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# Reconsiderations of Reconciliation and Recognition

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Aller au sommaire du numéro

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# Reconsiderations of Reconciliation and Recognition

INDIGENOUS AND NON-INDIGENOUS SCHOLARS HAVE LONG RECOGNIZED the steadfast existence of structural and ideological barriers undermining the recognition of Indigenous rights – especially pre-existing rights to land and governance. Indigenous legal scholars, for instance, have regularly drawn attention to the intricate connection between Canadian law and colonialism, particularly the manner in which violence continues to be deployed through the Canadian legal system in relation to Indigenous women and alternate relationships to land.[1] More recently, in this current era of rights "recognition" and "reconciliation" with Indigenous populations, scholars in such disparate fields as anthropology and political theory have offered incisive accounts of how liberal discourses of recognition and reconciliation have served to undercut Indigenous claims and sustain structures of domination by reconfiguring and reproducing settler-colonial assemblages of power – ultimately drawing Indigenous peoples further into the ambit of the state.[2] Given the presumed efficacy and prominence of discourses of reconciliation in Canada today, such concerns continue to resonate.

Indeed, the four texts reviewed in this essay not only continue to "unsettle" prominent national mythologies and conventional legal conceptions but also trace strategies of resistance and possibilities for establishing decolonial relationships between Indigenous and non-Indigenous peoples: Arthur

1 See, for instance, the work of Mary Ellen Turpel, "Home/land," *Canadian Journal of Family Law* 10 (1991): 17–40; see also Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), 174–9.

2 Elizabeth Povinelli has referred to this process as the "cunning of recognition"; see Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002). In a similar vein, Yellowknife Dene political theorist Glen Coulthard has argued that there is a pressing need for Indigenous peoples to "turn away" from the limited forms of recognition and delegations of rights offered by the Canadian state and instead shift attention towards rebuilding communities "from within" through a resurgence and reawakening of Indigenous cultural practices and forms of direct action; see Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 45.

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Manuel's *Unsettling Canada: A National Wake-Up Call*, Manuel's *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy*, John Borrows's *Freedom and Indigenous Constitutionalism*, and John Borrows and Michael Coyle's *The Right Relationship: Reimagining the Implementation of Historical Treaties*.[3] While these texts are similarly critical of Canadian institutional structures and the discourses of reconciliation prevalent in both the legal and political realms, they are not necessarily so quick to discount the significance of constitutional recognition for Indigenous peoples. In this regard, by canvasing strategies of resistance, critiquing predominant legal falsehoods and mythologies, and highlighting constitutional mechanisms for renewing relationships grounded within Indigenous legal traditions, these works not only offer significant insights for activists, academics, and policy practitioners, but also for general readers and students who may wish to enrich their understanding of the history of colonial relations shaping the development of the Canadian state.

*Unsettling Canada: A National Wake-Up Call*, written by the late Arthur Manuel, is a powerful condemnation of governmental policy and legal doctrines (such as the doctrine of discovery) that have regularly been utilized to dispossess Indigenous peoples of their lands. Manuel, who for years was a leading figure and activist within Indigenous movements at both the international and domestic levels, situates his own early protest activities within a broader history of Indigenous resistance to Canadian settler colonialism. In this regard, the book stands as a potent reminder that Indigenous peoples have never been "idle" but have continually resisted the dispossession of their lands and rights to governance.

While Manuel's book briefly charts some early forms of Indigenous resistance and petitions to government by members of Manuel's nation (the

3 Arthur Manuel and Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015); Arthur Manuel and Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy* (Toronto: James Lorimer & Company, 2017); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); John Borrows and Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017). Grand Chief Ronald M. Derrickson wrote the "Afterword" for *Unsettling Canada* and the "Introduction" and "Afterword" for the *Reconciliation Manifesto*. Derrickson not only notes in his "Introduction" to the latter book that "it is laid out as he [Arthur Manuel] wrote it" (28), but also, in his "Afterword" to the former book, attributes the previous chapters as having been written by Manuel (231, 234) – going so far as to refer to it as "his [Manuel's] book" (230). As such, this review is primarily concerned with the main portion of each text (written by Manuel).

Secwepemc Nation) that condemn the territorial encroachments of settlers in the early 20th century, the bulk of the book concerns a variety of instances of resistance stretching from the late 1960s to the present. This book, to a large extent, is a chronicle of how, in the face of successful resistance against Pierre Trudeau's White Paper, the overarching goals of assimilation and elimination of Indigenous rights have instead stubbornly persisted and continued to manifest within governmental policy. It is ultimately, however, the "mass mobilization of the people . . . outside the narrow bounds of parliamentary procedure and official negotiating tables" that will lead to increased governmental recognition of Indigenous rights.[4] The grassroots mobilization of Indigenous peoples against Pierre Trudeau's efforts at constitutional patriation in the 1980s is used to demonstrate this point.

Drawing upon the history of the "Constitution Express," whereby more than 1,000 Indigenous grassroots activists and supporters chartered trains from Vancouver to Ottawa to increase support for protecting and entrenching Indigenous rights (as well as mobilization efforts throughout Europe), Manuel argues that it was largely due to the grassroots mobilization of people that Aboriginal rights were "recognized and affirmed" in Section 35(1) of the Constitution Act, 1982. In particular, he argues that it was through such grassroots organizing and resulting constitutional recognition that patriation "turned . . . from a serious threat to an important gain for us that we can continue to build on into the future."[5] In this respect, the book stands contrary to established critiques concerning "recognition" within academic literature; while theorists have often drawn attention to problems inherent with official forms of recognition, this book reminds readers that legal recognition can serve as a potential springboard for the enhancement and protection of rights. It also argues, however, that the "great error" after successfully entrenching Aboriginal rights in the constitution "was to relax the grassroots mobilization within Canada and internationally."[6]

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4 Manuel and Derrickson, *Unsettling Canada*, 74–5.

5 Manuel and Derrickson, *Unsettling* Canada, 75. Similarly, Kiera Ladner has also noted that "those who waged [the] battle for constitutional recognition achieved something many believed impossible. With the entrenchment of Section 35, Aboriginal and treaty rights were recognized and affirmed, arguably as *sui generis* rights originating within Indigenous nations or the agreements between Indigenous nations and the settler society"; see Kiera Ladner, "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in *Patriation and Its Consequences: Constitution Making In Canada*, ed. Lois Harder and Steve Patten (Vancouver: UBC Press, 2015), 270–1.

6 Manuel and Derrickson, *Unsettling Canada*, 105, 78.

Manuel builds upon this linkage between grassroots mobilization and recognition in *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy*. In this book, however, the author not only offers a succinct plan towards decolonization, but also further unpacks the settler-colonial logics surrounding Indigenous rights and reconciliation. In order for reconciliation between Indigenous and non-Indigenous peoples in Canada to occur, "reconciliation has to pass first through truth"[7] – and it is elucidating the "truth" surrounding the history of setter-colonial relations in Canada that is one of the primary aims of this book.

Challenging the narratives of pioneering exploration, lawfulness, and compassionate stewardship that reside at the core of the Canadian national identity, Manuel tracks the eliminatory logics and legalized violence not only contained in Canada's 1867 constitution but that also continues to structure relations between Indigenous peoples and non-Indigenous Canadians. As Manuel rightly points out, the Constitution Act, 1867 fundamentally excluded Indigenous legal orders, jurisdictions, and treaty relationships by situating Indigenous peoples and their reserved "lands" under the authority of the federal Parliament. In Manuel's estimation, it is theories of "racial superiority"[8] that underpin such legal structures of domination – structures that continue to fuel the colonial relationship between Indigenous peoples and the Canadian state. Connecting the settlement of Canada with more current developmental projects in the mining and pipeline industries, the book cautions readers not to be swayed by the florid rhetoric surrounding reconciliation and instead to consider the extent to which governmental policy acknowledges the ability of Indigenous peoples to actually determine how their lands will be developed.

Manuel ultimately argues that what is required to mend the "broken" relationship between Indigenous peoples and non-Indigenous Canadians is "recognition and restitution" in accordance with both domestic and international law. In this regard, he argues that it is Indigenous rights to self-determination as expressed in the United Nations Declaration on the Rights of Indigenous Peoples, proprietary land interests, and "Aboriginal and treaty rights on the ground"[9] that need to be recognized and respected. Writing in an accessible, conversational tone throughout the "manifesto," Manuel posits that there is a need to move beyond strict legal recognition through the courts

7 Manuel and Derrickson, *Reconciliation Manifesto*, 56.

8 Manuel and Derrickson, *Reconciliation Manifesto*, 76.

9 Manuel and Derrickson, *Reconciliation Manifesto*, 57, 201.

and towards a form of political recognition where the ability of Indigenous peoples to determine the direction and development of their lands according to their own laws and values will be recognized and respected. For Manuel, such change can only occur through the continuing tensions and pressures exerted by and through grassroots mobilization and non-violent forms of resistance.

In *Freedom and Indigenous Constitutionalism*, Anishinaabe legal scholar John Borrows also provides a discussion of the importance of recognition and forms of resistance through a range of case studies of Indigenous direct action across Canada. However, Borrows highlights moments where direct action (as opposed to its relaxation) can contribute to further oppression and work against the interests of Indigenous peoples. Although civil disobedience can enhance Indigenous freedom and lead to improved relations, Borrows notes that it can also be a "double-edged sword for Indigenous peoples" and be used against them by non-Indigenous peoples. Borrows notes, for instance, that despite legal principles contained in the Royal Proclamation of 1763 to protect Indigenous peoples and lands against the encroachment and actions of settlers, non-Indigenous peoples "physically occupied Anishinaabe lands in the area [of the Saugeen/Bruce Peninsula], contrary to British and Indigenous law." Similarly, Borrows remarks that in the aftermath of the Supreme Court of Canada's 1999 *Marshall* decision recognizing Mi'kmaw treaty rights to fish for a moderate livelihood, non-Indigenous peoples engaged in forms of "direct action to attempt to blockade Mi'kmaq access to the [lobster] resource." As such, Borrows cautions readers against romanticizing the benefits or uncritically accepting the utility of direct action as it can also be "a powerful tool when non-Native people want to resist outcomes contrary to their perceived interests."[10] Borrows similarly provides a nuanced and contextual analysis of legal traditions in Canada, centring his work within Anishinaabe conceptions of freedom and pathways towards living a good life. The text not only uncovers problematic assumptions and forms of reasoning embedded within Canadian constitutional law and governmental policies that frustrate the ability of Indigenous peoples to live according to their own legal traditions, but it also provides an opening for considering how Canada's legal

10 Borrows, *Freedom and Indigenous Constitutionalism*, 80, 67, 79–80. In a similar vein, early work by political scientists such as Radha Jhappan noted that publicity-seeking strategies could also be a "double-edged sword" and used as a "weapon" against Indigenous peoples by governments; see C. Radha Jhappan, "Indian Symbolic Politics: The Double-Edged Sword of Publicity," *Canadian Ethnic Studies* 22, no. 3 (1990): 22.

and political domains can be transformed so that Canada itself can be placed along a pathway towards decolonization.

For instance, Borrows begins his book by presenting two concepts drawn from Anishinaabemowin: *mino-bimaadiziwin* (living a good life) and *dibenindizowin* (freedom). Within the constitutional traditions of the Anishinaabe, according to Borrows, freedom is understood to be both personal and relational such that "a person possesses liberty within themselves and their relationships." From this perspective, freedom is understood to be much more than just the mere absence of restraint or coercion: "It is the ability to work in cooperation with others to choose, create, resist, reject, and change laws and policies that affect your life."[11] With these concepts and overarching framework in place, Borrows explores the extent to which Canadian laws, policies, and traditions facilitate the exercise of freedom.

Given this relational and action-oriented understanding of freedom, Borrows considers practices of mobility in relation to the law as one avenue for thinking about and pursuing freedom. He does not, however, simply consider mobility in the bodily sense of being able to travel freely across a territory, but rather also in the philosophical sense of being able to travel "through the world of ideas." According to Borrows, legal regimes can do more than simply demarcate and confine the movements of people in physical space – they can also confine the rights available for "recognition or retention" through the ideas that underpin and breathe life into those systems. In this regard, Borrows argues that the Canadian legal system is shot through with stereotypical and contradictory ideas concerning the "nomadic" nature of Indigenous peoples (in relation to land) or their "static" character (in relation to unchanging cultural practices) that serve to limit the rights available to Indigenous peoples and their "ability to develop through time."[12]

In fact, Borrows delves deeper into both the Canadian constitutional structure itself and considerations of legislative recognition from a comparative perspective. Borrows, for instance, notes that while Canada's constitutional structure has been one of the ways in which colonial relations of oppression and domination have been deployed and sustained, there are also unwritten traditions and principles (such as the doctrine of continuity) inherited from British imperial law that should help recognize the continuing strength and existence of Indigenous laws and jurisdictions. Borrows interestingly notes

11 Borrows, *Freedom and Indigenous Constitutionalism*, 6, 12.

12 Borrows, *Freedom and Indigenous Constitutionalism*, 22, 30, 32–3.

that, in terms of constitutional interpretation, courts in Canada regularly apply "living tree jurisprudence" to non-Indigenous Canadians and deploy forms of "originalist" reasoning when interpreting Aboriginal and treaty rights. Such an approach freezes Indigenous peoples and rights in time and does not permit Indigenous rights to evolve or meet the contemporary needs of communities in the same manner as those of non-Indigenous Canadians. While this is generally correct in terms of how the Supreme Court has interpreted Aboriginal rights under Section 35, it should be noted that this court often departs from its stated commitment to "living tree jurisprudence" and interprets texts in a manner similar to the "originalist" approach criticized by Borrows. Not only has the court relied on originalist forms of reasoning when departing from Charter precedents surrounding guarantees of freedom of association,[13] but it has also deployed "originalist arguments" in both federalism cases and Charter rights cases when "giv[ing] weight to the framers' intentions." As legal scholars such as Leonid Sirota and Benjamin Oliphant have further argued, "Partly or even wholly originalist decisions are part and parcel of our constitutional law, and they are too numerous to be regarded as aberrations or wished away."[14]

It should also be noted that in comparison to the two works by Arthur Manuel discussed above, Borrows's final chapter addresses the issue of violence against women in the context of Section 35(1) of the Constitution Act, 1982, in a more substantive manner. Borrows argues that the manner in which the courts have framed Section 35 "spawned a political approach that largely emphasizes land and resource conflicts"[15] at the expense of issues related to gender-based violence. In Borrows's estimation, drawing upon Indigenous legal traditions and recognizing that Indigenous governments possess jurisdiction in this area could potentially help to alleviate the issue of violence against women.

Borrows's text is rigorous, challenging, and insightful, weaving together the work of theorists such as Hannah Arendt, Michel Foucault, and James Tully with such Indigenous theorists and scholars as Basil Johnston and Glen Coulthard. Borrows, in this sense, also travels through the "world of ideas," just as easily drawing upon and critiquing the work of theorists in a multiplicity of fields as he does the reasoning of members of the judiciary across time

13 Bradley W. Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada," *Canadian Journal of Law and Jurisprudence* XXII, no. 2 (July 2009): 346–7.

14 See Leonid Sirota and Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence," *UBC Law Review* 50, no. 2 (June 2017): 511, 548, 510.

15 Borrows, *Freedom and Indigenous Constitutionalism*, 182.

and geographic space. Borrows's centering of Anishinaabe legal traditions and willingness to question conventional habits of thought in legal, political, and social realms not only provides readers with a map to question their own underlying presuppositions and/or disciplinary perspectives, but also an opening to reimagine and decolonize the legal and political structures of the Canadian state.

Borrows's willingness to question conventional habits of thought and forms of reasoning is not surprising given that much of his past work has been devoted to uncovering Canada's "hidden" constitutional origins and treaty arrangements.[16] This focus on reconsidering conventional understandings of Canada's historical origins is also given new life in his and Michael Coyle's edited collection *The Right Relationship: Reimagining the Implementation of Historical Treaties*. The book uses the Treaty of Niagara of 1764 as its entry point for considering relationships between Indigenous and non-Indigenous peoples in Canada. In this regard, rather than begin with the 1867 constitutional origin story likely most familiar to non-Indigenous Canadians, this book takes the gathering at Niagara between Indigenous nations and representatives of the British Crown as its narrative beginning. This is significant as the agreement reached at Niagara not only recognized the autonomy of both settler and Indigenous nations, but also provided a framework for co-existence predicated upon principles of kinship, consent, and legal pluralism.[17]

The collection brings together a number of Indigenous and non-Indigenous legal scholars to consider how the Treaty of Niagara and its underlying principles might inform treaty relations today between Indigenous peoples and the Canadian nation. Many of these pieces, similar to the reconciliation critiques in the other texts noted and discussed above, provide pointed critiques of current approaches and discourses of reconciliation and also provide alternative ways of considering reconciliation as grounded within Indigenous legal traditions. For instance, given that the Supreme Court's approach to reconciliation under Section 35 has often involved the non-consensual reconciling of Indigenous peoples *with* the sovereignty of the Crown and its presumed legal superiority, Borrows argues that the concept is a "flawed

16 See for instance, John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation," *UBC Law Review* 28, no. 1 (1994): 40.

17 Similarly, political scientists such as Peter Russell have referred to the Treaty of Niagara as Canada's "first Confederation"; see Russell, "Can Canada Retrieve the Principles of its First Confederation?" in *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, ed. Kiera L. Ladner and Myra J. Tait (Winnipeg: ARP Books, 2017): 77–91.

metaphor" and should be rejected as "any compromise with colonialism causes us to be compromised by colonialism."[18] While Borrows notes that Canada's predominant constitutional narrative has involved the perpetuation of racist and discriminatory doctrines in relation to Indigenous peoples, he reminds readers, through invoking the Treaty of Niagara, that there are also other stories and principles grounded within Indigenous law that continue to animate Canada's constitutional framework. Likewise, the chapter by Aaron Mills draws further linkages between the Treaty of Niagara and reconciliation – particularly in terms of how its underlying principles could be harnessed to produce a more just relationship and understanding of reconciliation. In this regard, rather than reconcile Indigenous peoples to an imposed constitutional order not of their choosing, the principles for partnership and legal pluralism drawn from the Treaty of Niagara "mean that any settler constitutional order will have to reconcile itself to the confederal treaty superstructure that holds distinct Indigenous constitutionalisms together."[19]

The writings in this collection not only draw attention to the linkage between discourses of reconciliation and colonialism, but also reverse the concept of reconciliation so that it no longer serves a unidirectional or "one-sided" purpose in support of Crown sovereignty/domination.[20] Indeed, authors such as Mills draw attention to ways in which it could serve a transformative anti-colonial purpose through the clearing of space for Indigenous legal orders, jurisdictions, and more respectful treaty relationships. Similarly, scholars such as Sarah Morales argue that contemporary treaty negotiations and disputes in the province of British Columbia hold a greater likelihood of being resolved and placed on a path towards more respectful relations through the incorporation of Indigenous legal practices, customs, and traditions. For Morales, such incorporation would help to constitute a "renewal of the process of reconciliation."[21] Other chapters in this collection draw attention to treaty conceptions and understandings of relationships grounded in Anishinaabe law (chapters by Mark D. Walters, Mills, and Heidi Kiiwetinepinesiik Stark), highlight legal principles and common understandings contained in historic treaty-making processes that could serve as a foundation for renewing treaty

18 Borrows, "Canada's Colonial Constitution," in Borrows and Coyle, *Right Relationship*, 20.

19 Aaron Mills, "What is a Treaty? On Contract and Mutual Aid," in Borrows and Coyle, *Right Relationship*, 242.

20 Manuel and Derrickson, *Reconciliation Manifesto*, 202.

21 Sarah Morales, "(Re)Defining 'Good Faith' through *Snuw'uyulh*," in Borrows and Coyle, *Right Relationship*, 292.

obligations, rights, and persisting partnerships in the present (Michael Coyle), and examine international contexts, forums, and legal principles for implementing treaties and strengthening relationships (chapters by Jacinta Ruru, Jean Leclair, Sara Seck, and Shin Imai). Ultimately, this collection not only challenges readers to think critically about Canada's constitutional history in the context of differing understandings of reconciliation but to also consider what the underlying principles contained in the Treaty of Niagara might mean for future treaty relations and the building of a post-colonial world in Canada.

Reading through these texts in the context of recognition and reconciliation – particularly Manuel's assertion that reconciliation must first pass through "truth" – I could not help but be reminded of former Australian Prime Minister Paul Keating's famous "Redfern Speech," where he spoke about turning "reconciliation into reality" in December 1992 to commemorate the impending International Year of the World's Indigenous People. As Keating observed:

> The starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. . . . We committed the murders. . . . With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask – how would I feel if this were done to me?[22]

The reactions by members of the media and the general public in Canada this past June to the use of the term "genocide" in the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls suggests that there is still an entire history of (ongoing) colonial relations in this country that many Canadians are not yet willing to confront and/or reconcile with their own inherited images and self-understandings of Canada. These four texts not only shed further light on the continuing linkage between Canadian law and settler-colonial violence, but also reveal possibilities for establishing a future post-colonial order in Canada based on past practices of treaty-making, legal pluralism, and recognition. Indeed, as the work of John

22 The entire text of Keating's speech is available online: https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf.

Borrows has routinely pointed out, Canada's own constitutional tradition also "contains strands of recognition and protection of Indigenous peoples."[23] Given that the Treaty of Niagara (and subsequent numbered treaties) are grounded in Indigenous legal orders and practices, the recognition of Indigenous law or jurisdictions need not be understood as a threat to the Canadian state or its constitutional legitimacy. Instead, as the work of legal scholars reminds us, Canada also has a history of generating relationships of coexistence and mutual autonomy that both emerge out of Indigenous law and which continue to underpin Canada's own constitutional structure. Perhaps it is by both acknowledging the ongoing strength of these principles and owning up to the entire history of colonial relations that a more honourable form of reconciliation can develop in which Indigenous legal orders and jurisdictions are fully "recognized" and more just relationships are reinforced.

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23 Borrows, *Freedom and Indigenous Constitutionalism*, 108.