

Canada's Contradiction of Legitimacy

Remembering Colonialism, Forgetting the Nation-to-Nation Relationship

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Question: How does the commemoration of the past shape current political realities? How has history been mobilized in contemporary debates over how to commemorate past injustices?

Summary: Questions of political authority in Canada are invariably connected to settler-colonialism. Similar to Europe, Canada's democracy must confront a horrific history of colonial injustice; acts that are clearly in contravention of liberal democratic values and ideals. Unlike most European cases, however, these acts of colonialism created the Canadian state. In this essay, I set out an argument for Canada's contradiction of political legitimacy, where Canada disavows colonialism, but ignores the fact that it established Canada's claim to political legitimacy. In doing so, I delineate between *destructive* and *constructive* elements of Canadian settler-colonialism. The Canadian state can, and has, acknowledged its role in destructive colonialism, but refuses to engage in claims of constructive colonialism. To demonstrate my argument, I look at examples from the historical record and how these events and ideals are memorialized today. This essay builds on works from political science, Indigenous studies, law, democratic theory, and transitional justice.

In Canada, questions of political legitimacy and authority are inherently connected to the state's settler-colonial formation. Canada claims to be the unilateral sovereign political actor within its territory. Indigenous nations contest this understanding and instead point to the political and legal autonomy they enjoyed before the arrival of Europeans to these lands (Coulthard, 2014; Starblanket, 2019). Indigenous scholars have long pointed to the legitimacy of their legal and political orders as external to the Canadian state (Jobin, 2013; Simpson, 2014; Turner, 2006). As a settler researcher, I do not attempt to define the content of Indigenous political orders, but rather, I seek to elaborate on the inconsistency of the Canadian state's relationship with colonialism. Fundamentally, this inconsistency is a problem of memory; Canada can apologize and disavow colonialism but refuses to connect this colonialism to the foundations of the Canadian state. The Canadian state's memory of its relationship with Indigenous peoples is incredibly paternalistic, conferring supreme authority on the colonial state at the cost of the political and legal authority of previously self-determining Indigenous nations.

How do these conflicting memories interact with one another? I argue Canada is undergoing a contradiction of political memory, and by extension, political legitimacy. This contradiction reflects the reality that Canada seeks to condemn colonial injustice as illegitimate, all the while grounding its claim to legitimacy in this same history. Colonialism is illegitimate because it infringes on the liberal democratic values that Canada endorses such as, equality, impartiality, and self-determination (Habermas, 1998; Rosanvallon, 2017). At once, Canada seeks to move away from the illegitimacy of colonialism without addressing how its claim of legitimacy derives from it. This paper uses settler-colonial theory to make distinctions between the destructive and constructive aspects of settler-colonialism. The Canadian state now actively condemns the *destructive* aspects of colonialism whilst actively displacing the *constructive*

aspects - those that created the Canadian state's claim to legitimacy. Throughout the paper, I will demonstrate how Canada's commitment to unilateralism is ahistorical and instead granted in a memory of colonialism that rids Canada of responsibility through willful ignorance.

Two Aspects of Settler-Colonialism

Settler-colonialism refers to the distinct set of colonial processes in which European settlers sought to usurp Indigenous political authority to establish new settler societies (Veracini, 2010). Patrick Wolfe argues, for example, that settler-colonialism is structured around a "logic of elimination" that contains both positive and negative aspects. In the negative sense, "it strives for the dissolution of native societies" and positively, it strives to create a settler society in its place; accordingly, "invasion is a structure not an event" (Wolfe, 2006: 388). I reconceptualize these two aspects into destructive and constructive elements. I do so because destructive emphasizes the impact of colonial injustices on Indigenous nations, while also acknowledging that dissolution of said nations did not occur. The constructive element is to reinforce the *ongoing* nature of memorializing Canadian state formation to emphasize that an account that only recognizes destructive colonialism reinforces the constructive element of colonialism, namely, the Canadian state's claim to legitimacy.

Remembering the Nation-to-Nation Relationship

Canada's contradiction of memory can be explained through a close reading of the nation-to-nation relationship between Indigenous nations and the Crown. As Indigenous scholars argue, the nation-to-nation relationship is the political ideal of a relationship in which Indigenous nations and Canada are recognized as nations with distinct governing systems, legal orders, and claims to territory (Henderson, 1994). I will look to discuss examples of this ideal within the Treaty of Niagara, the numbered treaties, and repatriation of the Canadian constitution.

The Treaty of Niagara was an agreement between a plethora of Indigenous nations and the British Crown. The agreement addressed the governance set out in the Royal Proclamation of 1763 over the newly “acquired” territories that the British had inherited after the French defeat in the Seven Years' War. The Proclamation was a declaration of British intention in North America and the Treaty of Niagara was the political realization of these goals (Borrows, 1994; 1997).

Peter Russell argues that we must read the Proclamation through the events at Niagara as it explains that the Treaty is “the Crown’s commitments in the 1763 Royal Proclamation, to the extent they are consistent with the Great Covenant Chain and the Two Row Wampum. For it is only on that basis that the assembled representatives of the Indian nations agreed to cease their military struggle and become allies of Britain.” (Russell, 2017: 50). Niagara represents the codification of the Proclamation as the governing document of the nation-to-nation relationship.

The guarantees of the Proclamation are of tremendous significance to remembering the foundations of the Crown-Indigenous relationship; in the document, there are strong guarantees for the political, economic, and land-based rights addressed to “the several Nations or Tribes of Indians with whom We are connected” (George R, 1763: 5). Included in these guarantees, in no uncertain terms, is the obligation that “We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements” (George R, 1763: 5). The significant promises made in the Proclamation, and then echoed at Niagara, reflect the reasons why First Nations agreed to ally and work with Britain (Borrows, 1994; 1997). To fully appreciate this influential event, we must look beyond the historical record and toward modern interpretations of it.

The historical memory of the Proclamation and Niagara continues to produce competing interpretations. Indigenous peoples have long evoked the Proclamation as evidence that colonialism was an obfuscation of the original spirit and intent of the relationship (Henderson, 1994; RCAP, 1996). The Proclamation was once seen as a guarantor of Aboriginal rights in court cases. Judicial interpretation, however, has moved away from this position in cases like *Guerin v. The Queen* where a majority of the Supreme Court found that “The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision” (*Guerin*, 1984: 336). Indigenous rights as inherent, while important, did not alter the colonial relationship. Accordingly, we are starting to see a *return* to the Proclamation and Niagara. In *Restoule v. Canada*, the Ontario Superior Court confirmed that Ontario and Canada must ensure the annuities of the Robinson Treaties are reworked more justly, an argument that was based on the spirit of cooperation put forth at Niagara and in the Proclamation (ONCA, 2021). Moreover, recent court cases argued before the Ontario Superior Court each make similar arguments about Niagara and the Proclamation: *Saugeen First Nation v. The Attorney General of Canada* and *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*. We can establish that while the state and courts sought to move away from the foundations of the relationship, Indigenous nations have brought these events back into public memory to contest colonialism.

The potential of this reinterpretation of the foundations of the relationship should not be overstated. Indeed, the Crown's reinterpretation of these foundations is subject to many limitations, as seen in the numbered treaties. Cree scholar Gina Starblanket argues the Canadian state uses the numbered treaties in a way akin to mythologizing. Starblanket argues that the myths of the numbered treaties provide for the “depoliticization, simplification and racialization,

which collectively locates treaties as matters of cultural identity rather than the locus of Indigenous peoples' distinct political relationship with the Canadian state" (2019: 446). Critics argue this fundamentally misunderstands Indigenous intentions. Instead, as Starblanket notes, within Indigenous political thought, land cannot be surrendered or sold through treaty because these concepts are not present in Indigenous legal orders; rather, these systems "understand treaties to represent land-use arrangements that are intended to delineate frameworks of nonhierarchical co-existence between nations" (2019: 453). Canada memorializing these treaties as land surrenders is a contradiction of the historical record. Cree scholar Kiera Ladner points to items like the "peace and good order" clause of the numbered Treaty 7 to demonstrate that the establishment of peace and good order relied on Indigenous nations. The clause was "a recognition of sovereignty, and a recognition of Indigenous signatories' understanding that they would go on living according to their laws, customs, and traditions without interference from the Queen" except for assistance in times of transition and need (Ladner, 1997: 97). The numbered treaties then provide a stark example of the contradiction of political memory in Canada; at once, Canada seeks to sanitize its deceiving use of the numbered treaties by ignoring the legal and political autonomy guaranteed to Indigenous nations while using treaty as a historical relic.

The contradiction between Canadian legitimacy and colonial illegitimacy is made clear in the process of the 1982 repatriation of the Canadian constitution. This was the last comprehensive reform to the Canadian constitution and was the process of 'bringing the Constitution home' from the formal permissions of the United Kingdom. During this process, the Constitution Express formed, an Indigenous-led protest movement against a constitutional reform that did not include Indigenous nations. A recent issue of *BC Studies* focuses on this protest movement in depth, specifically on how the Express emphasized Indigenous sovereignty,

Indigenous feminism, and international decolonization (Feltes and Coulthard, 2022; Nickel, 2022; Feltes and Venne, 2022). Once the Express gained popular support, Indigenous leaders were invited to appear before the Special Joint Committee on the Constitution of Canada (SJC).

Despite inclusion at the SJC, there was a consistent contradiction between the views of leaders of the Canadian government and Indigenous leaders. For example, it was the position of then-Attorney General Jean Chrétien that including section 25 was a first step, that “What we are trying to do in ...Section 24 [draft of 25] we want to protect all the rights of the natives...

Exactly the reason why we are doing that is to make sure that all the rights be protected because in Canada we still need some clarification to come to an agreement about native rights” (Canada, 1980a: 32).¹ This position was unlike that of Algonquin Chief William Commanda who argued for settling Aboriginal rights *then*, at the time of patriation, rather than later (Canada, 1981: 20).

The second contradiction lies in the actual memories attributed to the Royal Proclamation during the Special Committee. As we have seen, Indigenous interpretations of the Proclamation are based on nation-to-nation understandings, originating from events like the Treaty of Niagara. The government, while recognizing the rights attributed to the Proclamation and guaranteeing their protection, had a different position (Canada, 1980a: 68). Chretien articulated the government’s position that these rights, which were not defined, did not contain a significant guarantee of Aboriginal land rights: “If your view is that no laws could cover expropriate the land of any natives, I do not think that it is a proposition... *There is [sic.] no circumstances under which some parts of Canada cannot be expropriated for the benefit of the totality of the nation*” (Canada, 1980b: 13). This is perhaps the greatest contradiction in the government’s

¹ Section 25 is a saving provision clause of the Charter that ensures collective Aboriginal rights are not infringed by individual Charter rights. This section was a result of negotiating with Indigenous representatives; negotiation that would further result in Section 35, the main guarantor of Aboriginal rights in the Constitution (Wildsmith, 1988).

memory of the Proclamation, that it could lock in Aboriginal rights while ensuring this guarantee would be devoid of the original land rights observed by the Proclamation, further showcasing a relationship not based in mutuality and consent, but rather, unilateral colonial rule.

History reveals the tensions at the core of the shared memory between Indigenous nations and the Crown. For the Crown, there has been a steadfast commitment to embracing claims of legitimacy that have their roots in colonialism. In this section, we reviewed the Treaty of Niagara and Royal Proclamation, the numbered treaties, and the contradictions within the repatriation of the Canadian constitution. To understand how the contradictions of memory within these three histories play out today, we must turn to contradictions within contemporary governance.

Memory and Contemporary Reconciliation

Today's Crown-Indigenous relationship is deeply troubled. The Crown continues to unilaterally govern, to the detriment of the original spirit and intent of the nation-to-nation relationship. The Crown's position is made complicated by moves of the Canadian public towards guilt, regret, and shame over the colonial injustices committed against Indigenous peoples. In this section, I will discuss the growing contradiction in terms of colonial harms, stalled governance, and competition for claims of legitimacy.

Colonial harms in Canada, which historically have been little-known to the general public, have become widespread knowledge as of late. This increase in common knowledge has happened concurrently with official public apologies, commitments to reconciliation, and institutional developments. The fastest spread of knowledge, however, has been the result of recent discoveries of unmarked gravesites at former residential schools, discoveries that prompted global attention (Austen, 2021). With the latter, colonial injustice become impossible to deny, and many people, Indigenous and non-Indigenous, called for change with protests

around the country. The Canadian government responded to the international attention to the horrific discoveries by condemning the history of residential schools and recommitting themselves to reconciliation and the TRC Calls to Action (CIRNAC, 2021). The Indigenous-led Yellowhead Institute, which has issued three yearly reports on the status of the Calls to Action, notes that the federal government completed three calls immediately after the discoveries. The researchers note, however, that the government remains better at completing symbolic calls, rather than those of structural change (Jewel and Mosby, 2021: 5). As a result, the researchers ask: “if morbid and traumatizing revelations of Indigenous children’s graves advanced completion on Calls to Action that are *only symbolic*, what will have to happen for Canada to complete Calls to Action that are *substantive*?” (Jewel and Mosby, 2021: 30, emphasis added).

The displacement of substantive change in favour of symbolic changes contributes to a notion of reconciliation that relies on a status-quo politics of recognition. This politics, as Glen Coulthard’s seminal work argues, means “colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political, and economic framework of the colonial relationship itself” (2014: 41). The greatest revelation of colonial injustice in recent years was responded to, not with structural changes, but with symbolic gestures that memorialized destructive colonialism while ignoring constructive notions of colonialism.

Transitional justice has many insights into how contemporary states deal with injustices of the past. Ruti Teitel, in her seminal work *Transitional Justice*, explains that transitional justice unfolds with a collective memory undergoing transition: “Legal processes of truth-tellings construct collective memory in transition” (2000: 116). The aims of this process, however, do not fully extend to the Canadian case. As Teitel explains, the aim is for a new political order:

“Collective history making regarding the repressive past is said to lay the necessary basis for the new democratic order” (2000: 69). By comparison, for the Canadian state, there has been no commitment to new forms of political and legal authority after discoveries of colonial injustice. This lack of transitional commitment has laid bare the structural injustices that the Canadian state continues to create as a result of reconciliation *within* settler colonial systems (James, 2021; Nagy, 2022). Accordingly, we must ask how does Canada address its collective memory if not through transition? Here, we can return to settler colonial theory: Canada seeks to condemn, absolve, and process the destructive aspects of colonialism while distinctively turning away from the constructive aspects of settler colonialism.

Recent efforts to achieve reconciliation have focused on the Canadian state engaging in land claims, compensation packages, and apologies. While each of these may have potential in and of themselves, they are often devoid of greater moves towards reshaping the relationship between Indigenous nations and the Canadian state. In these efforts, the Canadian state is selective and contradictory in its recollection. The reserve system in Canada, for example, was designed to subvert Indigenous governance and facilitate European settlement in its place. Reserve parcels of land were, and continue to be, small tracts of land; as Daniel Rück argues, reserve creation did not match the substantial portions of the land promised in the Royal Proclamation nor did they correspond to traditional territories, but rather “only a few small spaces that would interfere as little as possible with white settlement” (2021: 110). Allan Greer argues that settler-colonial formation did not just guide the reserve system, but that the reserve system guided the settler-colonial formation of Canada: “novel developments in eliminating the Indigenous presence to make way for settlers need to be seen not simply as things the government of Canada did, but as functions constitutive of what Canada was (and is)” (Greer,

2019: 72). The continuation of the reserve system is a prime example of the contradiction of Canada's political memory.² At once, Canada can condemn the colonialism that enabled the reserve system without addressing how the reserve system itself was a constructive act of statehood as much as it was a destructive act of Indigenous political and legal autonomy.

Current political realities are invariably shaped by Canada's memorialization of colonial injustice in two notable and inextricable ways. The first is economic. Canada's engagement in a symbolic, but not substantive, memorialization of colonial injustice relies on a neoliberal mode of economics that depends on subverting large-scale reform and redistributive programs through a politics of recognition designed to protect its economic structures (Coulthard, 2014; James, 2012). The second is a matter of legitimacy. Canada must engage with claims of colonial injustice because colonialism infringes on liberal democratic values (Habermas, 1998; Rosanvallon, 2017). Furthermore, Indigenous claims to political and legal autonomy clash with the Canadian state's unilateral claim to political legitimacy. When history blurs, then "the erosion of historical consensus undermines authority and blurs the distinction between liberal politics and naked assertions of power... [subsequently] Fundamental questions about values start to interrupt the procedural regularities of the liberal state and raise questions about their legitimacy" (Muldoon, 2003: 185). To protect against this confusion over memory and history, the Canadian state must respond with reconciliation efforts. However, as we have seen repeatedly, these efforts acknowledge the destructive nature without engaging with the constructive nature of settler colonialism.

² A recent example of this contradiction can be seen with the apology and compensation given by the Canadian government to the Peepeekisis Cree Nation. Canada recognized that the "federal Agent arbitrarily allocated agricultural land on reserve without the Nation's consent and without compensation," but did not recognize that this reserve itself was a small portion of Cree territory designed to subvert Cree influence and construct a settler society in its place (CIRNAC, 2022).

CONCLUSION

Canada's historical memory has been contested by Indigenous nations fighting for justice within settler-colonial constraints. This contest has mobilized public support and the Canadian state has engaged in reconciliation efforts accordingly. However, a contradiction has emerged within these efforts. As Canada has sought to engage with past and current injustice, Canada has entered into a contradiction of memory. This contradiction is because the Canadian state engages only with the destructive elements of its colonialism while failing to memorialize its constructive nature. Settler-colonialism attempted to not only efface Indigenous autonomy, but it also sought to construct settler sovereignty in its place. The current legitimacy of the Canadian state depends on engagement with both the colonial injustices of the past and the still-existing structures that were created as a result. Future research could draw comparisons between works on democratic legitimacy and the illegitimacy of colonialism using the destructive-constructive model. Settlers in Canada must remember both colonial injustices and their contribution to establishing our modern institutions. Memorializing the first while suppressing the second would not only allow the contradiction to persist, but it would perpetuate the colonialism that we seek to condemn.

Words: 3 215 (excl. notes)

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