



CONSTITUTIONAL STORIES

Pride, Violence, and Citizenship in Canada

By Aaron Mills

Allow me to frame my comments by presenting two contrasting quotations at the outset, one from Canada's current prime minister and one from the prime minister who immediately preceded him. I'm not going to refer to them further in my essay; rather I invite you to read them now and then to return to them once more at the end. Each presents a strikingly different constitutional narrative of Canada, even though spoken by a prime minister. This essay unpacks the remarkable tension between them and tries to explain the work that each narrative does for Canadian self-understanding today. I conclude that the constitutional story we tell has a tremendous impact on the quality of citizenship we hold. Here we go:

We should not, you know we're so, we're so, humble isn't the word, but we're so self-effacing as Canadians that we sometimes forget the assets we do have that other people see. We are a very large country, with a well-established, you know, we have one of the longest-standing democratic regimes, unbroken democratic regimes, in history. We are one of the most stable regimes in history. There are very few countries that can say for nearly 150 years they've had the same political system without any social breakdown, political upheaval, or invasion. We are unique in that regard. We also have no history of colonialism. So we have all of the things that many people admire about the great powers, but none of the things that threaten or bother them about the great powers. We also are a country, obviously beginning with our two major cultures, but also a country formed by people from all over the world that is able to speak cross-culturally in a way few other countries are able to do at international forums.¹

—*Canadian Prime Minister Stephen Harper, addressing the G20 in Pittsburgh, 2009*

◁ *Idle No More demonstrators blocking Canadian National Railway, Portage La Prairie, Jan. 16, 2015. John Woods/Associated Press/The Canadian Press*

The history of the indigenous populations of the world is a book most people have never read. This is certainly true of Canada. And unfortunately when we do read the book of the First Nations, the Métis Nation and Inuit, it begins with the European explorers who, after they figured out this wasn't India or China, believed they had discovered a new continent where no one of any consequence lived. It starts with Canada's beginnings when the European settlers believing that native culture had no value, the settlers who followed made no attempt to understand it because they assumed its people had nothing to say. Thus began the tradition of dismissing indigenous knowledge in order to impose the European settler's mono-cultural point of view on everything they saw, touched, or heard in the so-called new world. From the start, the newcomers' message to North America's First Peoples was the mantra used by colonial powers the world over. We told them, and we told ourselves, that all that we believed was good, and that all they believed—their history, their traditions—was irrelevant.²

—Former Prime Minister Paul Martin, address in Saskatoon, 2014

Most would agree that until recent years, Canadians have long enjoyed a strong reputation internationally for our commitment to global welfare and for the living conditions we sustain at home. Probably less known, Canadians are awfully proud of it. We don't like to own up to it—I sometimes feel as if there's a sense of joint enterprise in keeping our pride on the down low. Most of us wouldn't want to be caught in public feeling so upbeat about ourselves. Doesn't jibe with our reputation for getalongability and easy-goingism. But make no mistake, we're proud of what are seen as Canada's remarkable social, political, and economic successes. We're proud of the tremendous quality of life we have. We're immensely proud *to be Canadian*. We see our country as embodying the progressive politics but neither the external open imperialism nor the internal casual indifference toward others of our neighbors to the south. We understand ourselves as international exemplars of lives lived valuing and experiencing freedom, justice, and equality and all of this without adopting an American ethos of we'rebestism.

This is a caricature of course. Many critical-minded Canadians do not feel this way at all; some rail against this view. But my experience across a wide array of spaces is that beyond the academy, beyond activist communities, and beyond identifiable minorities, most Canadians subscribe to a version of it (as do hordes of academics, activists, and minorities). In our ordinary capacity as citizens we complain of course—about policies we don't like, about the identity of the government of the day, about how out of touch their values are with the heart of our collective being—but we don't call into question the quality of our citizenship itself. No, Canada and membership in it are taken as unambiguously *good*. That's always presented as a settled answer, not an

open question. It's the invisible claim upon which all self-reflexive political judgment may issue, not a premise within the purview of debate.

On the surface, of course, this sense of certainty has to do with the immense privilege that citizenship in Canada bestows. But not far beneath this secret self-love has to do with a rather obvious, important and permanent feature. Travelling on the back of citizenship, it finds its foundation in our constitution. All of the citizenship goods that empower the caricature find their (effective) first cause in the set of documents and unwritten conventions that bind our political community together. Statements about pride in Canadian identity are ultimately statements about the domestic structural conditions that authorize and shape it.

That structure is deeply (although as the Supreme Court of Canada's *Quebec Secession Reference*³ made clear, not classically) liberal, and has been given great force judicially through the metaphor of "a living tree." As Western liberal democracies grew, a deep constitutional divide emerged as to how (and whether) a constitution could allow its government to recognize changes in the society it governs. That is, a divisive question arose as to how the settled legal and political superstructure could account for dynamic social, economic, and (though liberals are loath to admit its existence in public life) moral sensibilities formally beyond, but in reality shot through, law and politics.

For Canada the debate was settled in 1929 by the Judicial Committee of the Privy Council, Canada's then-final legal arbiter, in *Edwards v. Attorney General for Canada*, better known as the Person's Case.⁴ Speaking for the Council, Lord Sankey delivered his famous statement that, "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."⁵ That's the metaphor for Canadian constitutionalism and thus the home of our private self-confidence. The fact that the tree is specified as living underscores Canada's constitutional commitment to growth and change; ours is not a constitutional order forever determined by our originator's intent. Rather, where existing legal disadvantage has in contemporary contexts come to be seen as prejudicial, the relevant law will be reformed.⁶

Violence of Erasure

The choice of a tree over other life forms is apt because the structure of branches suggests that the tree can accommodate (there's the liberal move) a wide variety of directions for growth all at once and none of the branches are expected to look alike. Subject to what the trunk may bear, each has a space of its own in which to thrive. But of course everything turns on the reality of the trunk. All branches find roots and hence nourishment only through it. And this is precisely as Lord Sankey intended with the insufficiently discussed last half of his statement that the growth (and imperially,

his use of the language “expansion”) of the living tree was always to be constrained “within its natural limits.”

“Aha,” anti-imperial skeptics like me will exclaim.

For anyone concerned about power, the constraining condition necessarily raises the rather important questions of 1) what those limits are, 2) how they are justified, and 3) whether the justificatory standard invoked is the right one. And from the perspective of the status quo, those are dangerous questions for their effect is to topple the constitutional story Canada tells of itself, and thus call into question citizen confidence in the goodness of their national identity. Those questions, in like metaphor, are the lumberjack’s ax.

First, let us be clear: the limits contemplated are the hard edges of liberalism—a political community built on an anthropological premise that each of us exists independently before we exist in groups and the resulting valuation of individual autonomy as the primary political good even where other political goods are taken as being of vital importance; the concomitant problem of individuals needing certainty of security from one another’s capacity for open physical violence and for the violence of liberty deprivation; the need to vindicate the right where such transgressions occur; and a resulting necessary, shared orientation to justice. To accomplish all of this the living tree has its roots clutching a social contract struck between settler⁷ peoples at confederation in which the rule of law was sanctified and marshaled to police a hard line between public and private life. Within this story, that contract is the seed for Canada’s entire constitutional enterprise.

Question two: all of this is said to be justified because the sovereign—vested with a monopoly on the legitimate exercise of violence to enforce compliance with the right—finds its authority in this contract, the product of autonomous citizens having delegated their power upward and centrally to it.

That just leaves the third question: whether the justificatory standard of autonomous settler citizen authorization is the right one. Use of the descriptor “settler” in posing the third question is not out of place because in the contract story Canada tells, only settler peoples were invited to participate in the dialogue. Which is already to state the beginning of my answer to the question.

A necessary condition of the contract is the violence of erasure. The living tree draws up through its roots strength and support from the contract story, in which indigenous peoples do not appear: folks already present can’t feature in a story of beginning. We were not party to confederation. Although we may now vote (and many of us do), we are not retroactively made subjects of popular sovereignty: Canada is still not ruled with our consent. And guess what? Many of us would steadfastly refuse to legitimize a shared political community bound within a liberal constitutional framework even if we *were*

offered authorization/non-authorization over it: we already have stories that explain how we constituted ourselves as political communities on our traditional lands. And as folks who were already here, organized in vibrant political communities, indigenous peoples' foundational political claim is not to fit in with, or be tolerated by, the rest of Canada, but rather to have our own ways of being—legal, political, economic, social, spiritual, and ecological—stand in the world that gives them life and meaning.

Let's sideline all of that for a moment and reflect on Canada today. We have the metaphor of the living tree and considerable citizen pride in the real-world impacts it conditions and empowers. But how are the benefits of Canadian constitutionalism distributed across citizens? Who feels that pride? And more pointedly, how's the living tree working out for the indigenous peoples whose political communities on Turtle Island preceded and—albeit colonized, disempowered and thus rendered largely ineffective in practice—survive despite Canada?

The question is no question at all. I have no interest here in inventorying the causes of the incalculable suffering that indigenous persons, peoples, and lands have experienced because of institutionalized state depredations against them. Accounts of both the distant past and ongoing violence have been and are being widely reported and are readily available for those interested in educating themselves. Although it has its own problems, the five-volume report of the Royal Commission on Aboriginal Peoples released in 1996 is a good starting point.

Alternatively, to learn more one could simply check out the headlines of Canada's national dailies (not for the quality of coverage—which is widely biased against indigenous interests—but for an identification of national issues regarding indigenous suffering). We recently had the Idle No More movement in Canada which brought tens of thousands of people, indigenous and settler, from across all corners of Canada into the streets, public squares, malls, and highways in recognition of indigenous suffering and in support of change. Support rallies broke out in various cities in the United States and in other countries. Second, the Truth and Reconciliation Commission of Canada is currently wrapping up its inquiry into the federal government's Indian Residential Schools' ethnocide program. The government was compelled to create the process through a settlement agreement that resolved litigation, and it has fought the process throughout it, including, perhaps most importantly, denying the commission access to critical documents and information needed to deliver on its mandate. Third, affected families and many sections of civil society have long been voicing concern over the massive-scale murder and abduction of indigenous women in Canada. Although the Royal Canadian Mounted Police released "Missing and Murdered Aboriginal Women: A National Operational Overview," a report documenting 1,181 cases of missing and murdered indigenous women in Canada between 1980 and 2012 (and these are just the cases the

RCMP had documented), Canada's federal government refuses to take targeted action. In particular, it continually rebuffs calls for a national inquiry on this issue specifically in favor of general tough-on-crime legislation. I once had a settler man in his 50s tell me he missed "the good old days when you could dump a squaw back in the ditch when you were done with her" as casually as if commenting on the weather, while driving me down the TransCanada highway. He even smiled. Not smugly; as if in fond remembrance.

Those are just a handful of contemporary reference points, which for many indigenous peoples reflect the experience of life under Canada's imposed constitutional order. If you're a Canadian citizen who happens to be indigenous and who thus resides on the boot end of Canadian constitutionalism, you might well feel no pride in Canada at all. On the contrary, many indigenous persons voice deep anger, hurt, and frustration at Canada for its total disinterest in reckoning its genesis with indigenous existence and for its ongoing quiet disinterest in drawing out the connection between its contemporary constitutional practice and our suffering today.

Stunning Apathy

Yes, to be sure many indigenous persons and peoples in Canada are suffering but *that* right there—the reaction—is the real story: that it's possible for Canada's disinterest in indigenous suffering today to be quiet, that Canada is so far removed from claiming any sense of responsibility for the living conditions it has imposed on indigenous peoples, that its disinterest *could* register as quiet instead of shocking, deafening silence to the average citizen's ears. The real story is about why Canada *feels no need* to claim responsibility. The real story is about why so many settler Canadians are mystified when confronted with indigenous peoples' absence of pride in Canadian constitutionalism and even offended by indigenous non-identity with Canadian citizenship. The real story is about the stunning apathy so many Canadians demonstrate to indigenous suffering today and their sustained commitment not to educate themselves about it. The real story is about the dynamic that allows for Canadians' righteous indignation at human suffering in other parts of the globe—enough so that governments of different political stripes continually find public support for the allocation of funds and troops in support of peacekeeping and military interventions abroad—while generating little more than exasperated sighs about indigenous suffering at home. I have yet to see a Canadian federal election in my lifetime where citizens decided that indigenous suffering was a matter of Canadian governance and hence a voting issue.

Many Canadians go further still and are actively angry with us for suffering. Many Canadians, including some of Canada's most highly regarded print journalists, consistently argue that we bear the primary responsibility for our own suffering. Liberal constitutionalism has done us the good service of working out for us the conditions that

will allow us to thrive and those conditions, we are told, are universal; we're thus at fault if we don't accept the offer of constitutional transformation. On this popular account, a need to inquire into *the actual causes* of indigenous suffering isn't taken as necessary to address it. Let me repeat that astounding perspective: knowing the *cause* of indigenous suffering is not taken as necessary or even important to *address* it. Indigenous peoples enjoy a unique cultural quality of *timelessness* so special that so far as our interests are concerned, public policy need not attend to the trivialities of cause and effect. The question of cause either doesn't arise or answers are simply presumed. In the latter case, the answer proffered is always a version of "they aren't willing participants in our liberal constitutional order." One of the strongest moments of this latter form of imperialism I've personally experienced was in March 2011. I was an invited speaker at a forum on indigenous-Canada reconciliation in Canada's province of Ontario. It was held in the Native Canadian Center, in Toronto. Sitting in the audience and waiting for my panel, I was stunned to hear our keynote's core message. A former premier of Ontario shared with easy confidence and certain conviction that indigenous peoples in Ontario need to join the twenty-first century: that was the central impediment to our having a successful relationship. It was such an unbelievable statement coming from someone with as much constitutional authority as he had that I kept waiting for the punch line. Then slowly I realized he really is that ignorant and that his presence at this event was the (albeit unintended) joke. In my comments, shaking I was so angry, I stated that his prehistoric view works directly against reconciliation and in the interests of division.⁸

So much for getalongability. So much for easygoingism. On home soil—where Canadians are inescapably confronted with indigenous suffering—the national disposition wavers instead between privileged confusion (those who have continually refused to educate themselves) and angry judgment (those who always already know the answer). Either way, it's an orientation of open imperialism that follows from unquestioned, unjustified, and unjustifiable settler privilege: never having to justify how it is one came to inherit the considerable benefits of life in Canada; as if no disadvantage has been borne for what appears through the filter of settler privilege as a marvelous, costless, constitutional windfall.

Colonialism is not reducible to a historical process of European settlement and indigenous displacement. That's but one phase of what is, properly understood, *a mode of relation*. Today it's exercised through the imperial imposition of a liberal constitutional order over pre-existing indigenous ones: the living tree refuses to acknowledge the forest around it and stubbornly, selfishly, proceeds to draw up as many resources as it can for itself, oblivious to the needs of all others. The question Canada poses to the indigenous peoples it colonizes even today is "liberty or unfreedom?" but this is a false dichotomy which serves the purpose of (thinly) concealing

Canada's constitutional commitment to violence. The real question is always "freedom or unfreedom?": there are logics of freedom beyond liberty. This is not a sophisticated insight. One simply needs to be willing to ask the third question raised by Lord Sankey's constraining condition for it to be disclosed.

This brings us to the heart of the problem of contemporary Canadian colonialism and our starting point of the pride so many Canadians feel by virtue of the constitutional order in which they claim citizenship. Through the lie that liberty represents the whole of freedom, Canada's greatest constitutional feat has been to hide domination within the shadows of freedom. The Honorable Frank Iacobucci, retired Puisne Justice of the Supreme Court of Canada, recently concluded an inquiry into the systematic exclusion of on-reserve indigenous peoples from the jury roles in Ontario, Canada's most populous province. Consider the following quotation from his final report:

One of the biggest challenges expressed by many First Nations leaders and people is with respect to the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offense, rather than seeking retribution and punishment. First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.⁹

The real story is not the one Canada tells.

As this quotation reveals, it is not the case that on northern Turtle Island, what many of us now call Canada, a single constitutional order occupies all the constitutional space. Liberty is not the only foundation for political community, nor is it the only face of freedom. Long before early Europeans showed up (much less the hordes of immigrants from every country imaginable who are still arriving), the indigenous peoples of Turtle Island not only lived in political communities, but did so according to constitutional frameworks reflective of their own ways of being and knowing in the world and of their own conception of value.

Indigenous Forbearance

Canadian imperialism stands on the unforgivably arrogant assumption that before Europeans showed up, indigenous peoples had no constitutional order; that we were autonomous units roaming randomly about, occasionally bumping into one another, which is the cause of our cultural diagnosis of civilizational failure to thrive. But

the real story is about conflicting constitutionalisms. The real story of indigenous resistance to Canadian constitutionalism—the reason we refuse the offer of liberal transformation—is because there *is* freedom beyond liberty; because it is not the case that all we need is a shot of liberal constitutionalism to set us straight; because we are not scaling ourselves against the liberal metric of success; because despite centuries of dispossession and violence, we have not forgotten who we are; because we know that we claim citizenship in our own constitutional orders which are premised on an ontological claim of interdependence, not one of individual autonomy and which are pointed toward harmony (understood not as non-conflict, but as right relation), not justice; because we know that submission to liberty and the privileging of the individual it requires over the relational mode of being required of an interdependent self will alienate us, too, from the conditions of earth which sustain our lives, and will make us, too, complicit in the violence that has ushered in the Anthropocene and climate crisis.

The real story is about indigenous forbearance. Despite repeated state-sanctioned violence taking physical, mental, economic, ecological, and social forms, we have not adopted a responsive course of violent confrontation. Of how many other places in the world where peoples live under conditions of domination—precisely because of who they are as peoples—can this be said? The real story is about indigenous peoples staying true to their own teachings, which have to do with guiding those who behave harmfully into right relation. This is a story of unimaginable patience. It is a story of giving to those who do not deserve the gift, but who, despite their commitment to violence, are also part of creation. It's a story about the daily practice of indigenous constitutionalism under conditions determined to stamp it out.

Finally, the real story—about violence, imperialism, education, forbearance, and *hope*—is about treaty. Canadian constitutionalism brings a treaty within the liberal logic of distributive justice. It says that treaties are contracts which distribute settled rights between parties, which are then enjoyed by each party's respective membership. As such, treaty rights are expressed *within* the forms of Canadian constitutionalism and thus speak under, not to, its power.

Although they all use different language to express the idea, most indigenous peoples I know think of treaties instead as a framework for right relationships. That is, the work of a treaty is not to distribute rights under the authority of Canadian constitutional power, but rather to coordinate distinct constitutional orders. Often this is described as a “nation-to-nation” relationship. It is an intersocietal practice indigenous peoples engaged one another in long before settlers arrived and into which settler peoples were welcomed.

This has been a long answer to the third question, but my view will be plain: from no space could settler peoples legitimately authorize a constitutional contract on

Turtle Island without the express consent of indigenous peoples, and for reasons of conflicting ideas about the foundations of healthy political community, that consent would not, is not, and will not be given. But that isn't the end of the story. We are not to draw from widespread indigenous refusal of the contract and the resulting violence upon which Canadian constitutionalism is necessarily predicated that settler citizens can never claim legitimacy here. The replacement story for settlers is not a choice between acknowledged domination or insufferable guilt and the resulting deliberate ignorance and animosity it breeds.

Instead, we could all choose education and the connection it allows for, together. Indigenous peoples could volunteer to teach settlers about our own constitutional orders and about the treaties that invoke these constitutional forms to make a home for settler peoples here. Many have already been working hard at this for a very long time. We could all accept that treaties serve the end of bringing us into political community together, and thus legitimize settler presence on Turtle Island. We could all accept that treaties are also the constitutional *means*: our difference is not a tension to be resolved once and for all; rather settler presence is forever to be contingent on compliance with the earth-first treaty order. If this were the constitutional story we told, our lives would all change. Thankfully, we would no longer enjoy the unsustainable pace of earth-destroying modes of economic development which are responsible for the Anthropocene, and all of us, settler and indigenous, would be able to claim citizenship in our shared political community knowing that violence is not the foundation of our link. And that's a community I'd be proud to be part of.

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- 1 Aaron Wherry, "What he was talking about when he talked about colonialism," *Macleans*, 1 October 2009. Online: <http://www.macleans.ca/politics/ottawa/what-he-was-talking-about-when-he-talked-about-colonialism/>.
 - 2 Paul Martin (The Rt. Hon.), "Wâhkôhtowin 2014: Indigenizing Practice in Post-Secondary Education: Linking Kindred Spirits," Keynote Address, Saskatoon, Saskatchewan, 19 September 2014. <http://www.witbn.org/APTNFinalSmallTypeJune19.pdf>. To be clear, although I contrast Martin's statement with Harper's, I am not intending to hold it out as representative of an ideal constitutional story. Martin, too, is a committed contractarian of the sort I argue against in this essay, but he's able to see some colonial impacts, both contemporary and historical.
 - 3 *Reference re Secession of Quebec* [1998] 2 S.C.R. 217., in which the Supreme Court of Canada addressed three reference questions on whether and under what conditions the Province of Quebec could unilaterally secede from Canada.
 - 4 *Edwards v. Canada (Attorney General)* [1929] J.C.J. No. 2, [1930] A.C. 124. (J.C.P.C.). Five women sought to prove that they were "persons" within the meaning of s. 24 of the *British North America Act, 1867*, which regards senate appointments.

- 5 *Edwards* at 136.
- 6 “Seen by whom” of course remains a live and contentious question. I note also that this generous characterization of the doctrine of the living tree denies the possibility that some legal disadvantage may have been intentionally prejudicial (and indeed in my opinion, was so) from the outset.
- 7 I don’t intend my use of the descriptor “settler” to reduce the political identities of non-indigenous Canadians to the fact of colonization. However, in an argument where our respective political status on Turtle Island is the very thing at issue, centring settler and indigenous locations is critical.
- 8 Symposium on Reconciliation in Ontario: Opportunities and Next Steps, University of Toronto / National Centre for First Nations Governance Symposium, Native Canadian Centre, Toronto, 10 February 2011.
- 9 Frank Iacobucci (The Hon.), *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Government of Ontario, 2013) at 210.