first government, who negotiated with the Nisga'a for almost twenty years, the NFA constitutes a possibility to extend to British Columbia federal policies concerning land claims and self-government. The NFA enables the federal government to provide certainty to land tenure, and consequently, to investment in a province where Aboriginal title was never extinguished, and therefore, remained in effect until today. The NFA is also seen as an opportunity to put an end to the application of the Indian Act, and therefore put an end to federal responsibility with regards to Nisga'a people, enabling them to assume responsibility in the management of their own affairs in accordance to the 1995 federal policy on Aboriginal self-government.

The relevance that certainty has in this treaty, and its beneficial implications for Canada and the province, are underlined by Jane Steward, Minister of Indian Affairs and Northern Development, when affirming:

The Nisga'a treaty will respect the need of Canada and British Columbia for certainty and closure. It will make clear who has title to land in the Nass Valley— who can log, who can fish, who can mine, and where. Business in British Columbia want to know who owns the land so they can invest with confidence. Now, this Final Agreement will pave the way to a treaty which makes that clear, opening up northwest British Columbia to investment and job creation.\(^{258}\)

For the federal government the NFA is also a demonstration that, as the Supreme Court affirmed in the Delgamuukw decision, negotiations and not confrontation are the best way to settle Aboriginal land claims in Canada.\(^{259}\)

For the government of British Columbia, which was involved in negotiations with the Nisga'a only in the last eight years, this is an historic agreement, the first of its kind ever in the province. According to Premier Clark, one of the principal advocates of the NFA, there are moral, economic and legal reasons to support the treaty. Moral reasons deal with addressing

\(^{258}\) Canada, Indian and Northern Affairs, "Speaking notes for the Honourable Jane Steward, Minister of Indian and Northern Development, at the Initialling Ceremony for the Nisga'a Tribal Council Final Agreement. August 4, 1998," New Aiyansh, British Columbia" (Canada, 1998) at 5 [unpublished].

\(^{259}\) Ibid. at 9.
past injustices of British Columbia's treatment of Aboriginal peoples. They also deal with the need of confronting the poverty which continues to affect Aboriginal people in the province, many of which live in a condition which is similar to that existing in Third World countries. The economic reasons deal with the need of achieving certainty over lands and resources in the province, and therefore allowing investment to be made on them. A final and important reason deals with the need to enable Aboriginal people in the province to enjoy the legal and constitutional rights that the courts in Canada have acknowledged to them in the last years.  

There are also political reasons that explain the support that this government has given to the treaty. The governing party (New Democratic Party) has strongly been advocating throughout the 1990’s the need to address Aboriginal land claims through a treaty process. Currently 50 peoples in the province, including Tribal Councils and bands, are sitting at the negotiating table with the provincial and federal government on the British Columbia Treaty Commission in an attempt to reach agreements concerning their land and self-government claims. An important amount of time and resources have been spent by all parties with these purpose. The Nisga’a treaty, although negotiated outside this Commission because negotiations were started before its creation, comes to prove that the system works, that agreements that are acceptable to all parties, including the province, can be reached, providing certainty in the province. As Dale Lovick, provincial Minister of Aboriginal Affairs, affirms “[t]his treaty is the first step in the process. The treaty shows that good-faith negotiations are the best way to right the wrongs of the past and to bring all British Columbians together as equal members of society.”

The importance that the provincial government assigns to this treaty help to explain the involvement of the current Premier in its promotion throughout British Columbia, as well as the campaign launched to obtain public support for its ratification at the provincial legislature. It also explains the responses that this government has made to the critiques raised against this

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treaty by opposition leaders, in particular those dealing with the creation of a "third order" of government for the Nisga'a people.²⁶³

2.10. Final comments.

In the past Nisga'a traditional chiefs were among the first in British Columbia to assert Aboriginal title, travelling to Victoria and Ottawa and promoting the creation of the Indian Rights Association, the Allied Tribes of British Columbia and the Native Brotherhood of British Columbia for that purpose. Today, with the settlement of the NFA, the Nisga'a are again playing a leading role in the struggle for Aboriginal rights in British Columbia and Canada. Although other Aboriginal peoples in the province have warned the government that the Nisga'a treaty will not constitute a template or model that will restrict their ability to work out different agreements with the federal and provincial governments based on their own necessities, inevitable this treaty will establish a precedent that will be difficult to leave aside for those involved in the negotiation process, including Aboriginal peoples themselves.²⁶⁴

Certainly, what has been achieved by the Nisga'a through the negotiating strategy in which they have been involved in the last twenty years is a compromise. A compromise which for them has had significant costs. However, the NFA will also have significant beneficial

²⁶³ According to the British Columbia's government interpretation, the powers of Nisga'a Government in the NFA will fall into three categories: Those which are or have been exercised by municipalities or regional governments, including authority over matters such as zoning, land use planning, licensing of business, public works, traffic regulation and health services; those exercised previously by Indian Bands under the Indian Act, including authority over culture and language, ability to prohibit liquor and gambling, and regulations of fisheries entitlements; and powers not covered by these forms of governments such as authority over solemnization of marriage, wills and estates of Nisga'a citizens, environmental assessment among others (See British Columbia, Ministry of Aboriginal Affairs, The Nisga'a Treaty, August 1998 [unpublished] supra note 190). In its advertising campaign, the provincial government has rejected explicitly the idea that the treaty will create a third order of government, affirming that the Nisga'a people will "govern themselves in a way comparable to a municipal government." (Advertisement, What does it mean to me? The Nisga'a Treaty, Globe and Mail, October 13, 1998, A 10 in Sanders,"We Intend" supra note 200 at 18). Douglas Sanders has a different perspective on this matter. He affirms that the comparison made by the provincial government is not accurate stating that some roles and powers of the Nisga'a government are not municipal in character. The Nisga'a government, he states, is not a copy of the municipal, provincial or federal model. He concludes by affirming that "[s]tatements that the treaty will create a "third order" of government, linked with suggestions that Nisga'a government powers will be "sweeping," are misleading." (Ibid. at 18:25)

²⁶⁴ The legal advisor of the Nisga'a, Jim Aldridge, does not believe that this treaty will become a template for other treaties in the province due to the unique physical characteristics of the Nisga'a territory, which is all included within one watershed (that of the Nass River), and is undivided or continued. According to him, the NFA is also unlikely to become a template because of the significant population figures of this people (6,000) when compared to other Aboriginal peoples in the province. Aldridge, oral statement, supra note 187.
implications for their people. In accordance with this treaty, the Nisga'a will be acknowledged as
a Nation or people within Canada and British Columbia, a status that was denied to them until
the Constitution Act, 1982, and in their daily lives until today. Consistent with these recognition,
they will have the right to self-govern themselves in most relevant aspects of their lives within
their lands in accordance to the treaty and the Constitution of the Nisga'a Nation, a right that for
many Aboriginal peoples in Canada and worldwide continues to be an aspiration.

Despite the criticisms made from an Aboriginal perspective to shortcomings of this treaty
and the nature of the self-government regime that the Nisga'a will have in accordance to its
provisions, the fact is that their lives will no longer be under the control of the Canadian
government. The Indian Act, whose contents and nature were analyzed in Chapter III, will no
longer be applied to them. The Nisga'a will be able to make their own laws and policies in
matters that are central to them, to elect their own authorities who will be in charge of Nisga'a
Government in accordance to the treaty and Nisga'a Constitution. They will also administer the
fiscal resources which were assigned to them on the treaty, as well as those that in the future will
be collected by Nisga'a Government through taxation or different economic activities in which
they become involved.

What will happen after the ratification of the treaty remains uncertain. The Nisga'a, who
have demonstrated to be pragmatic people open to compromise their historic claims in order to
reach possible agreements with governments in Canada, have expressed their hopes that the tools
provided by the NFA will be sufficient to achieve self-government and development. Nevertheless,
although self-government is a right of the Nisga'a guaranteed by the NFA provisions, economic development of the Nisga'a people is not.265 These long term aspiration of
the Nisga'a will ultimately depend on their ability to construct an economic base to guarantee
their independence from Canada and the province.

This is when the pragmatic nature of the Nisga'a people should again be considered. Nisga'a leaders have not hidden their intentions to maintain and expand the resource based
economy until now existing in their territory. Neither have they hidden their interest in

265 Aside from the initial fiscal transfers to be made to the Nisga'a in accordance to the NFA, this agreement only guarantees them that in the future British Columbia and Canada will share with them responsibility for funding public services and programs on Nisga'a Lands at a level comparable to neighbouring areas.

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promoting capital investment for this purpose.\footnote{266}

Nisga'a desire to promote investment on their lands are understandable due to the need they have to achieve economic independence from Canada and BC in order to succeed as a self-governing people. This desire is also explained when taking in consideration the weaknesses of the Nisga'a current economy.\footnote{267} Investment on Nisga'a lands might be positive in the short term, because of the capital flows that might come. Nevertheless, some concerns should be expressed with regard to the environmental sustainability of an investment oriented to resource exploitation when considering the reduced land base that was acknowledged to the Nisga'a in the NFA. The same concern should be expressed when considering the cultural impacts that such investment might have on a people for whom the relationship with land and resources has traditionally been sacred and spiritual, and whose economy, since time immemorial, has been based on sharing rather than profiting.

The road that the Nisga'a will have to walk to become a self-reliant people in this modern globalized world is certainly complex. They will have to balance their aspirations of economic independence with the sustainability of their resources and culture for future generations. Harmonizing these two apparently conflicting aspirations will probably constitute one of the major challenges that the Nisga'a will have to face under the treaty. Ultimately, they will have to do it their own way, according to their own decisions. As Chief Joseph Gosnell has affirmed, now that the Nisga'a will become a self-governing Nation, they will be able to make their own mistakes and to their own victories.\footnote{268}

\footnote{266} These intentions are clearly expressed by Joseph Gosnell, Chief of the Nisga'a Tribal Council, on his speeches to the Vancouver Board of Trade, (February 24, 1998, available from Internet at http://www.ntc.bc.ca, accessed on November, 1998), and on his European and UK Tour (supra note 230). On the first speech before mentioned, Gosnell refers to a study from a Vancouver investment counsellor, Milton K. Wong, who estimates the benefits that British Columbia economy will have after the settlement of treaties with Aboriginal peoples due to investment, including that of international companies, to be made on Aboriginal lands. The need of implementing a strategy of joint ventures as a way of acquiring the required capital and capacity to pursue larger developments has been underlined recently by the Nisga'a analyst Matthew Moore. (In Matthew Moore, "The Nisga'a Treaty: Business and Economic Issues. A Preliminary Overview" (paper presented at conference on the Nisga'a Treaty organized by the Pacific Business & Law Institute held in Vancouver on September 18, 1998) at 3, 8.

\footnote{267} Moore, supra note 266 at 2-3.

\footnote{268} Joseph Gosnell, supra note 230 at, 6.
CHAPTER V

COMPARATIVE STUDY.

INTRODUCTION.

In previous Chapters (II and III) we have referred to the history and present situation of the Indigenous peoples of what today is Chile and Canada. In the same Chapter we made an extensive description and analysis of these peoples' rights in the same contexts from pre-contact time until today. In Chapter IV we attempted to exemplify the way in which these rights have been dealt with first by the colonizers and afterwards by the states in the case of the Pehuenche people of the Alto Bío Bío in Chile and the Nisga'a people of the Nass Valley in Canada.

In this final Chapter we will attempt to draw some parallels between the past and present situation of Indigenous peoples' rights in the two contexts. We will first refer to the common characteristics of Indigenous peoples' societies in pre-contact time. We will then focus on the similarities and differences that can be identified in the relationship established with Indigenous peoples by the Spanish in Chile and the French and English in Canada, and later by the states in the same contexts. Finally, we will identify some of the factors that help to explain the differences in the recent evolution of Indigenous peoples' rights in Chile and Canada.

Aware of the fact that Indigenous peoples' histories stand on their own, and not necessarily in comparison to other histories, we will make use of the comparative analysis approach to highlight the common position of domination in which Indigenous peoples in Chile and Canada, as well as in the Americas more generally, have been placed since the arrival of the Europeans. We will use this approach also to highlight the similar process of emancipation in which these peoples have been involved in recent years in both contexts and to underline the different attitudes taken today by Chile and Canada today to deal with Indigenous peoples claims.¹

¹ In Chapter I we referred to questions made to the validity of the case study method in social sciences. It should be noted here that the validity of the comparative analysis approach in studies specifically concerning Indigenous peoples and their rights has also been questioned on the grounds of the historical and cultural differences that exist among these peoples. Authors who consider the use of comparative analysis approach valid in this kind of study have responded to these critiques. As Augie Fleras and Jean L. Elliot affirm¹ to justify the use of this approach in a study concerning Aboriginal-state relations in Canada, the United States and New Zealand;
In an attempt to follow the same framework used in previous Chapters, we will divide this final analysis into three main periods: the pre-contact period; the colonial period; and the republican (Chile) and confederated (Canada) period. As done in previous Chapters, we will centre this comparative analysis on these peoples' political and territorial rights, as they are understood by the existing international legal instruments that concern them.

1. PRE-CONTACT.

Consistent with the perspective that is dominant today among Indigenous peoples', and with the approach assumed in previous Chapters of this study, mention should be made of the characteristics of Indigenous peoples' societies in Chile and Canada in pre-contact time.

As previously stated, Indigenous cultures differed from one another in many ways. Their languages and the material expressions of their cultures were diverse. Their subsistence patterns were also diverse. Some were hunters and gatherers; some had fishing as their main subsistence activity; others practiced animal breeding and/or agriculture. Although Indigenous social structures were generally built around the extended kinship groupings, the complexity of their governing systems varied from one people to the other, ranging from the simplicity of the Inuit system in

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Not all would agree with our use of the comparative approach as a tool for investigating the transformation of aboriginal-state relations. Historical and cultural differences do tend to cast doubt on the validity of common patterns and call into question the meaning of divergent findings. Yet to reject comparisons is to ignore the extent to which aboriginal peoples constitute a social type, occupying similar structural positions in society and facing similar challenges.... [A]boriginal peoples share a common experience in terms of who they are, what they want, and how they propose to get it, through decolonization of their relations with the state and restoration of their once subjugated status to one consistent with the self-determining ethos of a nation within a state. This commonality of experience and purpose justifies the comparative approach.

In Augie Fleras and Jean L. Elliot, The Nations Within. Aboriginal-State Relations in Canada, the United States and New Zealand (Toronto: Oxford University Press, 1992) at 220-221. Support for this comparative approach can also be found in the field of anthropology, where the use of qualitative analysis is accepted today. According to Kessing, a leading anthropologist, anthropological approach “has stressed study of the likenesses and differences among men, that is, a comparative viewpoint.” (See Felix M. Keesing, Cultural Anthropology: The Science of Custom (New York: Holt, Rinehart and Winston, 1966) at 2.

2 Approximately 2,000 distinct languages and dialects were spoken by Indigenous peoples in America. Differences existing in the material aspects of their cultures, such as metallurgy, architecture, scripture systems (when existing), etc., were also significant. See Bernardo Berdichewsky, En Torno a los Orígenes del Hombre Americano (Santiago: Universitaria, 1972) at 40-41.
North America to the sophistication of the Iroquois confederacy in the same continent or that of the Aymara in South America, especially under the period of Inca influence.\(^3\)

Despite these cultural and material differences, important commonalities can be found in this period among Indigenous peoples in matters which are central to this study. In both geographical contexts considered in this study, they were for the most part self-governing and sovereign peoples. Their sovereignty was manifested in their ability to relate to other peoples as equals, entering into treaties or forming alliances with them for different purposes. It was also expressed in the legal systems which ruled their internal relations as well as their relations with land and resources. Each of these peoples had a territorial base, which was generally recognized by themselves and by other neighbouring peoples. Indigenous territoriality was manifested in the jurisdiction their authorities had over a certain areas, or the wars in which these peoples engaged to defend such areas. Land for these peoples had a broad meaning, including not only its surface, but also its natural resources - trees, waters, lakes, rivers, fauna, etc.-. In contrast with western concept of individual property, lands and resources were generally owned and used communally by these peoples. The same land was considered by different Indigenous peoples to be sacred, to be a mother or a giver.\(^4\) In accordance with this concept, land and resources were to be cared and preserved for future generations.

The recognition of these elements that were common to Indigenous societies in pre-contact times in what came to be Chile and Canada is essential in challenging the traditional notions still prevailing among some sectors of the dominant societies in the two contexts. According to these notions, Indigenous peoples are considered to have been nomadic or semi nomadic bands, unable of governing themselves, with no real ownership of the lands they inhabited.\(^5\) It is also essential to

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\(^3\) This circumstance explains why Olive P. Dickason affirms, when referring to Indigenous peoples' in Canada, that these peoples' cultures were as different from each other as were the cultures of European nations. Olive P. Dickason, *Canada's First Nations. A History of Founding Peoples from Earliest Times* 2nd. ed. (Toronto: Oxford University Press, 1997) at 46 [hereinafter Dickason, *Founding Peoples*]. Their categorization as “Indigenous peoples,” as if they all shared the same culture, is an artificial construction of the European which responds more to their colonial mentality rather than to the existence of a real homogeneity among them.

\(^4\) Different terms used to refer to the land by Indigenous peoples in both contexts (Turtle Island by the Cree in North America or *Pachamama* by the Aymara in South America) are demonstrative of the sacred connection which they had with them.

\(^5\) This is the underlying thesis contained, for instance, in the analysis that present day historian Sergio Villalobos makes of the Pehuenche society at the moment of contact. (See Sergio Villalobos, *Los Pehuenche en la Vida Fronteriza* (Santiago, Universidad Católica, 1998) [hereinafter Villalobos, *Pehuenche*]). The same thesis was held in Canada in the Calder case by Chief Justice Davey, of the British Columbia Court of Appeal, when affirming that the Nisga’a people at
understand the claims that Indigenous peoples are making today not only in Chile and Canada, but worldwide, in order to regain their ability to self-govern themselves, as well as to assume control of the lands, territories and resources that are crucial for their subsistence and development as a people.

2. COLONIAL PERIOD.

2.1. Commonalities.

The ancestors of the Indigenous peoples that currently live in Chile and Canada witnessed the coming of outsiders of European origin to their territories in a similar period of time. Spanish, French and English explorers and navigators first in the late fifteenth and early sixteenth century, and settlers afterwards, throughout the sixteenth century, intruded into most of these peoples' territories. Although European penetration into Indigenous territories would continue to take place until the nineteenth century in both contexts,\(^6\) and even during the twentieth century in Canada,\(^7\) a large part of Indigenous peoples entered into contact with the Europeans before the eighteenth century ended.

In different degrees and through various means, the newcomers arrival altered Indigenous peoples' lives forever. Indigenous peoples were dispossessed of a significant part of their lands and resources. Indigenous governing systems, laws and spiritual beliefs were generally not respected by the European colonizers, who immediately, or gradually, imposed on them their authorities, legal systems and religions. Indigenous population decreased substantially as a consequence of diseases brought by the newcomers or wars triggered by their presence. These and other devastating impacts that European colonization had on them help to understand why Indigenous people in Chile and Canada, as well as in the Americas, frequently refer to this episode as an "invasion."\(^8\)

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\(^6\) European settlement in the Araucania in Chile and in the prairies in Canada occurred in the nineteenth century.

\(^7\) This is the case of the occupation of the Inuit territory in northern Canada.

\(^8\) The term is frequently used today by Indigenous peoples' intellectuals and organizations in the Americas to refer to the intrusion of the Europeans into the homelands of their ancestors. It has also been used in recent year by academics,
We will attempt to identify the main commonalities that in the opinion of this author characterize the attitude assumed by the colonizers in their relationship with the Indigenous peoples they found in Chile and Canada. We will also highlight the impacts that the arrival of Europeans produced on Indigenous peoples living in the same contexts.

2.1.1. Dispossession and domination.

According to the accounts narrated in previous Chapters, Europeans who came to the territories that today comprise Chile and Canada generally regarded Indigenous peoples of the new world as savages or barbarians of an inferior nature. These peoples were depicted by the newcomers as infidels or pagans, people without law or order. These perceptions, which were common among European nations at the time of their first trips to what became known as the Americas, help to explain the attitude they assumed with respect to these peoples and their lands throughout the colonial period. Spanish, French and English claimed sovereignty and jurisdiction over the territories and peoples they found in their explorations. This, as if these lands were empty or vacant, or as if the peoples living in them were unable of governing themselves or had no real ownership over them. Different doctrines, including discovery and terra nullius, were used by European nations to justify the appropriation of Indigenous lands.

There is no question that the Spaniards relied on discovery in their conquering expeditions throughout the Americas. As we referred to in Chapter II, the Spanish Conquest of the new world was initially based in the bulls issued by Pope Alexander VI in 1493, in which the monarchs of Spain and Portugal were authorized to take control of the lands they "discovered," as well as their inhabitants, who were to be brought into the Catholic faith. As L. C. Green affirms, the language of these documents makes it clear that the Pope regarded his award as a legal grant giving European monarchs (Spanish and Portuguese) full power of sovereignty and jurisdiction over the territories of the new world, with the primary objective of spreading Christianity. No reference was made in these documents to the possessory rights of the local inhabitants.9

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In accordance with these papal bulls, Spanish conquerors claimed *dominium* over the lands and peoples they found in the new world. Crosses were raised in the lands "discovered" for this purpose. The *requerimiento* was read to the native population with similar intentions. In case the natives rejected Spanish occupation or faith, war was made to them, their women and children were enslaved, and their goods appropriated. Chile, as we saw in Chapter II, was no exception in this regard. Valdivia and his successors used this doctrine as a basis for their claim of sovereignty not only over the lands they found there, but also jurisdiction over the peoples living in them. The *requerimiento* was read by Valdivia to the peoples he found on his way to Chile. Conquest wars were made against the Mapuche people who resisted the Spanish occupation and faith.\(^{10}\)

The territories occupied by the Spanish were appropriated through the imposition of the *encomienda*, an institution which theoretically was intended to respect native possessions, but which in practice was used to dispossess Indigenous peoples of their lands. Native populations were forced to live in *pueblos de indios* (Indian towns), small plots of land which were left for the settlement of the *encomendados*. Spanish laws were imposed on the Native peoples as a means to achieve control over them.\(^{11}\) Although Indigenous customary laws were to be respected by the Spanish authorities when not incompatible with colonial laws and beliefs,\(^{12}\) Spanish laws regulated the central aspects of Native life, including their land rights, their obligation to pay tribute to the colonists through the *encomienda*, their residence, etc. The only exception to this rule, as we saw in Chapter II, was the case of the Mapuche people in southern Chile, who, as a consequence of their resistance to the Spanish, was able to maintain their political and territorial autonomy from the colony.

France and England also relied on the concept of discovery to assert sovereignty over the territories they claimed in North America, or at least to protect their possessions from other

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\(^{10}\) The use that Valdivia made of this institution as a means to assert territorial and political dominium in Chile is described in Jose Bengoa, *Conquista y Barbarie* (Santiago: Sur, 1993) at 19-27 [Bengoa, *Conquista*]

\(^{11}\) Legislation applied to those living in the colony, including Indigenous people, generally denominated *derecho indiano*, was that dictated in Spain by the *Consejo de Indias*, in Peru by the Vice Roy, and in Chile by the colonial Governor, the Audiencia and the Cabildos. See Jaime Eyzaguirre, *Historia del Derecho* 12th ed. (Santiago: Universitaria, 1992) at 147-148.

\(^{12}\) This was mandated among other laws by the *Tasa de Gamboa* of 1580 and the *Recopilacion de Leyes de Indias* (Indian Laws Compilation) of 1680. Also, an *ordenanza* of 1786 established the right of Native people to elect their own authorities in the *pueblos de indios*. *Ibid.* at 150. All evidence indicates that Indigenous customary laws, except for those dealing with minor aspects, were not respected by colonial authorities.
competing colonial powers. The use of this doctrine by France and England is evident in the royal commissions that were issued to navigators mandating them to search for new lands. This doctrine inspired the charter addressed by Henry VII of England to John Cabot and his sons in 1496, in which the king authorizes them to "discover" new lands unknown or not inhabited by Christian people, and to "occupy" and "possess" these lands for them. It is also contained in the royal commissions made by the king of France to Cartier on his expeditions to New France. The French and the English also had the custom of raising crosses, leaving marks or holding ceremonies on the lands they found in the new world. These were symbolic acts through which they attempted to assert their possession.

France, as we saw in Chapter III, also relied in the concept of terra nullius as a justification for its territorial claims in North America. According to different authors, this doctrine was used by the French in the St. Lawrence, where Indigenous population at the time of European arrival was

In recent years a growing number of Indigenous scholars in North America, have supported the idea that Indigenous land dispossession at the hands of the British was a process which was fundamentally based on this doctrine. Among these scholars, Patricia Monture-Angus (Patricia Monture-Angus, Thunder in my Soul: A Mohawk Women Speaks (Halifax: Fernwood Publishing, 1995), Robert Williams Jr. (Robert Williams Jr., The American Indian in Western Legal Thought. The Discourses of Conquest (New York: Oxford University Press, 1990), and Sharon H. Venne (Sharon H. Venne, Our Elders Understand Our Rights. Evolving International Law Regarding Indigenous Rights (Pencticton, B. C.: Theytus Books, 1998) are to be mentioned. The doctrine of discovery was accepted in the United States as fundamental to the European appropriation of lands of North America by Justice Marshall in the Johnson v M’Intosh decision in 1823. In this decision, which would have important implications throughout North America, including Canada, Justice Marshall affirmed:

[The natives] were admitted to be the rightful occupants of the soil, with a legal, as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle that discovery gave exclusive title to those who made it.


Although the ideology of the expansion of Christian faith and the conversion of Indigenous population was initially the fundamental justification for the French royal commissions, it is clear from its contents that sovereignty was much as involved as this other objective (See L.C. Green, supra note 9, at 19; 25). The same doctrine inspired the commission given to Roberval on his trip to New France in 1541, where he was mandated to "descent and enter these lands and put them in our possessions, by means of friendship and amicable agreements, if that can be done, or by force of arms..." (Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Regime" in J. R. Miller ed., Sweet Promises. A Reader on Indian-White Relations in Canada (Toronto: University of Toronto Press, 1991) at 26-27).

French explorers had the Catholic tradition of planting crosses in the lands they claimed. Although the English did not always raise a cross in the places they landed they claimed for their monarch, they also left marks on them as a means of making act of possession in addition to the mere title based on discovery. L. C. Green, supra note 9 at 10-11.
scarce due to previous conflict among the different Native peoples that had inhabited the area in the past. In accordance with this doctrine, the territories inhabited by the so-called "primitive" peoples were considered to be legally equivalent to desert land. Consequently, they could be occupied without the need to obtain the consent of the inhabitants, or even to conquer them. Although the application of this doctrine by the English in North America is debated, there is evidence that it was used by them as an argument for the appropriation of Aboriginal land in the colonies of New England and Virginia, and exceptionally in Canada.

As a consequence of the application of these doctrines, Indigenous peoples who entered into contact with these European powers (France and England) were gradually dispossessed of their lands. Dispossession was particularly relevant in the British colonies of New England and Virginia, in what was to become United States territory, where agricultural activities required the occupation of Native lands. Although some treaties and contracts are said to have been used in these colonies as a means to acquire Indigenous lands, this rule changed later in the seventeenth century when a policy of confiscation of Indian lands was introduced by the colonizers. Violent wars against Native peoples of that area were waged by the English during that century with the

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16 Jaenen, supra note 14 at 20; Dickason, Founding Peoples, supra note 3, at 150.

17 According to Robert Williams Jr. English Protestant colonists in New England and Virginia referred to the lands they found as "exceedingly large and waste countries." They also considered the Aboriginal population as incapable of possession when affirming that "[t]hey range rather than inhabit" their "unmanned wild country." These discourses, which were based in the notion of terra nullius, were used to dispossess Aboriginal peoples of their lands in densely populated areas (see Williams, supra note 13 at 180; 218). In the case of Canada, the use of this doctrine can exceptionally be found in the instructions sent in 1849 by the Hudson Bay Company to James Douglas, governor of the colony of Vancouver Island and the company's representative in that same area. These instructions mandated Douglas to consider the Natives as rightful possessors of lands occupied by cultivation, while all other lands were to be "regarded as waste, and applicable to the purposes of colonization." According to Paul Tennant, the term "waste" in this case presumably meant "uninhabited, uncultivated." (see Paul Tennant, Aboriginal Peoples and Politics. The Indian Land Question in British Columbia, 1849-1989 4th ed. (Vancouver: UBC Press, 1995) at 18; 242). The doctrine of terra nullius was explicitly accepted in Canada by a Nova Scotia Court in 1928 in Rex v. Syliboy (see Brian Slattery, Ancestral Lands, Allien Laws: Judicial Perspectives on Aboriginal Title (Saaskaton: University of Saskatchewan Native Law Centre, 1983) at 3-7 [hereinafter Slattery, Ancestral]). According to Douglas Sanders, the first case (Vancouver Island) is the closest to the acceptance of the concept of terra nullius in Canada. Sanders affirms that the Syliboy decision of 1928 should not be taken as representing an accurate analysis. It is the only court decision that talks in those terms. It is also inconsistent with the Royal Proclamation of 1763 and with the land cession treaties signed by Canada. Finally, according to the same analyst, there is no clear position that runs through the history of European imperialism on the question of the rights of Indigenous peoples in what is now Canada (Douglas Sanders, personal communication to the author, July 1999).

same purpose.\textsuperscript{19} As described in Chapter III, violence against these peoples was also used by the English to open lands for settlement in what became Canada. Such is the case of Newfoundland, where the confrontation of the English colonists with the Beothuck resulted in the early extermination of this people. It is also the case of Acadia, where English were engaged in a long war with the Mi'kmaq people who resisted the occupation of their territory.

English policy towards Native lands in North America, as we saw in the same Chapter, was only changed in the eighteenth century. This was a consequence of their need to obtain the alliance of Indigenous peoples in their conflicts with the French as well as their need to make possible European settlement on these peoples' lands.

It has to be acknowledged that the French seemed to have had a different perspective with regard to Indigenous lands in North America. According to the accounts of different authors cited in Chapter III, the scarcity of the French population in their settlements in New France and Acadia, and the nature of the activities in which the economy of these settlements relied (fur trade), did not make the appropriation of lands necessary for them. Reductions established by the Jesuits were few, and therefore, occupied a small percentage of the Indigenous territories. Moreover, they were not initiatives created to deal with the land question, but rather aimed at the religious conversion of Indigenous people.

The doctrines previously referred to were used by the French and the English in North America not only as a justification for the appropriation of Indigenous lands, but also for the subjugation of Indigenous peoples themselves. Although the early relationship among the newcomers and Indigenous peoples in North America, or at least in Canada, has been characterized as that of a nation to nation, there is evidence that the colonizers attempted to dominate the peoples they found here in different ways.

In the case of the English, there are many accounts of how Indigenous people were regarded in the early contact period as a source of labour, a perception that led to their enslavement.\textsuperscript{20} Crown

\textsuperscript{19} Such is the case of the New England Wars (Pequot war) and the King Philip's war in the seventeenth century (Ibid). A description of the wars held at that time among the English and the Indigenous peoples of that area is contained in Jennings, Invasion, supra note 8 at 146-170 (Chapter 9, Savage Wars).

\textsuperscript{20} W. R. Jacobs talks of how Native people in New England were captured and deported to work as slaves in sugar plantations in the West Indies (Jacobs, supra note 18, at 5). O.P. Dickason refers to English slave raids along the North Atlantic coast capturing Mi'kmaq people in Acadia (Dickason, Founding Peoples, supra note 3, at 85).
officials in the colonies were granted almost unlimited powers to deal with Native population before the appointment of Indian superintendents in the mid eighteenth century. Overall policy allowed no special place for Indigenous population, who were treated as "subjects" of the Crown. There was no body of imperial law to protect it, and colonies in fact were allowed to make their own policy with regard to them. Individual colonial legislatures applied their own laws to those Indigenous people who came within the orbit of settled communities.\(^{21}\)

In the case of the French, as we saw in Chapter III, the situation was theoretically different. The nature of the French settlements is said to have forced them to establish a more egalitarian relationship with Indigenous peoples. Military and trade alliances were negotiated by the French colonists with these peoples, allowing them to continue to live independently, retaining their own forms of social organization, customs and practices. However, as we also mentioned in this Chapter, French policies were more ambiguous when it came to decide their legal and political status. This situation explains why the French, like the English, are said to have attempted to apply their laws to Indigenous peoples as much as they could, treating them in practice as subjects.\(^{22}\)

### 2.1.2. Conversion to Christianity.

Another commonality in both colonial Chile and Canada was the effort to convert Indigenous population into Christianity. Although the means that each colonizer used for this purpose varied, the importance of this goal was similar, in particular in the case of the Spanish and the French. The spread of Christianity into the new world was Spain's official justification for its conquering expeditions. As we highlighted in Chapter II, many of the institutions that the Spanish crown developed for its colonies, including the requerimiento and the encomienda, were theoretically aimed at the religious conversion of Indigenous peoples. Missionary activity among Native people in Chile was undertaken during the colonial period by different Catholic orders, including the Franciscans and the Jesuits, with the support of Spain. The importance that these orders had in the regulation of the encomienda was underlined in the same Chapter. So was the influence that the Jesuits had in the adoption of a defensive war strategy with the Mapuche, as well

\(^{21}\) Jacobs, supra note 18 at 5.

\(^{22}\) 22 Jaenen, supra note 14 at 30; Dickason, Founding Peoples, supra note 3 at 140-141.
as in the many parlamentos that were held with this people to promote peaceful relations. The impact that these orders had in the religious conversion of Native population living under Spanish control, and even of Mapuche population in southern Chile, was significant.

Christianity was also a central objective of the French colonies in New France and Acadia. Religious activity was undertaken by different missionary orders, including the Recollets, the Franciscan and the Jesuits. The reductions, an institution modelled on a similar experience implemented in Paraguay, was established by the Jesuits for this purpose. Christianization of the Native population, as mentioned in Chapter II, was closely interrelated with trade, an activity in which the economy of the French colony in North America was based. French missionaries were successful in their efforts to Christianize the Native population in North America. The impact of their activity was such that Catholicism would continue to link Indigenous peoples, such as the Mi'kmaq in Acadia, to the French, after they had lost that territory at the hands of the English in 1713. Christianization was also successful in undermining Indigenous peoples cultures and governing systems. The internal split among the Wendat people in the seventeenth century was provoked by the missionaries. Its effects in the decline of this people is a good example of the devastating implications that this activity had among Native peoples.

In contrast with these experiences, the early English settlements in North America did not seem to assign religious conversion the same priority. Nevertheless, the Puritans in New England implemented missionary activities among the Natives of Massachusetts in the seventeenth century to achieve this goal. Several missions (praying towns) aimed not only at worshipping God, but also at imposing "civilization" and repressing "savagery" were created. Unlike the Spanish and the French Catholic missions, which ventured into Native territories, learning their languages and cultures in order to convert Indigenous population, the Puritan early missions did not do so, but rather remained close to their settlements. Consequently, the effectiveness they had in bringing Native population into Christianity, at least initially, was limited.

English missionary activity was undertaken later in the Maritime provinces. Different initiatives were implemented to "decatholicize" the Native population in that area, in particular the

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23 By 1674, fourteen of praying towns with a total of 1,100 Christianized natives would exist. In Jennings, Invasion, supra note 8 at 250-251.

24 Ibid. at 56-57
Mi'kmaq, by the English Missionary Society, the Methodist and the Baptists in the late eighteenth century. However, for the most part these missionary efforts failed.  

2.1.3. Indigenous population decimation.

Finally, another element which was common to the colonial experiences here referred to is the devastating consequences that European presence had for Indigenous population. As mentioned in previous Chapters, this population is said to have substantially decreased as a result of the impacts provoked by diseases brought by the Europeans. Another factor which contributed to this phenomenon were the wars that their presence generated, both between Indigenous peoples and colonizers, as well as among Indigenous peoples themselves.

Bacteriological contact with the Spanish is said to have caused the death of two thirds of the Mapuche population in the Araucania region in Chile within the first fifty years of contact. This aside from those who died as a consequence of wars in which both parties engaged in. The imposition during the Spanish colonial period of the encomienda and its related institutions, which resulted in the establishment of forced labour and in the resettlement of Native population in pueblos de indios, is said to have constituted another important factor in the decimation of Indigenous population, in particular to the Picunche in central Chile and Aymara in the northern part of the country. It also contributed to the extinguishment of other Native peoples of smaller population, including the Changos and Diaguitas in the north, and the Chonos in the southern channels.

A similar phenomenon affected Indigenous peoples of Canada after contact. As mentioned in Chapter III, estimates show that Indigenous population in what today is Canada diminished from half a million at the time of contact to 102,000 in 1871. Several peoples did not survive the

25 According to L.F.S. Upton, Mi'kmaq preserved their Catholic faith because it was already part of themselves (See L.S.F. Upton, Micmacs and Colonists. Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979) at 160-170 [hereinafter Upton, Micmacs].

26 Jose Bengoa, Historia del Pueblo Mapuche (Siglo XIX y XX) (Santiago: Sur, 1985) at 15-16 [hereinafter Bengoa, Historia Mapuche].

impacts of the European presence in their traditional homelands. Such is the case of the Beothucks in what is now Newfoundland and the Wendat in eastern Canada, whose disappearances were undeniably triggered by the presence of European colonizers.

Population decimation, along with the encroachment of Indigenous peoples' lands, and the imposition of the newcomers laws and religions were factors that would considerably undermine Indigenous peoples' ability to survive the colonial experiences, not only physically, but also culturally.

2.2. Differences.

Notwithstanding the commonalities underlined above, important differences can be found in the forms of relationships established by the newcomers with Indigenous peoples in Chile and Canada during this period. Some of these differences are related to the origin and characteristics of the colonizers who came to the areas here analyzed. Others have to do with the nature of the colonies they established. Another important difference is the nature of the instruments (legislation, treaties, etc.) used by the colonizers to relate to Indigenous peoples.

2.2.1. Characteristics of the colonizers.

The Spaniards who came to America in general and to Chile in particular, were dominantly poor people who could not find a place within the feudal Spanish society of that time. They were soldiers, caballeros, adventurers, peasants, people who had a strong desire to become rich, to be served by others, and to return to Spain with fame and glory. Unlike the French, who came to North America dominantly as traders, and the English, who came as farmers, the Spanish came to the new world, and to Chile, as conquerors. Spanish colonists were also Catholic. Also

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28 According to historian Sergio Villalobos, the plebeyos (plebeians) and villanos of low social condition, constituted the overwhelming majority of the Spanish colonizers in Chile. Sergio Villalobos, Historia del Pueblo Chileno vol. 1 2nd. ed. (Santiago: Zig-Zag, Instituto Chileno de Estudios Humanisticos, 1983) at 122-144. [hereinafter Villalobos, Historia vol. 1].

29 Olive P. Dickason, "Europeans and Amerindians: Some Comparative Aspects of Early Contact" in Olive P. Dickason ed., The Native Imprint. The Contribution of First Peoples to Canada's Character vol. 1 (Canada: Athabasca University, 1995) at 180 [hereinafter Dickason, "Europeans"]. As Jose Bengoa affirms when contrasting the Spanish with the English colonization in America:
relevant, the majority of the Spanish who came to Chile were men.\textsuperscript{31} These two last characteristics had profound consequences in the future of the colony, resulting in intermarriage between the Spanish men and the Indigenous women.\textsuperscript{32} Intermarriage among Spaniards and the Indigenous population in Chile not only gave origin to the existence of a large mixed blood population in the colony, but also allowed important links with Indigenous peoples, notwithstanding the persistence of wars and conflicts.

The French and English who settled in North America had different backgrounds which should be highlighted to understand the relationships they established with Native peoples. The background of the French settlers who came to the New France and Acadia did not differ substantially from the Spanish who went to Chile. Many of them were impoverished peasants coming from an overpopulated and feudal France seeking a better life in the colonies.\textsuperscript{33} Like the Spanish settlers in Chile, they hoped to improve their social status in the new world.\textsuperscript{34} French who came to New France were also Catholic.\textsuperscript{35} The majority were men. As in the case of Chile, this resulted in a large degree of intermarriage between French men and Native women, a practice that

\textsuperscript{30} Many priests were found among the first European settlers in Chile. Villalobos, \textit{Historia vol. 1, supra} note 28 at 132.

\textsuperscript{31} Only 16 per cent of the colonists found in the first 30 years of Spanish settlement were women. \textit{Ibid.} at 133.

\textsuperscript{32} It should also be highlighted that the Spanish, at the time of conquest, had been living for a long time in the Iberic peninsula with people of different ethnic background, including Arabs and Jews, with whom they had mixed (See Bengoa, \textit{Conquista, supra} note 10 at 11). This is a fact that obviously contributed to Spanish openness to intermarriage.


\textsuperscript{34} Many of those who came to New France as servants of trading companies. After serving their masters for some years, they could work for themselves. According to D. Delage, social stratification among settlers in this colony persisted in time. \textit{Ibid.} at 303; 317.

\textsuperscript{35} According to Delage, those that were not Catholic, such as the Huguenots, ended up in the English or Dutch colonial settlements in North America (\textit{Ibid.} at 247). By 1650, Catholic nuns and priests constituted almost ten percent of the population of New France (\textit{Ibid.} at 328).
was initially encouraged by colonial authorities.\textsuperscript{36} Intermarriage was so common in the French colonies that by the time the English had taken control of Acadia, the population living there was considered to be dominantly half-breed.\textsuperscript{37} As in the case of Chile too, intermarriage played a vital role in the French relationship with the Indigenous peoples, helping to sustain the trading and military alliances which were built during the colonial life, as well as to spread Christianity.

Differences are stronger when comparing the Spanish and French backgrounds with that of the English who settled first in New England and Virginia and later in the territories that today comprise Canada. Several circumstances, including economic depression, cumulative hardship imposed on the peasantry by enclosure, and religious persecution in the British Isles, are mentioned among the reasons that explain English exodus to the North American colonies.\textsuperscript{38} People who came to these colonies were generally poor. As mentioned earlier, settlers dominantly came as farmers. Unlike the Spanish and the French, English colonizers were Protestant. Many of them, as the Puritans in New England, came seeking a place to find refuge from religious persecution. Another important difference between the English and the French and Spanish colonists, is that the first generally came to North America as families.\textsuperscript{39}

Religious intolerance and inflexibility among English colonists,\textsuperscript{40} as well as the fact that settlers dominantly came with their families, help to explain the limited presence of intermarriage between the English and the Natives in their North American colonies. Whatever the cause of this phenomenon, the fact is that the English did not intermarry with the Indigenous population to the extent that the Spanish and French did. This is a circumstance that would leave traces in the future

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\textsuperscript{36} In the words of Champlain to the Huron, "[o]ur young men will marry your daughters, and we shall be one people." Thwaites, ed., Jesuit Relations V, 211; x, 26 in Dickason, Founding Peoples, supra note 3 at 141.

\textsuperscript{37} Ibid. at 144.

\textsuperscript{38} Delage, supra note 33 at 246.

\textsuperscript{39} It should be acknowledged, nevertheless, that some of the English colonist came as individuals and not in family groups. Ibid.

\textsuperscript{40} As Francis Jennings affirms when referring to the kind of relationship established between settlers in early English colonies in North America and Native population, "the Protestant principle of elitism worked out in practice to exclusionism and indifference." Jennings, Invasion, supra note 8, at 57.
\end{flushleft}
development of Indigenous- non Indigenous relations in Canada, which as we saw in Chapter III, many analysts consider to be segregationist. 41

2.2.2. Nature of the colonies.

Important differences can also be identified in the nature of the colonies established in Chile and Canada, as well as in the type of relationship they developed with Indigenous peoples. Spanish settlers in Chile were not numerous. 42 Despite the scarce population, the goals of the Spanish conquest placed the settlers in conflict with Indigenous peoples from early contact. As described in Chapter II, the colony relied on Indigenous labour and lands to implement agriculture and mining, which were its the main economic activities. Indigenous peoples’ lands in central and northern Chile were appropriated for this purpose. Indigenous peoples themselves were forced to work for the colonists through the encomienda. Uprisings against this oppressive system in that area were suffocated by the Spanish. Mapuche resistance to Spanish expansion into their territories made war a dominant feature of Chile’s colonial life. As explained in that Chapter, much of the colony’s three and a half centuries were marked by military conflicts of varying intensity between the Spanish and the Mapuche. Most of the resources of this distant and impoverished colony were used in wars against this people.

In the case of Canada, a distinction has to be made again between the French and the English settlements. French settlers in North America were not numerous. 43 They settled mainly in the St. Lawrence valley, an area which was scarcely populated by Indigenous people at that time.

41 Olive P. Dickason refers to this matter when comparing English and Spanish colonization and their implication for Native peoples. She affirms:

The irony of all of this was that it left the English open to charges of being even more cruel than the Spaniards in their treatment of Amerindians, on the grounds that, whereas both the European nations fought bloody wars and imposed harsh terms on the defeated, the Spaniards incorporated the survivors into colonial society, albeit usually in the lower echelons, whereas the English excluded them.


42 By the end of the sixteenth century, after seventy years of settlement, the number of Spanish and criollos in the colony was estimated in only 7,500. Sergio Villalobos, Historia del Pueblo Chileno vol 2. 2nd. ed ( Santiago: Zig-Zag and Instituto Chileno de Estudios Humanisticos, 1983) at 103 [hereinafter Villalobos, Historia vol.2].

43 By 1663, 3,035 French were living in the Saint Lawrence area, a population which represented one twentieth of the English living in its North American colonies. Delage, supra note 33 at 247.
Moreover, the fur-trade activities in which the life of the French colony was based required the active involvement of the Native population, which was to provide the furs for export to Europe. Consequently, as we mentioned in Chapter III, trade allowed the continuation of the Native life and economy. These factors, combined with intermarriage and religious conversion, to which we have previously referred, resulted in the development a close connection between French and Indigenous peoples in this area. Despite the conflicts which existed between these two parties, important alliances were forged among them through oral and written treaties aimed at developing partnership in the fur trade, providing mutual support in their armed conflicts, or renewing peace, treaties to which we referred in the same Chapter. These alliances lasted until the end of the French colonial experience in Canada, when the English fought not only against the French army, but also with its Native allies, to take control of its possessions.

British migration to North America was much larger than that of the French. Unlike the French, English colonists settled in an area that was densely populated by different peoples at the time of their arrival. Moreover, these peoples included a high density of sedentary farmers and a low density of hunters and gatherers. In contrast with the French fur trade economy, the English colonies developed an agricultural economy which required Indigenous lands, but not Native people. Farming also constituted the central economic activity for the large number of Loyalists and migrants from the British Isles who settled in the Maritime area, as well as in Upper Canada (Ontario) after the American revolution.

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44 By 1660, approximately 100,000 people had migrated from the British Isles to its colonies in North America. 71,300 people had migrated to New England, and 33,000 to Virginia. *Ibid.* at 243-244.

45 *Ibid.* at 281-282. Jennings describes the complexities of the horticulture practiced by the Indigenous peoples in the areas of New England and Virginia at the time of English occupation. According to this author, Native people in that area lived basically from farming and fishing, in contrast with those of the St. Lawrence area who lived from hunting and gathering. See Jennings, *Invasion*, supra note 8 at 61-66.

46 Delage, *supra* note 33 at 282.

47 RCAP, *Report vol. 1*, supra note 27 at 137-138. As noted in Chapter III, a different form of English settlement, based on fur trade and not on agricultural development, took place in the northern part of North America. A vast area which initially included the territory drained by waters flowing into the Hudson Bay and later extended to British Columbia and the Yukon, was opened for the English through the trading activities of the Hudson Bay Company (HBC). Since its creation in 1670, the HBC played an important role in English-Aboriginal relations in Canada. According to Douglas Sanders, this company largely succeeded in blocking agricultural settlement in the western part of Canada until its charter was ended last century in 1869-1870. Sanders, *supra* note 17.
The obvious consequence of this type of colonization, which required lands to be set aside for the colonists, and where Native people had no space, was confrontation. As it was previously highlighted, confrontation with Indigenous peoples was not only frequent in New England and Virginia, but also in Acadia and Newfoundland, in what is today Canadian territory. It was precisely to avoid these confrontations that the English later introduced important changes in their land policy as we will see in the following section of this Chapter.

2.2.3. Instruments used by the colonizers in their relationship with Indigenous peoples.

The differences highlighted above had important consequences in the nature of the instruments used by the colonizers in both contexts in their relationship with Native peoples in the new world. The Spanish, who came as conquerors in search of souls, wealth, glory and new land for their monarchs, did not hesitate in using force against those who resisted Spanish occupation or faith. Once Indigenous peoples were under their control, voluntarily or not, the Spanish imposed on them their laws and institutions as a means to subjugate them.  

Spanish conquerors rarely used treaties or other agreements with Indigenous peoples in the new world as means to define their relationship with them. Exceptionally, diplomacy and treaties were used with Indigenous peoples when Spanish could not subjugate them by force. In the case

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48 As Francis Jennings has affirmed, "[exclusion of Indians -in effect a form of segregation- was especially true for the British colonies between the Atlantic Coast and the Appalachian Mountains, where immigration was heavy and land hunger intense." In Francis Jennings, The Founders of America. From the Earliest Migration to the Present (New York: W.W. Norton & Company, 1993) at 199. [hereinafter Jennings, Founders]

49 As O. P. Dickason explains on this matter:

The usual Spanish stance was the hard-line position vis-a-vis the infidel: if Amerindians refused to accept the faith, they forfeited their rights, including those of property. If they accepted Christianity, they automatically placed themselves under Spanish jurisdiction without any other formalities necessary.

50 There is not much information about other treaties entered by the Spaniards with Indigenous peoples in other parts of the new world. Miguel Alfonso Martinez, Special Rapporteur of the United Nations for the Study of Treaties concerning Indigenous Populations, only refers in the Final Report of his study to the parlamientos they entered with the Mapuche people in southern Chile (Miguel A. Martinez, Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations. Final Report [unedited version] (UN Doc E/CN.4/Sub.2/AC.4/1998/CRP.1), at 36 para. 180. O. P. Dickason refers to the food, clothing, grants of land and freedom from tribute offered by the Spanish with the Chichimecs in northern Mexico in the sixteenth century in return for the peace necessary to develop the mines located in their territory. According to the same author, gift-giving diplomacy became a practice of the Spanish along the northern frontier of New Spain by the end of the 1580's. Written treaties nevertheless, were not entered by the Spanish in North America until 1784, when they signed a mutual
of Chile, the only exception to this rule can be found in the case of the parlamentos entered by the Spanish with the Mapuche throughout the colonial period. These bilateral instruments, to which we referred extensively in Chapter II, were a consequence of Spanish inability to defeat this people by force. They became an important source of law during Chile's colonial life, creating rights and duties both for the Spanish and the Mapuche. Through these instruments, considered by Mapuche people and other analysts today as treaties between sovereign peoples, the Spanish in practice acknowledged the political and territorial independence of the Mapuche people south of the Bio Bio River.

This practice contrasts somewhat with that of the French and the English in North America during the same period. Although as previously affirmed both of these colonial powers also considered the Indigenous peoples they met here as subjects of their monarchs, and consequently, attempted to impose their laws on them, different circumstances led them to enter into negotiations and treaties with these peoples. In these treaties, Indigenous sovereignty and territories were acknowledged. The French concluded oral and written treaties with Indigenous peoples in New France and Acadia as a means to strengthen military and trade alliances. The English also relied on similar agreements in New England and Virginia, mainly as an instrument to acquire Indigenous lands for settlement, and in Atlantic Canada, as a means to achieve peace with the Mi'kmaq.

During the fall of New France in the eighteenth century this form of relationship was further developed by the English in North America. As we saw in Chapter III, changes were introduced by the English Crown in its land policy in order to win the friendship of France's former Indigenous allies as well as to mitigate the dissatisfaction of English Indigenous allies with the incursions of American colonists in their lands. According to this new policy, whose principles are contained in the Royal Proclamation of 1763, Indigenous peoples were considered autonomous political units living under the Crown's protection while retaining their internal political authority and their territories. Moreover, Indigenous territories were not to be granted or appropriated by the British without their peoples' consent. 51

Consistent with this policy, an important number of land treaties between the English Crown and various Indigenous peoples were made in Ontario from 1815 to the 1850's. According

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51 RCAP, Report vol. 1, supra note 27, at 116.
to these treaties, Indigenous lands were transferred to the Crown who left them for settlements and developments, in exchange for goods delivered at the time of the agreement. Revenues from the sale of these lands also paid for services to be provided for Indigenous peoples. 52

Despite the restrictive use that British colony made of the treaties, which were used in Canada mainly as a tool for obtaining Indigenous surrender of their lands in order to make European settlement possible, these bilateral arrangements became a central mechanism in the definition of the English-Indigenous relationship in colonial Canada. This until the introduction of the Indian Act and its related legislation in the nineteenth century, laws which became the central mechanism in the definition of Indigenous peoples’ rights and the regulation of Indian life.

3. THE REPUBLICAN (CHILE) AND CONFEDERATED (CANADA) PERIOD. 53

Independence in Chile and confederation in Canada did not significantly alter Indigenous peoples’ situation. Laws passed after 1818 in Chile and after 1867 in Canada did not have, in practice, a significant impact in changing the legal or material conditions of these peoples which had been framed during the colonial regimes. In the case of Chile, the encomienda system was abolished in the late eighteenth century as a consequence of a decision made by the Spanish Crown and not by the newborn state. Although in 1819 the Chilean authorities declared Indigenous peoples free and equal to the rest of the population, the practical benefits of this declaration were minimal.

In accordance with the Royal Proclamation of 1763, Canada continued in the late nineteenth and early twentieth century with the implementation of the treaty relationship with Indigenous peoples as a means to open lands for European settlement. After the British North America Act, 1867, which placed "Indians and Lands reserved for the Indians" under the legislative jurisdiction of the federal government, protectionist laws which had been enacted in the first half of

52 Ibid. at 155.

53 It is difficult to find a common denomination that is suitable both for Chile and Canada to refer to the period in which they became independent, immediately or gradually, from the European powers that had controlled them during the colonial period. This is particularly difficult when taking into consideration the history of Canada, where although some independence from Great Britain was achieved in 1867 with confederation, total independence was not obtained until the patriation of the Constitution in 1982. We have chosen these denominations in the absence of another which could be more adequately used to describe this common period of history of the countries considered in this study.
the nineteenth century by different colonial assemblies and by the legislature of United Canadas', were perfected. Although some changes were introduced, the central aspects of the colonial legislation were maintained.

3.1. Commonalities.

Commonalities can be found again in the policies implemented in Chile and Canada during this period. Similarities can also be found when analyzing the implications that these policies have had on Indigenous peoples. Many parallels can be drawn too with regard to the evolution of the relationship between the states and Indigenous peoples in the last decades. Among these commonalities and parallels, the following are to be mentioned:

3.1.1. Indigenous tutelage.

As referred to in previous Chapters, both Chile and Canada have enacted legislation and implemented policies establishing different forms of government control or tutelage over Indigenous people. The brief egalitarian period established in Chile in 1819 ended in 1853 with the enactment of laws that prohibited Indigenous people’s participation in contracts resulting in the alienation of their lands without government approval. Indigenous legal incapacity on this matter has been maintained until today, except for some short periods during the present century. Protectionist laws enacted since then made the intervention of government officials, such as the Protector of Natives and Indigenous tribunals, mandatory in contracts concerning purchases or leases of Indigenous lands. Government tutelage over contracts resulting in the alienation of Indigenous lands was discussed in the early 1990's when a new law concerning these peoples was being drafted. As a result of this debate, in which Indigenous leaders stressed the need to prohibit the alienation of Indigenous lands to non-Natives, these lands were declared to be generally inalienable by the 1993 law. Consequently, Indigenous peoples tutelage, at least in this matter, continues to exist in Chile today.

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54 This in order to impede land dispossession that the so called egalitarian laws had generated. See Comision Especial de Pueblos Indigenas ed., Congreso Nacional de Pueblos Indigenas de Chile (Santiago: Interamericana, 1991) at 36-37.
A similar tutelage concerning Indigenous lands was established by legislation in Canada prior to confederation. Laws enacted in the 1850's by different colonial assemblies made it an offence to deal directly with Indians for the acquisition of their reserve lands. Unlike the case of Chile where tutelage over Indigenous peoples was related to land, laws enacted and policies implemented after confederation extended this tutelage to other aspects of Indian life. Such was the consequence of laws which allowed the federal government to intervene in a band's political affairs, imposing elected local governments, removing those considered unqualified, regulating the size of band councils, etc. (1869, 1884). Tutelage was also manifested in laws that prohibited western Indians from selling agricultural products without an appropriate permit from the Indian agent (1881), or those that impeded Indians from travelling off their reserves without written authorization from the agent (1885).

Although some of these prohibitions were lifted, Indigenous tutelage was maintained in Canada throughout the twentieth century. Laws facilitating the alienation or lease by government representative (superintendent general) of reserve lands for different purposes, including mineral exploration, cultivation or grazing, were enacted in 1906, 1911, 1918 and 1919. The law enacted in 1927 obliging anyone (Native or non-Native) soliciting funds for Indian legal claims to obtain a licence from the government, constitutes another example of the control exercised by the government over Indigenous peoples and their lives.

The federal government White Paper policy of 1969, to which we referred to in Chapter III, proposed to integrate Indigenous people into Canadian society by repealing special legislation for them and establishing their equality with the rest of the population. This initiative would have ended the tutelage system here referred to. However, it was rejected by Indigenous organizations due to their fears that it would also end their special rights and status within Canadian society and result in their disappearance as a distinct people. Consequently, Indigenous tutelage at the hands of the state continues to exist in Canada today for First Nations ruled by the Indian Act.

As mentioned in Chapter III, Indian legislation rested in the notion that Indigenous people were "to be kept in a condition of tutelage and treated as wards of the state..." Department of Interior, Annual Report for the year ended 30th June, 1876 (Parliament, Sessional Papers, No. 11, 1877) p.xiv, in RCAP, Report vol.1, supra note 27 at 227.
3.1.2. Territorial expansion and the encroachment upon Indigenous lands.

Another phenomenon which has taken place in the two contexts during this period has been the encroachment upon Indigenous peoples' land base. This phenomenon has resulted from different expansionist initiatives undertaken by the dominant societies on Indigenous territories. During the nineteenth century and first decades of the twentieth century, this encroachment was a consequence of plans defined by the states in order to expand its borders into Indigenous areas. According to these plans, territories occupied by Indigenous peoples, which were considered to be in a state of abandonment, were assigned to non-Native settlers to encourage agricultural development.

As we saw in Chapter II, Chile's occupation of Mapuche territory last century was justified by the need to expand the country's agriculture southwards and to colonize the area with "industrious" settlers. By different means, including legislation, the allocation of state resources, etc., the government encouraged the coming of European settlers who could develop the area. Although the number of Europeans who came to Chile for this purpose was smaller than those who came to Canada, and even than those who settled in other neighbouring countries, such as Argentina and Brazil, these immigrants were given priority in the settlement of the lands that the army had occupied in previous years.\(^{56}\)

In the same period, this state also promoted non-Native settlement on what until then was Mapuche territory. Through public auctions called for this purpose, affluent Chileans acquired vast tracts in the Araucania. National settlers were also encouraged to colonize the area by the end of the nineteenth century, when European migration had declined. Through an unilateral decision of the

\(^{56}\) Between 1883 and 1890 approximately 11,000 immigrants from Germany, France and Switzerland came to Chile to settle in the Araucania and neighbouring regions (See Gonzalo Isquierdo, Historia de Chile vol. II (Santiago: Andres Bello, 1990) at 256-257). Many others migrants of different European nationalities would arrive to the area during the following years. This and other important waves of European migration that came to Chile during the colonial and republican period help to explain why some authors consider Chile, together with Argentina and Brazil, to be settler states (Herbert E. Bolton, "The Epic of Greater America" in Lewis Hanke ed., Do the Americas have a Common History? A Critique to the Bolton Theory (New York: Alfred A. Knopf, 1964) at 94; Beverley Gartrell, "Colonialism and the Fourth World: Notes on Variations in Colonial Situations" (1986) 1 Culture VI 3 at 5ff). Although this perception is true when compared to other countries, such as Peru and Bolivia, where European migration was smaller in number, the notion that has been constructed by the ruling class which portrays Chile as a country where European population is dominant, as mentioned in Chapter II, does not correspond to reality. Indigenous and mixed blood population in Chile are, in the opinion of this author, by far dominant.
Chilean state, the Mapuche were settled in 3,000 reducciones comprising approximately 500,000 hectares or 6 per cent of their traditional lands. The reducción system, more than responding to the recognition of Indigenous land title by the Chilean state, was a policy aimed at providing certainty to land tenure in order to make non-Native settlement in the area possible. With Mapuche settlement in reducciones, all the remaining lands were freed for colonization.

The motives behind the encroachment upon Indigenous lands in Canada were not significantly different than those existing in Chile. European immigrants continued to arrive in significant numbers to Canada during the final decades of the nineteenth century and first decades of the present century. They were encouraged by the Canadian confederation to occupy the vast lands to the west of the country. Unlike Chile, where the appropriation of Mapuche lands was conducted unilaterally by the state through military occupation and legislation, encroachment upon Indigenous lands in western Canada after confederation was largely achieved through a treaty process which involved the participation of Indigenous peoples and the federal government. However, the voluntary nature of the so called numbered treaties entered by Indigenous peoples in Ontario and western Canada between the 1870's and the 1920's - as well as of those entered into during pre-confederation time - must be questioned. Those who resisted signing treaties with the Crown, such as the Cree leader Big Bear in the prairies, ended up in a military confrontation with Canada, and finally had no choice but to surrender their lands.

These treaties obliged Indigenous peoples in this part of Canada to surrender their traditional territories in exchange for annual cash payment and other benefits. Lands representing a minimal percentage of their traditional territories were set aside for Indigenous people as reserves.\textsuperscript{58}

\textsuperscript{57} Canada is considered together with the United States, Australia and New Zealand a typical case of a settler state where immigrant population, in this case of European origin, became a majority, relegating Indigenous population to enclaves, often referred to as reservations (See Douglas Sanders, "Settler States and Customary Law. Indigenous Lands Rights in the United States, Canada, Australia and New Zealand" (Course Material, Faculty of Law, University of British Columbia, April 1, 1998) at 2 [unpublished] [hereinafter Sanders, "Settler"]). Some authors consider Canada as well as Chile as examples of what has been called a "temperate settler colonies" (Gartrell, supra note 55 at 8ff). The difference between Chile and Canada with this regard, in the opinion of this author, lays in the number of European settlers that arrived to each country. Although it is difficult to obtain accurate statistics on this matter in Canada, probably because of the massive number of migrants that have arrived to this country, the literature and evidence indicates that this migration was much larger in Canada. Another difference related to the first, is the significance that the mixed blood population has had in the formation of both states, which according to all literature available, is much larger in Chile.

\textsuperscript{58} According to estimations made by Richard H. Bartlett in 1988, the total lands set aside as reserves for Native people in Canadian provinces, excluding Labrador and the James Bay and Northeastern Quebec Agreements, was of approximately 6.1 million acres, which corresponds to 0.33 per cent of the total area of the provinces (excluding Labrador and Northern Quebec). The per capita area set apart in reserves, using the figure of 410,000 Indians that was...
Moreover, according to the *Indian Act*, reserve lands were to be held in trust by the Crown for the use and benefit of Indians. Until reforms were introduced to this Act in 1951, the Minister of Indian Affairs had "control and management of the lands and property of the Indians of Canada." Although that provision was changed in 1951, the substance of the Crown's power over reserve lands remained unchanged. Reserves, as *reducciones* did in the case of Chile, resulted in the physical and cultural segregation of Indigenous peoples from the rest of Canadian society. Segregation imposed on Indigenous peoples in Canada by the reserve system is a phenomenon that has left deep scars among First Nations people. This explains why some authors, both Native and non-Native, have compared the reserve system in Canada and its related policies to the apartheid system which was imposed in the past by the white minority to the African population in South Africa.

Finally, no treaties, or very few, were signed with these peoples in vast areas of this country, such as British Columbia and northern Canada. As a consequence of this situation, many Indigenous peoples were not acknowledged land rights. Therefore, they continued to live on reserves established unilaterally by the government or simply on lands considered to belong to the Crown.

Indigenous dispossession, nevertheless, continued to take place throughout the twentieth century. In Chile, laws passed from the 1920's promoting the division of Mapuche communal lands were applied, except for some short periods of time, until 1993. These laws resulted in the division of almost all Mapuche *reducciones*, as well as in the loss of an important percentage of the land valid for October of 1987, amounted to 15 acres per capita. Richard H. Bartlett, "Parallels in Aboriginal Land Policy in Canada and South Africa" (1988) 4 C.N.L. R. 1 at 17 [hereinafter Bartlett, "Parallels"]

59 According to Richard H. Bartlett, the *Indian Act* and the *Indian Oil and Gas Act*, vest control, management and disposition of Indian lands and resources in the Department of Indian Affairs. Control was, and still is, founded in the case of all reserves other than special reserves, upon the underlying title of the Crown. Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada. A Homeland* (Saskatoon: University of Saskatchewan, 1990) at 136 [hereinafter Bartlett, *Indian Reserves*]. The general rule of Crown title and control of reserve lands in Canada is implicitly reaffirmed by the *Land Management Act* (Bill C-49), a law that has recently been passed by the House of Commons. In its Article 18, this Act, which will be applied to thirteen First Nations in Canada, states that after the coming into force of this Act, First Nations will be able to establish land management codes and regimes which will allow them to (a) "exerciser the powers, rights and privileges of an owner in relation to that land."

60 Among these analysts Richard H. Bartlett (See Bartlett, "Parallels," *supra* note 58), Paula Mallea (See Paula Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon, Manitoba: Bearpaw Publishing, 1994) and Howard Adams (See Howard Adams, *A Tortured People. The Politics of Colonization* (Penticton, BC: Theytus Books, 1995) are to be mentioned. According to Douglas Sanders, the reserve system in Canada, as a system of indirect rule, and therefore a local government jurisdiction, was supposed to be a system of "separate development" (term used in South Africa during the apartheid regime). Instead of integrating the Indians, which was the stated intention, it had the opposite effect, that is, it separated and marginalized them. Douglas Sanders, *supra* note 17.
individual plots into which *reducciones* were divided. Similar processes of land dispossession affected other Indigenous peoples in Chile throughout this period, such is the case of the peoples of Austral Chile, to which no lands entitlements were made. This is a situation which significantly contributed to the decimation of the Indigenous population.

In Canada, the reduced land base recognized to Indigenous peoples through the treaty process was affected as a consequence of the lack of commitment of the Canadian government to fulfil the obligations acquired by treaties. The federal government's restrictive interpretation of treaties generally undermined Indigenous peoples' rights, including rights to lands and resources. Moreover, the *Indian Act* which has regulated reserve lands established by treaties or by administrative act, has not always protected such lands but has also has imposed restrictions on Indigenous rights to them. This has resulted in many occasions in their transfer to non-Indigenous hands.

Finally, a mention should be made to the impacts that large scale developments undertaken in recent decades by non-Indigenous people have had on Indigenous lands and resources in Chile and Canada. Initiatives such as mining and forest exploitation, hydroelectric dams and road construction have been implemented in both contexts by public and private, national and transnational entities on lands held or territories claimed by Indigenous peoples. These initiatives, which have generally been implemented without Indigenous consultation or consent, have resulted in a further encroachment upon Indigenous lands and resources. Examples include the hydroelectric dams that are currently being constructed on Pehuenche territory in Chile, and the logging activities which have been taking place for decades on Nisga'a territory in Canada. These and other development projects implemented on Indigenous territories in both countries, aside from diminishing the already small Indigenous land base and devastating Indigenous resources, are having a deep negative impact in these peoples’ lives, threatening the survival of their traditional economies and their cultures.

### 3.1.3. Assimilation.

The assimilation of Indigenous people into the dominant societies has been another goal pursued during this period both by Chile and Canada. As seen in previous Chapters, different laws were enacted and policies implemented in both contexts until not so long ago as a means to deal
with the so called "Indigenous problem." Individual land entitlement, education and Christianization, were promoted by governments in order to "civilize" these people, without respect for the specificity and richness of their cultures. Government efforts on this matter, aside from being discriminatory, have seriously undermined their cultures, affected Indigenous people's self-confidence, produced anger and frustration.

Assimilation into the Chilean society was an important goal of government policies concerning Indigenous peoples since the annexation of their territories in the late last century. Attempts to extend to their communities the institutions that were characteristic of Chilean culture, among them schools, Christian religion, military service, etc., were made by almost all governments until recently. In some cases, such as that of the Aymara in northern Chile, and that of the Rapa Nui in Easter Island, these "Chileanization" policies were oriented to ensure the country's sovereignty over lands occupied by these peoples, which are claimed by other states. In the case of the Mapuche, these policies have been mainly aimed at their conversion into a "productive" part of the population. In the case of the Selknam people in the Austral part of the country, the state supported missionary initiatives aimed at the Indigenous protection from extermination at the hands of non-Indigenous settlers.61

The best example of the assimilationist efforts of the Chilean state towards these peoples can be found in the laws enacted since the 1920's encouraging the division of Mapuche communal lands. Through these laws, to which we referred previously in this Chapter, the state would not only attempt to end up with Mapuche communal lands - transforming them into individually owned lands - but would also encourage the conversion of Mapuche themselves into inquilinos or dependent peasants of non-Natives. The same laws were aimed at undermining Mapuche culture, which was depicted by Chilean society as undesirable.62 During the Allende government in the

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61 Paradoxically, more Selknam died of diseases in the Salesian Missions created with state support last century, than at the hands of settlers of whom they were to be protected. Jose Aylwin, Comunidades Indigenas de los Canales Australes (Santiago: CONADI, 1995) at 42-46.

62 Wilson Cantoni, Legislacion Indigena e Integracion del Mapuche (Santiago: Programa de la Sociologia del Cambio Economico, Universidad de Wisconsin, 1969) at 37-40. As Jose Bengoa affirms, the option assumed by the state policies with regards to Mapuche people was clearly assimilation and not integration. Bengoa, Historia Mapuche, supra note 26 at 283. This contrasts with the option assumed in other contexts of Latin America where the policy of indigenismo (indigenisms) was developed. According to the leading Mexican anthropologist Hector Diaz Polanco, this policy, which was assumed by many states in the region since the 1940's, in particular by Mexico, advocated the integration of Indigenous people, with their cultural baggage, into national society, providing them with the necessary tools of civilization for their articulation within society. See Hector Diaz Polanco, Indigenous Peoples in Latin America. The Quest for Self-Determination trans. Lucia Reyes (Boulder, Colorado: Westview Press, 1997) at 68.
early 1970's the goal of the state policies concerning Indigenous peoples changed briefly from assimilation to integration, this time into a socialist agrarian reform project. Nevertheless, assimilation again became the state’s goal during the Pinochet regime in the 1970's and 1980's. This goal was explicitly manifested in the Law Decree No. 2568 of 1979 which was enacted with the purpose of terminating the division of Mapuche reducciones or communal lands.

Assimilation was an equally or even more important goal of Canadian laws and policies concerning Indigenous peoples. This became an explicit goal of Canadian Indian policy prior to confederation. The same goal was strengthened after confederation with the passing of the "Act for the gradual enfranchisement of Indians" in 1869. Similarly to the laws enacted in Chile since the 1920's which promoted the division of reducciones and encouraged individual land entitlement, the Indian Act of 1876 established that reserve Indians who proved suitable for this purpose were to be enfranchised and given title to an individual lot of land. Indigenous peoples' assimilation was also pursued by legislation passed late last century resulting in the prohibition of the sun dance, the potlatch and the give away ceremonies. These laws, which affected Indigenous peoples in the prairies and western Canada, remained in effect for several decades.

63 This goal was clearly stated by the "Act to encourage the gradual civilization of Indians" passed by the legislature of the United Canadas' in 1857. According to L. F. S. Upton the policy of assimilation in Canada was the result of two different factors:

the sentiment that a superior race (the British) had definite responsibilities towards an inferior (the Indians) coincided with the self-interest of the British government in cutting the costs of Imperial administration.

L. S. F. Upton, "The Origins of Canadian Indian Policy" (1973) Vol. VIII No. 4 Journal of Canadian Studies 51 at 51 [hereinafter Upton, "Origins"].

64 As the first Prime Minister of Canada, Sir John Macdonald, expressed, Canada's efforts at that time were "to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion." Malcolm Montgomery, "The Six Nations Indians and the Macdonald Franchise," in Ontario History 57 (1965) at 13, in RCAP, Report vol. I, supra note 27 at 179.

65 As mentioned in Chapter III, amendments introduced in 1920 to this legislation made enfranchisement compulsory by granting the superintendent general power to recommend this measure for any Indian male or female over 21 years old. According to the Royal Commission on Aboriginal Peoples, this provision was repealed two years later. Nevertheless, it was reintroduced in slightly modified form in 1933 and retained until the revision of the Act in 1951. According to the same entity, a further modification of this Act made in 1951 and retained until 1985, allowed the compulsory enfranchisement of Indian women who married a non-Indian men until 1985 (RCAP, Report vol. 1, supra note 27 at 287-288). It is important to note that other analysts have a different perspective on this matter. According to Douglas Sanders, there was a controversy on this issue during the Diefenbaker government (1959-1963). Compulsory enfranchisement was said to have been ended by an amendment to the Indian Act in that period. Sanders also stresses that the lost by Indian women of status as a result of marriage was always discussed separately from the issue of compulsory enfranchisement. Sanders, supra note 17.
Probably the best example of assimilationist policies in Canada can be found in the residential school system. The clear objective of this policy to which we referred in Chapter III, was to impede home influences in Native child upbringing and education, and to promote changes in their habits. This sad experience is still fresh in the memories of Indigenous people in Canada, and in the shame of the dominant society. Although no such policy officially existed in Chile, the role that missionary schools first, and public schools later, played in the transculturization of Indigenous children throughout this century, does not differ substantially from that of the residential schools in Canada. The magnitude of assimilationist efforts undertaken in the past by Canadian government and society with regards to Indigenous peoples in Canada explains why the federal government has recently (1998) felt obliged to express its regrets for the damages that its policies, in particular the residential schools, have inflicted to these peoples.

3.1.4. Indigenous organization process and its impact in the change of state policies.

Another commonality which can be found in Indigenous peoples' recent history Chile and Canada, is related to the political and cultural revival that these peoples have experienced in both contexts in the last decades. As mentioned in previous Chapters, after a long period in which these peoples were forced to assimilate into the larger societies, and where serious limitations impeded their political and cultural organization, they have raised their voices in protest of government abuses, and in demand of a new and more just relationship with the states where they live. Different forms of Indigenous organizations, ranging from the local level (reducción or reserve) to the national level, have emerged in recent decades channelling Indigenous discontent and claims.

Indigenous organizations in both contexts initially focused their efforts on the defence of their land and resource rights threatened by government policies. These organizations later incorporated into their claims a broad scope of matters not only related to their territorial rights, but also the political and cultural rights denied to their peoples. The same organizations had a strong influence in the process of cultural and spiritual revival which Indigenous peoples have experienced in both contexts in recent years, allowing them to regain some of the strength and pride they had lost after a long period of subjugation.

The emphasis that Capuchinos and Anglicans placed in the creation of missionary schools for Mapuche children in the Araucania is described in Bengoa, Historia Mapuche, supra note 26, at 383-384.
Indigenous organizations in Chile emerged later in time than the same organizations in Canada. However, the influence that these organizations have had in both contexts in the changes introduced in the relationship between the peoples they represent and the states has been similar. Through different actions, including acts of civil disobedience such as tomas or land occupations in Chile or road blockades in Canada, litigation, in particular in Canada, and political negotiation, a practice common to both contexts, Indigenous peoples have put pressure on their governments, forcing them to introduce important reforms to the prevailing laws and policies.

Although the scope of rights acknowledged by the states to these peoples as a consequence of their pressure will vary significantly in the two contexts analyzed here, assimilationist policies of the past would be formally abandoned. Aboriginal peoples in Canada or Indigenous ethnic groups in Chile, would be acknowledged as a distinct part of each society. Important political and territorial rights until then denied to these peoples would be recognized in both contexts as we saw in Chapters II and III.

3.1.5. Indigenous peoples' social and economic discrimination.

Finally, a mention should be made to the different forms of material discrimination that continue to affect Indigenous peoples in Chile and Canada. Despite the legal and political changes introduced in both countries allowing a broader recognition of their rights, these peoples' still constitute the poorest sectors within the societies where they live.

Comparatively speaking, Indigenous people in Canada have a much higher standard of living than Chilean Indigenous people. Nevertheless, all studies and statistics that are available in both contexts, demonstrate that the social and economic situation of Indigenous population is by far worse than that of non-Indigenous population in both countries. Access to social services such as health, education and housing is generally more difficult for these people. Unemployment and dependency from government assistance programs among these populations is higher, while

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67 Aboriginal organizations became strong in Canada after the White Paper of 1969. As mentioned in Chapter III, it was during this period when national organizations representing different Indigenous categories in this country (status Indians, non-status, Metis and Inuit) were created. In Chile, Indigenous organizations only emerged as relevant actors in the late 1970's and 1980's as a reaction to the laws enacted during of the Pinochet regime threatening their land and resource rights. Unlike Indigenous organizations in Canada, the same organizations in Chile have rarely coordinated at the national level, but rather focused on representing each people separately.
income per capita is lower.

Past policies of dispossession and assimilation help to explain Indigenous social and economic backwardness in both cases. However, the material inequalities still existing in both contexts cannot be understood without acknowledging the discrimination and intolerance which continues to affect Indigenous peoples in their daily lives. This is a problem which, as mentioned in previous Chapters, cannot be overcome only through legislation, but also through other policies, including education on tolerance and respect for ethnic and cultural diversity.

3.2. Differences.

Significant differences can also be identified when analyzing the way in which Chile and Canada have dealt with Indigenous peoples during the period in analysis. Some of these differences were already highlighted in previous sections of this Chapter. The protectionist relationship created by the British Crown with Indigenous peoples in North America through the Royal Proclamation of 1763 did not make possible in Canada the enactment of egalitarian laws such as that which prevailed in Chile after its independence. The only initiative aimed at establishing Indigenous people legal equality with the rest of the Canadian population, the White Paper of 1969, was never implemented.

Another difference to which we have previously referred, deals with the nature of the legal instruments used by the states to define relations with these peoples. In the case of Canada, despite the protectionist and assimilatory laws enacted since last century, treaties entered by the federal government (Crown) with Indigenous peoples were central instruments used for the definition of Indigenous rights to lands and resources during the late nineteenth century and early twentieth century. The so called modern treaties have also been used to settle Indigenous territorial and political claims from the 1970's. This practice contrasts with Chile, where the relationship between the state and these peoples, as well as their land rights, was fundamentally defined unilaterally through legislation enacted by the state. The exception of the peace and mutual support treaties entered into by the Pehuenche chiefs with the Chilean state in the early 1870's and of the agreement reached by the Rapa Nui chiefs with the same state in 1888, are to be mentioned.68

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68 Although there is no analysis on this matter, another exception to this rule which should be noted is the Acuerdo de Nueva Imperial (Nueva Imperial Agreement) entered in 1989 between Indigenous peoples representatives and the
The multiplicity of mechanisms through which Indigenous rights have been established in Canada, which include treaties, legislation and judicial decisions, has resulted in the existence of differentiated legal regimes which are applied to different Indigenous peoples, or even to different sectors within a specific people. This is particularly evident in the case of treaty rights, which are only applicable to those individuals who are part of a people or a band that is the beneficiary of a specific treaty. This situation contrasts with that existing in Chile, where Indigenous rights are defined by legislation. Although this legislation has in the past mainly dealt with the Mapuche people, the 1993 legislation now in effect applies to all Indigenous peoples in the country. Consequently, the rights and benefits established by this legislation, as well as the restrictions it imposes, are also applicable to all Indigenous peoples.

The different nature of the reducción system in Chile and the reserve system in Canada also has to be highlighted. While the first was basically a system of land, the second has been both a system of land and a jurisdictional unit. Consequently, in Canada, as in the United States which has a similar system, band councils are recognized as local governments. This is a form of "indirect rule," where the Indian collectivity is not brought directly under settler government administration, but also is administered through a Native leadership.69

A major difference existing between Chile and Canada on which we would like to focus our attention, deals with the extent in which the rights of Indigenous peoples have been legally and materially acknowledged in both contexts as a consequence of reforms introduced in recent years on Indigenous-state relationship. As we have done throughout this study, we will focus our analysis on Indigenous political and territorial rights. In doing this analysis, we will have in consideration the standards set in recent years by international forums to which we referred in Chapter I.

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69 Sanders acknowledges that the indirect rule system, which is characteristic of North America and does not exist in other parts of the world, such as New Zealand or Australia, creates a tension for the Native leadership, which has to respond to two constituencies; the Indian community and the national government. Douglas Sanders, "The Reserve System: Indirect Rule, Federalism, Land" (Course Material, Faculty of Law, University of British Columbia, September 28, 1979) at 1 [unpublished] [hereinafter Sanders, "Reserve"]. Sanders also affirms that with the settlement of Aboriginal land claims and the emergence of Aboriginal right to self-government in recent years, the reserve system is being reaffirmed as a land and local government system. Therefore, he believes that the indirect rule of the reserve system has been reinvented as "tribal sovereignty" or "inherent right to self-government" in North America. Sanders, supra note 17.
3.2.1. Indigenous peoples' political rights.

As referred to in Chapter II, the legal framework established by the 1993 law in Chile has placed its emphasis on Indigenous participatory rights. Such is the approach of its provisions aimed at promoting Indigenous right to organize through their comunidades and asociaciones, which are given legal recognition. It is also the approach of those provisions establishing Indigenous participation within CONADI, an entity which has been conceived by Indigenous leaders as granting to their peoples a kind of co-management of government policies concerning them. Finally, the provisions establishing Indigenous peoples right to be heard and considered by state agencies when making decisions which concern them, also responds to this orientation. The emphasis here described is consistent with the participatory rights provisions of the International Labour Organization Convention No. 169 and of the United Nations Draft Declaration previously referred to, which attempt to ensure Indigenous participation within the states where they live in decisions that concern their rights, their lives and destinies.

However, as we saw in Chapter II, other rights claimed by their organizations, which have been explicitly or implicitly recognized by these international instruments, have been excluded from this law. Such is the case of the recognition of their status as distinct "peoples." It is also the case of the right to Indigenous self-government, or at least to co-management, within those traditional territories where Native population is significant. It is finally the case of Indigenous customary rights, whose recognition is limited to trials among members of the same ethnic group, when not incompatible with the national Constitution.

Moreover, the way in which the Chilean government has applied this legislation in recent years has restricted these peoples' ability to exercise the limited participatory rights that were acknowledged to them in 1993. The case of CONADI, an institution that has been intervened by the government in order to impose its views in the definition of policies which are central to these peoples' future, illustrates the way in which these rights have been undermined in recent years. The same restrictions can be evidenced in the case of the Pehuenche people, whose voice has not been heard by government institutions in the case of the Ralco hydroelectric project, nor by ENDESA, the private enterprise behind this project. The hopes that the Pehuenche had to participate, together with government and local institutions, in the definition of development strategies within their traditional territory, has not been fulfilled. The Indigenous development area created in their
territory has not considered Pehuenche participation. Moreover, contrary to what the 1993 law states on this matter, the kind of development that is being encouraged by the government in the Area, cannot be considered as balanced and respectful of Indigenous culture as mandated by law.

The situation described here significantly contrasts with that prevailing in Canada. Events occurred in recent decades in this country have opened space for a different evolution on this matter. Consistent with the tendency that is acknowledged today by international legal instruments, Indigenous peoples of Canada, including the Indian, Metis and Inuit, and their "aboriginal and treaty rights" are recognized and affirmed in the Constitution Act, 1982. The right to self-government, although not explicitly entrenched in the Constitution, constitutes according to the 1995 federal policy guide on this matter, an inherent right of Indigenous peoples existing within the Constitution Act, 1982. Under this policy, the government of Canada is willing to negotiate self-government agreements which enable these peoples to exercise legislative and administrative powers, in a broad scope of matters that are "internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their lands and their resources." The only powers which are excluded from negotiation according with this policy are those related to Canadian sovereignty, defence, external relations as well as some areas of national interest, including fiscal and monetary policy, banking, substantive criminal law, protection of health, etc.

Different agreements reached between the federal government and Indigenous peoples, generally involving provincial governments, have enabled the acknowledgement of this right in different parts of Canada. The Nisga'a Final Agreement of 1998, to which we referred extensively in Chapter IV, constitutes an example of the self-government powers that Indigenous peoples have achieved in this country in recent years. Notwithstanding the criticism made by some Aboriginal

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70 Canada, Minister of Indian Affairs and Northern Development, Aboriginal Self-Government. The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Right to Self-Government (Ottawa: DIAND, 1995) at 4. The terms in which this right is defined by the federal government is very similar to the way in which it is defined in Article 31 of the UN Draft Declaration, which affirms that "[i]ndigenous peoples, as a specific form of exercising their right to Self-determination, have the right to autonomy or self-government, in matters relating to their internal and local affairs..." United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994 [hereinafter UN Draft Declaration]

71 Canada, Minister of Indian and Northern Affairs, supra note 70, at 6-7.

72 Other self-government regimes which should be mentioned are those established for the Cree and Naskapi people of Quebec by the Cree-Naskapi Act of 1984 and that granted to the Sechelt of British Columbia by the Sechelt Indian Band Self-Government Act of 1986. Also important to consider on this matter is the Nunavut Land Claim Agreement of 1993 to which we referred in Chapter III. Although this agreement did not create a specific form of Inuit government, it
organizations in Canada of the shortcomings of this agreement, this treaty will provide the Nisga'a with legislative, administrative and judicial self-powers that are unimaginable today under the approach of Chile's legal and political framework. Nisga'a people will have the right to elect their own government in accordance with their Constitution. The Treaty provisions granting the Nisga'a government taxing authority over Nisga'a citizens on Nisga'a lands, as well establishing fiscal transfers from the federal and provincial governments to the Nisga'a, may allow this people to make self-government a reality and not a mere declaration.

It is interesting to highlight that the participatory approach that is present in many of the provisions of the ILO Convention No. 169, and is characteristic of the 1993 Indigenous law in Chile, can also be found in some of the modern treaties in Canada. This approach is present in the fish, wildlife and environmental co-management regimes, involving the participation of both Indigenous peoples and government(s), which have been established in some of these treaties. Nevertheless, unlike Chile, where the 1993 law acknowledged the right of Indigenous people to participate within CONADI, the state entity responsible for the definition and implementation of policies that concern them, Indigenous leaders in Canada have not shown interest in obtaining similar participatory rights within the government agency in charge of the same policies (Ministry of Indian Affairs). They instead have centred their efforts in strengthening their own organizations as a means to negotiate their political and territorial rights with the government as an independent actor. The strategy adopted by Indigenous peoples in Canada not only seems to be more consistent with their self-government claims, but also appears to have been more successful in terms of guaranteeing the independence of Indigenous organizations from the government in Canada than the strategy of Indigenous organizations in Chile during the CONADI period. It also seems to have been more successful in terms of the rights they have achieved in recent years in Canada when compared to those achieved in the same period by Indigenous peoples in Chile.

established a new territory in northern Canada (Nunavut), which is controlled by the Inuit majority who lives there. Also relevant are the self-government agreements signed by Yukon Indians under the provisions of the Yukon Umbrella Final Agreement of 1993. Finally, the Labrador Inuit Land Claims Agreement-in-Principle reached in May of 1999, also will establish, after its ratification by the parties involved (Labrador Inuit Association and the Governments of Canada and Newfoundland and Labrador) a self-government regime benefiting Inuit in this northern part of Canada.

Among the treaties establishing such regimes, the James Bay and Northern Quebec Agreement of 1975, the Inuvialuit Final Agreement of 1984 and the Yukon Umbrella Final Agreement of 1993 are to be mentioned. The same approach can also be found in the co-management bodies of the Nisga'a Final Agreement of 1998, such as those aimed at the administration and preservation of fisheries and parks on Nisga'a Lands and of wildlife in the Nass Wildlife Area.
However, it has to be underlined that Indigenous peoples in Canada who are part of these agreements and consequently enjoy the rights referred to above, still represent a small percentage of Indigenous population. First Nations people living on reserves, who constitute a large part of the Indigenous population in Canada, are still ruled by the provisions of the Indian Act. Notwithstanding the legislative powers that Indian Band Councils exercise today under this Act, and the changes introduced in recent years through the devolution policy allowing these people to gain increasing responsibility in the management and delivery of social programs such as education, child care and community infrastructure, it cannot be said that these are self-governing peoples in accordance with the existing international standards. A similar situation exists for the Metis and off reserve people, who also represent an important percentage of the Indigenous population in Canada. Although these Indigenous categories have been included by the federal government as beneficiaries of its 1995 Aboriginal self-government policy, they have generally not taken part in the modern treaties before referred to, the exception of this being the Metis of the Northwest Territories who participated in the Sahtu and Metis Agreement of 1993. Neither have those living in urban areas, whose participation in the decisions taken concerning their lives is generally restricted to consultation process undertaken by federal or provincial governments. Their political rights as Indigenous peoples in Canada are therefore very limited.

3.2.2. Indigenous peoples' territorial rights.

As explained in Chapter II, the main goal of the 1993 law in Chile on this matter was the protection of the reduced land base that Indigenous peoples still maintained after its encroachment by non-Natives. This law also attempted to increase Indigenous land base through the creation of a land fund. Although consistent with the content of the international instruments which exist on this

74 According to estimates contained in the RCAP Report, Indian (First Nations) people living on reserve constitute a 58.1 per cent of the total Indian population in Canada. Indian population represents 76.9 per cent of the total Indigenous population in Canada. See RCAP, Report vol. 1, supra note 27 at 16-19.

75 According to the same Report, Metis people represent 18.8 per cent of the total Indigenous population in Canada. Indian (First Nations) people off-reserve constitute 41.9 per cent of the total Indian (First Nations) population. Ibid.

76 According to Douglas Sanders, the Metis and non-status Indians participation in treaties or land claims settlements in Yukon and the Northwest Territories represents the historic failure to extend the reserve system into these two northern territories. According to the same analyst, in the provinces, Metis are not included in any land claims negotiations or agreements. Sanders, supra note 17.
matter, and relevant as a means to impede and reverse land dispossession that these peoples have experienced in the past, the law did not extend this protection to natural resources existing within Indigenous lands. Consequently, resources such as water and minerals located on these lands, which are increasingly protected by these international instruments, were not acknowledged to them by this law. The concept of Indigenous territory, which is included both in the ILO Convention No. 169 and the UN Draft Declaration as a means to guarantee rights over broader geographical areas which these peoples have traditionally owned or otherwise occupied or use, was not included in this law. The figure of Indigenous development areas (IDAs), which had been proposed by Indigenous peoples’ representatives as a way of materializing their territorial rights in areas where their population is relevant, was included in this law as an area for the coordination of government policies concerning Indigenous development. Consequently, no special rights were acknowledged to these peoples.

Moreover, although important efforts have been made by CONADI to increase Indigenous land base through its land fund, Indigenous lands and resources continue to be threatened by large development projects which are being implemented on their territories today. This has resulted in a further encroachment upon Indigenous lands, as well as in the appropriation of natural resources claimed by these peoples. The case of the Pehuenche people before referred to constitutes again an example of the fragile protection that Indigenous land rights continue to have today in Chile. Pehuenche ownership of their lands, although explicitly protected by this law, is being threatened as a consequence of the Ralco project. Pehuenche people are being relocated from their ancestral lands. Individual land swap contracts signed by them for this purpose under pressure, are being authorized by CONADI, the entity responsible for the protection of Indigenous lands. Moreover, the resources that Pehuenche people claim within their traditional territories, such as the Bio Bio waters, have not been recognized to them by the government, but instead have been ceded to non-Native investors in the area.

This experience contrasts again with Canada, where Indigenous rights not only to lands but also to resources have increasingly been acknowledged in recent decades. Court decisions made on Aboriginal title cases since the Calder decision in 1973 have progressively supported Indigenous claims on this matter. These decisions have been instrumental in the changes introduced in

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77 Article 13 of the ILO Convention No. 169 and Article 25 UN Draft Declaration.
Canadian policies since that time, opening the doors for Indigenous land claims negotiation throughout Canada. More than ten agreements or modern treaties have been reached with the government(s) by different Indigenous peoples in non-treaty areas of Canada through these negotiations. Despite the insufficiencies and problems that are characteristic of these agreements, Indigenous full ownership of certain lands within the settlement areas has been recognized through them. The same agreements have guaranteed wildlife and harvesting rights to Indigenous peoples. They have also established Indigenous participation in land, water, wildlife and environmental management throughout the areas they cover. Other rights, including financial compensation, resource revenue-sharing, measures to stimulate economic development and management of heritage resources and parks in the settlement areas have also been established.

The Nisga'a Final Agreement or treaty constitutes an interesting example of the land and resource rights which are today being recognized to Indigenous peoples in Canada under this policy. Although some of the rights contained in this treaty, such as those dealing with land ownership, forest or sub-surface resources are limited to the so called Nisga'a lands, which represent a limited percentage of this people's traditional lands, and fishing rights are quota rights to be shared with others in accordance with the treaty, in general they have no parallel with the limited framework of rights acknowledged to Indigenous people in this matter by Chilean legislation.

The scope of rights acknowledged in these agreements, in particular in the most recent ones, generally met the standards that have been set on these matters by international legal instruments. The significance that the decision made by the Supreme Court of Canada in the *Delgamuukw case* in 1997 can have in the future materialization of Indigenous rights to lands and resources in Canada should also be highlighted. According to this decision, where Aboriginal title is understood not only as a right to land but also to resources on and under Aboriginal lands, negotiations

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78 One of the central critiques which has been made by Indigenous and non-Indigenous advocates to this policy, is the inclusion of the extinguishment clause in agreements reached through it. In accordance to this clause before explained, Indigenous peoples are obliged to surrender all their claims, rights and interests on their lands and water, in return for specific "benefits."

79 This is the interpretation made by among other analysts, Brian Slattery (Brian Slattery, "The Definition and Proof of Aboriginal Title," in Pacific Business and Law Institute ed., *The Supreme Court of Canada Decision in Delgamuukw* (Pacific Business and Law Conference, Vancouver, April 1998) at 3.6 [hereinafter Slattery "Definition"] [unpublished]) and Kent McNeil (Kent McNeil, "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?" (Presentation made at the Twelfth Annual Robarts Lecture, March 15, 1998, York University, Toronto) at 17 [unpublished]).
between Indigenous peoples and governments to solve Aboriginal title claims or disputes are encouraged. Consequently, in accordance with this decision, new agreements dealing with Indigenous lands and resource rights are to be expected in Canada in the coming years.

It has to be acknowledged here too, that the largest part of Indigenous population in Canada has not been involved in these agreements, and consequently has not been benefited by this new approach of the Canadian government. The land and resource rights of a significant part of First Nation people are still defined in the treaties they entered with Canada in the past or by the Indian Act. Many peoples who are part of these past treaties continue to claim that the land and resource rights that were promised to them have not been fulfilled by the government. As mentioned in Chapter III, the federal government established in the 1970's the specific claims policy with the purpose of attending claims related to the non-fulfilment of treaties and to the federal government's administration of Indian reserve lands, among other issues. However, agreements reached by Indigenous groups through this policy have failed to respond to Indigenous claims.\(^{80}\) Land and resource rights of First Nations living on reserves and ruled by the Indian Act are still restricted by the broad powers and control that the federal government has on these matters. The situation of Metis communities in this regard is also problematic. Metis communities generally lack an adequate land base. Their land claims rarely have been attended by the governments. Therefore, it cannot be said that international standards concerning land and resource rights are being enjoyed by all Indigenous peoples in Canada, but rather only by those peoples whose rights have been acknowledged through modern treaties after a difficult process of litigation and/or negotiation.

3.3. Factors which help to explain the differences in the recent evolution of Indigenous peoples' rights in Chile and Canada.

As we have seen throughout this Chapter, the dominant characteristics of the relationship established during the period in analysis by the governments of Chile and Canada with Indigenous peoples, did not differ substantially from one another. Indigenous land dispossession and

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\(^{80}\) As mentioned in Chapter III, only a limited percentage of the claims presented (151 out of 743 claims) have been settled positively for Indigenous claimants. Moreover, the federal government has failed to include lands in these claim settlements, using instead financial compensation for this purpose. Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, vol.2 Restructuring the Relationship (Ottawa: Minister of Supply and Services, 1996) at 547 [hereinafter RCAP, Report vol. 2]
assimilation seemed to have been the among the main goals of the policies encouraged by both states until recently. Changes experienced in these policies in last three decades, however, vary significantly in nature and extent in the two contexts here studied. What can explain the different recent evolution on this matter in both contexts? How is it that Canada has opened to the acceptance that Indigenous peoples have rights to lands and resources that arise from their prior occupation of their land and Chile has not? How is it that Canada has moved toward the acknowledgement of Indigenous peoples' right to self-government and Chile has not?

There are several factors which should be taken into consideration in order to respond to these questions. Among them the following are to be mentioned:

3.3.1. Legal factors

An important factor which has to be considered to explain the different evolution experienced on Indigenous rights in both contexts in recent years deals with the nature of the legal systems which prevails in them. According to the civil law system which Chile took from the French and the Spanish, the main source of law (el derecho) is legislation as enacted by the National Congress in accordance to the Constitution.\footnote{Maximo Pacheco, Teoria del Derecho 2nd. ed. (Santiago: Editorial Juridica, 1976) at 329.} Other sources of law have limited acceptance within the Chilean legal system. Custom only has juridical power when the law refers to it.\footnote{Article 2, Civil Code of Chile, in Ibid. at 320} Jurisprudence also has limited power as a source of law within this system. The judiciary, to whom the faculty of adjudicating is granted by Chile's constitution, can only apply and interpret the law to the specific cases that are being considered by a judge or court. Consequently, according to this legal system, a decision made by a judge or court only has force in the case on which it has been made.\footnote{Article 3, Civil Code of Chile, in Ibid. at 346.} Therefore, these decisions do not oblige other courts in the future to apply or interpret the law in the same way.\footnote{Ibid. at 346.}

Jurisprudence is generally followed by judges and courts in cases of similar nature to which laws are to be applied or interpreted. Nevertheless, such jurisprudence will not override the existing
legislation, which will continue to be in effect until its amendment by other law of a similar or higher rank passed by the national legislature in accordance to the Constitution. Consequently, law reform in Chile is usually slow. Legislation concerning Indigenous peoples is not an exception in this regard. The 1979 legislation enacted during the military regime promoting the division of Mapuche lands had to wait more than a decade, until the re-establishment of democracy, to be reformed by new legislation. Challenges made by Indigenous peoples to this legislation through litigation were rare because of the fact that the judiciary was incapable of overriding such legislation under the legal system prevailing in Chile.  

This situation contrasts with that prevailing in Canada where, as in other countries of Anglo-Saxon influence, a common law system inherited from England exists. Although it has been debated in Canada whether in accordance to this legal system the judiciary can make law, or simply declare the meaning of existing laws to specific cases, it is evident that decisions of the Supreme Court of Canada have historically had an enormous influence in the legal evolution in this country. The inclusion of the Charter of Rights and Freedoms, which limits the powers of legislative bodies in Canada, in the Constitution Act, 1982, is said to have broadened the scope of judicial review traditionally existing in Canada.

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85 The absence of litigation as a means to challenge this law can also be explained in the dependency that the judiciary had on the de-facto government of that time.

86 As jurist Paul Weiler affirms, two models of judicial decision making have been debated in Canada. The first, associated with the British common law tradition, which he denominates the adjudication of disputes model, in which the role of the judge is limited to decide his cases "by the somewhat mechanical application of the legal rules which he finds established in the legal system"; and the second, inspired in the American tradition, which he identifies as the judicial policy maker model, in which judges "collaborate with other bodies in society in the development and elaboration of the law." Although the author believes that the role of the judiciary has not fit in the past in neither of these models, traditionally it has been more or less organized along adjudicative lines. See Paul Weiler, "Two Models of Judicial Decision-Making" in F.L. Morton ed, Law, Politics and the Judicial Process in Canada 2nd.ed (Calgary, University of Calgary Press, 1985) at 27-31.

87 According to legal analyst Douglas Sanders, judicial review of the validity of legislation in Canada long preceded the federal constitution of 1867 (Sanders, supra note 17). Constitutional analyst Peter Hogg adds that after confederation, review the validity of legislation enacted by legislative bodies in Canada has been a power exercised by the Supreme Court of this country since it was established in 1875. The same author adds that the current basis of judicial review in Canada can be found in Section 52 (1) of the Constitution Act, 1982, which stipulates that the "Constitution of Canada" is the "supreme law of Canada," and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." (Peter W. Hogg, Constitutional Law of Canada 2nd. ed. (Toronto: Carswell, 1985) at 95).

88 According to Peter Hogg, the additional limits to the powers of legislative bodies established by the Charter of Rights and Freedoms "give rise to judicial review in the same way as the limits created by distribution-of powers-provisions." Ibid.
Making use of the possibilities offered by this legal system, Indigenous peoples have systematically challenged in recent years the legal order imposed on them by Canada through litigation. As explained throughout this study, Supreme Court rulings in Canada, from the *Calder* decision in 1973 until now, have been instrumental in the changes introduced in Canadian legislation, including the Constitution, and policies concerning these peoples' rights, in particular to lands and resources.

Another legal element which has influenced the evolution here referred to, is related to the nature of both states. Unlike Canada, which has a federal structure, Chile, since its independence, has been conceived as a unitary state, where the provinces, and more recently the regions into which it is divided, are politically and economically dependent on the national or central government. This structure has resulted in the creation of a centralized country, where there is little space for geographical or cultural differences. The lack of flexibility in Chile's political structure, and the absence of a culture which allows distribution of powers throughout the country, has constituted a clear impediment for the acceptance of Indigenous participatory and territorial demands. The central government has historically rejected decentralization claims made by the provinces in the past on the grounds that these demands could result in the destruction of the unitary nature of the state, as well as in the fragmentation of its territory. Political and territorial claims made by Indigenous leaders when a new legislation concerning their peoples was debated in the early 1990's, were dismissed by conservative sectors using the same arguments that have been used by the central government in the past to oppose to the decentralization of the state. The acceptance of Indigenous claims was again seen as a threat to the unitary nature of the state and to the powers of the central government.

In Canada, meanwhile, the federal nature of the state has obliged the different governments (federal and provincial) to share powers since confederation. Canadian federalism, in the opinion of this author, has resulted in the creation of a political culture which makes the acceptance of Indigenous self-government and territorial claims less traumatic than in unitary states such as Chile. Governments powers can be shared with Indigenous peoples, as they have been shared among them

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89 According to Peter W. Hogg, initial distribution of powers among federal and provincial governments in the Canadian confederation according to the *British North America Act, 1867*, was more centralized than that of the United States. Over the years, however, their has been a steady growth in the power and importance of the provinces. Consequently, he believes that Canada has now a federal Constitution which is less centralized than that of other federal states such as the United States and Australia. Hogg, *supra* note 87, at 86-88.
in the past, without the fear of breaking the state's structure. Territorial rights, and not only land rights, can be acknowledged to these peoples much more easily within the framework of the federal system. The rights acknowledged to the Nisga'a recently show the flexibility of Canada's federal system to deal with Indigenous demands. An agreement of that nature would not have been possible in Chile, not only because lack of political will from the larger society, but also due to restrictions imposed by the centralized structure of the state.

3.3.2. Political factors.

Another element which should be taken into consideration to understand the different evolution referred to here, is the nature of the political systems existing in both contexts. The emergence of Indigenous peoples as a relevant political actor in Chile coincided with the period in which the authoritarian regime of General Pinochet was established. During almost two of the last three decades, the Chilean population was impeded from exercising basic rights and freedoms which are characteristic of a democratic system. The legislature was closed, social and political organizations were banned, political leaders were persecuted, etc.. In this context, Indigenous peoples were not able to organize adequately in defence of their rights. Consequently, no progress concerning the recognition of their rights was made. Although the Indigenous movement reemerged with strength after the re-establishment of democracy in 1990, the chances of introducing substantial reforms concerning not only these peoples rights, but also on other relevant social and political matters, have been limited due to the restrictions imposed by the 1980 Constitution still in effect to the democratic composition of the Senate.

This situation contrasts with that of Canada, a country that during the same period has experienced an important process of legal and political democratization within the framework of its parliamentary system. Of particular relevance in this matter has been the proliferation of human rights legislation, both at the provincial and federal level, including the entrenchment of the Charter of Rights and Freedoms in the Canadian Constitution of 1982. This legislation, which is aimed at guaranteeing the full exercise of human rights to individuals or groups within Canadian society,\(^{90}\) has had a significant impact in making Canadian society more egalitarian in recent years.

\(^{90}\) This, both by guaranteeing non-interference by the state in the exercise of human rights by individuals or groups, and by obliging the state to take appropriate measures, including the provision of resources out of public funds for this
New legislation and court decisions based on these constitutional rights have enabled important sectors of Canadian population, including Indigenous peoples, to exercise rights and freedoms that were denied to them in the past. This is a context which definitely has contributed to the debate and changes experienced in recent years on Indigenous peoples’ rights in Canada.

### 3.3.3. Cultural factors.

As mentioned in Chapter II, ethnic and cultural diversity in Chile has historically been denied by the larger society. The idea that Chile is a racially homogenous society of European origin has been converted to an official myth which is still believed by important sectors of the larger population, in particular, by the ruling class. This notion, which discriminates against Indigenous peoples, has harmed attempts made to recognize them as distinct peoples within Chilean society. This reality helps to explain the rejection of the constitutional amendment project concerning these peoples sent to the national legislature in 1991. It also helps to explain the shortcomings of the 1993 Indigenous legislation.

In Canada, different circumstances, including the need that Europeans colonizers had of Indigenous peoples to survive in the harsh environment they found here, and the different background of the French and the English, led from early to a broader acceptance of ethnic and cultural diversity. The coming of immigrants from varied nationalities throughout the twentieth century forced the Euro-Canadian society later to accept multiculturalism in Canada. Unlike the United States, where a “melting pot” approach has been used to deal with migrants of different ethnic backgrounds who have arrived to this country, Canada embraced a policy of multiculturalism since the 1970’s as a means to deal with its ethnic and cultural diversity.\(^1\) This policy, which has been reflected in varied legislation starting from the Languages Act of 1969 to the Canadian Multiculturalism Act of 1988,\(^2\) has created a much more adequate environment than

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\(^{(1)}\) Bernardo Berdichewsky, *Racism, Ethnicity and Multiculturalism* 2nd. ed (Vancouver: Future Publications, 1996) at 69 [hereinafter Berdichewsky, *Racism*]. Multiculturalism is, according to this author, a Canadian term for cultural and ethnic pluralism. It promotes unity on diversity and integration without losing identity.

\(^{(2)}\) The nature and goals of this policy are expressed in the Preamble of the *Multiculturalism Act, 1988*, when affirming:
exists in Chile for the acknowledgement of Indigenous peoples’ rights. Although problems of racism and intolerance are evidently still present in Canada, Indigenous peoples have progressively been acknowledged in this country as founding peoples of Canadian society.

Another cultural factor which, in the opinion of this author, has had an important incidence in the recognition of Indigenous peoples’ rights in Canada in recent years, is the attitude of "guilt" which has been present among Euro-Canadians in their relationship with Indigenous peoples. There is evidence of how this sentiment of religious origin inspired the humanitarian movement based in London which advocated for the adoption of protectionist policies concerning these peoples in the last century. No specific mention has been found in the literature analyzed regarding the influence that guilt has had among Euro-Canadians, dominantly of Christian background, in the recent changes of their relationship with these peoples. However, the constant references that are found in the literature and discourses of Euro-Canadians to the damages of all kinds that their society inflicted on Indigenous peoples as a consequence of discriminatory policies of the past, evidences that the sentiment of guilt is still present among them. An expression of this attitude is contained in the federal government "statement of reconciliation" of 1998. In this document described in Chapter III, the government formally expresses its regrets for past actions undertaken by it harming these peoples, such as the implementation of the residential school system, acknowledging the need to renew the relationship with these peoples.

This sentiment has also been present among the larger society in Chile in recent years, in particular within the Catholic church, when analyzing the past relationship with Indigenous peoples. Guilt was probably influential in the process leading to the enactment of the 1993

... the government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour or religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social and political life of Canada;

In Ibid. at 103.

93 As Evelyn Kallen affirms, this legislation has served to raise the level of public consciousness of racism in Canada. Moreover, she adds, although discrimination has lost its public respectability, it has definitely not disappeared in Canada. Blatant racism has gone "into the closet," where it has been transformed into its more subtle counterpart, the "new racism" she concludes. Kallen, supra note 90 at 233.

94 According to L.F.S. Upton, guilt was one of the essential attributes of the humanitarians last century. As he affirms "[g]uilt prefaced almost every account of the Indian in this period: guilt for destroying his independence, his manliness, for killing him through war and disease, and demoralizing him with liquor." Upton, "Origins," supra note 63 at 54.
Indigenous law in Chile. However, it has not had, in the opinion of this author, the dimensions, and consequently the impact, it has had in Canada. Important sectors of the larger society in Chile still do not admit the damages inflicted to Indigenous peoples in the past. Moreover, many continue to believe that the solution to the so called "Indigenous problem" is their assimilation, or at least their integration to the dominant society. This attitude, still prevailing among powerful sectors of Chilean society, as we saw in Chapter II, helps to explain the obstacles that have impeded Indigenous peoples from achieving a broader acceptance of their political and territorial claims by Chilean state and society.

3.3.4. Economic factors.

The economic disparities existing between both states, should also be mentioned as a factor which helps to explain differences here referred to. While Canada has one of the strongest economies in the world, Chile's economy is still considered to be poor and underdeveloped. The abundant financial resources existing in Canada have enabled the state to devote important funds for social programs, including those concerning Indigenous peoples. According to official information, federal expenditure on Indigenous programs in Canada totalled $ 6.0 billion in 1997-1998. These expenditures do not explain by themselves the progress achieved on Indigenous rights in Canada in recent years. However, they have been instrumental in making possible the materialization of certain rights that Indigenous peoples enjoy today. The relationship between cash expenditures and the realization of Indigenous rights can be exemplified in the devolution policy to which we referred in Chapter III. The funding provided by the federal government through this policy has allowed First Nations to participate in the administration and delivery of their own social services. Another example can be found in the funds provided by the governments to Aboriginal self-government regimes resulting from modern treaties, which contribute to ensure the feasibility of such regimes for different Indigenous peoples in Canada.

95 It should be acknowledged that Chile's economy has grown systematically in the last decade at a rate between 6 ad 7 per cent a year. This growth, nevertheless, has not benefited evenly all sectors of the population. The richest 10 per cent of the population receives 41 per cent of the national product, while the poorest 10 per cent receives only 1,5 per cent of the same product. One fourth of the population currently lives in a condition of poverty. Programa Chile Sustentable ed., Por un Chile Sustentable. Propuesta Ciudadana para el Cambio (Santiago: LOM, 1999) at 20.

The contrast with Chile in this matter is significant. While Chile has a larger Indigenous population than Canada, the funds provided by the government to the implementation of policies concerning these peoples are minimal when compared to those which the Canadian government has spent on the same matters. The fiscal restrictions that have characterized Indigenous policies in Chile cannot be used to justify the shortcomings that characterize the legal framework concerning Indigenous peoples rights. Nevertheless, they help to explain, at least in part, the limited progress achieved through policies such as the land and development funds to which we referred to in Chapter II.

Finally, a mention should be made of the differences that exist in the two contexts analyzed here with regard to the patterns of land ownership prevailing in them, as well as to the implications they have had in the achievement of Indigenous territorial rights. In Canada, millions of square kilometres, representing more than eighty per cent of the country's surface, remain as Crown lands. Despite the existence of private interests on these lands, areas of Canada such as British Columbia and northern Canada, where the European presence is more recent, and where Indigenous territorial claims have been centred lately, still remain largely as Crown lands. In Chile, meanwhile, state owned lands have gradually been perpetually ceded or sold to private interests throughout the country. Consequently, most of the country's lands today are privately owned. This situation is particularly relevant in the case of the Mapuche territory where most of the fertile lands were ceded or sold to non-Indigenous people last century, and consequently, few state lands remain today.

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97 It has not been possible to obtain up to date information of the funds that are currently being allocated to CONADI for the implementation of its different programs concerning Indigenous peoples in the country. As seen in Chapter II, according to CONADI, the funds destined by this institution to the implementation of two of its main programs (land fund and development fund) corresponding to the period 1994-1997, totalled US $ 25 millions.

98 According to the RCAP Report Crown lands are state owned lands managed by provincial and territorial government agencies on behalf of the Crown (RCAP, Report vol 2, supra note 80, at 520).

99 Important resources existing within these lands, such as forests and minerals, are controlled today by private interests under long-term tenures (Ibid.). According to Douglas Sanders, mining and logging interests can even be found in isolated areas of Canada such as the Nass valley, in the Nisga'a territory. Aboriginal land claims have traditionally been seen as a threat to these private interests on those areas. Sanders exemplifies this situation in the Calder case (to which we referred to in Chapters III and IV), where the province submitted evidence of the extent of logging and mining rights that had been granted in the area, suggesting that a pro-Nisga'a ruling would threaten third party property rights. Sanders, supra note 17.

100 State owned lands are still available in the extreme north and extreme south of Chile. They are also available in Easter Island. This fact has been beneficial for Indigenous land claims in these areas. The situation of the Mapuche
The existence of an important percentage of Crown lands in Canada, notwithstanding the private interests existing on them, is a fact that has to be taken into consideration to understand the progress achieved on Indigenous land and resource rights in Canada in recent years. While in Canada the governments (provincial and territorial) have had to transfer Crown lands to Indigenous peoples in order to satisfy their claims,\textsuperscript{101} in Chile lands have been purchased by the state from their current owners in order to resolve similar claims. Government ownership of lands in Canada has made the solution of Indigenous territorial claims less costly, and therefore, more feasible than in Chile.

territory is different. On this territory, the few state owned lands remaining have been transferred to their communities in recent years (approximately 54,000 hectares of state lands between 1994 and 1997 according to official sources).

\textsuperscript{101} The economic value of Crown lands acknowledged to Indigenous peoples in modern treaties in Canada is generally assessed. As mentioned in Chapter IV, the land that will come under Nisg\'a'a ownership in accordance to the Nisg\'a'a treaty was valued in $107 million, an amount which is seen as a contribution by British Columbia. Although this value will not be paid by the BC government in the implementation of the treaty, it has to be acknowledged that third party compensation will be provided by BC and the federal government to interests in the forestry and fisheries sectors whose licenses will be acquired or modified as a result of this treaty (Grant Thornton Management Consultants, \textit{Financial and Economic Analysis of Treaty Settlements in British Columbia} (Victoria: Queen's Printer, 1999) at B-7).
CONCLUSION.

After a long period of sovereign life, the Indigenous peoples of what became Chile and Canada saw outsiders of European origin come to their traditional territories. In different degrees and through various process, the arrival of the newcomers altered their lives forever. Making use of similar doctrines, European colonizers, in particular the Spanish in Chile and the English in North America in general, appropriated a significant part of these peoples' lands and resources. The same doctrines were also used by these colonizers to dominate these peoples, generally attempting to impose on them their laws and spiritual beliefs. Exceptionally, when alliances with them proved to be convenient, or when their subjugation was not possible, these colonizers acknowledged the status of the Indigenous as sovereign peoples and entered into treaties with them. Such was the case of the French colonizers in Canada, who needed Indigenous peoples as partners in the fur trade business. It was also the case of the English, who needed the support of Native peoples in their territorial competition with the French in North America, as well as their lands for European settlement. Although to a less extent, it was also the case of the Spanish, who attempted to ensure a peaceful relationship with the Mapuche people in southern Chile in order to protect their colonial settlements and interests.

Even more harmful than dispossession and domination for these peoples were the impacts produced in the contexts analyzed here by diseases brought by Europeans or wars triggered by their presence. These impacts literally decimated Indigenous population, weakening their ability to resist the newcomers and threatening their cultural and material survival as peoples.

Independence in Chile and confederation in Canada did not alter this process significantly. During most of this period, domination of Indigenous peoples and dispossession of their lands and resources continued to take place in both contexts. Laws and policies imposing government control or tutelage over these peoples were established. Efforts to assimilate or at least to incorporate them into the dominant societies, its economic system, its culture, intensified. Encroachment upon Indigenous lands and resources for the purpose of opening space for European settlement first and for the implementation of development projects later, continued to take place until recently in both contexts. Indigenous people were confined to live in reducciones or reserves, representing a small percentage of their traditional lands. As a consequence of the laws enacted and policies implemented by both governments, many were forced to abandon their communities and settle in
urban areas. Indigenous populations, both in rural and urban areas, became one of the poorest sectors within Chilean and Canadian society. According to statistics available in the two countries, their access to health, education and housing, is more difficult for them today than for non-Indigenous people. While unemployment rate and dependency on government programs is higher among Indigenous people than among non-Indigenous, their income per capita is lower.

As it has occurred for Indigenous peoples worldwide since the coming of the colonizers to their homelands until recently, Indigenous peoples in Chile and Canada were affected by what Miguel Alfonso Martinez, United Nations Special Rapporteur for the study of treaties, has denominated a process of "retrogression" and "domestication." As a consequence of this process, these peoples were deprived of some of the "essential attributes on which their original status as sovereign nations was grounded, namely their territory, their recognized capacity to enter into international agreements, and their specific forms of government." Consequently they have been converted into dependent domesticated peoples under the control of the states where they live.

As a consequence of the ethnic and cultural revival process that these peoples have experienced in Chile and Canada in the last decades, as well as of their struggles in defence of their land rights and of their rights as distinct peoples, important reforms have been introduced in both contexts leading to the revision of state-Indigenous relationship. However, the extent to which Indigenous peoples' rights have been acknowledged to them by the Chilean and Canadian states varies considerably. In general, Indigenous peoples in Canada have achieved during the last three decades a much broader recognition of their political and territorial rights than have Indigenous peoples of Chile in the same period. Despite the progress made in Chile by the 1993 Indigenous law, the rights acknowledged to them, limited to participatory rights and to the protection of their existing lands, are far from meeting the standards which have been set by international legal instruments such as the ILO Convention No. 169 and the UN Draft Declaration. This, in contrast with Canada, where the same peoples and their Aboriginal and treaty rights have been acknowledged in the Constitution Act, 1982, and where Indigenous self-government is considered today by the federal government to be an existing right within the same Constitution. Moreover, court decisions made on Aboriginal title cases have acknowledged these peoples' rights to lands and resources denied to them until recently. Finally, policy reforms introduced in recent years by

102 Martinez, supra note 50 at 22 para. 103.
the government in accordance with this evolution, have opened the door to the negotiation of modern treaties through which Indigenous peoples of the non-treaty areas of Canada have achieved political and territorial rights similar in nature to those acknowledged by international instruments. It has to be recognized that a significant part of Indigenous population in Canada, including on and off-reserve Indians or First Nations and Metis, still have restrictions which impede them from enjoying the rights acknowledged to Indigenous peoples internationally. Many of them continue to live today in a condition of legal or material dependency on the government.

The future evolution of Indigenous peoples' rights in Chile and Canada is uncertain. What is known is that the struggles of these peoples will intensify in the coming years. Recent events occurred in both contexts showing Indigenous dissatisfaction with the existing patterns of Indigenous-state relationship justify this statement. A constructive evolution in this matter will not only depend on the ability of these peoples to organize themselves in defence of their rights, but also in the ability of governments and larger societies in both contexts to understand the need of establishing a more just and fair relationship with them based on the acceptance of Indigenous political and territorial rights internationally acknowledged today. Their reluctance to admit a new form of relationship with these peoples, based on these standards, will not only be prejudicial to Indigenous claims, but also to the future democratic development of the Chilean and Canadian states and societies as a whole.
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