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Canada

Canada's State of Reconciliation

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“Water versus oil: life versus death:” Across Canada, Indigenous peoples continue to resist Canada’s ongoing disregard for treaty rights and the subjugation of environmental welfare to capitalist extractivism. The brutal suppression of water protectors at Standing Rock, North Dakota and their ongoing resistance has also galvanized Canadian conversations about Indigenous land rights and environmental welfare.

Many non-Indigenous Canadians have stood in solidarity with Indigenous peoples at marches and rallies organized across the country “ Manitoba, Montreal, Hamilton, Toronto “ to protest the pipeline and the major Canadian banks financing it: TD subsidiary TD Securities has given a project-level loan of \$360 million to the pipeline, while RBC and Scotia Bank finance the Energy Transfer family companies. [2] (Canadian energy company Enbridge is also directly financing the Dakota Access Pipeline.)

The Treaty Alliance Against Tar Sands Expansion “ an alliance of 85 First Nations and Tribes from all over the North American continent, including the Standing Rock Sioux “ has pledged to stop the expansion of the tar sands through all proposed pipeline, tanker and rail projects through their lands and waters.

This includes the proposed Kinder Morgan Transmountain pipeline in British Columbia, which the Liberal government has just approved along with Enbridge Line 3; as well as Energy East; Northern Gateway which the government has rejected; and Keystone XL which was rejected by the Obama administration but may be revived under Trump. [3]

Ambiguities of “Reconciliation”

In 2017, Canada will mark the 150th anniversary of confederation. As part of its sesquicentennial celebrations, the government is funding a few national initiatives on reconciliation with First Nations as signature projects. The 4Rs Youth Movement: Possible Canadas and Reconciliation in Action: A National Engagement Strategy are both Indigenous-led initiatives focused on creating cross-cultural dialogue.

The Toronto District School Board now requires all schools to start their day with a land acknowledgement, and the province of Ontario marked its first ever Treaties Week from November 6 to 12, to raise awareness of treaty obligations and offer teachers a recurring opportunity to plan lessons around the history and importance thereof. [4]

On the surface, the Canadian government's reconciliation process seems to be making strides in the right direction. One of the aims of the Truth and Reconciliation Commission was to make the horrors of the residential school system [which generations of Native children were forced to attend after being taken from their families “ ed.] a matter of public record, and the conversation among the non-Indigenous population finally seems to be pivoting.

Gord Downie, frontman of a hugely popular band The Tragically Hip and an artist with a massive following who's battling terminal brain cancer, is dedicating his last days to promoting reconciliation. Downie's latest solo album “The Secret Path” is dedicated to Chanie Wenjack, a 12-year-old boy who ran away from residential school in Kenora, Ontario, only to meet a tragic end hundreds of kilometers from his home.

Downie is not the first artist to work in the space of reconciliation “ Indigenous artists have been tackling the issue

for years” but he is, as Jesse Wenthe points out, the one most likely to reach the largest number of people, and consequently foster an increased interest in the work of Indigenous artists and activists. [5]

But as of September 30, 2016, 94 First Nations communities in Canada have been under 139 drinking water advisories. [6] Some, like Neskantaga in northern Ontario, have been under boil-water advisories for upwards of 20 years.

The announcement of the “historic” federal budget in March was met with disappointment by Indigenous leaders, who once again saw the chronic underfunding of First Nations, Métis and Inuit housing and infrastructure projects, education, language revitalization, healthcare and child welfare. [7]

Across the country” in Newfoundland, Ontario, Alberta and British Columbia” Indigenous communities have been protesting the government’s support for energy projects that will leave devastating environmental impacts in their wake. Grassy Narrows First Nation is still fighting to have mercury cleaned up from its river; after the Dryden Chemical Company dumped poisonous waste into the waters in the 1960s and “70s more than 90% of the population now exhibit signs of mercury poisoning. [8]

Attawapiskat First Nation in northern Ontario was forced to declare a state of emergency in April after a spate of suicide attempts in the community” over 100 attempts since September 2015. All this, then, is the state of reconciliation today” driven by state interests, riven with contradiction, and slow to effect systemic change.

Nation-to-Nation

In the October 2015 election, Justin Trudeau’s Liberal party ran on a platform that promised “a renewed nation-to-nation relationship with Indigenous peoples, based on recognition, rights, respect, co-operation and partnership.”

The Liberals also pledged to implement all 94 calls to action in the final report of the Truth and Reconciliation Commission, starting with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the report sees as crucial to the work of reconciliation: “The Commission is convinced that a refusal to respect the rights and remedies in the Declaration will serve to further aggravate the legacy of residential schools, and will constitute a barrier to progress towards reconciliation.” (TRC Report, 137)

What then would a renewed nation-to-nation relationship entail? It’s worth unpacking the meanings and constraints of sovereignty, a legal-political concept most closely associated with nation-states.

The executive summary of the TRC’s report returns time and again to two sets of legal principles that should form the basis of the Canadian state’s relationship with Indigenous nations: the treaty rights of Indigenous people and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The treaties made between the settler colonial powers, Britain and then Canada, starting in the late 18th century have become central to ongoing land claims as well as the question of reconciliation.

Treaty-making as it relates to the Canadian state stretches back to the Royal Proclamation of 1763, when the British empire, realizing that the colonization of Canada west of the Great Lakes would entail expensive military expeditions, decided instead to make agreements” treaties” with Indigenous peoples.

For a brief period before the onslaught of European settlers, treaties represented a recognition of Indigenous nationhood and sovereignty, and honoring of a longstanding feature of Indigenous social and political systems.

Treaty-making was already a well-established historical practice among Indigenous nations; Anishinaabe scholar and professor Hayden King writes that “[a] treaty is not merely a document. Certainly not to First Nations. Treaty is a practice. A practice that endures over time.” [\[9\]](#)

Activist and scholar Chelsea Vowel speaks of the need to move away from a rights-based framework toward a framework of “reciprocal obligation” in understanding what it means to live as treaty people. [\[10\]](#)

Treaties also did not entail cession of indigenous lands; the Mi'kmaq and Maliseet in Nova Scotia, for instance, made Treaties of Peace and Friendship with settler authorities which maintained their title to the land as well as rights to trade, hunt and fish. [\[11\]](#)

Treaties, and the framework of mutual obligation within which they function, are a challenge to the settler colonial legal system — they offer a way to highlight Indigenous sovereignty on Indigenous terms, without bowing to Canadian law.

The British empire, and later the Dominion of Canada following confederation, both tended to treat treaties as mere transactions at best, an exchange of money for land, eschewing any understanding of treaties as long-standing agreements of mutual support, obligation and friendship.

No “transactional” understanding of treaty-making, however, could encompass the brutal and systematic attempts at eradicating Indigenous peoples through residential schools, relocation and legislation; these were and continue to be a violation of treaty rights.

Fighting for Rights and Justice

The Royal Proclamation, and the numbered treaties that followed, are undoubtedly colonial instruments — documents that acknowledge the rights of Indigenous peoples to their lands, but often with the intent of eventually purchasing or otherwise taking over the land for colonial interests.

Many Indigenous scholars have made the point that First Nations do not need a Royal Proclamation to recognize their claim to the land; yet the realities of appealing for justice in a settler colonial context have made appeals to Canadian law unavoidable and even necessary.

When the Canadian constitution was repatriated in 1982 [i.e. freed from the vestiges of British control, a process involving a struggle over Quebec’s political status in confederation — ed.], several Indigenous activists fought to have Aboriginal title to land recognized in the constitution. Section 35 of the Canadian constitution now recognizes existing Aboriginal rights, although it does not define the substantive content of those rights.

Indigenous peoples have fought to have the contents of these rights recognized in Canadian courts, with varying degrees of success. In *Delgamuukw v. British Columbia* in 1997, the Supreme Court refused to rule on the issue of land ownership but made several statements acknowledging the responsibility of the Crown to consult with First Nations on issues concerning “Crown” land.

In *R v. Marshall* in 1999, Donald Marshall, a Mi'kmaq man, successfully argued that treaty rights exempted him from fisheries regulations. [12] The court later clarified its ruling to state that treaty rights did not extend to all natural resources, and that the government could restrict these rights "in the interest of conservation." [13]

More recently, the Federal Court of Appeal overturned the previous (Conservative) Harper government's approval of Enbridge's Northern Gateway pipeline, citing lack of adequate consultation with Indigenous peoples. [14]

On the whole, however, it has been difficult to insist upon treaty rights in Canadian courts, or to pursue justice through the courts for indigenous women who have been abused by the Canadian police. Moreover, recourse to the settler legal system continues to treat Indigenous communities as "wards" of the Canadian state, reinforcing the colonial paternalism of the state.

The tension between demanding justice from the institutions of the state and questioning the legitimacy of those very institutions is reconciliation today writ large.

A Renewed Relationship Needed

A renewed nation-to-nation relationship would free Indigenous communities of their reliance on the Canadian legal system by respecting their rights to self-determination and sovereign governance, including reinstatement of Indigenous systems of law and recognition of treaty rights, often including the right to derive economic benefits from the land and make decisions concerning education and healthcare.

While the language of negotiating nation to nation is undeniably important, it cannot resolve the question of power that looms over the discussion. Indigenous peoples are contending with a state apparatus that has been responsible for the destruction of their systems of law and governance, and the decimation of complex societies. What might self-determination and autonomous governance look like when the Canadian state delimits the structural conditions within which this can happen?

When the Liberal government promised to adopt the principles of the UNDRIP into law, it seemed that the "free, prior and informed consent" of First Nations to decisions concerning their land "which would amount to the right to veto government initiatives" would be enshrined in Canadian law. But in July, the Liberal government reneged on its election promise of adapting the UNDRIP into law, with Minister of Justice Jody Wilson-Raybould asserting that the implementation of the 42 principles would be "unworkable."

As things stand, the Trudeau government continues to approve controversial development projects across the country in direct contravention of the demands of Indigenous communities. The government has issued construction permits to the Site C dam in British Columbia, the Nalcor Energy dam project in Labrador, the LNG pipeline in BC, Enbridge Line 9 carrying crude from Alberta to Montreal "the list goes on."

As Mi'kmaq lawyer and activist Pamela Palmater noted in a recent piece for the Canadian Center for Policy Alternatives, the Canadian government still assumes that it can make a unilateral decision regarding the fate of unceded Indigenous lands; it cannot legally do so.

[1] 85 First Nations and Tribes Condemn Enbridge's Role in the Violations at Standing Rock and Call on Trudeau to Speak Out." See <http://www.treatyalliance.org/wp-co...>

[2] For details on the involvement of Canadian banks, see Cary Collins, "Canadian banks fund Dakota Access Pipeline companies: an investigation." Ricochet. September 9, 2016. <https://ricochet.media/en/1386/cana...>

[3] For more information, see <http://www.treatyalliance.org/>

[4] See <https://news.ontario.ca/mirr/en/201....>

[5] Jesse Wenthe, "With Secret Path, Downie is illustrating a way forward to Indigenous artists." CBC Arts, October 18, 2016.

[6] <http://www.hc-sc.gc.ca/fniah-spnia/...>

[7] Pamela Palmater, "Trudeau's promises of 'renewed relationship' with First Nations evaporated with Liberal budget." rabble.ca, March 23, 2016. Palmater provides an excellent breakdown of estimated costs for improving living conditions and the amounts actually allocated in the Federal budget.

[8] Jody Porter, "New generation suffering mercury poisoning at Grassy Narrows, Ont," CBC News. September 20, 2016. <http://www.cbc.ca/news/canada/thund...>

[9] Hayden King, "Anatomy of a First Nations Treaty." TVO.

[10] <http://montreal.mediacoop.ca/video...>

[11] Mi'kmaq Rights Initiative. <http://mikmaqrights.com/negotiation...> Accessed November 19. See also Living Treaties: Narrating Mi'kmaw Treaty Relations, ed. Marie Battiste. Sydney, NS: Cape Breton University Press, 2016.

[12] 6 landmark rulings on native rights." CBC News. January 8, <http://www.cbc.ca/news/canada/6-lan...>

[13] Ibid.

[14] "Ottawa won't appeal court decision blocking Northern Gateway pipeline." CBC News. September 20, 2016.