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Sovereign authority and the limits of constitutional democracy: The case of indigenous peoples in Canada

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Abstract

The victory of Justin Trudeau's Liberals in the Canadian federal election of 2015 brought with it hopes for meaningful change in the relationship between indigenous peoples and settler-Canadian society, with "reconciliation" a prominent feature of the new government's discourse. But long on symbolism, the new government's efforts have been markedly short on substance, and all good intentions seem unlikely to dislodge the more stubborn problems underpinning the relationship between indigenous peoples and the settler state that claims sovereignty over their lives. While many of the obstacles to be confronted involve familiar problems confronting institutional reform, deeper, more substantive barriers lie in the character of modern nation-formation and state sovereignty, and in contradictions that lie at the very heart of liberal constitutional democracies.

Key words

Indigenous peoples; liberalism; Canada; constitutional democracy; sovereignty; popular sovereignty; sovereign violence

Resumen

La victoria del partido liberal de Justin Trudeau en las elecciones de Canadá de 2015 trajo consigo esperanzas de un cambio significativo en la relación entre los pueblos

This paper stems from a workshop at the International Institute for the Sociology of Law in Oñati, Gipuzkoa, Spain in July 2017. I would like to express my deep thanks to the workshop coordinators Miren Manias-Muñoz and Lucero Ibarra for the invitation to join the workshop, and for their helpful comments and suggestions. Thanks too to all the participants in the workshop, most especially John Brigham and Susan Ball. Special thanks to all the exceptional staff at the IISL who make these workshops possible – one could not find a more welcoming and stimulating place in which to engage in intellectual discussion. Finally I would extend my gratitude to multiple reviewers of the text who made enormously helpful suggestions. Any residual inadequacies rest squarely on my shoulders.
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indígenas y la sociedad canadiense–colona, con la "reconciliación" como tema destacado del discurso del nuevo gobierno. Pero, si bien sobrado de simbolismo, los esfuerzos del nuevo gobierno se han quedado cortos en sustancia; es poco probable que las buenas intenciones desalojen los problemas que subyacen a la relación entre los indígenas y el estado colono que reivindica la soberanía sobre sus vidas. Aunque muchos de los obstáculos se refieren a problemas familiares frente a reformas institucionales, hay barreras más sustanciales relativas al carácter de la formación de la nación moderna y a la soberanía estatal, y a las contradicciones inherentes a las democracias constitucionales liberales.

Palabras clave

Pueblos indígenas; liberalismo; Canadá; democracia constitucional; soberanía; soberanía popular; violencia soberana

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1. Introduction

For more than a quarter-century now the deep-seated economic, social and political marginalization of the indigenous peoples who live within Canada's borders has been a prominent feature of Canadian political discourse. Driving this discursive turn has been the steady persistence of Canada's First Nations as they've struggled for more meaningful voice in the socio-cultural and political life of the broader Canadian national project. Amid wider discussions surrounding recognition and accommodation of multicultural diversity, reconciliation between settler society and indigenous peoples aimed at ameliorating the legacies of colonialism has received a great deal of lip-service from state actors. Meaningful progress has, however, remained elusive, and the weight of Canada's colonial past continues to affect the daily lives of indigenous peoples and undermine their socioeconomic prospects in a country that consistently ranks as one of the most prosperous in the world.

The history of the Canadian state, its origins in the colonial encounter between indigenous peoples and Europeans, and the gradual dispossession of the former by the latter, is one that parallels the broader development of the doctrine of sovereignty. From its outset, sovereignty was a doctrine that sought to enframe the possible territorial and institutional parameters of political life and in so doing constitute the very community that mythically contracted it for protection. Most particularly it asserted the legitimacy of the exercise of political violence in defense of the commonweal. As in other iterations of European colonialism, Canadian sovereignty was built upon the presupposition that indigenous populations, for whatever variety of reasons, were simply incapable of exercising any political authority that might exist prior to or compete with sovereignty's claims to absolute, *legitimate* authority. Absent recognizable contestants, sovereignty armoured the effort to unify territory and people, and the imagination of sovereign space would permit of only one ultimate authority.

It is not at all clear, however, that a conceptual innovation that was ushered in as a normative response to the chaos of sixteenth and seventeenth century Europe is adequate to the democratic pretensions of a twenty-first century Canada. Sovereignty's earlier absolutist conceits were supposedly swept aside with the dawn of liberalism and its revolutionary repatriation of sovereign authority to "the people". But the idea of popular sovereignty has always been a bit of ruse: sovereignty, whatever its pretensions, is always, in the end, absolute. In the end, *legitimate* violence will intercede to vanquish all contenders. The struggle for indigenous rights in Canada highlights the persistence of this reality as indigenous peoples' struggles for inclusion continue to be limited to piecemeal and precarious advances, while the coercive apparatuses of the state limit those efforts whenever they pose meaningful challenges to, and impose burdens upon, the settler state.

This paper explores the recent proliferation of the discourse of "reconciliation" that has come to dominate state-level discussions of the indigenous/colonial encounter, casting that encounter against the introduction and evolution of the modern concept of sovereignty and its relationship to liberal constitutionalism. The first section sketches some highlights of the much-vaunted era of reconciliation ostensibly ushered in by the election of a Liberal federal government in 2015. From there the paper moves to a brief discussion of the limits of liberal constitutionalism and its problematic assumption of

the commonality of the "national" interest. From there the paper moves to a discussion of the emergence of the concept of sovereignty and its liberal iterations, highlighting key limits of the concept of popular sovereignty and the apparent inability of liberal constitutional democracies to genuinely attend to socio-cultural difference when doing so is perceived to impose unacceptable burdens on "the people" whose interests are assumed to be coextensive with those of the state. The paper then offers a broad-brush account of the historical relationship between indigenous peoples and the (post)colonial state in what we know today as Canada. The concluding section casts these reflections against the problems of liberal constitutionalism and persistence of postcolonial sovereign violence today.

2. "Sunny Ways"

Shortly after winning a surprise victory over the Harper Conservatives in November 2015, newly minted Canadian Prime Minister Justin Trudeau lifted a line from his party's legacy. Drawing upon another, much earlier Liberal Prime Minister, Sir Wilfred Laurier, Trudeau proudly proclaimed a new dawn for Canadian government: "Sunny ways my friends, sunny ways. This is what positive politics can do" (CBC 2015, O'Connor 2015). If premature, his proclamation certainly captured the mood of much of the country. Trudeau and his government were chock-full of promises for reclaiming Canada's reputation as a leader in the environment, internationalism, and multiculturalism. And at the forefront of the new era would be long-overdue reconciliation with Canada's indigenous peoples.

Nineteen months later Mr. Trudeau marked summer solstice 2017 with an array of gestures. Two decades earlier the annual mid-year solstice had been designated "National Aboriginal Day". Trudeau proudly announced the day would be renamed "National Indigenous Peoples' Day", a change of language ostensibly more in keeping with that of the United Nations Declaration on the Rights of Indigenous Peoples and Canada's firm commitment to reconciliation with indigenous cultures, languages and traditions. Moreover, the Prime Minister announced, one of the principal federal government buildings in Ottawa, the Langevin Block, would be renamed. Long a point of strong criticism from indigenous peoples, the building's name was seen to be deeply offensive and reflective of Canadians' lack of appreciation of the very manifest legacy of its colonial past and present (Southey 2017, Harris 2017). Hector-Louis Langevin, for whom the edifice had been named, is known most famously as one of the cultural icons that are Canada's "Fathers of Confederation". More infamously he is known as the principal architect of Canada's Residential School system for Indigenous children, a system now frequently referred to as the "darkest stain" on Canada's past, and whose operation Chief Justice Beverly McLaughlin of the Supreme Court of Canada (among others) has characterized as an exercise in attempted cultural genocide (Fine 2015; cf. MacDonald and Hudson 2012). The schools were opened in the early 1880s, introducing a system of physical and cultural violence that would endure for more than a century, the last closing in the mid-1990s.

Basking in the glow of feel-good inclusivity, Mr. Trudeau proudly made the announcement in front of 100 Wellington Street, a building that had housed the US Embassy for many decades, and a piece of "prime real estate" in the heart of Ottawa. Not only would the Langevin Block be renamed the "more practical" (Trudeau's term)

Office of the Prime Minister and the Privy Council; to cap off the symbolism of the occasion, he used the event to announce that the stately old "architectural gem" behind him would henceforth house a facility dedicated to Inuit, Métis and First Nations peoples. The symbolism of the event and its attendant announcements was meant to reflect (yet again) the federal Liberal government's firm commitment to enhancing the relationship with indigenous peoples across Canada. With its mantra of "Sunny Ways", the new Trudeau government's dedication to righting historical injustices, and affirming the centrality of reconciliation for such injustices was on full display.

The same day, Romeo Saganash, Member of Parliament for the federal New Democratic Party and representative for the northern Quebec riding of Abitibi/Baie-James/Nunavik/Eeyou, stood in the House of Commons and addressed a question to the Prime Minister. The question, however, was lost on Mr. Trudeau. Saganash had delivered his query in his "native" tongue, Cree. The Prime Minister responded respectfully: "I thank the member opposite for his words and wish I had the capacity to understand the strong culture and language that he shared with us today". The Cree language is the most prominent indigenous language of Canada, the mother tongue of well over 100,000 people whose traditional lands occupy a territory whose area rivals that of Western Europe and spans six provinces and one territory. If the old mythology of Canada's "two founding nations" – one French and one English – has indeed been supplanted by a recognition that the national project that is Canada must include recognition that Indigenous peoples were here first, Mr. Saganash's intervention symbolized nicely the distance yet to be travelled on the road to reconciliation (Galloway 2017).

Indeed, Saganash's question was every bit as loaded with symbolism as the Prime Minister's actions, and illustrated with great clarity the persistence of what, until a few short decades ago, was still known as Canada's "Indian problem" (Satzewich 1997). His question, in fact, concerned the renaming of the Langevin Block. Like many, he had been advocating for the change of name for some time. But, while the federal government had announced that they would consult with indigenous peoples over the issue, choice of a replacement name seems to have been lower on the list of consultative priorities. As Saganash pointed out ("unintelligibly" to the house), a building whose name had memorialized one of the founding fathers of the national project of Canada might have, after appropriate consultation, considered a name more appropriate to the event. He suggested renaming the building in honour of the Penoshway family whose lands were expropriated in the early 19th century and upon which the Parliament buildings were later constructed. After all, Mr. Trudeau had promised to consult indigenous Canadians on the issue of changing the name of the building. In the end, consultation was not really necessary: the federal government, all too characteristically, seemed to think consultation involved simply offering public recognition of a problem, then acting unilaterally in resolution thereof.

Saganash's challenge suggested a deeper more entrenched set of problems. For all the talk of reconciliation, how is it that a language group that is the mother tongue of peoples who dominate roughly a quarter of the land mass that comprises the "nation"-state of Canada cannot be heard in the chamber comprised of those who represent its "nationals": its legislators? Indeed, not only could Mr. Saganash not address his

Parliament in his indigenous language, but was made to suffer the indignity of a reprimand from the Speaker of the House, who informed him that the resources of the House of Commons could not realistically be expected to accommodate the multitude of language groups that comprise the various indigenous "nations" across the "cultural mosaic" that is Canada.[1] Saganash found the Speaker's decision profoundly troubling.

Many indigenous people in attendance at the announcements in front of 100 Wellington were underwhelmed. Removal of the Langevin name was welcomed, and the change of the day of celebration, from National Aboriginal Peoples' Day to National Indigenous Peoples' Day, was acknowledged for its symbolic value. But the feel-good event did not blunt the frustration of many. The government's generous donation of a "heritage building" of such obvious value and prestige was problematic for many. Not five hundred metres from 100 Wellington, in the middle of the Ottawa River, lies a group of islands that mark a traditional meeting ground, trading place and sacred site for indigenous peoples. Archaeological evidence indicates its continued use by the descendants of local and regional indigenous groups for many centuries (millennia) before contact with Europeans. For indigenous peoples, the importance of the site to them is directly related to its surrounding geography. The islands sit at the base of the Chaudière Rapids and Falls, a once spectacular cataract know by locals as "Atsicou" (the Algonquin word for "kettle") where the Ottawa River narrows significantly and plunges some fifteen metres. As a natural resting place that marked a watery crossroads for indigenous cultures, indigenous peoples have persistently maintained claims to the lands and its revered status. European settlers saw things differently.

By the mid-to-late nineteenth century, the importance of the site to industrial development became clear to planners, and construction began in earnest. In 1910, the falls were dammed, and by then the whole of the area had been turned over to industrial production based on the burgeoning local lumber industry. Industry built on the islands finally closed in 2007, and since that time indigenous peoples have been pursuing repatriation of the lands to their care. In an era replete with talk of the importance of indigenous peoples to Canada's cultural heritage, the federal government has, however, turned the industrial site over to condominium developers. The condo developer has very thoughtfully named the development "Zibi", the Anishnabe word for "river". But, in its generosity and wisdom, dedication of a 1930s building long associated with one of the most violent regimes of indigenous repression – the United States – seemed to make good sense. Many were quick to point up the absurdity. Somehow, the government's "donation" of a building that had lain vacant for almost two decades, and whose fate they had struggled to decide, was a gift horse with very long teeth. Why, one commented, don't they build the condos on their prime real estate and heritage building, and return the traditional sacred lands to the original inhabitants?[2]

[1] In popular Anglo-Canadian national mythology, this cultural mosaic is juxtaposed to the assimilative "melting pot" that had emerged to the south.

[2] Carolyn Bennett, the Liberal Cabinet Minister for Indigenous Affairs proudly captured the government's sense of self-satisfaction: "The building is a prime piece of real estate [she] said, adding it will send a clear signal that First Nations, Inuit and Metis people represent the most important relationship to Canada. 'It looks straight to the Parliament buildings… So it is location, location, location'" (Kirkup 2017).

The celebrations were short. Two days after the generous announcements, the federal government issued an appeal from the Canadian Human Rights Commission, challenging, for a second time and at the cost of hundreds of thousands of dollars, the government's failure to meet its obligations to ensure access to health services for indigenous children across the county (Barrera 2017, Meyer 2018). A week later, indigenous activists erected a demonstration tepee on Parliament Hill to protest Canada's grand sesquicentennial celebrations under the watchful eye of the Royal Canadian Mounted Police's national protective intelligence unit who "believed activists could disrupt Canada Day celebrations, and that the ceremony attended by communists 'may not remain peaceful'" (Beaumont 2017). Nine protesters were arrested (Gottbrath 2017).

A day later Canadian media provided generous coverage to the Prime Minister's reconciliatory visit to the protest site. "Sunny ways" indeed.

3. The Constitutional Limits of Indigenous Democratic Inclusion

The current liberal government, it must be said, finds itself in a serious bind. All good intentions seem unlikely to dislodge in any remotely expeditious fashion the more stubborn problems underpinning the relationship between indigenous peoples and the settler state that claims sovereignty over their lives. Their efforts are bound to confront all of the broader social and institutional barriers that have made substantive change so difficult for the past half-century. While many of the obstacles to be confronted involve complex questions attending, and slow-moving processes of, institutional reform, deeper, more substantive barriers lie in the character of modern nation-formation, questions about the character of state sovereignty, and the contradictions that lie at the very heart of liberal constitutional democracies and are particularly manifest in settler societies.

In the century-and-a-half since Confederation Canada has grown into a mature liberal constitutional democracy, its ability to bring a significant level of prosperity to its population has offered a formidable source of legitimation to the general framework of its constitutional arrangements. And, as a constitutional liberal democracy, it has proven stubbornly resistant to the development of meaningful and entrenched mechanisms for fulsome inclusion of indigenous peoples within the framework of the Canadian political imaginary outside of the trappings of shared citizenship. At the most immediate level, the nature of those impediments can be identified in the formulations of one of liberalism's most formidable defenders:

> [W]hen may citizens by their vote properly exercise *their coercive political power over one another when fundamental questions are at stake? Or in the light of what principles and ideals must we exercise that power if our doing so is to be justifiable to others as free and equal?* To this question political liberalism replies: our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – *to be able to explain to one another on those fundamental questions how the principles*

> *and policies they advocate and vote for can be supported by the political values of public reason.* (Rawls 2005, p. 217, emphasis added)

In short, citizens, through the aperture of their shared values of public reason, may exercise their coercive political power over one another if, in accordance with those same shared values, such exercise can be justified by reference to constitutional principles all can be expected to agree upon. The troubling circularity of such formulations will be immediately apparent to those whose inclusion within the constitutional community is dramatically circumscribed by that same constitution, and their principal, if not only, access thereto is through the homogenizing project of shared common citizenship.

The problems attending Rawls' formulation have been at the centre of a formidable literature that has grown up around the character and limits of multiculturalism in which the status of minority nationalities has occupied a central position.[3] But however one attempts to address them we remain captives of a perennial paradox that bedevils constitutional democracies generally: constitutions have an annoying tendency to stultify the democratic imagination. Indeed, as Wolin points out, "'constitutional democracy' is not a seamless web of two complementary notions but an ideological construction designed not to realize democracy but to reconstitute it and, as a consequence, repress it" (Wolin 2016, p. 79). In setting the boundaries that are mutually constitutive of social, political and juridical life within the nation state, the constitution acts to assume a *particular* arrangement of foundational juridical relations premised upon assumptions of the homogeneity of political life, and in turn, regulating "the amount of democratic politics that is let in" (Wolin 1994, p. 14). It is a homogeneity that makes possible "a species of power based on non-differentiation" (*ibid*., p.20). And it is characteristically and deliberately resistant to change.

There is no doubt that liberal constitutional democracies can accommodate and even promote significant degrees of cultural difference, but too frequently that accommodation figures in terms of absence of the state intrusions into properly "private" affairs and a broader ethos of social tolerance.[4] Such tolerance, however, particularly if premised upon common "political values of public reason", seems deeply inadequate to the complex socio-economic realities confronted by indigenous peoples in Canada today. Meeting the challenges of remediating the initial social exclusion that formed the basis of indigenous-state relations – a sort of exclusion that was premised simultaneously upon their inclusion as subjects of sovereign authority and their exclusion from the body politic – requires that we seriously address some of the deeper normative underpinnings of liberal constitutional democracy, and the central role of collective state violence premised upon liberal public reason in the reproduction of that exclusion.

It is this recourse to "legitimate" state violence that is of particular concern here. Constitutions mark the broad parameters within which the state's "monopoly of the legitimate use of physical force within a given territory" is to be exercised (Weber 1946,

[3] Discussions of multicultural citizenship have occupied a central place in political philosophy, legal theory and sociology across a range of disciplines since the mid-1990s (Gutmann 1994, Tully 1995, Connolly 1995, Kymlicka 1995, 2001, Habermas 1998, Gagnon and Tully 2001).

[4] It is a divide reminiscent of Berlin's formulation of positive and negative liberty (Berlin 1967). On the limits of liberal tolerance, see Brown (2009).

p. 78). In the language of another tradition, if the state is understood in terms of "hegemony protected by the armour of coercion", the hegemony required to legitimize settler domination of indigenous peoples need not extend to those subject to that domination (Gramsci 1971, p. 263). The foundations of legitimate (i.e. hegemonic) rule extend only as far as consent to rule is achievable, and in keeping with the foundational logic of modern sovereign political rule, the mark of such authority "is the right to impose laws generally on all subjects regardless of their consent" (Bodin 1992). Beyond that, political liberalism regards as proper and justifiable the exercise of coercive political power when it is employed in keeping with constitutional constraints that free and equal citizens regard as "reasonable and rational".

4. Leviathan's People

The frontispiece of Hobbes' *Leviathan* famously envisages a monarch whose body is comprised of the multitude it governs. The powerful symbolism of the image captures nicely the assumptions of sovereignty more generally. Most particularly, it conveys the isomorphism between ruler and ruled, political realm and authority. Sovereignty was, from its inception, a strategy to domesticate and limit the political, territorially and juridically, and always with recourse to violence exercised on its behalf. As the cornerstone of modern political authority, sovereignty has always sought to obviate the prior and original political question of the constitution of "the people".

The modern state has, of course, played a crucial role in containing and shaping cultural formation and the promulgation and consolidation of national narratives within the territorial boundaries demarcating the sovereign's domain. The strategies and processes that have informed national consolidation – the development of national consciousness coextensive with the territorial boundaries of the modern nation state – are well known. From the propagation of preferred languages of administration and commerce, through the production of particular historical narratives chronicling the sacrifices of "founding" generations and promulgation (indeed "invention") of particular traditions, to the corresponding erasure of counter-narratives and frequent elimination of their narrators, the latter those dangerous insiders that might threaten the very coherence of such myths – the creation of a national sensibility has been central to the idea of the modern state.

The practical synthesis of the national imaginary with that of the sovereign state is a very modern cultural-political phenomenon. It really makes its historical debut with the bourgeois revolutions of 1776 and 1789 and arose from a challenge that had been festering for at least a century as a normative political theory of right against the absolute authority of the sovereign. The doctrine of absolute sovereignty, which had first developed two centuries earlier as a conceptual and normative theoretical response to the political dissolution of feudal Europe and the disintegration of the universal authority of the Church, was a doctrine of authoritative, legitimate rule with few, if any cultural pretensions beyond those that might serve to enhance that authority. That new doctrine came in the form of absolute submission to an uncommanded commander, supplication to whom entailed disavowal of any and all claims to right vis-à-vis Leviathan (Hobbes 1991, Bodin 1992). Peace and public order could thus be secured by sovereignty's circular claim to legitimacy (i.e. the sovereign is unchallenged in its authority because it is, by definition, unchallengeable; in more recent parlance, sovereign is he who decides the exception, so long as no other is capable of usurping the decision)

[cf. Schmitt 1985, Agamben 2005]. The upshot of the doctrine was a presupposition of the territorial scope of the sovereign's realm that implied a complete collapsing of the scope for contestation over legitimate political authority. There was to be no right that might challenge sovereign authority.[5]

The conceptual and theoretical revolution initiated by Locke, Voltaire and Rousseau would be inscribed in the constitutional orders born of the political revolutions of the late-eighteenth century. Now sovereignty – *popular* sovereignty – sought to turn Hobbes on his head by rooting sovereignty in the people, the nation. The project of the nation was one that would delimit dramatically the distribution of the so-called Rights of Man, all the while claiming sovereign right whose legitimate authority was rooted in the mythical, amorphous subjects of the popular-sovereign social contract. But the supposed subject of popular sovereignty was from the outset a fabrication, an artifice to be actualized through the unification of the people, usually in the guise of "civilization" and/or the promotion of the manifest superiority of the "chosen" nation, and enshrined in the new ethos of constitutional democracy.

As Benedict Anderson has suggested, amongst many of its "imagined" attributes, the novel concept of the nation was "imagined as *sovereign* because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm" (Anderson 1983, p. 6).[6] Sovereignty, as the Declaration of the Rights of Man and the Citizen proclaimed, henceforth was to be properly understood as rooted in and emanating from "the nation", or in its other famous iteration, "We the People". However, the ink was not yet dry on these grand declarations when the scope of citizenship and the rights it accorded would be the subject of heated contestation.[7]

In practice, the "popular" foundations the new concept of sovereignty lay in a juridico-political model that simply replaced the absolute sovereign with the rule of representatives of the "the people" exercised in their common interest. The reality of sovereign authority generally reflected a profoundly limited conception of "the popular". Indeed, the exercise of "popular sovereign" authority stood in sharp and often very violent juxtaposition to those who would dare to contest its authority. The gradual fulfilment of the promises of revolutionary rhetoric would only come from concerted resistance to the tyrannies of narrow class, gender, and racial interests in fact governing the affairs of the masses, resistance that was met with every bit as much sovereign violence as had been contemplated by its earlier absolutist variants.

On conventional Whiggish readings it is customary to trace the evolution of liberal rights discourse as a history of a natural unfolding of the promise of those Rights of Man. The gradual acquisition of the promised *liberté, égalité, fraternité* would be realized through

[5] Perhaps nowhere have the implications of this notion of sovereignty been laid as bare as in Carl Schmitt's neo-Hobbesian reading of *Leviathan* (Schmitt 1996).

[6] Notably, sovereignty's great theorist, Hobbes, had already dissociated his concept from divine right, introducing the social contract as the normative foundation of Leviathan's supremacy.

[7] See for instance Olympe de Gouges and Mary Wollstonecraft and their respective calls for extension of the "Rights of Man" to women commensurate with the revolutionary impulses unleashed in 1789 (de Gouges 1791/2007, Wollstonecraft 1992). For the mobilization of the "Rights of Man" as a touchstone for the intellectual leaders of Haiti's revolution see Kaisary (2014).

the development of the rights of citizenship. But, as originally cast, who should represent "the nation" – who should be able to access the levers of recognized, legitimate institutions of sovereign political authority – was narrowly circumscribed. The Rights of Man were indeed, the rights of *men*: *white propertied men* of particular languages, cultures and customs. These were to be the foundations of the new national communities, and the masses they so benevolently "represented" would be molded to the homogenizing forces of civilization.[8] The cultural and physical violence attending the disciplining and molding of the national body into such has been well chronicled (Anderson 1974, Poulantzas 1978, Giddens 1985, Foucault 2003), but it is crucial to note that popular sovereignty, like its absolute predecessor, has always been premised on violence and the power over life and death. Recourse to that violence would be an all too frequent counterpoint to demands for greater rights.

Within Europe the rise of the "nationalities principle" – the idea that every nation worthy of the appellation would ultimately secure a state of *its* own, whilst those unable to do so would be destined for the dustbin of history – would sweep across the continent through the "long eighteenth century",[9] and crystalize in all its violent potential with the dissolution of the three great empires at the end of the First World War.[10] Programs of ethnic cleansing and the struggle for the consolidation of newly discovered "nations" out of the cultural mélange that had been its predecessor became a hallmark of the interwar period. The supposed pre-political unity of the people was, in actuality, a deeply political affair, and the violence of that politics would break through the "naturalness" of a world divided into "self-evident" national communities confronting the genuinely human condition of (often radical) cultural heterogeneity (Arendt 1994, Wolin 1994). Through violence often led by, or with the tacit and frequently manifest support of, the repressive apparatuses of the state, terror would become a crucial corollary of nation building. And it should be stressed that for the sake of *raison d'état*, now retooled as the *national interest*, the project of national consolidation was simultaneously an ideological hegemonic project backed by unbridled sovereign violence when that interest was ostensibly threatened (Purvis 1996).

[8] In his remarkable *Peasants into Frenchmen*, Eugen Weber traces the domestic character of this project in the context of the "French" nation of France. The language of nineteenth century bourgeois intellectuals and legislators vis-à-vis the peasant masses bears remarkable similarities to the crude ethnocentrism of its approaches to the uncivilized masses of the colonies. Their backwardness was to be eradicated, while the "savages" of the countryside were to be disciplined into the civilization of proper Frenchmen. Weber points, rather poignantly, to the fact that well into the nineteenth century much of the rural population of France did not understand, let alone speak, French. By the standards of the urban bourgeois, the prevailing belief was of a peasantry "unintegrated into, unassimilated to French civilization: poor, backward, ignorant, savage, barbarous, wild, living like beasts with their beasts. They had to be taught manners, morals, literacy, a knowledge of French, and of France, a sense of the legal and institutional structure beyond their immediate community" (Weber 1976, p. 6).

[9] English historians coined this term as marking the age of the great bourgeois revolutions, the rise of nationalism, and the dramatic intensification of European pretensions to global civilizational and political dominance, running from 1789 to 1914. See particularly Hobsbawm (1994, 1996a, 1996b).

[10] The term "peoples without history" is drawn from Hegel (1975). The *nationalities principle* and its vicissitudes was the focus of much of the path-breaking work of Otto Bauer and his concerns over the dissolution of the Austro-Hungarian Empire and its descent into the scourge of ethnonational purification (Bauer 1996; cf. Wolf 1982).

But while the European struggle for national self-determination operated squarely within the logic of "popular sovereignty" by eradicating difference within the territorial scope of the "national" state, the character of sovereignty extended to the colonies of Europe would take on particularly odious forms. By extension of its circular logic, sovereignty over territories whose "princes" were deemed incapable of exercising *imperium* (i.e. most of the non-European world) would dramatically alter the fates of indigenous populations, particularly in the colonies of the Americas and Australasia (Williams 1990, Anghie 2005). Constructed on the foundations of centuries of intellectual sophistry – whether the Doctrines of Conquest or Discovery (Green and Dickason 1989, Miller *et al.* 2010), the principle of *terra nullius* (Williams 1990, Anghie 2005), or the appeal to rigorous nineteenth and twentieth century anthropological "science" (Rosaldo 1982, Zulaika 1998) – European intellectuals and political leaders adduced an array of self-serving arguments justifying the assumption of sovereignty over such territories. In the face of growing and begrudging acknowledgement of representational concerns of settler colonists their rights of self-rule would be slowly wrested from imperial centres. The "natives", however, enjoyed no such rights. Indeed, by the logic of sovereignty, their political existence and control over their collective destinies was radically usurped; whatever rights they might enjoy were simply at the pleasure of the sovereign. If the new societies invented by liberal democracy were indeed to be founded in law and principles of shared public reason, rule of law would be displaced by *rule by law and sovereign violence* in the encounter with indigenous peoples. Whatever national project they attempted to nurture, it was almost invariably premised upon the exclusion or occlusion of indigenous peoples from the foundational myths of "the people".

The histories of nation formation are as varied as the nations who lay claim to that status. But one constant that punctuates that history is the struggle to shape and control the dissemination of narratives of the homogeneity of the people – of a "naturally" constituted pre-political "community of fate". Combining various shades of ethnicity, language, religion, race and locality, the nation – the new subject of self-determination – invariably entailed a rewriting of the past cast now as naturally unfolding histories. The reality, of course, was the often perversely selective reading of history that obscured the brutalities and outrages that had so frequently gone hand-in-hand with the nation-building project. As Renan suggested, "the essence of a nation is that all individuals have many things in common, and also that they have forgotten many things" (Renan 1990, p. 11). The legacies of those brutalities live on, and have a way of disrupting national forgetfulness. But liberal democracies were not born of radical democratic impulses, and their democratic bona fides are challenged by the persistence of those historically excluded from the national imaginary.

The front line of the struggle to expand the scope of the political within the confines of liberal democracies over the last two centuries has taken the form of struggles for citizenship rights. By gradually expanding the array of rights – civil, political, social (and in the Canadian case, cultural) – attached to citizenship, greater inclusion of all of a state's inhabitants would be enshrined in the juridical foundations of the national-popular order. Growing inclusiveness via realization of the promises of citizenship completed the sovereign's end of the social contract, undermining contesting claims to the constitutive foundations of the national community. But the doctrine of popular sovereignty combined with liberal democracy exposes the profound limitations of

liberal constitutions to account adequately for historical collective grievances and the socio-cultural and economic legacies that lie at their root.

Constitutions set crucial parameters to the political and legal life of a given society, determining and limiting who and what subjectivities will be granted recognition in the political fray as defined by the formal apparatuses of state power.[11] They do not limit the capacity to act *politically* and challenge the prevailing order, but it does constrict who enters the rarified corridors of "popular power" understood as coextensive with popular sovereignty and defines the scope of what is open for deep political contestation – the "fundamental issues" Rawls speaks of – in the framework of the episodic remaking of the homogeneous "people" in the democratic rituals of *liberal* democracy. Absolute sovereignty had entailed the total collapsing of the political into the person of Leviathan, both mythical and corporeal (Laclau 2007, p. 16). Liberalism, on the other hand, was premised on the elevation of propertied classes to the status of guardians of the nation and custodians of the supremacy of constitutionally justified violence. As Wolin points out,

> … a constitution in setting limits to politics sets limits as well to democracy, constituting it in ways compatible with and legitimating of the dominant power groups in the society. Constitutions are not only about what is legal and what illegal political activity, but they regulate the amount of politics, the temporal rhythms or periodicity of politics, and they give it ritualistic forms, e.g., every four years the 'voice of the people' is given the opportunity to 'speak' by entering an appropriate mark beside the name of one or another presidential candidate. (Wolin 1994, p. 14)

Once the episodic rituals in democracy are complete and the nation has spoken in one voice, the homogeneous inclusiveness of the constitutional order can once again set about masking meaningful efforts at change. Indeed, once the "realm of the political begins to crystallize around the main event, the contract, heterogeneity is suspended and plays no part in the consensus" (*ibid*).

5. Constituting the Popular in Canadian National Policy

While it was not until the early decades of the 20th century that a distinctive Canadian national identity began to emerge, the Canadian state and its colonial antecedents laid the foundations upon which that identity would be forged. More than a century before Confederation the Royal Proclamation of 1763 laid the constitutional foundations of much of what would follow insofar as how relations with indigenous peoples were to proceed. Marking the end of the North American side of the Seven-Years' War – the so-called French and Indian Wars – the Proclamation notes the British Crown's assumption of sovereignty over the territories hitherto claimed by France and its indigenous allies in the New World.

[11] I follow Wolin in his formulation of the distinction between politics and the political: "I shall take the political to be an expression of the idea that a free society composed of diversities can nonetheless enjoy moments of commonality when, through public deliberations, collective power is used to promote or protect the wellbeing of the collectivity. Politics refers to the legitimized and public contestation, primarily by organized and unequal social powers, over access to the resources available to the public authorities of the collectivity. Politics is continuous, ceaseless, and endless. In contrast, the political is episodic, rare. Democracy is one among many versions of the political but it is peculiar in being the one idea that most other versions pay lip-service to" (Wolin 1994, p. 11).

Referred to by some as the "Indian Magna Carta" (Indigenous Foundations 2009) the Proclamation's status as such is rooted in its guarantees that lands whose title had not hitherto "been ceded to or purchased by [the Crown], are reserved to them (…) as their Hunting Grounds". This has been seen by many as having established the legal foundations of indigenous title in British North America (*Calder v AGBC* 1973). That said, the Proclamation also asserts, in no uncertain terms, the Crown's sovereignty over those same lands.[12] Indeed, as the Supreme Court of Canada would suggest in 1990,

> that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. (*R. v Sparrow*, 1991, at 1103)

The "Indians" would be protected as subjects of the Crown, and their lands would be reserved to them by sovereign beneficence. By fiat, the Indians were to be at once within the fold of the sovereign's authority while simultaneously *not* a part of colonial society proper. Any pretensions to sovereign-to-sovereign relations were little more than a ruse to gain indigenous acquiesce to their wholesale dispossession.

In what might be seen as the first grand effort at nation-building in the colonies of British North America, the last decades before Confederation in 1867 saw the implementation of a grand social experiment that merged the recently rebellious colonies of Upper (English) and Lower (French) Canada into a single province. Responding to political unrest in each of the provinces in the 1830s, the British Parliament had commissioned Lord Durham, the newly appointed Governor General of the Canadas (and friend of John Stuart Mill), to investigate the source of the turmoil. In addition to having recommended the subsequent merger, Durham's report had infamously lamented the existence of "two nations warring, in the bosom of a single state" (Durham 1912, p. 127). He recommended the assimilation of the French population, a peasant population he regarded as having no history and a remnant of a world past, in language reminiscent of his French bourgeois contemporaries (Weber 1976). While the political experiment would bring responsible government to the Canadas, Durham sorely underestimated the demographic and political resilience of French Canadians. The experiment ended in failure, and the provinces were once again separated, entering now into a federal constitution comprised of the older provinces of Nova Scotia, New Brunswick, and two new provinces of Ontario and Quebec.

The federal character of the new constitution, the British North America Act 1867 (BNA Act), was precisely designed to offer some protections for the French-speaking majority in Quebec. Securing its provincial share of the equal distribution of provincial powers and its territorial integrity, protections for elements of Quebec's cultural distinctiveness were included, inscribing the mythology of "two founding races" of Canada in the fabric of the constitution. The racial makeup of the new "nation" eliminated any place for the

[12] "We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid" (Indigenous Foundations 2009).

indigenous peoples who had occupied the land for millennia. Instead, the new constitution assigned responsibility for "*Indians and lands reserved for the Indians*" to the federal government in its division of powers. It was within this rubric that the Indian Act 1876 was promulgated, a colonial instrument *par excellence* that would frame a subsequent century of forced dispossession and acculturation, and founded on social, political production and management of precarious populations.

The central aim of the Indian Act was to address and resolve the "Indian problem". As wards of the state, indigenous persons were largely reduced to the status mere objects of administration, whose claims to and rights arising from prior occupation were trumped by a sovereign whose superior title meant the "Indians" had only usufructuary rights, enjoyment of which were ultimately rooted in sovereign beneficence.[13] A good deal of juridical sophistry obscured any serious consideration claims to genuine self-government, alternative forms that might shatter the illusion of a singular Canadian people-nation of "two founding races" bound together by federal compact. Indigenous peoples, who showed themselves quite capable of political action, were, however, excluded any recognition as subjects recognized as such within the scope of the political as framed by the BNA Act. Insofar as they were recognized by Canadian law, it was by virtue of a relation of *inclusive exclusion* armored by sovereign violence (Ophir *et al*. 2009).

The history of the Indian Act and other institutions and instruments of governance have been well chronicled, and it is a dark one (Tobias 1983). The Residential School System mentioned above was just one of myriad mechanisms designed to discipline and civilize the indigenous population. Forcibly removing children from their families and placing them in church-run enterprises tasked with destroying their connections with family, communities, and cultures was a particularly perverse affair in which children were subjected to widespread physical and sexual abuse, beaten for speaking their mother tongues, and unable to see their families. In the case of the schools alone up to 6,000 children are thought to have died under these abusive conditions (Puxley 2015). While shot through with familiar themes of discipline and civilization, the production of life in these contexts was often simply the production and exploitation of profound precarity – less a biopolitical enterprise than one of thanatopolitcs (Ghanim 2013; cf. Mbembe 2003). With state-sanctioned violence parading as civilizing mission, sovereignty offered the legitimatory foundation for their removal, with the schools themselves acting as proxies for the sovereign people. These enterprises were engaged not simply in the making up of better, more civilized possible citizen-subjects, but crossed the line into the exercise of sovereign violence over life, and leaving the lifeworlds of survivors in catastrophic disarray.

Other examples of such violence include the criminal prohibition of sacred rituals, such as the Potlatch and Sun Dance, prohibitions that were harshly enforced by the courts (Cole and Chaikin 1990, Backhouse 1999). Pass systems were established that presaged those of Apartheid South Africa and present day Palestine, and were brutally applied to circumscribe the movement of indigenous peoples and isolate them from settler society. Such laws emboldened racist proclivities among the general population of settler

[13] A point made quite clearly by Lord Watson of the Judicial Committee of the Privy Council in the new Dominion's first major case of regarding indigenous rights (*St. Catharine's Milling and Lumber Company v The Queen*, 1888, pp. 54-55).

Canadians and were manifest in practices that resembled the Jim Crow laws in the United States. Where control of territory had been gained through the extinguishment of "native title" by treaty[14] the corresponding peoples were relocated to "lands reserved for Indians", generally of substandard quality. Indigenous women who married non-indigenous men lost their "Indian" status as did their children. The history of abuse of indigenous children extended beyond the horrors of the residential school system to include the now infamous '60s Scoop wherein thousands were forcibly removed from homes and placed in foster care or put up for outright adoption (Fournier and Crey 1998). While these efforts were ostensibly directed toward the amelioration of the lives of indigenous peoples by facilitating their integration into Canadian society, their goal was the practical erasure of indigenous populations by way of total assimilation.

But the road to assimilation would be paved with other indignities. From its inception Canadian penal policy has held a special place for indigenous people whose road to assimilation was not as smooth as the sovereign carceral state would prefer. Today, indigenous peoples comprise roughly 25% of the federal inmate population, almost ten-fold their representation in the general Canadian population.[15] And just how assimilated one need be to enjoy the fruits of Canadian citizenship was called into question by the withholding of the franchise to indigenous persons. The Indian Act did lay out a path to enfranchisement that entailed grants of farmland from the government which, if indigenous homesteaders proved themselves capable of civilized farming methods would, after a period of years, be granted full title to said property. Many attempted this route, but frequently found their efforts thwarted by Indian Agents who usually assigned lands of poor quality and worked in cahoots with local settlers jealous of any successes realized by their indigenous neighbours (Tobias 1983). On the reserves life was often lived in abject poverty. Life in urban areas was equally impoverished and punctuated by the crassest racisms. Isolation and marginalization were and are hallmarks of this order, always undergirded by sovereign violence exercised in the "public" interest.

These are just some of the indignities that indigenous people have suffered in face of the exercise of colonial sovereignty since the establishment of the Canadian state and its efforts to shape the cultural makeup of the country. Popular Canadian appreciation for that plight was very thin, and the efforts of the state and its proxies vacillated between the sentiment of "soothing the dying pillow" – benevolently keep the "natives" comfortable and isolated until they naturally die off– to brutal forms of acculturation that entailed beating the "savage" out of the "Indian". But most important for present purposes was the fact of their total, and intentional, exclusion from the scope of the formal institutional political life of the newly formed national state. Their engagements with that political life came generally in the form of the political violence monopolized by the state in the name of the young Dominion.[16] As wards of the state they were a

[14] The federal government of Canada, despite so much talk of nation-to-nation relations, has consistently refused to recognize such treaties as between equal sovereign authorities.

[15] Federal and provincial governments both exercise penal authority. For a useful overview of federal statistics, see Office of the Correctional Investigator (2013). Some provincial numbers are significantly higher.

[16] None of this is to suggest indigenous peoples did not resist these many indignities. Resistance was a persistent counterpoint, and indigenous leaders proved themselves capable of mounting political

population to be managed, disciplined and excluded from the formal apparatuses of state power (Smith 2009). The legacy of these and other horrors runs deep in indigenous communities today.

Some cracks began to show in the absolute exclusion of indigenous peoples from Canadian political life from the late 1940s, when British Columbia granted its first peoples the franchise. In the 1960 the federal vote would be extended to all. Quebec would be the last to grant the franchise in 1969.[17] These moves, however, simply reaffirmed the rights of indigenous peoples to be fully "Canadian", while the invitation to enjoy that right insisted they abandon any distinctive claim to their difference at the door of political citizenship. By the end of the 1960s Canada was in political turmoil as the effects of Quebec's *Révolution tranquille* began to be felt in federal politics. Calls for a more just distribution of opportunities and language protections for francophones came along with growing separatist sentiment. The "national question" in Canada was blown wide open, led by Quebecers' grievances over their status as second-class citizens in the Canadian national framework. Indigenous actors would seize upon this opening of the universe of political discourse to assert their voices in the broader discussion of the character of Canadian nationality.

In response to growing concerns about the future of the federation the Canadian federal government established a Royal Commission to

> [i]nquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between *the two founding races*, taking into account the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution. (Compendium of Language Management in Canada –CLMC– n.d.)

The Bilingualism and Biculturalism Commission ultimately recommended Canada press forward as a bilingual and *multicultural* state. Indigenous peoples' linguistic needs were, however, disqualified by the Commission whose focus remained very much cast within the terms of the old myth of two founding nations (Haque 2012).

Canada's newly minted Liberal Prime Minister, Pierre Trudeau, father of the current Prime Minister, would take up the Commission's recommendations with great zeal. An avowed anti-separatist and ardent liberal, he seized upon the occasion to introduce bilingualism as official federal policy, aiming to undermine growing separatist sentiments through statutory protection of French language rights. The other branch of the new cultural policy was that of the novel notion of "multiculturalism". Canada, unlike our neighbours to the south, would be, not a melting pot, but a rich *mosaic* of cultures drawn from around the globe. And to his credit, Trudeau recognized that "native peoples" should be celebrated as an important part of that heritage. So he immediately set his new Minister of Indian and Northern Affairs, Jean Chretien, about

opposition to these travesties. They were not, however, recognized as political actors with any valid claim to political representation in the mobilization of state resources.

[17] Some moves in this direction had been started in the late 1940s, but excluded the largest subgroup: status Indians. For the latter, previous governments had insisted that special exemption granted them under treaty arrangements would have to be eliminated before the franchise would be extended.

the task of producing a White Paper aimed at amelioration of the life-conditions confronted by indigenous communities.

However well intentioned, the now infamous White Paper (*Statement of the Government of Canada on Indian Policy*, 1969) was met with outrage from indigenous peoples. Despite consultations, indigenous leaders did not feel the government had remotely addressed their concerns. After so much "consultation" the policy proposals were seen as offering First Nations nothing short of assimilation. Chief among its suggestions was the dismantlement of the reserve system (itself rooted in "treaties") along with the elimination of the Department of Indian and Northern Affairs and effective dismantlement of the operation of the Indian Act. These changes were to be fully realized within a five-year period. Canada's "First Nations", as they were now called (a reflection of indigenous resistance to the mythology of "two founding nations"), would, by fiat, become true Canadian citizens in every respect.

Much to the government's surprise, the plans were roundly rejected. Indigenous leaders recognized that, in their exclusion from the constitutional foundations of Canada, the only juridical foundations for the distinctiveness of their cultures and claims would disappear. The hubris of the plan was self-evident to many, but also served to highlight the new Prime Minister's conception of the nature of liberal democracy. The White Paper was unceremoniously shelved, but the discussion surrounding its proposals had laid the basis for involving indigenous Canadians in the constitutional discussion that would dominate federal politics for much of the next two-and a-half decades.

One of the principal achievements of Pierre Trudeau's tenure as Prime Minister was the patriation in 1982 of the Canadian Constitution that included a new Charter of Rights and Freedoms and further amendments ostensibly clarifying the character of the state's relationship to indigenous peoples.[18] And, it must be said, that achievement has had important implications for jurisprudence regarding indigenous rights in Canada. Article 25 of the Charter would henceforth ensure that:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> - any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> - any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

While it conferred no new rights, it did guarantee that existing aboriginal rights would not fall victim to subsequent interpretation of other Charter rights guarantees. In addition to these Charter provisions, Part II of the Constitution Act 1982 stipulates that:

> 35. (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 Métis peoples of Canada.

[18] The province of Quebec rejected the passage of the Federal *Charter*. The Quebec National Assembly passed its own Charter of Human Rights and Freedoms in its stead, an option unavailable to indigenous peoples.

> (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.

Standing outside of the provisions of the Charter Article 35 has offered an important juridical touchstone for indigenous groups pressing claims for greater autonomy and self-government, and has been a focus of a number of important cases in Canadian constitutional law. Standing outside of the Charter means that the rights recognized and affirmed cannot be subject to the notwithstanding clause that governments can invoke in the general public interest, whereas core rights provisions of the Charter can be.

Despite much self-congratulatory discourse from the government side, this limited recognition came only in response to defiant resistance from indigenous leaders. And the "special rights" negotiated are limited to *existing rights and freedoms* – in other words, there were now constitutionally entrenched rights premised upon *existing* rights, giving them, finally, greater legal purchase. But it essentially confirmed an existing state of affairs that had characterized the relationship for over a century, contestation over which would be reconciled by the courts.

These provisions have been consequential. Indeed, they have provided a set of legal pathways to resolution of points of lasting contention between the Canadian federal government and its provincial counterparts on the one hand, and indigenous groups on the other. Their inclusion finally provides a touchstone for the recognition of some collective rights on their part. But that inclusion remains cast firmly within the confines of Canadian sovereignty, so what legal recognition has been gained is deeply attenuated by its secondary role within the legally constituted game that is nation-building by law in support of the national-popular interest: interest that continues to trump indigenous claims when push comes to shove, as it so often does. The slow pace of progress in those struggles, and the willingness of governments ostensibly committed to reconciliation who choose nevertheless to fight corresponding claims through the courts (at enormous cost to indigenous groups, not to mention taxpayers more generally) really do call into question the genuineness of that commitment.

The early years of the Charter saw little action on the indigenous file other than efforts to assert indigenous rights through the courts, adding to the meager "guarantees" of 1763 the now constitutionally enshrined promises of 1982. With indigenous claims met consistently by concerted resistance from both federal and provincial governments, the slow pace of substantive change went neither unnoticed nor uncontested by indigenous groups across the country. In 1991, just nine short years after the advent of the Charter, relations with indigenous peoples came to a head when the Mohawk peoples of Kanesatake, a Mohawk community some thirty miles from Montreal, with the support of surrounding First Nations communities, led a blockade against the local town council. The town of Oka had approved plans to extend a golf course over lands promised to the Mohawk residents a century-and-a-half before Confederation. When police were called in to challenge the blockade the standoff turned violent. Standing their ground, the protesters were now joined by well-armed Mohawk Warriors. When the provincial police force decided to storm the blockade, one police officer was killed in the hail of crossfire. The Prime Minister of Canada, Brian Mulroney, promptly labeled the

protesters "terrorists" and called in the military to assert control and reestablish the "rule of law". After weeks of tense standoff between battle-ready military troops and the Mohawk protestors the situation was diffused by way of grudging concessions to the protestors (Swain 2010).

The Oka Crisis, as it came to be known, was just the first in an array of such confrontations, some armed, the large majority not. Failure to settle claims to lands, including those whose title was never extinguished by treaty and touching upon indigenous peoples who had stood outside the realm of formal Indian status as dictated by the Indian Act, have been met with growing opposition, usually peaceful, but sometimes militant. The upsurge in very public indigenous resistance inspired the Mulroney government to pursue the establishment of a Royal Commission on Aboriginal Peoples. The Commission would take six full years to complete its main study (the longest of any Royal Commission to date) at a cost of $60 million (twice as much as the next most expensive commission). The final report came in the form of a six-volume report that filled close to 4,000 pages of text; volumes supplemented by tens of thousands of pages of ancillary studies and appendices. Extraordinary in its scope and ambitious in its objectives, the upshot was a call for a comprehensive overhaul existing relations, a deeper commitment to moving forward on negotiating paths forward on the basis of recognition of the equal place of indigenous peoples in the framework of federal relations through the creation of new forms and levels of government premised upon claims to national solidarity among the many hundreds of indigenous groups across the country. Henceforth, state-indigenous relations would, it recommended, advance on the basis of nation-to-nation status, the paternalism of the past, hopefully, put to rest (Royal Commission on Aboriginal Peoples 1996).

The light that shone so brightly through this process would be effectively extinguished upon arrival. Two years into the Commission's inquiries, the federal Progressive Conservative government of Brian Mulroney was replaced by a new Liberal government headed by Jean Chretien (of White Paper fame) that moved to fast-track dramatic moves toward fiscal restructuring and a deepening of neoliberal austerity measures, implementation of which had persistently bedeviled its Conservative predecessors. The Commission's final report was received with great fanfare coupled with much talk of renewal and reconciliation by the Chretien Liberals (Barnsley 1998). But the report was quickly shelved, reconceived as aspirational. Its proposals deemed too expensive and too politically difficult to realize, as they implied opening up the Constitution for renegotiation, an historically horrendous task in which the principle subjects of federal constitutional relations are the provinces and the federal government, both of whom have steadfastly resisted incursions into their respective fields of administrative jurisdiction and territorial integrity.

The new government's appeal to fiscal rectitude followed the familiar neoliberal philosophy of TINA (There Is No Alternative). Canadians would collectively have to tighten their belts in the face of new socioeconomic realities. Fulfilling the proposals outlined by the Royal Commission would simply have to be put off to a time when the "national", collective interest of Canadians could afford the costs that would invariably be associated with such change. But, we were reassured by the government, Canada would redress the living legacy of historical wrongs committed against collectivities

whose cultural and political lifeworlds had been shattered by centuries of colonial erasure.[19]

The Chretien years saw effectively no meaningful effort to address any of the Commission's recommendations. When Chretien's Minister of Finance, Paul Martin, succeeded him to office, there was significant talk of renewal and reconciliation, but as the principal architect of Chretien's austerity politics and deep commitment to core neoliberal principles, his talk was regarded by many as little more than that. Martin's tenure would be short-lived. Internal party turmoil led the minority government Liberals to defeat a few short years later. While the right wing, newly-minted Conservative Government of Canada (dropping the "Progressive" from its predecessor's name to ensure no one would mistake the political orientation of the new party) headed by Stephen Harper would prove itself capable of ostensibly sympathetic, wholly symbolic announcements regarding the plight of indigenous communities, their political base and many members of parliament made no secret of their disdain for special treatment received by aboriginal Canadians at the cost of "taxpayers" – the neoliberal constituent content of the national community. The Harper years were replete with calls from Conservative ranks to shut down the "Indian gravy train", get rid of the reserves, and force indigenous peoples to finally confront reality by becoming responsible Canadian citizens like everyone else. The mood underlying such claims harkened back to the assimilationist pretensions of the White Paper of forty-years past, but this time with a meaner, more virulently racist tone. The Harper Conservatives showed little appetite for "reconciliation" beyond grand symbolic gestures (Kennedy 2015).

For indigenous peoples the Harper years had been filled with deepening of existing conditions of destitution in many communities. Chronic underfunding and no small measure of mismanagement combined to lead to financial crises and conflicts with the federal government. Industrial pollution largely from resource extraction, the scope and burden of whose effects have weighed most heavily upon indigenous communities, increased through these years. With its neoliberal focus on deepening fiscal austerity measures, desperately needed infrastructure investment in indigenous communities was simply not forthcoming. These years also saw chronic underfunding of medical care and education to communities, many suffering the effects of environmental poisoning and an explosion of preventable conditions such as diabetes and heart disease. Teen suicide rates are the highest in the world in some communities, and chronic (often fatal) substance abuse amongst pre-teens and youth more generally (particularly glues, gasoline and solvents) became regular fare in nightly newscasts. They had been dark days for Indigenous peoples in these and many other ways.

The election of Justin Trudeau was greeted with a collective sigh of relief among a majority of Canadians. The young, handsome, and charismatic Trudeau made a stark contrast to the cold, technocratic style of Stephen Harper. And he espoused a bright, optimistic view of a kinder Canada that would reclaim its place on the international stage as a champion of internationalism and human rights. On the home front, one of

[19] The fanfare would include the first of a growing number of formal apologies to indigenous peoples for wrongs suffered. But there would be little effort to address seriously the 440 recommendations offered by the Royal Commission in its final report (Royal Commission on Aboriginal Peoples 1996; cf. Schneider 1998).

the principal planks of the new Sunny Ways agenda would be greater inclusion of and reconciliation with Canada's indigenous peoples. But, as suggested at the outset, the government has accomplished very little of substance on the indigenous file beyond symbolic gestures in its first two years. Frustration among indigenous leaders and within their communities has been gaining in intensity. Reconciliation may prove a difficult row to hoe while the new government, very much like its predecessor, seems prepared to trump indigenous claims in favour of wider (read "national") economic interests. Among many there is a sense that the symbolic gestures hide a much weaker commitment to serious redress of issues that have been festering at the heart of the national imagination.

6. Constitutional Democracy in the (Post)colonial Slipstream

> [P]ostcolonial means after the epoch when imperial power was exercised by direct colonization, but it also means an era when everything still takes place in the slipstream of colonialism and bears the inscription of the disturbances that colonialism set in motion. (Hall 2017, p. 101)

Constitutions attempt to give juridical form to the character of political relations in liberal democracies, and to that end they are *constitutive* of fundamental elements of social and political identity. In the case of constitutional democracies they give juridical shape and authority to the sovereign people, settling *a priori* a series of fundamental questions about the character of the societies they enframe. They are, of course, amenable to change, but are deliberately resistant to amendment. And when such amendment might imply, as they would in the Canadian case, a reordering of relations in which the central actors in the existing constitutional state of affairs fear any reforms that might derogate from jealously guarded jurisdictional rights, the likelihood of their supporting such change is correspondingly limited.

The ostensible end of the age of colonialism has yielded a world in which those able to successfully throw off the colonial yoke have taken the reigns of sovereignty, for good or ill. In those postcolonial instances in which the colonizers never left, but came, rather, to vastly outnumber their indigenous neighbours, the newcomers have jealously guarded *their* sovereignty. The sophistries of jurisprudence, theology and philosophy have combined over the centuries to effectively banish indigenous peoples from meaningful inclusion as distinct cultures coexisting with those of settler societies. The constitutional structures of settler societies that have evolved into modern liberal democracies have proven themselves profoundly resistant to fulsome efforts at reconciliation and investment – social, political and economic – for past injustices, their current legacy and redress. In the slipstream of colonialism constitutions have borne "the inscription of the disturbances that colonialism set in motion" (Hall 2017, p. 101).

For indigenous peoples, life in Hall's postcolonial slipstream continues to be "a concatenation of multiple powers: disciplinary, biopolitical, and necropolitical" (Mbembe 2003, p. 29). The conventional elements of modern liberal governmentality – discipline and biopolitics – always operate upon the presupposition of recourse to sovereign violence. Absent radical rethinking of constitutional foundations and an equally radical reconfiguration of democratic practice capable of forcing a corresponding reconfiguration of the scope of the political capable of accommodating

"new" voices, the precarity of indigenous life seems destined to persist at the margins of the popular "Canadian" imagination.

Much has changed while much more has remained the same since the advent of the constitutional reforms of 1982 and the advent of the Charter. The intervening years have been fraught with contestation over the place of indigenous peoples in the cultural-political makeup of Canada. Celebrations of Canada's "indigenous heritage" have become a centrepiece in the state's production of multicultural inclusion. But the terms of invitation into the national tent have remained markedly attenuated by the rigidities of prevailing constitutional instruments and thwarted by a liberal-democratic vision of the national interest that too frequently sees indigenous claims as unfortunate relics of the past and an inconvenience in the present. While meaningful change is promised, the persistence of induced precarity – social, political and economic – is abetted by the profound limitations of the Canadian version of liberal democracy to deliver meaningful change within the confines of its existing constitutional constraints.

Since the events of National Indigenous Peoples' Day in 2017, the Trudeau government has engaged in some institutional reforms backed with promises of a general infusion of funding that may ultimately enhance the engagement with indigenous communities, perhaps significantly (Forrest 2018). The Prime Minster has remained outspoken about the need for greater efforts at reconciliation and the need for greater inclusion of indigenous voices in the national project that is Canada. Indeed, he has recently acknowledged that

> [i]nstead of outright recognizing and affirming Indigenous rights, as we promised we would, Indigenous Peoples were forced to prove, time and time again, through costly and drawn-out court challenges, that their rights existed, must be recognized and implemented. (Tasker 2018)

But despite the earnestness of such acknowledgements it must be recalled that the present government has *continued* to force indigenous peoples to wrest acknowledgement and respect for their extant rights through the courts in a fashion more in keeping with past practices than divergent therefrom. And whatever the government's intentions, when indigenous claims threaten the prevailing federal institutional order, as they have recently in the case of federal pipeline politics, federal government consultations with those communities have taken an all-too-familiar form in which acknowledgement of your right to voice your objections is mistaken for the sort of deep intercommunal recognition that it parades as (Kane 2017). When perceived as a very real threat to interprovincial peace that could itself descend into dangerous row over "fundamental questions" constitutive of Canadian democracy generally, this government, for all its professed good intentions, has retreated to a position where meaningful reconciliation takes a distant second place to the broader Canadian "national interest". In the end, the apparent needs of a late-modern capitalist state whose political economy is rooted in resource extraction, operating under conditions of neoliberal austerity and bound to create conditions conducive to the expanded reproduction of capital is too likely to favour the sovereignty of "the people" over the needs of those whose difference "the people" occlude.

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