

***Treaties in the House:
Canadian Electoral Reform, Indigenous Political Presence
and the Theory of Treaty Federalism***

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INTRODUCTION

A revitalized discussion of electoral reform in Canada, prompted by calls for change to the first-past-the-post system that has selected membership in our provincial and federal legislatures since Confederation, has been urged on by the 2015 federal election of Justin Trudeau and the Liberal party. In June 2015, Trudeau, as leader of the federal Liberals, committed to electoral reform, vowing that the 2015 federal election would be the last one conducted using the single member plurality system. However, talk of reform for the legislative bodies of Canada predates Trudeau's commitment as senate reform has, for much longer, been a point of contention. Both discussions of reform point to a growing problem with the legitimacy of legislative institutions in Canada. However, what remains obscured by current discussions of electoral reform is the extent to which this legitimacy is even more fragile and fragmented for certain populations than for others.

Canada's Indigenous populations have consistently participated less frequently in federal elections than non-Indigenous Canadians, with lower voter turnout documented at 63% for "Aboriginals"¹ in elections between 2004-2011, as compared with 83% for non-Aboriginals (Fournier & Loewen 2011: 7, 70). Attempts to explain this discrepancy first focused on "conventional" or "mainstream" voter turnout explanations that mirror those of the general population (for example, socio-economic factors or sense of civic duty). However, in 1996, a "nationalist" explanation was offered that suggested Aboriginal turnout is lower due to "a change in consciousness" in which Aboriginal populations increasingly see themselves as members of a distinct and separate nation rather than as "Canadian" citizens (Fournier & Loewen 2011: 16; see also Bedford & Pobihushchy 1996 and Schouls 1996). This increase in Aboriginal self-identification suggests that political legitimacy and authority can only be found among self-determining Aboriginal organizations, rather than within the confines of a (colonial-settler) state.

A second explanation noted by Fournier & Loewen (2011: 16) is the "alienation" hypothesis which explains low Aboriginal electoral participation in terms of social and political exclusion from the democratic and representative processes of Canada. Proponents of this explanation, including Cairns (2003), Ladner (2003) and Dalton (2007), suggest that there is an overall lack of trust for the institutions that are populated by electoral processes.

As the literature on the subject grows within the context of a larger Canadian debate regarding system-wide electoral reform, it is worth considering whether and how the state might use the opportunity of electoral reform to restore, build and strengthen legislative legitimacy for Indigenous communities. One way in which this task might be accomplished is to consider the import and institutionalization of legislative reform vis-a-vis Indigenous theories of political representation. Consequently, this paper will examine the significance of legislative representation through the lens of treaty federalism. Treaty federalism posits that treaties with First Nations prior to Confederation in 1867 constructed the original Canadian constitution, setting the ideal foundation for a federal relationship between the state and First Nations signatories. Consideration of electoral reform through the lens of treaty federalism therefore

¹ The term "Aboriginal" refers to the collection of Indigenous populations in Canada, including the First Nations, Inuit and Metis. Use of this term is intended to convey the inclusion of all three groups. Where specific reference is made to a particular subgroup of Indigenous peoples (e.g., First Nations), that term will be used rather than the all-encompassing "Aboriginal" or "Indigenous."

requires that we center the pre-Confederation treaties in any discussion of Indigenous/non-Indigenous relations in Canada. However, the implications of these treaties for First Nations' political presence generally, and for electoral reform in Canada more specifically, have largely gone unexplored.

In order to address this oversight, this paper will discuss First Nations' perspectives on political representation as drawn from the pre-Confederation treaties as well as compare the potential legislative institutions that have been posed from within the treaty federal model. The first section of this paper begins with an exploration of the notion of "political representation" and "political presence" by considering the conventional theories that have informed these concepts. This section will also discuss how Indigenous theories of political presence resemble and differ from these conventional theories. This theoretical framing is crucial for the second section of this paper which will consider how implementation of treaty-based notions of Indigenous political representation might restructure the state's legislative architecture, potentially crafting a decolonized representative body that increases the trust in and legitimacy of the institution for Indigenous peoples across Canada. Ultimately, this paper concludes with the suggestion that careful selection of treaty-adherent models for the guaranteed representation of First Nations within a reformed and decolonized Canadian legislature could lead to an increase in the legitimacy of these institutions for Indigenous populations, and even to a fundamental shift in the very functioning of parliamentary institutions in Canada as a whole.

"REPRESENTATION MATTERS!": INDIGENIZING THEORIES OF POLITICAL PRESENCE

Central to the question of electoral reform is the form and function of legislative representation. The Canadian House of Commons (and indeed, by extension, the Canadian Senate) is a legislative body within which citizens are represented by Members of Parliament, elected from constituencies across the country. Democratic theory suggests that "political representation" is crucial to the effective and legitimate functioning of such a representative body; however, the manner of that representation remains highly contested, rooted in a debate about the very concept of "representation" itself.

Writing in 1967, Hanna Pitkin is one of the first contemporary theorists to trace the origin and evolution of the concept of representation. She frames her project in terms that resonate today, arguing that "we are troubled by the difference between sham and real representative institutions, and by the many competing ways in which representation can be institutionalized" (Pitkin 1967: 2). Drawing on the etymology of the word "representation" itself, Pitkin defines the term as "*re-presentation*, a making present again," or "the making present *in some sense* of something which is nevertheless *not* present literally or in fact" (8-9). It is from this definition that we derive the association of "representation" with the politics of "presence." This presence, however, can take a multitude of forms: descriptive representation, symbolic representation, representing as "acting for", and the delegate/trustee dichotomy. Pitkin analyzes each of these in turn. Taken as a whole, what Pitkin suggests about *political* representation is therefore that

...representing here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his action must involve discretion and judgement; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgement, not merely being taken care of. And, despite the resulting potential for conflict between representative and

represented about what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. (Pitkin 1967: 209)

Within this definition, there remains a great deal of scope for the conceptualization and institutionalization of the actual activities of the representative. For example,

Think of the legislature as a pictorial representation or a representative sample of the nation, and you will almost inevitably concentrate on its composition rather than on its activities. Think of the same body as a symbol and you will almost inevitably be more concerned with its psychological impact on the minds of the people than with the accuracy of correspondence between it and the nation. Think of it, in turn, as an agent or collection of agents, and your interest will focus on other concerns. (Pitkin 1967: 226)

Consequently, there is a great deal of correlation when we speak of “representation” between the concept itself and its operationalization in “long-term systematic arrangements” or institutions (Pitkin 1967: 234). It is for this reason that Pitkin summarily concludes that “the conception of representation thus is a continuing tension between ideal and achievement” (1967: 240).

Democratic theorists have used Pitkin’s analysis and conclusions as a jumping-off point for further consideration of the ways in which representation might take place, particularly in an age of increased intra-state diversity. The question of “representation” is increasingly one of “group political presence” within democratic governing bodies. The work of Phillips (1995), Williams (1998), Mansbridge (1999) and Htun (2004) has revitalized the conversation around representation, incorporating the concerns of groups that have increasingly come to the political fore claiming, in their words, that “representation matters.” These groups do not neatly fit the categories that Pitkin discussed, such as “nation” or “corporation” or “interest.” Rather, the groups that increasingly seek representation are collectively associated with a given “identity” such as those provided by a religious denomination, an ethno-racial association or gender-based affiliation. Without fail, theories of political presence maintain that the mechanisms by which these groups – irrespective of the *type* of group - represent their goals and interests to the larger political body affect whether and how the groups’ interests are accounted for in the exercise of political power.

The question of *effective* representation has created a crucial divide within the democratic theory literature, bounded by two categories of representation: “descriptive” representation and “substantive” representation. “Descriptive” representatives are those individuals who “in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to [a] group” (Mansbridge 1999: 628). These representatives are, in some ways, “typical” of the group they seek to represent. The argument for descriptive representation suggests that presence of the group ensures their values and interests are accounted for in decision-making. It can also increase the legitimacy of the institution, both for the group seeking representation and even for the larger population. However, descriptive representation is often attacked for being “untenable”, “essentializing” or lacking any consideration of the fact that the individual, while being descriptively representative, may fail to effectively advance the interests of the group they purport to represent. This has

resulted in an argument for “substantive representation,” whereby the descriptive characteristics of the representative matter less than the ability of that representative to “represent the substantive interests of the represented through both deliberation and aggregation” (Mansbridge 1999: 630). This distinction has led to debate about which type of political representation is more effective for the group in question, with some scholars suggesting that there will always be some degree of “tradeoff” between descriptive and substantive representation (Mansbridge 1999; Banducci et al. 2004). However, there is a more common argument that rather than choosing between descriptive and substantive representation, they are better seen as linked: only with the descriptive presence of a group can you have its substantive representation as well. Therefore, the question shifts to one not of “which” but of “how”.

Whether and how descriptive and substantive representation are linked is the primary concern of empowerment theory. Regardless of the strict tradeoff that may exist between both types of representation, “increased minority representation might produce other effects that should be considered in any assessment of the potential tradeoffs between substantive and descriptive representation” (Banducci et al. 2004: 538). Empowerment theory suggests that the visible presence of groups who are typically or systematically excluded from the institutions of government by visible members of their own groups should increase the group’s trust in government, efficacy, group pride and overall political participation (Banducci et al. 2004: 538). In fact, proponents of this theory have empirically demonstrated that those who choose to be represented by a member of their own group are more likely to believe they have a “say” in government than those who do not (Banducci et al. 2004: 550). This suggests that descriptive representation, perhaps combined with and supported by some mechanisms for substantive representation, produces at least some desirable effects from the perspective of democratic legitimacy. Thus, we have both a normative imperative and an instrumental incentive to consider how First Nations might best institutionalize mechanisms for their (descriptive) political representation and participation at the legislative level.

However, few theories of political representation apply the distinctive aims and interests of Indigenous peoples in colonial or settler-state contexts. For example, the literature on political representation highlighted above frequently differentiates gender-based groups from ethno-national groups, suggesting that each is categorically different in their political aims and therefore gravitate toward different models for the entrenchment of their representation in legislatures (see, in particular, Mansbridge 1999, Htun 2004 and Bird 2014). By contrast, the literature related to whether and how Indigenous groups might differ from other ethno-national groups, particularly when operating within a colonial or settler-state context, has largely gone unincorporated into democratic theories of representation and has, to date, not constituted a significant area of focus for understanding the politics of presence for Indigenous peoples in legislative bodies.

A variety of approaches might be taken to “Indigenize” the literature on political presence. Indigenous theorists could engage this body of work directly and supplement understandings of the concept of “representation” with those that have informed Indigenous political structures for centuries – and continue to do so. Another option is to consider the concept of representation through the lens of existing theories, just as Pitkin did in the work that set the stage for our now-conventional understanding of political representation. One theory

that allows us to do this in such a way as to contribute to the Indigenization of the theory of political presence is that of treaty federalism.

“Treaty federalism” takes the treaties negotiated and signed between First Nations and the British Crown prior to Confederation to be the foundation of a nation-to-nation relationship. Importantly, “treaties were not only negotiated on a nation-to-nation basis, but they entailed mutual recognition of nationhood and affirmations of commitment to a continuous nation-to-nation relationship” (Ladner 2003: 171). Therefore, treaty federalists argue that the original federation of the territory now called Canada was negotiated and ratified between First Nations and the Crown well before 1867 (Henderson 1994: 250). Fundamentally, the negotiations that took place and the relationship that was crafted between First Nations and the British sovereign recognized the comprehensive and supreme authority of “Indian” peoples as “foreign jurisdictions” within their own territory and over their own peoples (Henderson 1994: 257). Treaties entrenched this “dual” sovereignty within the imperial constitutional order of Britain (later Canada), thereby affirming and recognizing the mutual rights of self-determination and self-government for each people (Henderson 1994: 251, 252).

While some work has been done to examine the representative institutions that might derive from particular treaties in Canada, this work has, to date, focused on post-Confederation (particularly, the numbered) treaties (see, for example, Ladner 1997). However, the very conceptualization of representation from an Indigenous perspective dating to the early colonial era has largely gone unexplored. This paper will consider two pre-Confederation treaties with regard to their conceptualization of Indigenous political representation: the 1725 Treaty of Peace and Friendship; and, the 1764 Treaty of Niagara. The 1725 Treaty is one of the first treaties entered into between an Indigenous population and the British colonial authorities anywhere in the territory now considered Canada. It is thus a cornerstone to the treaty relations that followed after, despite its confinement to the several “tribes” listed on the eastern Atlantic coast. The Treaty of Niagara which followed forty years later involving First Nations from the Canadian interior has become the fulcrum around which most of the pre-Confederation treaty literature revolves due to its significance in ratifying the Royal Proclamation of 1763, which affirmed the sovereignty of the territory’s Indigenous peoples.

It is important to note that the collection of pre-Confederation treaties as a whole traces the evolution of the notion of “representation” in Indigenous politics. Early treaties make little use of the term “representative” whereas later treaties, such as that of the 1760 Peace and Friendship Treaty, begin using the term “representative” to define who has the right to negotiate the treaties on behalf of the First Nations “tribes” involved. This speaks to an awareness on the part of both sides that not every individual had the authority or legitimacy to negotiate a treaty between the two nations. In this way, both the Indigenous and British nations share an understanding regarding “representation” that acknowledges limits on who and what an authoritative representative is. The fact that these early pre-Confederation treaties are considered legitimate today further confirms this view as the First Nations parties continue to uphold the stipulations of these agreements, inherently recognizing the legitimacy of the representatives who negotiated the agreements over 200 years ago. By contrast, the crisis of “legitimate representation” now rests on the side of the Canadian state as the extent to which the state must adhere to treaties made by the colonial British authorities is continually debated.

The notion of the “representative” as an individual or agent acting on behalf of their community or nation is one way in which we can understand the Indigenous idea of “representation” as overlapping with conventional approaches to political representation. The roles of these treaty-negotiating individuals rest, as noted by Pitkin, on the extent to which the representative acts “in the interest of the represented.” A close examination of the early treaties such as that of 1725 suggests an overlap with the conventional theories of political presence, which note the dichotomy of an “independence/mandate” divide in which representatives function either as trustees or as delegates, respectively. In the case of the 1725 Treaty, the document speaks only in terms of “delegates” of the “Indian tribes”:

“We the said Delegates for and in behalf of the several Tribes aforesaid Do Promise and Engage that at all times forever from and after the date of these presents...”

“We also the said Delegates in behalf of the Tribes of Indians Inhabiting within the French Territory who have assisted us in this War, for whom we are Impowered to Act in this present Treaty....”

Later ratification of the 1725 Treaty also noted that the “Articles of Peace and Agreement made and concluded upon” were done so “by our Delegates & Representatives,” listing the names of those who “Sign’d Seal’d & Exchanged... in behalf of us, the Said Indians of Penobscot, Norridgewolk, St. Johns, Cape Sable, and the Other Indian Tribes belonging to & inhabiting within these His Majesty of Great Britains Territories Nova Scotia & New England.” Combined, these clauses (and numerous others that reference the role of the “delegate” as synonymous with the “representative”) speak to the conceptualization of political representation entrenched by Indigenous populations in the treaties themselves. As delegates, these individuals worked “on behalf of” their communities and had the power to enter into binding agreements. Some of these delegates are chiefs, other are “representatives” of the community. Both however are referred to as “delegates.” Within the context of the Burkean trustee/delegate dichotomy, a delegate has significantly less autonomy than a trustee; delegates are instead expected to operate in accordance with the mandate afforded them by their constituents. This suggests to us that the negotiated treaties were ratified by a mandate from, not the individual representative himself, but the community as a whole. This interpretation likely explains why the pre-Confederation treaties continue to be perceived by First Nations as legitimate foundations for political relations between the nations and the Crown today. The power of the treaty federal idea is therefore linked to the sense of legitimacy inherent in treaties themselves as negotiated and ratified in this “delegatory” fashion.

While the Treaty of 1725 sheds some light on the role of individual representatives acting on behalf of Indigenous communities, we can look to the Treaty of Niagara in 1764 for information regarding what “representation” looks like on a macro-scale, such as between nations and not merely individuals. While we have a written record of the Royal Proclamation of 1763, the ratification by treaty of this royal edict took place not in written form, but in the form of wampum and gift-giving over the course of several summer months in the Niagara region in 1764. Indeed, for First Nations, “the Royal Proclamation was fully rejected by the Western Nations as a stand-alone document,” instead requiring the Treaty of Niagara for its full ratification and implementation (Tidridge 2015: 53). This is because the Proclamation “needed to be made

explicit using Indigenous frameworks and perspectives” (Tidridge 2015: 55). The Treaty, instead of relying on the written word, used “Indigenous diplomacy and traditions, including the exchange of wampum” to ratify the Royal Proclamation (Tidridge 2015: 59). The most significant wampum exchanged at this time was the Covenant Chain of Friendship, an ancient chain that was extended across the 24 nations in attendance. The significance of this Chain cannot be understated:

Likely woven by Indigenous women during the summer meetings, the chain evoked by this belt was one of silver, meaning that it required constant polishing in order to stay bright (reminding the various nations, including the British, that the relationship established at Niagara needed to be regularly communicated and renewed. (Tidridge 2015: 61).

Built into the Covenant Chain “was a complex relationship that provided a forum to resolve disputes and make formal grievances, [extending] beyond the Haudenosaunee and Western Nations” (Tidridge 2015: 65). Like the Peace and Friendship Treaties of the Atlantic coast, the Covenant Chain established systems of conflict resolution based on mutual respect and familial love.

What this reading of the 1764 Treaty and Covenant Chain suggests is that an ongoing relationship is required between the party nations, and that the “constant polishing” speaks to the need for institutions within which these nations represent themselves to one another. Echoing Pitkin’s analysis of symbolic representation, the wampum belt depicts pictorially this ongoing relationship at the same time as points ideationally to the need for an institution within which substantive representation actually takes place. What we learn from this reading of the Treaty of Niagara is that Indigenous political representation contains both symbolic gestures (such as the exchange of wampum) as well as substantive mechanisms by which relationships are maintained and re-forged in perpetuity. Only institutions that serve both of these purposes are likely to be amenable to Indigenous theories of political presence.

It is worth remarking on the significant constraints inherent in this textual analysis of the treaties as it applies to understanding Indigenous conceptualizations of political representation. Primarily, the treaties are written in English and therefore, arguably, offer a “one-sided” perspective on the realities of political representation in Indigenous communities at the time. The treaties were inevitably drawn up by English-speaking authors and any hermeneutical investigation into the concepts embedded within the treaties must be sensitive to the fact that concepts are not always easily translatable across languages. Thus, the use of the term “delegate” or “representative” operates within the confines of the English language and may have distinctive differences when translated into an Indigenous language using a comparable, though not necessarily synonymous, term. Indeed, the Indigenous term used to describe the individual who undertook the negotiation and ratification of these pre-Confederation treaties may entail wholly different responsibilities and roles that are not adequately captured by the term “delegate.” This is a significant constraint on the analysis provided here, one which can only be fully understood by supplementing this textual analysis of the treaties with a thorough investigation into the languages, histories and political structures of the specific Indigenous nations party to a given treaty. Nevertheless, the treaties do constitute one source, among others, of information regarding Indigenous conceptualizations of political representation and suggest at least some

ways in which Indigenous communities in the colonial era conceived of their “presence” in the “multi-national” political realm that was emerging. Furthermore, we can still interpret treaties according to the idea that “to arrive at a common intention of the terms of a treaty that reconciles the interests of both parties, a valid treaty must be the product of a meeting of the minds to a sufficient degree that the parties have a shared understanding of the agreement reached” (Asch 2014: 83). Consequently, the information derived from a textual analysis of the treaties can help us understand the kind of representative roles and institutions that might align with the distinctive conceptualizations embedded within and advanced by Indigenous parties to early treaties.

“TREATIES IN THE HOUSE”: TREATY FEDERALISM & LEGISLATIVE REPRESENTATION

As noted above, some work has been done to consider the various representative institutions that might derive from specific treaties between First Nations and the colonial state. The work of Ladner, for example, suggests that the “peace and good order clause” of treaty seven requires that adherents “would coexist peacefully as sovereign entities with their own independent spheres of jurisdiction, assisting the others in maintaining peace and good order when required and permitted by their own traditions” (1997: 92). Ladner furthers her reading of the mutuality clause, arguing that while there is no mention of a specific mechanism by which guaranteed representation might occur, the responsibility of all treaty signatories to maintain peace and good order requires shared jurisdiction, and a mechanism by which that shared jurisdiction is managed. Today, the responsibility to maintain peace and good order is carried out by federal and provincial governments, which implicitly exclude First Nations governments. To bring contemporary institutions in line with the promises of the treaties requires two measures: first, that First Nations maintain their sovereignty; and second, that “chiefs and minor chiefs will share the responsibility to maintain peace and order” (Ladner 1997: 97).

While Ladner’s article centers on the reserved seat model as a viable option, her argument is not constrained to a particular mechanism for parliamentary representation. Rather, she suggests that the mechanism must simply be acceptable to both parties to the treaties and an effective means by which responsibility for “peace and good order” might be shared:

This could also be achieved through the creation of a separate but parallel parliament or even the recreation of the Senate, turning it from an appointed body from the dominant culture to a council of the signatories of the Numbered Treaties or possibly all Aboriginal peoples. (Ladner 1997: 98)

Most importantly, Ladner is clear on the desirability of parliamentary representation: as the true governing body of today is the federal government, or even, in some cases, the provincial government, pursuit of representation at this level is crucial to achieving treaty compliance in the realm of shared-rule. Furthermore, it is possible to participate in the shared structures of governance on a nation-to-nation basis, as sovereign entities have done at the international level without forfeiting any right of self-determination or of sovereign status (Ladner 1997: 98). What is required then is an institution for the entrenchment of Indigenous representation at the federal level that respects the legacy of the treaties, the foundations of the federal ideal, and the unique political needs and perspectives of Indigenous peoples in Canada.

A number of models have been attempted in jurisdictions outside of Canada, including the “parallel parliament” and “reserved seat” models. Other models have been proposed from within the treaty federal framework, including the development of a “third legislative chamber”, the “treaty delegate” model and the establishment of a “treaty council”. What each of these three models share is their organization under a larger “third order” model of federal government, which would recognize Indigenous nations as distinct and equal with the two existing orders of federal government in Canada (the pan-Canadian federal order and the provincial order). Each of these models will be briefly explored in order to suggest ways in which “representation” might occur that acknowledges and furthers the Indigenization of political presence in Canada.

Indigenous Representation as Parallel Parliament: the Sami in Norway

The 1970s saw the rise in Sami nationalism, primarily taking the form of culture and language rights. The rallying point for the Norwegian Sami revolved around the Alta Affair (1978-1982) in which the Norwegian government proposed the construction of a hydro-electric dam that would have inundated and displaced a Sami village, as well as disrupted reindeer migration and wild salmon fishing (Semb 2005: 533). The dam eventually proceeded following riots and a supreme court ruling, but many suggest that while the Sami may have lost this particular battle, the national and international attention they received as a result has solidified a long-term political agenda of Sami rights recognition.

To that end, in 1981, a Sami rights commission was appointed. The most notable outcomes of the commission’s work include the Sami Act establishing a Sami parliament (1987), a constitutional amendment recognizing Sami language and culture rights (1988) and the first election to the Sami parliament in 1989 (Broderstad 2011: 899; Moyers 2005: 372; Semb 2005: 534). The *Samediggi* (Sami Parliament) is governed by the Sami Act, which stated that “the Sami people shall have its own national Sami assembly, elected by and among the Sami people” (Moyers 2005: 372). The *Samediggi* consists of 39 representatives divided among thirteen constituencies (each electing three representatives). The responsibilities of the Parliament include upholding the provisions of the Norwegian *Constitution* that relate to Sami culture, as well as policing Sami language legislation that allows for and encourages Sami linguistic protection and development. The body also reports annually to the Norwegian Parliament on Sami issues, and in response, every four years, the Norwegian Parliament prepares a report outlining the current state of Sami rights in the country as well as future ambitions to bring the country closer to its constitutional goals with regard to Sami cultural and linguistic preservation (Moyers 2005: 372-373).

Overall, the power of the Sami Parliament remains primarily advisory, although it does have the capacity to take initiatives (Semb 2005: 535). As a result, over the last two decades, the *Samediggi* has transformed into an institution with a real “say” in the governing of Norway; “consultations have replaced hearings as a contact mechanism between the Parliament and the Norwegian state authorities,” and Broderstad finds three trajectories marking its increased authority (2011: 901-902). First, in spite of Norway’s unitary governing structure, the *Samediggi* has been delegated various management tasks historically under the purview of the Norwegian legislature. Second, it has significantly increased its competence and influence as noted by the 2005 agreement stipulating the manner of consultation, with the aim of reaching consensus,

between the Sami and Norwegian Parliaments. Finally, the Parliament has also increased its influence by way of the Sami rights commission which has strengthened the political position of the Sami in relation to public investigations, particularly those pertaining to land rights and resource management (Broderstad 2011: 902-903).

The most recent solidification of the *Samediggi's* political power has been in achieving the Finnmark Act (2005). The long-awaited outcome of processes initiated during the Alta Affair, the Act transfers nearly 95% of the area of Finnmark County to its inhabitants, of whom about a quarter are Sami, to be managed by the Finnmark Estate Agency. The Agency is comprised of six members, including three nominated by the Sami Parliament.

Despite such significant progress, the legitimacy of the Sami parliament remains hotly contested within the Sami population; in 1987, the largest Sami organization in Norway, the Norwegian Sami Union, strongly opposed the creation of the parliament as they argued that it would foster tensions between registered (and thus eligible to vote) Sami and non-registered (ineligible to vote) Sami. They further argued that it could increase tensions with ethnic Norwegians and other early settler groups in the country, such as hereditary Finnish communities (Semb 2005: 534). On the opposite end of the spectrum is the protestation that the only legitimate self-governing institution of the Sami must encompass their entire traditional territory of Sápmi. This territory, spanning Norway, Sweden, Finland and Russia, currently has three distinct Sami parliaments in these countries (excluding Russia); the claim of some Sami nationalists is that true self-government would embody a single Sami parliament unconstrained by settler state boundaries (Semb 2005: 538). A third group suggests that delegated authority from the Norwegian Parliament misses the point of self-determination, arguing that the Sami should demand the recognition and institutionalization of power-sharing mechanisms in the form of “co-determination” (Semb 2005: 541). It is this third point that likely presents the greatest challenge in the Canadian context of Indigenous representation given the interpretation of treaties as embedding Indigenous sovereignty in the pre-Confederation era.

Indigenous Representation as Reserved Seats: The Maori in New Zealand

New Zealand takes as its founding document the Treaty of Waitangi, signed between the British and Northern Maori chiefs in 1840. Underpinning the Treaty was the belief that the Maori would eventually assimilate into British society. In the meantime, the Treaty would “protect all the Maori people of New Zealand, and give them all the same rights as those of the people of England” (Fleras 1985: 554). As a result, the *Constitution Act* (1852) provided all Maori adult males with the right to vote upon fulfilment of a marginal property requirement; the majority of Maori rejected this offer to vote on the common roll (Fleras 1958: 554-555). Subsequent exclusion from parliamentary decision-making led to the outbreak of violence between the Maori and white New Zealanders in the Land Wars of the 1860s. It became increasingly obvious that some form of power-sharing would be necessary to stabilize political relations between the two nations (Fleras 1985: 555).

The Representation Act (1867) created a dual system of representation intended to pacify Maori resistance to colonial settlement and to incorporate Maori political concerns into the dominant political body (Fleras 1985: 555; Bird 2014: 22). New Zealand was divided into four Maori constituencies, superimposed over the existing electoral districts such that the Maori could elect one representative from each constituency to the House of Representatives. Unsurprisingly,

four seats were not a significant guarantee of Maori representation, and Maori representatives were not typically viewed in a favourable light by their non-Indigenous counterparts. As a result, the Maori were increasingly frustrated by the lack of proportionality. Instead of the twenty seats they were likely entitled to under the districting system of the non-Maori, they were guaranteed only four - an effective check on their political power and a guarantee of European dominance rather than Maori representation (Fleras 1985: 557).

Frustrated over the limited power that reserved seats allowed Maori in representing their political interests, they established a separate parliament between 1892-1902. Unfortunately, the *Kotahitanga* (literally "Unity") did not last long and did little to mitigate Maori impotence over issues related to their land and identity (Fleras 1985: 560). Finally, in the late 1920s, Maori representatives united under the banner of a single political movement entitled *Ratana*. By 1943, all four Maori seats were held by *Ratana* independents and it was the first time a united, primarily Maori political party had evolved out of the system of guaranteed representation. An alliance with the mainstream Labour Party strengthened by the 1950s and lasted nearly without interruption until the 1990s.

Changes to New Zealand's electoral system in 1993 heralded changes to the Maori system as well (Bird 2014: 23). The number of seats now floats in accordance with the number of Maori who enrol on the Maori, rather than the general, electoral roll. The 2008, 2011 and 2014 elections saw the creation of seven Maori constituencies in accordance with this rule. Furthermore, the system's restructuring facilitated the recently-formed Maori Party to win four of the seven Maori seats in 2005, displacing Labour-affiliated dominance of the special Maori districts and allowing Maori representatives to resist the pressures to ally with the larger parties (Bird 2014: 23). Furthermore, in 2011, the National Party was only able to form a minority parliament after striking an agreement with the Maori Party that stipulated portfolio assignments to two Maori Party representatives and outlined key policy objectives for Maori interests under the new government (Bird 2014: 23).

Contemporary responses to this model of reserved seats for Maori representatives range from acceptance, to rejection, to proposed reformation. Some scholars argue that the current system absolves non-Maori politicians from "taking an interest in Maori issues, since Maori voters are discounted as immaterial for re-election in general ridings;" these scholars suggest that the reserved seats should be abolished so that politicians will be forced to "chase the Maori vote" (Fleras 1985: 566). Another scholar, Ranginui Walker, argues that Maori seats constitute a "political cul-de-sac," an entrenched ineffectiveness due to the principle of majority rule. "Taken to the extreme, the principle of majority rule is discriminatory in a racially mixed democracy, since the minority group is permanently outvoted and forever excluded from exercising power in the House" (Fleras 1985: 567). In line with the majority Maori opinion, Walker advocates reform of the reserved seat system whereby Maori seats are increased in proportion to the representational basis of general ridings. Such critiques would likely be enhanced in Canada by the claim that reserved seats simply further entrench and legitimize a pre-existing colonial order. As reserved seats are embedded within an existing (colonial) parliamentary body, it has been shown that Indigenous peoples often do not see in this institution the kind of affirmation for the nation-to-nation relationship that they seek.

Political institutions, such as parliaments, tend to perpetuate the dominant culture through the maintenance of norms and practices that are seen as universal, thereby erasing their

cultural underpinnings.... By not challenging the representational norms of [colonial] parliaments Indigenous parliamentarians may risk further entrenching the mainstream cultural dominance that has excluded Indigenous people for so long. (Maddison 2010: 675)

Reserved seats, used in New Zealand and also in Australia, have therefore been shown to frequently entrench majority domination of the political process while *appearing* to bring about (though not *actualizing*) substantive Aboriginal influence and policy change.

Indigenous Representation as Third Federal Order: First Nations Treaties in Canada

Treaty federalism scholars have also advocated several “homegrown” approaches to political representation rooted in treaty recognition and empowerment. Almost all of these suggestions fit with what might be termed a “third order” of government approach. Such a model has been suggested by non-Indigenous and Indigenous scholars alike. Its earliest operationalization may date to Courchene and Powell’s proposal of a “First Nations province” in which “provincial powers, institutions, intergovernmental relations and fiscal relations [are applied] to the collective population and land base of aboriginals in Canada” (Courchene & Powell 1992: forward). More recently, a third order government contained within the larger Canadian federal architecture has been noted as one of four “pathways” to self-government for Indigenous peoples in Canada by Abele and Prince (2006). Their suggestion of a “trilateral federalism” echoes the increasing levels of participation by Indigenous political organizations and representatives in political decision-making at the provincial and federal levels and increasing demands to have a consistent “seat at the table” in federal-provincial policy-making.

The “full participation” of Indigenous governments in the federal order has not only been envisioned by scholars and Indigenous political leadership, but has also been suggested by the Canadian government itself. The Penner Report of the early 1980’s was the first federal-level recommendation that “First Nations governments be recognized with jurisdictional powers appropriate to a distinct order of government within the Canadian federation” (Abele & Prince 2006: 576). Indeed, the Report notes that First Nations governments likely have “implicit legislative powers that are now unrecognized” and “an inherent right to self-government” deriving from the Royal Proclamation of 1763, and guaranteed by section 35 of the Canadian Constitution, 1982 (Abele & Prince 2006: 576). Section 35 affirms “existing aboriginal and treaty rights,” ensuring that any powers written into pre-Confederation and historical treaties is constitutionally guaranteed, a stance that aligns with the basic precepts of the theory of treaty federalism.

The specific form that this third federal order may take has, however, been largely unexplored. While it is widely acknowledged that the establishment of a third order would grant an extensive set of political and constitutional powers, including legislative, policy-making and administrative jurisdictions, it is unclear the particular form that this third order government would take. Certain powers currently held by the provinces and the federal government would certainly be transferred to this third order, and agreements established to govern areas of overlapping concern (e.g., land and resource management); but would the third order resemble a province or something else entirely? In order to adhere to Indigenous conceptions of representation, it is likely that this third order of government would need to take a distinctively

“Indigenous” form – although that too has yet to be defined by Indigenous political scholarship and leadership.

Furthermore, the way in which this third federal order represents itself to the larger Canadian federal state would need to be informed by Indigenous conceptualizations of “representation.” For example, while Canada’s ten provinces are currently guaranteed representation in the federal legislative architecture by way of the senate which allots a certain number of seats of each province or regional collection of provinces, it is not necessarily the case that an Indigenous third order would mirror this model of federal representation. As noted in the textual analysis of the Treaty of Niagara above, Indigenous notions of representation encompass both symbolic and substantive components. In addition, the representatives themselves are considered to be delegates rather than trustees. These three facets of representation must be incorporated into any institution that establishes a legislative body for the third federal order.

To that end, James Sakej Henderson, one of the main authors of and proponents for treaty federalism has suggested several different institutions that might encompass these facets of Indigenous political representation within treaty-respecting legislative bodies. Among his recommendations are a “House of First Peoples,” functioning as a third chamber of Parliament (i.e., in addition to the House of Commons and the Senate), guaranteed representation for treaty delegates in existing legislative bodies (echoing the kind of reserved seat system that we find in New Zealand and Maine), and a Queen’s Treaty Council with the authority to implement treaties in a meaningful fashion and monitor progress on this implementation. To date, none of the three of these ideas has been fully hashed out by treaty federalism scholars and there is no indication in the literature of a popular or scholastic consensus on which institution, if any, might be viable as a third order legislative body. However, what these suggestions demonstrate is a commitment to expressing the particular principles of political representation rooted in the pre-Confederation treaties in a larger legislative body that operates on par with Canada’s existing federal legislative architecture.

CONCLUSION

A systematic analysis of whether and how the “homegrown” models stack up against the “international” models also discussed above has not been undertaken within the context of the theory of treaty federalism. This is not particularly surprising given that the two international models are currently operational, but in very different political contexts than Canada (i.e., Norway which is a unitary rather than federal state and New Zealand which has one predominant Indigenous group rather than dozens). Furthermore, the “homegrown” propositions remain largely that: hypothetical suggestions which have yet to be enacted. Consequently, it is difficult to measure these ideas and institutions against one another. However, this difficulty speaks to the necessity of more fully developing an understanding of Indigenous theories of political presence. It is crucial that scholars seeking to institutionalize treaty-based models of legislative inclusion first begin with the root concepts of “political presence” and “political representation” as embedded within Indigenous worldviews.

This paper has demonstrated one way in which to better understand what those concepts entail, and one pathway to Indigenizing both the theories and institutions of political presence in the Canadian context. However, a multitude of approaches is required if we are to ensure the

legitimacy of these institutions for the Indigenous peoples they seek to represent. The increased legitimacy of Canada's legislative bodies for Indigenous peoples is crucial if we hope to see an increase in voter turnout among these populations. Consequently, any discussion of electoral reform is remiss if it does not consider the ways in which marginalized groups such as Indigenous peoples might benefit from reform proposals as well. And, interestingly enough, there is good reason to believe that the incorporation of Indigenous conceptualizations of political representation will be good for the democratic legitimacy of not only Indigenous representative institutions but for mainstream institutions also: Alcantara and Whitfield (2010), in their examination of fourteen Aboriginal constitutions crafted vis-à-vis the contemporary comprehensive land claims process, have assessed the particular representative structures that these documents entrench. They note the heightened attention to mechanisms such as supermajorities and general assemblies, elements of direct democratic processes, and suggest that the "emphasis on consensus-making from the whole community and not just the elected representatives can be meaningfully interpreted as an Aboriginal approach to governance, compared to traditional Western-style executive branches" (Alcantara & Whitfield 2010: 133). To that end, an Indigenized discussion about electoral reform could bring about a set of institutions that not only increases the legitimacy of and trust in representative bodies at the federal level for Indigenous populations but could also dramatically shift the way that democratic processes play out for non-Indigenous legislative bodies also.

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