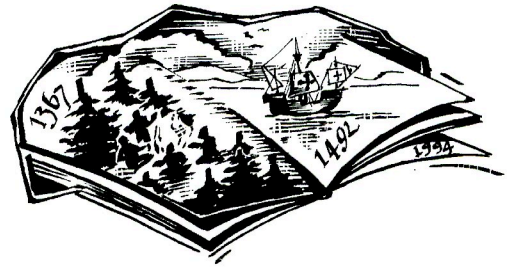
HUMAN RIGHTS IN THE COLONIAL AMERICAS



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That Canada's First Nations were living in structured societies when Europeans first arrived is generally, but not universally, conceded today. There are still those who accept the sixteenth century notion that before contact, aboriginal peoples lived according to nature, "like beasts in the woods". Witness Chief Justice Allan McEachern's rejection in 1991 of the Gitksan and Wet'suwet'en claim to over 54,000 square kilometres of land in northern British Columbia on the grounds that traditionally they had not had an organized society, and so could not claim rights of sovereignty or property.

Although Canadian courts have still to recognize the fact, it is being realized more clearly all the time that even mobile hunters and gatherers, whose groupings were small and necessarily fluid as they followed seasonal food cycles, lived within webs of ordered relationships that regulated their lifestyles, and made survival possible under what were often extremely demanding conditions. In other words, they were self-governing communities, the heirs of co-ordinated social patterns that had evolved over thousands of years.

This, however, was not the perception of sixteenth and seventeenth century Europeans; these perceptions not only dictated policies at the time but have continued to do so today, as the McEachern decision makes all too clear. Confronted with societies so different from their own that they could discern no points for comparison, the early European explorers concluded that First Nations had no social structure at all, but were ranging the land "without King, Law or Faith", in the words of the sixteenth-century catch-phrase. Even semi-sedentary farming villages were included in this judgment.

The political implications were profound: the First Nations were deemed to have no more claim to the land, or even to human rights, than deer or bears. In the European thinking of the day, humans could achieve their full potentialities only in and through a politically organized state. The importance of these perceptions lies in the fact that not only did they influence policies which in turn fuelled the colonial movement, but they are still powerful in today's post-colonial era. In Canada, the French regime never recognized aboriginal rights, a situation that carried over and culminated in the "Indian Summer" of 1990 at Oka. The basic issue of that crisis remains unresolved, with the Mohawk claiming possession of the land because of residence since time immemorial, a claim which Quebec, following French colonial practice, has not recognized.

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What this points to is the importance of first impressions, and how their influence can be carried down through the years. What had struck Europeans most forcefully on first meeting Amerindians was their disregard for clothing, and the practice by some groups of human sacrifice. These factors would dominate — one could say, dictate — the European assessment of Amerindians for centuries to come.

As the Europeans saw it, the adoption of clothing heralded the development of law, authority, and power: the lavishly dressed prince epitomized civility, the naked Amerindian, the state of nature. Although Europeans accepted nudity under certain circumstances (in the public baths, for instance, and in

representations of classic gods and goddesses), they equated going naked all the time with lack of social order and lack of development as human beings.

Since Amerindians had no shame of their bodies, they had obviously not shared in the experience of the Garden of Eden, and so could not be fully fledged humans. It was widely believed that a sense of shame distinguished humans from animals. Even such a tolerant observer as the essayist Michel de Montaigne, who lived in the middle of the sixteenth century, accepted that Amerindians were still in their cultural ABCs.

These assessments were reinforced by reports of cannibalism; although such practises were not found among all New World peoples, the fact that they were reported at all was enough for Amerindians in general to be categorized as not having the use of reason.

Thus, when France decided to establish a colony on the St. Lawrence in 1541, it was easy for her to class the region as terra nullius, uninhabited land, based on the argument that the mobile lifestyle of the original peoples, "ranging the land without settled abode", meant that they were not inhabitants according to European law. Another version was that of vacuum domicilium, "no domicile". According to these concepts, proprietary rights could only exist within the framework of statutory law enacted by a state; the lands of non-state peoples were thus legally vacant. Legal ingenuity did not stop there; it was soon decided that non-agricultural peoples did not have a valid claim to the land, as God intended it to be farmed. That notion received its classic formulation from Emer de Vattel in *Le Droit des Gens*, published in 1758. There was also the fact that Europeans believed that Christian rights prevailed over those of non-Christians, so it was not necessary — although wise if there was danger of confrontation — to obtain Amerindian permission to settle on their lands. By such arguments the colonizing powers circumvented European law, which held that rights of discovery could only be invoked in the case of unoccupied territory. It has been estimated that at the time of Europe's "discovery" of the Americas, the two continents together had a substantially higher population than Europe.

By redefining habitation, and invoking the Christian duty to evangelize, Europeans once again circumvented their own laws. The standard authority was the codification based on Roman law during the reign of Justinian I from 483 to 565. Since Roman times, jurists had considered continuous use and possession of land "from time immemorial" as a basis for title to be a self-evident rule of natural law; in Justinian's code the principle is enunciated in the section called Institutes. It does not qualify this by specifying a lifestyle or type of social organization. This principle was carried on under feudalism and common law. But old principles proved to be weak defences when faced with the temptations of New World resources and lands. The few who stood up for Amerindian rights were swept aside as the law was reinterpreted to accommodate the politics of European expansion. However, the old laws are still on the book, and are being given new attention as colonialism fades in a new era of self-determination.

Olive Patricia Dickason, now Professor Emeritus at the University of Alberta, has published widely in the area of native Canadian history. Among her books are The Law of Nations and the New World *(with Leslie Green), and* Canada's First Nations: A History of Founding Peoples.