

Article**Wisdom of the Elders: Canadian Reconciliatory Experience as an Insight on the Present**John Soroski^{1,*}

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Wisdom of the Elders: Canadian Reconciliatory Experience as an Insight on the Present

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Abstract

Canada's first two large historical encounters of recognition and work-in-progress accommodation of previously marginalized and alienated groups involved French Canada and newcomer Canadians. The third such engagement is now underway in response to the Indigenous peoples of Canada. While this endeavour is long overdue, there is reason for concern that the laudable enthusiasm of many for this project of reconciliation may be authorizing some policies, practices and discourses that conflict with and potentially undermine the values that informed and came out of previous inclusionary encounters. Three areas of concern arise. The first is the embrace of state deference in some instances to unlawful and sometimes violent forms of Aboriginal protest and resistance, undercutting the idea of the rule of law and of the value of the peaceful resolution of disputes. The second is the propensity to undercritically over-authorize Indigenous cultural communities as sources of moral valuation, in ways that may undermine individuals' dignity and well-being, as well as doing harm to the good of intra-cultural inclusiveness. The third is the related tendency to over-valorise Indigenous cultures and claims in ways that suggest symbolically and in practical terms the idea of the existence of morally first-class and morally second-class Canadians.

Keywords: Canadian identity, Canadian culture, indigenous peoples, cultural accommodation, French Canada, inclusivity, multiculturalism, reconciliation

Introduction

Canadian state and society have now participated in two grand, long-term encounters of response, recognition and work-in-progress accommodation of previously marginalized and alienated groups. The first concerned the place of French-speaking Canadians in the national fabric; the second, the relationship of newcomer Canadians to our society and its dominant norms of identity through the mechanisms of multiculturalism. A third, long-overdue and much-needed encounter involving Indigenous peoples in Canada is now underway. There is, however, some reason for concern that the laudable enthusiasm of many for this project of reconciliation may be encouraging and authorizing the embrace of a variety of policies, practices and discourses that conflict with and potentially undermine the values that informed and arose from previous inclusionary encounters.

Three such areas of conflict are considered here. The first is the rise in unlawful and occasionally violent forms of Aboriginal protest and resistance, sometimes met by state deference and unwillingness to intervene, undercutting the idea of the rule of law and of the value of the peaceful resolution of disputes. The second is the propensity to under critically over-authorize Indigenous cultural communities as sources of moral valuation, in ways that may undermine individuals' dignity and well-being, as well as doing harm to the good of intra-cultural inclusiveness. The third is the related tendency to over-valorise Indigenous cultures and claims in ways that suggest symbolically and in practical terms the idea of the existence of morally first-class and morally second-class Canadians. In each of these areas, it is argued, the historical encounters of inclusion that Canada has already experienced suggest the importance of recognition and reconciliation, but also of a commitment to principled limitations of response in the name of countervailing goods.

It must be acknowledged that there are some conceptual perils in this sort of argument. An emphasis on the historic record (or at least its more laudable elements) as a source of contemporary guidance can lead to an over-valuation of the good of continuity.¹ Sometimes the way we did something in the past was too narrow, only captured part of the goods desired or was simply wrong. The very need for the inclusionary projects of our history indicates that there is no special claim in the status quo or its close relatives. Nor, of course, is it the case that the circumstances of prior exclusion or the nature of the community we seek reconciliation with are the same as in historical examples. No one would

suggest that French Canada, newcomer Canadians and Indigenous communities are all just minor variants of each other: what constitutes responsiveness, accommodation and reconciliation for one group does not necessarily constitute it for another. There is also a real danger of being too facile in identifying the 'values' of a state, society or culture. Social reality is complex, and the claim that any particular mode of response or reconciliation is an expression of value 'X' is likely to be undercut by numerous counter-examples. Even if value X is expressed in some particular arrangement, who is to say that as such it represents a paradigm value or that it carries – or should carry – general social authority?

I offer these arguments, then, with some caution. The values of past encounters emphasized here include the rule of law, the recognition of individual importance and value alongside that of community, the idea of comity and mutual engagement between communities, and the relative equality of moral value of different cultural heritages. These are all goods which I think can be broadly recognized as having some claim on us, although of course the difficulty lies in the question of how they are to be weighed against conflicting goods.

State Authority, Violence and the Rule of Law

Since the 1990s, occasions of Indigenous–state conflict in Canada involving violence or the threat of violence, or otherwise embodying overt Aboriginal resistance to state authority have increased in number. While Indigenous activism has also been expressed in recent decades in activities such as blockades of roads and railways, these have generally been of relatively short duration and are therefore probably better understood as protests and forms of expression rather than actions rising to the level of threats to the rule of law. Among the most noteworthy of the sorts of encounters that might, however, be considered as suggesting serious threats to state authority have been the Oka Crisis of 1990 and the Caledonia Dispute of 2006.²

At Oka, Quebec, the municipality's planned expansion of a golf course on land claimed by local Mohawk peoples resulted in members of the Kanasatake and Kahnawake Nations establishing a blockade of the area's access road. When police sought to remove the barricades under the authority of a Quebec Superior Court injunction, a provincial police officer was shot and killed. The Canadian Army was subsequently brought in at the request of the provincial government, and a 78-day

siege ensued between the Army and approximately 100 heavily armed Mohawk warriors. Ultimately the Mohawk stood down, with a small number of arrests following. Despite the loss at the barricades, however, the actions of the Indigenous resisters produced an end to further development on the lands in question; indeed, the Mohawk community was ultimately granted the property through the federal government's purchase and transfer of it in 1999.³

The Caledonia Dispute arose similarly around a disputed land claim, in this case involving a new housing development on privately titled land near Caledonia, Ontario. The land, which had been the subject of a contested claim by the Six Nations of the Grand River, became a centre of conflict in early 2006. As development of the land for a housing tract began, some members of the Six Nations of the Grand River responded by occupying it. An injunction which was ordered against the occupation by Justice David Marshall of the Ontario Superior Court on 10 March 2006 had the opposite of its intended effect, when the original occupiers were almost immediately joined after its issue by additional supporters and nearly 1,000 members of nearby Mohawk communities as well. Six Nations road blockades and destruction of property, as well as cross-community conflicts between local non-Indigenous and Indigenous peoples during this time created considerable chaos, disruption and lawlessness. Justice Marshall issued a contempt order against the occupiers shortly thereafter. Provincial police, nonetheless, remained at a distance until April 20, when, in effectively their only substantial engagement during the conflict, they arrested 16 of the occupiers of the site.⁴

Subsequent provincial enforcement of the Superior Court's directives was largely non-existent, with the government of Ontario Premier Dalton McGuinty choosing a conciliatory and deferential path. Following executive direction and the guidance of the province's 'Framework for Police Preparedness for Aboriginal Critical Incidents', the Ontario Provincial Police declined to intervene in the occupation or to provide further enforcement of the injunction.⁵ The provincial government then purchased the contested land from the developer in mid-June, and entered into negotiations with the Six Nations community for a potential transfer. Seeking to bring the issue to a close, the governments asked the Ontario Superior Court to dissolve the injunction in August, but were not able to convince Justice Marshall, who issued a further order that negotiations were to cease until the terms of the injunction were fulfilled, the 'rule of law restored' and his criminal citations for contempt enforced (Brock, citing *Henco Industries*).

The Ontario Court of Appeal ultimately disagreed with Justice Marshall and terminated the injunction with no further enforcement actions or sanctions.⁶ Notably, local non-Indigenous residents of the Caledonia area filed a class action lawsuit against Ontario for the damages caused by the period of occupancy and the provincial government's failure to enforce the Ontario Superior Court's initial orders. That lawsuit was settled when the province agreed to endow a C\$20 million compensation fund for damages and disruption caused by the absence of the protection of the law during the Caledonia conflict.⁷ The disputed development parcel has continued to sit empty since the end of the Indigenous blockade.

Many difficulties arise in attempting to offer a critical commentary on events such as Oka and Caledonia from the rule of law perspective. Canadian history is replete with examples of the state itself departing from such rules in its treatment of Indigenous peoples and in ignoring their treaty, Aboriginal and human rights. As such, the argument goes, can one object to Indigenous parties deploying the same techniques? Similarly, in some instances of violent encounter between the state and Aboriginal peoples, state actions have themselves also been questionable or condemnable – the killing of the unarmed Dudley George in 1995 at Ipperwash is just one such example. What is more, it has also been the case that sometimes such conflicts have brought to public attention outstanding claims at issue. Indeed, at both Oka and Caledonia, the occupations eventually resulted in the national or provincial government purchasing the disputed land from non-Aboriginal title holders, with the ultimate end of transferring it to the Indigenous groups making the claim. This suggests, perhaps, that violence has in fact been productive in these exchanges. There is also the risk that critical commentary may conflate what might be better seen as relatively peaceful and legitimate protest or civil disobedience with the harsher end of the spectrum – violent rejection of state authority. Many of these conclusions underlie the often sympathetic treatment of violent Aboriginal encounters provided by numerous non-Indigenous scholars and commentators.⁸

An opposing analytical risk, however, is to forego the ability to identify and condemn violent Aboriginal activity or rejection of state authority in any and all cases, to suggest that violence in the name of Indigenous causes can never be wrong. Another risk here, and I think it is one that is already playing out to some extent, is that deference to violence and rejection of court authority and the rule of law – abetted by the reluctance of Canadian governments to intervene – may

itself encourage further and broader use of these techniques. Recent comments by Aboriginal chiefs in Ontario, Alberta, Manitoba and elsewhere exemplify this movement. In condemnations made in 2014 of the Stephen Harper government's curtailment of legislative mandates for Indigenous consultation under Bill C-45, Grand Chief Harvey Yesno of the Nishnawbe Aski Nation of Ontario asserted, for example, that his peoples should be prepared to die in defending their lands, while Alberta and Manitoba chiefs threatened to shut down the national economy with violence in their responses to the changes.⁹

Duties of reconciliation run both ways, and it is, I would argue, ever more difficult to justify the use of these sorts of approaches in the contemporary era when there is much legal, constitutional and judicial aid under the rule of law available to Indigenous communities seeking to enforce their rights. Violence cannot be justified merely on the grounds that one is unhappy with a less than absolute response to one's interests or demands. A clear historical precedent we might draw on in finding ground to reject these ways of resolving contending visions is that associated with the Quebec separatist movement and state responses to it.

Alongside its electoral and philosophical expressions, Quebec nationalism historically found supporters prepared to make use of violence to further their cause. Foremost among these was the Front de Libération du Québec (FLQ), which initiated a series of bombings in Quebec beginning as early as 1963. Sporadic violence involving bombs set off at places such as military bases and in post office boxes continued through the rest of the decade, raising some concerns and police attention, but with relatively little serious alarm on the part of the general public. These activities culminated in the October Crisis of 1970, in which members of the FLQ substantially upped the ante by kidnaping Pierre Laporte, Quebec's Minister of Labour, and James Cross, Britain's trade representative to the province. Prime Minister Pierre Trudeau famously, or infamously depending on one's point of view, invoked the War Measures Act 1914 in response, sending armed Canadian troops onto the streets of Montreal, Quebec and Ottawa. The Royal Canadian Mounted Police incarcerated hundreds of persons on its watch list without charge or access to counsel for periods of a few hours up to three weeks. While Cross was ultimately freed through negotiations, Pierre Laporte was murdered by the FLQ. His body, wrapped in a bloody blanket, was left in the trunk of a car on October 17, and photos of its recovery were widely disseminated in the Canadian press.¹⁰

Contemporary perspectives on the War Measures Act response by the Trudeau government tend to emphasize its over-expansiveness and the trampling of civil liberties that accompanied it.¹¹ The debate about how far it was reasonable to go is a legitimate one, but what was at issue at the time was not a response to a poster campaign or a mailbox bombing, but to the kidnaping (and later execution) of an elected official of the provincial government. Pierre Trudeau's own widely noted response to criticisms of his government's actions in his famed doorstep interview with journalist Tim Ralfe emphasizes democratic concerns, with the prime minister contending that

The society must take every means at its disposal to protect itself against the emergence of a parallel power, which defies the elected power in this country, and I think this goes to any distance. So long as there is a power here which is challenging the elected representatives of the people I think that power must be stopped.¹²

Denis Smith has also argued that the Trudeau response was intended 'to shock the Quebec public out of its confusion' about the legitimacy of the FLQ's rejection of state authority, which others have contended had gained a romantic cast among many in the larger public in the late 1960s.¹³ Whatever the merits or demerits of the Trudeau government's comprehensive response to the October Crisis, few would deny that the brutal killing of Pierre Laporte by the FLQ was a fundamental turning point for separatist, Quebec and Canadian views on the legitimacy of political violence around this issue. Very few voices endorsed the Front thereafter.¹⁴ Pierre Laporte's death was thus in a sense a humanization of what violent revolution can actually mean.

While the appropriateness of the breadth of state responses to the October Crisis are the subject of debate, the underlying value of rejecting the legitimacy of violence as a political tool is perhaps less contentiously expressed on the other side of the Quebec independence issue, in public responses of Canadian society to the idea of *peaceable* processes of separatism. Public responses to the idea of Quebec separating from the country have, at least in recent generations, been almost universally accepting, contingent on the idea that separation occurs through reasonable and democratic means. These values were also expressed in legal terms in the 1998 *Quebec Secession Reference*. There, the Supreme Court of Canada was asked to provide its legal opinion on the constitutional implications of a 'yes' vote to independence by Quebecers. Referring to Canadian constitutional convention

and values such as democracy and the rule of law, the Court held that ‘a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.’¹⁵ While the Court notably denied the legitimacy of a unilateral assertion of independence absent some prior negotiation with the rest of the country, its position quite clearly denies that Quebecers might be forced to remain Canadians through coercively imposed measures.

This seems too to be the view of most Canadians. For me, one of the most compelling statements of this conclusion can be found in a newspaper insert magazine article from 1976 whose author (whom I regrettably have forgotten) explored possible Canadian responses to the sovereignty referendum in Quebec then promised by the newly elected René Lévesque Parti Québécois government. The article represented a working out of ideas that was going on everywhere in the country at the time, with its author concluding, accurately I believe, that Canadians would never stomach nor allow a response to separation that would entail, for example, the idea of Canadian tanks ‘shelling out pockets of resistance in the Eaton’s Centre in downtown Montreal’ in anti-independence combat.¹⁶

The guidance implicit in the outcomes of the October Crisis, the Supreme Court’s reading of Canadian obligations in response to a successful referendum, and general Canadian views on these matters is clear. I think this represents well-considered and, at least in the case of the October Crisis, sometimes very hard-won wisdom. The paradox, of course, is that intolerance of violence may require the state to itself enter into coercive action. There are good arguments that this should be avoided to the extent that it can be, but too absolute an adherence to that precept may produce circumstances in which illegal disregard for the law goes unchallenged, unpunished and undeterred, encouraging further – perhaps more dangerous – explorations of the possibilities of violence.

Power, Authority and Community Self-Isolation

While the first area of concern I have noted here in the recent evolution of the Indigenous reconciliation process concerns implications around violence related to Indigenous claims and the related reduction of recognition of the legal authority of the overarching Canadian state, the second involves in some ways the flip side of this coin. This is the

potential over-authorization of Indigenous governments and cultures, expressed in particular in the idea of Aboriginal societies as exclusive sources of moral valuation for their members and in excessive idealization of isolationist forms of Indigenous sovereignty. These developments are problematic, I argue, in their own right in some ways, and specifically in their potential to do harm to the dignity and well-being of members of these communities and others. Philosophically, they are also questionable because of what seems to be their implicit epistemological suggestion that cultural and moral wisdom is carried in a singular culture.

A number of examples of this phenomenon might be considered here. The first concerns debate around the applicability of the Canadian Charter of Rights and Freedoms to Indigenous communities. Sections 25 and 35 of the Constitution Act 1982 recognize pre-existing Aboriginal rights in Canada and assert that other Charter and general constitutional provisions are not to be interpreted so as to abrogate or derogate from those rights. These provisions have in turn engendered debate about the extent to which the Charter can be understood as applying to or binding Indigenous communities. It is clear that the provisions are at their minimum intended to ensure that, for example, the Charter's guarantee of equality in s. 15 is not used to overturn Indigenous entitlement to, for example, special hunting and fishing rights.¹⁷ However, some Aboriginal and other scholars have argued that the provisions should be taken as exempting Indigenous governments from the Charter's rights guarantees *in toto*. Some of this commentary suggests that historical Aboriginal rights to self-government would be impeded by the Charter's extension to contemporary governments. Others add that the Charter's individualistic orientations are culturally inappropriate – European or American in their character – and therefore undesirable and inauthentic in Aboriginal settings.¹⁸ While the question of the Charter's general applicability within Indigenous communities has not been settled, it is clear that an adoption of these notions in their broader forms would preclude individual Aboriginal persons from invoking Charter rights in conflicts with their reserve governments.

These possibilities have been manifested in two relatively recent cases concerning Aboriginal children in circumstances of dire medical illness. In 2014, the parents of 'J.J.', an 11-year-old Ontario girl with leukaemia, chose to discontinue her chemotherapy in order to substitute a regime of traditional Aboriginal medicine. The hospital treating J.J. then applied for a court order which would have required the local Brant Families and Children's Services office to take custody

of the child and enable the restoration of the chemotherapy treatment. Justice Gethin Edward of the Ontario Court of Justice declined to provide the order, concluding that the Haudenosaunee community, of which J.J. and her parents were members, had an historic entitlement to the practice of traditional medicine, which extended to protect her parents' decision to opt for traditional over scientific medicine. That entitlement 'cannot be qualified as a right only if it is proven to work by employing the western medical paradigm', Justice Gerthin observed in his judgment, because 'to do so would be to leave open the opportunity to perpetually erode Aboriginal rights' (*Hamilton Health Sciences*, para. 81). Shortly after J.J.'s case, Brant Families and Children's Services declined on the basis of this precedent to intervene in a second similar case, involving another 11-year-old Indigenous girl with leukaemia whose parents chose traditional over Western medicine, Makayla Sault. While J.J.'s parents later relented and consented to provide her with chemotherapy, to which she successfully responded, Makayla Sault's parents persevered in their choice and she subsequently died.¹⁹

A second example of an invocation of Indigenous rights and values to the detriment of what one might contend are more generalized human values concerns rules established in some Mohawk communities in Quebec, including that of the Kahnawake, which prohibit non-Mohawk spouses of Mohawk members of the society from living with their partners on reserve lands. The argument for such measures is that they contribute to protecting and preserving the distinct and authentic cultural character of the local community, which presumably might be undermined by the ongoing presence of persons from non-Mohawk cultures. The regulations to this end were formally established in 1981 and began to come to broader public attention in 2010, when the Kahnawake band council delivered notices of eviction to persons caught by the regulations. Then Indian Affairs Minister, Chuck Strahl, expressed his 'discomfort' with the Mohawk decision at the time but deferred to the band's entitlement to make such decisions.²⁰ As of this writing, those requirements are now before the Canada Human Rights Tribunal. It might be noted that while the Indian Act 1876, with subsequent amendments, requires such decisions by bands to be reviewed by the Minister, the council had not presented their decision to the federal government for its consideration in this case.

A third example (albeit clearly less profound) of potential over-authorization of community, in this case under the guise of sovereignty, might be argued can be found in disputes that arose around the 2013 First Nations Financial Transparency Act, passed by the government of

Prime Minister Stephen Harper. The Act required the band governments of Canada's Aboriginal communities to publish general financial statements and salary levels for band chiefs and councillors. While 92 per cent of bands complied with the Act, those which did not asserted, as did the Assembly of First Nations, that the legislation had been advanced without consultation with Indigenous leaders and thus constituted an infringement of Aboriginal sovereignty.²¹ On coming to power in 2015, Prime Minister Justin Trudeau's government suspended enforcement of the Act. Indigenous and Northern Affairs Canada then noted on its website that it was 'seeking a way forward for mutual transparency and accountability with First Nations' – presumably a different way forward than one requiring a literal transparent accounting.²²

While the range of potential wrongs and concerns in these examples is wide, in each case here it might be argued that more compelling and justifiable goods, values or principles – Charter protections of individual rights against racial segregation, protection of children's lives, financial transparency for members of band communities – have been sacrificed in favour of arguably less compelling but more fundamentally or at least symbolically Aboriginal values. There are multiple ways in which one might approach these issues – through, for example, an evaluation of utilitarian or humanitarian considerations, a weighing of competing goods or a parsing of the logic behind the opposing claims in play. I wish to argue here that these examples represent misattributions of value which have their source in a narrow-sightedness about community; they are decisional outcomes which appear rooted in the perception that humans are best understood as morally situated fundamentally in a singular community, and that the goods of sovereignty, independence, authenticity and purity of community must serve in a sense as fences protecting their inhabitants. While there, of course, is some value in measures expressing and protecting community and diversity of community, too monomaniacal a focus on such ends ultimately produces human harm.

Arguably, one of the trends on the laudable side of Canadian history has been the working out over time of alternative visions in which human community is understood in much more complex terms. While it is subject to ongoing disputation and has often fallen short of its rhetorical aspirations, this vision of community suggests that inhabitants of Canada should be understood as potentially members of *multiple* communities. Communities themselves can be understood in this light as coming with their own porous boundaries and overlaps, suggesting in turn that no singular source of valuation and wisdom is

authoritative for all aspects of life. At its most successful, the Canadian experience, although still developing, therefore also embraces the idea of community as capable of incorporating new membership, as revisable, and ultimately, as inclusive.

This is demonstrated, for example, in the confederation project of 1867. At the bird's eye level, the creation of a country shared between English and French speakers, incorporating goods and protections for members of both groups, represents a deliberate departure from the past precedents of exclusion expressed in, for example, the prohibition in the *Royal Proclamation of 1763* of Catholics from holding public office, the accompanying and infamous instructions of the Crown to Colonial Governor James Murray to eliminate the French language and civil law in lower Canada, and later assimilationist policies endorsed by Lord Durham and expressed in the Act of Union of 1840.

At a more specific level, the consent to a federal model by the proudly British English speakers of Canada, whose heritage society was firmly unitary, represented a preparedness to depart from their own monocultural historic experience as a guide. The complex and overlapping accommodations and compromises embodied in the Constitution Act 1867 (whose original name, the British North America Act, was admittedly somewhat less culturally polyvalent) similarly express the idea of an everyday intercultural overlap between the British and the French, and the federal and the provincial in the country. The Constitution of 1867, for example, divided criminal law powers between governmental levels, with the federal government defining criminal offences and procedure and the provinces providing for its enforcement and administration. Marriage, similarly, was made subject to federal definition but provincial rules about solemnization applied. And the separate school system embodied in s. 93 required in most Canadian provinces the availability of a publicly provided education under a religious rubric for the province's 'dissentient minority', alongside the majority's public system. While the latter is noteworthy for its abrogation in the Manitoba Schools Crisis of 1890, it, along with these other jurisdiction-, culture- or religious-crossing arrangements, suggest the idea not of fencing off communities within the nation from each other, but of recognizing that policy powers might be viably informed by more than one cultural community, depending on the nature of the activity. As Samuel LaSelva has suggested, these are decisions that speak to the good of 'fraternity' in the Canadian context, which 'supposes that people with distinct ways of life can possess good will toward each other, live together, and engage in common projects'.²³

Further developments in the Canadian federation since 1867 also often speak to these sorts of overlaps and the embrace of multiplicity and cross-community engagement rather than mutual isolation. The development of the system of shared cost programmes which have made a Canadian model of universal public health care available everywhere in the country was made possible in the 1960s, despite differing theories of the state and different levels of wealth across provincial communities, by the federation's governments embracing (sometimes reluctantly) cross-jurisdictional cooperation.²⁴ The Canadian equalization system, which is financed through national taxation but which allocates its benefits very differently between the 'have' and the 'have-not' provinces in the country, is another example of a project which suggests that the country's provincial communities are not ten opposed and isolated fiefdoms, but co-participants in projects which imply mutual engagement. So too is the national employment insurance system in the country: it was made possible only by a constitutional amendment in 1940 in which all provincial governments – including Quebec's – joined to accept a jurisdictional transfer to the federal government to make the programme possible. None of these goods would have been possible without a preparedness to recognize the call of goods or values transcending singular, jealously self-protecting local communities of authority.

These ideas are also embodied in constitutional outcomes around responses to the Quebec question in recent decades. Arguably, one of the consistent outcomes of Canadian constitutionalism since the 1960s has been the rejection of the idea of special status or substantively asymmetrical constitutional arrangements for Canadian federal communities. These possibilities were broached, for example, in the 1960s in the early days of Canadian responsiveness to Quebec discontents with the federation, at, among other occasions, the Confederation of Tomorrow Conference of 1967 and the 1968 First Ministers Conference on the Constitution. At the latter, Premier Daniel Johnson of Quebec debated the two nations vision with Justice Minister Pierre Trudeau, who famously spoke for the side of non-asymmetrical theories of the Canadian state.²⁵ Asymmetry and dualism again were again offered to Canadians in the 1987 Meech Lake and 1992 Charlottetown Accords of Prime Minister Brian Mulroney. Both large-scale proposals suggested in many provisions an emphasis on the separateness and self-isolation of sub-communities – from the preambular recognition of Quebec as a 'distinct society', to limitations on federal spending power decisions for national social programmes, to the constitutionalization

of greater provincial powers over immigration and thus potentially of self-segregation. Despite the enthusiasm of many French- and English-speaking leaders and commentators about such arrangements, they have consistently failed to carry the national community's acceptance.

Some have lamented the failure of these proposals, and some commentators have attributed national rejection of them to narrow mindedness or indeed even to intercultural enmity.²⁶ While the sources of Canadian rejections of the dualist model are multiple, I would argue that they include some substantial incipient wisdom about the good of inter-communality and the merit of the multiculturalism of social valuation. 'Distinct society' critics worried not just about the implications of the relative value of communities expressed in the idea, but about the potential for the provision to encourage narrower interpretations of the Charter of Rights' protections for minorities and the vulnerable in some contexts in Quebec.²⁷ Many critics of the Mulroney constitutional proposals were concerned too that constitutionalizing provincialized immigration powers might produce immigration decision-making within the provinces that was over-responsive to local biases. Similarly, critics of the proposals' restrictions on federal spending power warned that if adopted they might spell the end of public health care in Canada or abort the development of future such programmes, with provinces vetoing such arrangements based on parochial concerns.²⁸ Whether one agrees with the national rejections of the Meech and Charlottetown Accords or not, these concerns are expressions of the idea that good things come from mutual engagement, inter-dependence, collaboration and cooperation, all of which are endangered by over-strengthening or over-authorizing singular communities of value.

On a hopeful note, I would argue that we might in fact look to a relatively recent Crown settlement with Indigenous Canadians as an exemplification of approaches which embrace the best of both sides of the community coin. The 2000 Nisga'a Agreement, concluded between British Columbia and federal governments, and the Nisga'a people of northern British Columbia, in many ways gives expression to the need and importance of local self-determination while at the same time recognizing, preserving and even introducing new forms of inter-communality. The Agreement incorporates what looks like in many ways a provincialized or semi-provincialized status for the Nisga'a. On many jurisdictional issues, the Nisga'a possess independent and final authority to make their own decisions. In areas such as fishing laws, language and Nisga'a governmental structures, for example, Nisga'a laws prevail in the case of conflict with other levels of government.²⁹ In

other areas, Nisga'a laws are superior, but are bound by the Agreement to some degree of accord or consistency with specific standards or the laws of other levels. Nisga'a authority over adoption, for example, is the community's, but the Agreement sets out that practices here must make the 'best interests of the child' the paramount consideration.³⁰ Nisga'a exclusive authority over education similarly requires the government to ensure that its programmes enable inter-transferability with the British Columbia educational system.³¹ On some other fronts, Nisga'a authority is subordinate in cases of conflict with other levels of government, as in public order, peace and safety, and the criminal law.³²

The Agreement also brings Nisga'a persons within the community's lands under the rubric of British Columbia and Canadian and tax regimes, eliminating the on-reserve tax exemptions that prevail in other Indigenous communities.³³ While no doubt many Nisga'a lamented that development (who wants to pay new taxes?), the inclusion of members of this community in the broader Canadian tax regime is a clear expression of the idea of mutuality, of the willing commitment of the Nisga'a to a larger community as well as to their own smaller one. Most appealingly from the perspective of those with concerns about the over-authorization of community, the Nisga'a Agreement expressly commits the Nisga'a Lisims government to the obligations of the Charter of Rights.³⁴ While the agreement represents a powerful step forward for Nisga'a self-government, it provides such opportunities within a framework which represents multiple, overlapping and mutually enriching sources of community.

First- and Second-Class Citizens

A third area of concern which might be noted in thinking about contemporary trends in reconciliation discourse concerns the valuation of Indigenous identity relative to that of other Canadians. While it is clearly the case that for far too long in Canadian history Indigenous Canadians were treated as social and legal inferiors, there is some danger that the essential righting of these wrongs may have brought with it a tendency in contemporary discourse and public expression not simply to eliminate the attributed moral difference of these forms of identity, but in effect to *reverse* it. My argument here is not with arrangements for Indigenous Canadians such as special hunting or fishing rights, entitlements to funding for health or post-secondary education, or other similar benefits associated with historic treaty-making, which

have deeper justifications. It is, rather, with more recent developments in the realm of public symbolism.

The first of these is the recently developing practice of beginning public meetings with a prayer-like call to the Aboriginal past in the local jurisdiction. The University of Calgary, for example, begins many of its meetings with the following: ‘We would like to begin by acknowledging that the land on which we gather is the Treaty 7 territory and the traditional territory of the Niitsitapi (Blackfoot), Nakoda (Stoney), and Tsuut’ina ...’³⁵ This practice is becoming ever more widespread, and it is accompanied more frequently by other similar symbolic singling-out of Aboriginal peoples in agencies of general jurisdiction. Edmonton City council, for example, recently committed to flying Treaty 6 and Métis Nation of Alberta flags at City Hall on an ongoing basis alongside the municipal, provincial and national flags.³⁶ While the institution sometimes flies flags of recognition for limited periods of time, no other national or identity-based flags have this permanent pride of place at City Hall. A second related development in this field has been the recent announcement by the government of Justin Trudeau in 2017 that the oath for new Canadian citizens will be amended to include a new commitment on their part to ‘faithfully observe treaties with Indigenous peoples’.³⁷ Alongside commitments to Queen and Constitution, new Canadian citizens will now also be providing a special acknowledgement of the Aboriginal treaty regime in the country.

The difficulty with broaching concerns about these sorts of matters is that they may appear at first examination relatively trivial – they are, after all, symbolic rather than substantive. They are, however, forms of symbolism which shape culture and values, and our culture and values – our attitudes towards social relationships between individuals and peoples – are at the very heart of processes of recognition and reconciliation. If we care about the latter, we must care about the former. What then is at issue with these measures?

First, at an abstract level, these collective statements of value are often impositions upon those required to observe them. They are involuntary endorsements of specific public values and as such they have about them an air (albeit a light one) of fascistic forms of collective, official belief. Canada, it might be observed, has for a very long time not had a tradition of collective oath-taking, and there is no widely observed equivalent here to the American Pledge of Allegiance. Such oaths are an affront to the values of individual conscience because they suggest that our moral commitments are determined collectively (or, more accurately in these cases, by our CEO or by the Board of

Governors at our university) rather than subscribed to individually. There is no ready means to dissent from such statements, just as there are no such means available in places where the school day begins with the Lord's Prayer.

Second, these statements represent a public prioritization of one possible item from a smorgasbord of public goods we might choose to collectively endorse in our public gatherings. Why not a salute to our military, a solemn pledge to democracy, a remembrance of the internments of Canadians during the First and Second World Wars, or a vow to balance our budgets (or not to)? This singular form of recognition suggests (without any particular indication of who made this our priority) that it is this fact being commemorated, above all others and indeed alone, that is important. This emergence of group-speak endorsements of a single idea in Canadian public life is objectionable, for such practices suggest a weighting of the fact to be commemorated above alternatives, other values, or a recognition of nuance and possible counter-considerations. The relative weight and place in our public decision-making of the existence of traditional territory is a matter for consideration and debate, not collective sloganeering.

Indeed, the most troubling aspect of these practices is their underlying symbolic implication – by our refrain-like singular invocation of them – that they *are* to be taken notice of. What does it really mean when everyone in the room must observe, at the opening of every gathering, that the land under their feet is the 'traditional territory' of some other group, and when our daily invocations speak to no other experiences? To my ear, the implication is that there exists some relationship of obligation on the part of the oath-sayers to those who are being acknowledged. As when Christians say grace at meals and thank the Lord for His bounty, the intimation seems to be that we must be thankful to our benefactors and compliant towards the responsibilities their bounty merits. It seems reasonable to argue, conversely, that in a free and equal society every citizen has a full and complete entitlement to stand on the ground of his own state without a perception that he owes someone else a debt of gratitude for their kind endowment.

On this front, perhaps more than any other, these practices are at odds with the transformative social developments of recent Canadian inclusionary experience. The roots of Canada's embrace of multiculturalism derived to no little extent from consistent rejections of the idea of privileged forms of social or cultural identity in the country. In the case

of multiculturalism, symbolic claims often preceded subsequent debates about real policy change. This itself is perhaps expressed in some of the earliest developments in our multicultural experience, notably the broad objections of many Canadian ethnic groups to the symbolism and valuation implied in the very name of our first large-scale modern investigation of identity – the 1963 Royal Commission on Bilingualism and Biculturalism.³⁸ These rejections of the ideas of Anglo- (and Franco-) conformity contributed substantively to producing the Pierre Trudeau government's 1971 multicultural policy, notably introduced by the prime minister with the observation that 'although there are two official languages, there is no official culture' in Canada.³⁹ Canada's 1965 flag debate (perhaps a pertinent precedent in the context of the flying of the flags of local Aboriginal groups in Edmonton and other places) similarly involved symbolic questions that went to the heart of national identity and the meaning of being a member of Canadian society. Not only French Canadians, but the vast majority of Canadians of non-British heritage were given a much greater sense of their shared participation as equals in the national project when the country retired the Canadian Red Ensign and the Union Jack – that is, when our shared symbols stopped giving daily acknowledgement to one heritage over and above all others.

Some of the most noteworthy of jurisprudential developments following the coming of the Charter with its multicultural interpretive clause also emphasize a rejection of official, superior, privileged or uniquely acknowledged cultures. Among the most notable of these developments is the early Charter case of *R. vs Big M Drug Mart* (1985). In *Big M*, the Supreme Court unanimously struck down the federal Lord's Day Act, which had required observation, in the form of closing businesses and public services, of the Christian Sabbath. On its way to the Supreme Court, the case passed through the Alberta Court of Appeal, where a dissenting minority of judges made an impassioned plea to preserve room for such special acknowledgements of the Christian heritage of the country. For the dissent, which would have upheld the Act, Justice Robert Belzil asserted at the Court of Appeal that the Canadian nation 'is a part of "Western" or European civilization moulded in and impressed with Christian values and traditions'. As such, he did not therefore 'believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions'. What is more, in Justice Belzil's view, the Lord's Day Act should not reasonably have been understood as infringing on the religious freedom of non-Christians, because it

merely required them to close shop on Sundays, not to attend Christian services.⁴⁰

At the Supreme Court of Canada, where the Lord's Day Act was unanimously struck down, Chief Justice Dickson specifically criticised Justice Belzil's theory of the case. For the Court, the Chief Justice held that the Lord's Day Act was an infringement of the Charter's guarantee of freedom of religion and that theories of Canada as a 'Christian nation' were contrary to the clear interpretive guidance provided in the document by its recognition of multiculturalism in s. 27. Justice Dickson observed that to the extent that the Lord's Day Act 'binds all to a sectarian Christian ideal', it 'works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians'. By 'proclaiming the standards of the Christian faith', he added, 'the *Act* creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians'.⁴¹ Dickson's concerns here, then, are to both applicative and symbolic dimensions of such measures. His judgment suggests the importance of avoiding official prioritizing or endorsement of any culture or religion, even when they are not being directly imposed upon others.

Conclusion

My intention in this article has been to highlight what I perceive to be some worrying developments in the admirable Canadian project of reconciliation with the country's Indigenous peoples. As I have tried to emphasize throughout, my argument is not against responsiveness, respect, understanding and accommodation of Aboriginal difference in Canada. The values of the Canadian past which I have appealed to in my arguments here are values of inclusion and reconciliation. Thus, while I offer critical commentary here on what I would argue is over-extension in some cases of claims or valuations in the process of Indigenous reconciliation, my intention is not to contribute to the development of what might be called the 'STOP' literature on this subject.⁴² I do not, for example, share Thomas Flanagan's comprehensive scepticism about the recognition of Aboriginal rights or forms of self-government, or Frances Widdowson and Albert Howard's at times highly critical approach to Indigenous cultural values.⁴³

I think there are a wide range of reasons why recognition, in the sense Charles Taylor suggests, and continuing reconciliation in the relationship of larger Canadian society and Indigenous communities

are desirable.⁴⁴ Like some of the counter-values I am endorsing here, in a sense reconciliation is a value which speaks for itself and needs no further justification. Prudence, in the Aristotelian sense of moderating abstract principle through application in the world of reality, also calls on us here. It is clear, as it has been historically in the case of French Canada, that the vast majority of Indigenous Canadians understand themselves as belonging to forms of community that differ from the larger society, and these understandings cannot be ignored without creating risks of discontent too strong to be ignored. Indeed, it is likely that some of the more troubling manifestations of Aboriginal discourse and activity considered here have their roots in the reality that Indigenous social claims have already been ignored too long. Moreover, many of the goods I am endorsing are themselves furthered by the processes of reconciliation. There can be little hope, for example, for comity and mutual engagement between communities or little claim that our country embraces the equality of moral value of different cultural heritages if we do not ardently pursue much greater Aboriginal inclusion in our theory of our country.

Finally, we are, of course, a bigger and better people for finding empathy, and a way forward in our working out of contemporary responses to Indigenous aspirations. The danger, though, is that this multiplicity of reasons for sympathy to the Aboriginal cause may press us towards forms of responsiveness which undo or undermine other laudable values hard won in past forms of reconciliation. Like others, I would invoke Chief Justice Antonio Lamer's closing words in *Delgamuukw*: 'Let us face it, we are all here to stay.'⁴⁵

Notes

- 1 Some scholarship in fact endorses continuity of culture, although of a delimited type, as a good in itself. See, for example, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Toronto: Cambridge University Press, 1995).
- 2 Among such conflicts might also be included the Ipperwash Crisis of 1995, the Three Nations Border Crossing closure of 2009 and New Brunswick anti-fracking blockades in 2013. Recent scholarship covering a wide variety of Indigenous–state conflicts of this type can be found in Yale D. Belanger and P. Whitney Lackenbauer (eds.), *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal and Kingston: McGill-Queen's University Press, 2015).
- 3 Canada, Indigenous and Northern Affairs, 'Fact Sheet – Progress Report – Kanesatake'. <https://www.aadnc-aandc.gc.ca/eng/1100100016305/1100100016306> (accessed 11 January 2016).
- 4 Canada, Indigenous and Northern Affairs, 'Chronology of Events at Caledonia'. <https://www.aadnc-aandc.gc.ca/eng/1100100016337/1100100016338> (accessed 29 June 2015).

- 5 Kathy Brock, 'From Oka to Caledonia: Assessing the Learning Curve in Intergovernmental Cooperation' (A paper prepared for presentation at the Canadian Political Science Association Meetings, Concordia University, Montreal Quebec, 1–3 June 2010), 16; citing Sidney Linden, 'Report of the Ipperwash Inquiry' (http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_4/pdf/E_Vol4_summary_2.pdf), 87.
- 6 Helen Burnett, 'Part of Caledonia ruling struck down'. *Law Times*, 22 December 2006. <http://www.lawtimesnews.com/200612221358/headline-news/part-of-caledonia-ruling-struck-down> (accessed 13 December 2016).
- 7 Christie Blatchford, 'Settlement reached in Caledonia class action suit'. *National Post*, 8 July 2011. <http://news.nationalpost.com/news/canada/settlement-reached-in-caledonia-class-action-suit> (accessed 11 May 2017).
- 8 See among others, for example, Laura Devries, *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law* (Vancouver: University of British Columbia Press, 2011); Brock, 'From Oka to Caledonia'; and Arthur Green, 'Review of *Conflict in Caledonia*', *Canadian Geographer* 57.4 (2013).
- 9 Maria Babbage, 'Ontario First Nations Ready to Die Defending Lands', CBC News, 30 July 2014. <http://www.cbc.ca/news/canada/thunder-bay/ontario-first-nations-ready-to-die-defending-lands-chiefs-1.2722587>; Sadeq Rahimi, 'Canada Heading for Bloodshed, Warns Aboriginal Leader', *Huffington Post*, 28 May 2014. http://www.huffingtonpost.com/sadeq-rahimi/canada-heading-for-bloods_b_2474733.html (accessed 26 January 2017).
- 10 Denis Smith, *Bleeding Hearts ... Bleeding Country: Canada and the Quebec Crisis* (Edmonton: M. G. Hurtig, 1971).
- 11 See, for example, M. V. Naidu, 'Democracy Versus Terrorism: FLQ Terrorism In Quebec, A Case Study', *Peace Research* 27.4 (November 1995): 1–15, at 4; Christo Aivalis, 'Review of Just Watch Me: The Life of Pierre Elliott Trudeau', *Labour / Le Travail* 65 (2010): 188–90; and Patrick J. Smith, 'Anti-Terrorism and Rights in Canada: Policy Discourse on the "Delicate Balance"', *Arab Studies Quarterly* 25.1/2 (2003): 137–58, at 141.
- 12 *Globe and Mail*, 'Trudeau: "Just watch me"', 5 October 2010. <https://www.theglobeandmail.com/news/national/trudeau-just-watch-me/article4327998/> (accessed 19 October 2015).
- 13 Michael Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (New York: Praeger, 2003), 128; citing Denis Smith, *Bleeding Hearts ... Bleeding Country*; Kevin Lee Pinkoski, 'The Historiography of the Front de Liberation du Quebec: Frameworks, "Identity" and Future Study', *Constellations* 3.2 (2012): 195–205, at 198; Raphael Cohen-Almagor, 'The Terrorists' Best Ally: The Quebec Media Coverage of the FLQ Crisis in October 1970', *Canadian Journal of Communication* 25.2 (2000): 251–84.
- 14 Smith, *Bleeding Hearts*.
- 15 *Reference Re Secession of Quebec* [1998] 2 SCR 217, headnote.
- 16 Lest these observations be taken as too halcyonic, it should be recognized that coercive violence in response to social unrest is not unknown in the Canadian experience. See, for example, J. A. Frank, Michael J. Kelly and Thomas H. Mitchell, 'The Myth of the "Peaceable Kingdom": Interpretations of Violence in Canadian History', *Peace Research* 15.3 (1983): 52–60.
- 17 See, for example, Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).
- 18 Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences', *Canadian Human Rights Yearbook* 6 (1990): 3–45.
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- 20 Graeme Hamilton, 'Mohawk Evictions Legal: Indian Affairs Minister', *National Post*, 8 February 2010. <http://www.nationalpost.com/news/story.html?id=2542877> (accessed 23 August 2011).
- 21 See, for example, Jody Wilson-Raybould, 'Presentation to the Standing Senate Committee on Aboriginal Peoples on Bill

- C-27: *First Nations Financial Transparency Act*, 5 March 2013. <http://www.afn.ca/en/news-media/latest-news/presentation-to-the-standing-senate-committee-on-Aboriginal-peoples-bi> (accessed 4 April 2017). (Wilson-Raybould subsequently served as federal Minister of Justice in the Trudeau government from November 2015 to January 2019.)
- 22 Canada, Indigenous and Northern Affairs, 'First Nations Financial Transparency Act'. <https://www.aadnc-aandc.gc.ca/eng/1322056355024/1322060287419> (accessed 14 May 2017).
- 23 Samuel LaSelva, 'Federalism as a Way of Life', in Samuel LaSelva, *The Moral Foundations of Canadian Federalism* (Montreal and Kingston: McGill-Queen's University Press, 1996).
- 24 Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 2006).
- 25 J. R. Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996).
- 26 See, for example, Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Don Mills, Ontario: Oxford University Press, 1997), and Charles Taylor, 'The Stakes of Constitutional Reform', in Taylor, *Reconciling the Solitudes* (Montreal and Kingston: McGill-Queen's University Press, 1993).
- 27 Quebec's Premier Bourassa himself suggested in the midst of the Meech Lake process that had the distinct society clause then been in place, the Supreme Court of Canada would not have struck down a number of French-only language laws in the province (referring to *Ford vs Quebec* [1988] 2 SCR 712) (Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3rd ed.) (Toronto: University of Toronto Press, 2004), 146). See also Anthony Parel, 'The Meech Lake Accord and Multiculturalism' in *Meech Lake and Canada: Perspectives from the West*, ed. Roger Gibbins (Edmonton: Academic Printing and Publishing, 1988), 171–8.
- 28 Alan Cairns, 'Ottawa, the Provinces, and Meech Lake', in *Meech Lake and Canada*, ed. Gibbins, 105–120, at 109. See also Pierre Trudeau, *With a Bang not a Whimper* (Toronto: Stoddart, 1988).
- 29 *Nisga'a Final Agreement*, ch. 8, art. 71, ch. 11, art. 43, ch. 11, art. 165.
- 30 *Nisga'a Final Agreement*, ch. 11, art. 96(a).
- 31 *Nisga'a Final Agreement*, ch. 11, art. 100(a).
- 32 *Nisga'a Final Agreement*, ch. 11, arts 62, 61.
- 33 *Nisga'a Final Agreement*, ch. 16, art. 6.
- 34 *Nisga'a Final Agreement*, ch. 2, art. 9.
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- 39 Canada, House of Commons, *Debates*, October 1971, 12:8545-8, cited in Yasmeen Abu-Laban and Daiva Stasiulis, 'Ethnic Pluralism under Siege', 366.
- 40 *R. vs Big M Drug Mart* ([1984] 1 W.W.R. 625), paras. 112, 113 (Alta. C.A.).
- 41 *R. vs Big M Drug Mart* ([1985] 1 S.C.R. 295), para. 97 (S.C.C.).
- 42 Thomas Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000), ch. 10.
- 43 Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal and Kingston: McGill-Queen's University Press, 2008).

- 44 Charles Taylor, *Multiculturalism and The Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992).
- 45 *Delgamuukw v. British Columbia* ([1997] 3 SCR 1010), para. 186.

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Conflict of Interests

The author declares that there are no conflicts of interests with this work.