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The Numbered Treaties and the Politics of Incoherency

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Abstract

This article explores the role of the numbered treaties relative to the continuity of the settler colonial project in Canada. Although the treaties are often invoked to characterize the federal government's commitment toward strengthening or renewing its relationship with Indigenous peoples at a symbolic level, there remains a disjuncture between the "nation-to-nation" depictions of treaties and the complex political relationships that Indigenous peoples have called for since their signing. This article explores the inconsistent ways in which treaties have been taken up within Canadian legal and political institutions, arguing that the incoherency surrounding treaties promulgates the notion that treaties are being implemented while simultaneously obscuring, distorting and minimizing the rights of Indigenous peoples in practice. It demonstrates that the failure to engage with treaties as the locus of Indigenous peoples' distinct political relationship with the Canadian state functions to continually produce conditions of colonization and dispossession through the denial of Indigenous sovereignty and jurisdiction as affirmed in treaties.

Résumé

Cet article analyse le rôle des Traités numérotés dans la continuité du projet colonial des pionniers au Canada. Souvent invoqué pour caractériser l'engagement du gouvernement fédéral visant à renforcer ou à renouveler sa relation avec les peuples autochtones à un niveau symbolique, il subsiste une disjonction entre, d'une part, les représentations de « nation à nation » des traités et, de l'autre, les relations politiques complexes que les peuples autochtones ont réclamées depuis leur signature. L'article examine la manière incohérente dont les traités ont été adoptés au sein des institutions juridiques et politiques canadiennes, faisant valoir que l'incohérence les entourant conforte l'idée que les traités sont appliqués tout en obscurcissant, déformant et minimisant les droits des peuples autochtones dans la pratique. Il démontre que le fait de ne pas s'engager dans les traités en tant que lieu de la relation politique distincte des peuples autochtones avec l'État canadien a pour effet de produire constamment des conditions de colonisation et de dépossession par le déni de la souveraineté et de la juridiction autochtones, comme le stipulent les traités.

Keywords: Indigenous peoples; Indigenous-Crown relationship; numbered treaties; colonialism; Canadian constitution; national culture

Introduction

The numbered treaties, negotiated between 1871 and 1921, play a foundational role in the story of Canadian nation-building. Often invoked in relation to Canada's putatively consensual and nonviolent history of settlement and development, treaties are said to have served the initial political function of extinguishing outstanding Indigenous "claims" to the land, authorizing colonial expansion and possession. Treaties also represent important national symbols, recognized as playing a foundational role in the formation of a nation-to-nation relationship between Indigenous peoples and European newcomers (Miller, 2009). However, there is an ongoing disjuncture between the characterization of treaties as nation-to-nation arrangements and the political relations that Indigenous peoples have called for since their signing. Indeed, simplistic narratives of land cession and surrender through treaty-making have always been contested by Indigenous peoples, who understand treaties as having involved the negotiation of far more complex political arrangements (Cardinal and Hildebrandt, 2000). This article explores the role of treaties relative to the continuity of the settler colonial project in Canada through reference to the ongoing depoliticization and containment of treaty relationships.

Treaty-based frameworks for relating, as they are generally understood by Indigenous peoples, represent diplomatic processes for negotiating relations of non-violent and generative co-existence between living beings in shared geographies. For the most part, this has not been the case in Indigenous peoples' treaty relationships with European settlers, particularly with respect to the ways in which the numbered treaties have been inhabited. Critics of Canada's record of treaty implementation alternately invoke the numbered treaties as acts of historical treachery, deceit, theft or betrayal (Adams, 1975; Tobias, 1983). While these arguments are certainly warranted, they focus primarily on colonial violence and dispossession as historical events that occurred when treaty promises were initially abandoned or broken by the Canadian state. Such arguments position colonialism as something that can be corrected through the proper implementation of treaties, yet they tend to overlook the active and ongoing role that misrepresentations of treaties play in sustaining structures of settler colonialism. As Jill St. Germain observes, the "broken treaties" tradition of treaty interpretation perpetuates a focus on policy and situates the state and its agents as the primary actors in treaty implementation, distracting from the need to direct attention beyond the realm of policy and toward the treaty relationship itself (2009: xviii). Yet as Michael Asch notes, treaties should be understood as political relationships between governments and not as mere "policy options" (2014: 164).

Rather than taking up treaties as historic events that were entered into and have long since been violated by the Canadian state, this article engages with treaties as relationship agreements that have been selectively and strategically invoked by Canada to continually produce its own claims to sovereignty in response to shifting socio-political climates. In particular, I trace the ways in which the incoherent nature of treaty implementation in Canada has functioned to contain the exercise of Indigenous political authority over time. Attention to such questions highlights the need for critical engagement with discursive constructions that foreground the symbolic importance of treaties in creating a nation-to-nation relationship but fail

to engage with the material implications of understanding treaties as political agreements between nations. Understanding these processes can help bring forward a more nuanced understanding of treaties as agreements that have not just been broken or dishonoured but that have been selectively invoked and employed over time to sustain Indigenous dispossession and marginalization. These inquiries stand to inform analyses of the procedural dimensions of settler colonialism while also contextualizing the Canadian state's ongoing failure to properly engage with and/or respond to the political mobilizations of treaty Indigenous peoples.

Mythologizing the Numbered Treaties

The numbered treaties are a foundational element of the political formation that scholars such as Joyce Green refer to as "Project Canada." As Green has observed, the configurations of the relationship between Indigenous peoples and Canada "are perpetuated by a mythologized history and by judicial and political institutions that proclaim and defend this mythology-cloaked, unhyphenated colonialism" (1995: 25). The selective construction of significant events such as treaties forms mythologies that shape the consciousness of many non-Indigenous people and Indigenous peoples in Canada, centring certain interpretations while invisibilizing others. And as Green notes, these mythologies are not merely discursive constructions but also take material form within Canadian legal and political institutions and processes (1995: 25).

The negotiation of the numbered treaties represents a formative period in Canadian narratives of settlement and development. The treaties are predominantly depicted in Canadian political institutions as historical events in which Indigenous peoples are said to have consensually ceded and surrendered title to the land, and relinquished our existing political authority to the Crown, in exchange for a fixed spectrum of rights and entitlements. This assumption is reflected in the description of treaties offered by the Department of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) which suggests that "At their base, the treaties were land surrenders on a huge scale" (CIRNAC, 2013). Interpreted in this manner, treaties represent mechanisms of extinguishment of Indigenous peoples' outstanding claims against Canada's assertion of sovereignty and jurisdiction following the transfer of Rupert's Land and the Northwest Territories from the Hudson's Bay Company to Canada (McNeil, 1982).

The transactional interpretation of treaties stands in direct contrast to the spirit and intent of treaty relationships described by treaty Elders (Cardinal and Hildebrandt, 2000; Hildebrandt, et al., 1996) and documented by Indigenous academics (Borrows, 2002; Cardinal, 1969; Craft, 2013; Ladner, 2003; Little Bear, 1986; Simpson, 2008; Stark, 2016; Venne, 1997; Williams, 1997; Youngblood Henderson, 2002), as well as by settler historians and anthropologists (Asch, 2014; Miller, 2009; Milloy, 2008; Tully, 2000), each of whom recognize that treaties represent the establishment of a legal and political framework intended to govern the co-existence of multiple beings in a shared space. Nevertheless, Canada's archive of historical narratives, social and cultural assumptions, and judicial and political decisions has sustained a set of unifying mythologies about the transactional nature of treaties over time. In its final report, the Royal Commission on Aboriginal Peoples commented

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that the public perception surrounding treaties is "the direct result of schoolboys having been misled or at least deprived of the truth about the treaties and about the peoples that made them" (Dussault et al., 1996: 2, 15). It is through the continual proliferation of treaty mythologies that the Canadian government legitimates its presence on and claim to title over much of central and western Canada. Further, mythologies of treaties as mechanisms through which Indigenous peoples surrendered not just land but also our associated powers of governance promulgate misinformation, half-truths and uncertainty about Indigenous peoples' political status that cloud the contemporary legal and political implications of treaty relationships.[1]

As I will demonstrate below, the repressive nature of treaty mythologies manifests in their depoliticization, symbolification and racialization, which collectively locates treaties as matters of cultural identity rather than the locus of Indigenous peoples' distinct political relationship with the Canadian state. James Tully has written that the failure to engage with Indigenous political practices through Indigenous philosophical tenets can either legitimatize or delegitimatize the colonization of Indigenous peoples and our territories. He argues that while Western political thought is woven into the everyday political, legal and social practices of Canadian society, Indigenous political thought is inevitably constrained by its subalternity (Tully, 2000: 37). This differential speaks to the need to engage with the language of Western political thought and its modes of interpretation and reflection as techniques of colonial governance. In the context of treaty relationships, such an approach offers to illuminate the dual and Janus-like character of treaties as they are differently invoked and operationalized at the level of symbolism and practice and to specifically call attention to how treaty mythologies marginalize the exercise of Indigenous political authority in order to uphold structures of settler colonialism.

The Suppression of Indigenous Political Orders in the Prairie West

In the decades preceding the negotiation of the numbered treaties, the Crown represented the prairie west as devoid of legitimate governance structures—or at least forms of governance that were legible to Western European newcomers.[2] As demonstrated in Heidi Kiiwetinepinesiik Stark's (2016) study, Crown officials sought to evidence the need for the extension of colonial law and governance in the prairie west by representing Indigenous people as in need of civilization and by constructing Indigenous territories as spaces that suffered from a deficit of law and order. Yet newcomers could not entirely deny the existence of Indigenous political orders, which needed to be at least partially recognized if Indigenous peoples were to consent to share the land through treaty-making. Crown representatives did, however, have to place concrete boundaries surrounding the exercise of Indigenous political authority, a feat which was attempted in part through the selective recognition of dimensions of Indigenous political orders and the simultaneous erasure of others (Stark, 2016).[3] As scholars of settler colonialism have noted, such eliminatory or repressive efforts were required to secure settler claims to land and to ensure the continuity of settler colonial formations in Canada (Simpson, 2016; Stark, 2016; Wolfe, 2006).

At the same time, a number of theoretical affirmations of Indigenous peoples' legal and political status appear in the historical record. These include the broad

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recognition of Indigenous nationhood in the Royal Proclamation of 1763, Lord Denning's 1982 acknowledgment of the significance of Indigenous customary law, and the Court's recognition in the 1998 *Reference re: Secession of Quebec* case that the special commitments made to Indigenous peoples by successive governments are rights that are reflective of "an important underlying constitutional value" (para. 82). Furthermore, Peter Russell has argued that despite its failure, "a constitutional convention recognizing the Aboriginal peoples' inherent right to self-government" was, in fact, established through the process surrounding negotiation of the Charlottetown Accord (1995: 75). Tully has also suggested that the treaty process itself can be understood as a form of constitutionalism whereby Indigenous people participate in the creation of norms and conventions governing Indigenous-Crown relations (1995: 117). And while there is significant disparity in oral and written treaty terms, even the Crown's written records indicate that Crown treaty negotiators offered Indigenous negotiators many assurances that their ways of life would not be interfered with and that they would not be expected to relinquish jurisdiction over their own affairs (Morris, 1880: 211, 233). Yet in spite of the acknowledgment of Indigenous peoples' political status through such oral promises and through the very act of treaty-making itself (Barsh and Henderson, 1982; Taylor, 1985), several authors have argued that Indigenous peoples' subordinate political status had already been presumed by the Crown prior to treaties (Peach, 2011: 10; Russell, 2017: 188).

Crown efforts to place parameters around the exercise of Indigenous governments were also decisively gendered during and after treaty-making. While Indigenous women occupied a symbolic position of importance in the negotiation of the numbered treaties (Venne, 1997: 192), their political authority was treated by settlers as inconsequential in practice. As Aimée Craft notes, the treaty process represented in many ways "a procedural beginning of the imposition of patriarchy," as the treaty commissioners insisted upon a negotiation process that was open exclusively to male representatives of Indigenous communities (2015). Indeed, despite the significant role that Indigenous women have played in the governance of their communities in many (but not all) contexts, the Crown overlooked the importance of Indigenous women in the negotiation of the numbered treaties, at least in a formal capacity.

Scholarship on the gendered nature of settler colonialism has argued that settlers' failure to acknowledge Indigenous women's political authority in the context of treaties and elsewhere was not merely a by-product of patriarchal norms but, in fact, possibly a far more deliberate political strategy. As Audra Simpson (2016) has argued, the high level of power and authority exercised by Indigenous women formed a direct threat to the settler colonial project, as it represented an explicit marker of difference from Western orders of governance. The extension of settler political authority over Indigenous peoples required the removal or erasure of Indigenous polities, and particularly those dimensions of Indigenous political orders that call into question settler claims to sovereignty. Thus gendered colonial violence has enacted an assault not just upon Indigenous women's physical bodies but also upon the political form and power that said bodies represent.

The complex networks of interdependence with Creation that Indigenous peoples inhabit represent the source of Indigenous peoples' political authority and

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jurisdiction, informing our associated rights and responsibilities (Cardinal and Hildebrandt, 2000: 11). Furthermore, Indigenous political orders are grounded not just upon a pre-existing relationship but also upon a continuous and engaged relationship with Creation. Since Indigenous women hold jurisdiction relative to many nonhuman elements of Creation, their very presence in the political life of Indigenous communities can be understood as signifying a threat to the settler colonial project by representing the continuity of a political order and of relations to Creation that serve to challenge settler claims to jurisdiction (Simpson, 2016). The symbolification of Indigenous women's roles and repression of actual political authority, both in historical and contemporary treaty politics, has thus served the purpose of bracketing off questions of Indigenous peoples' responsibilities to Creation and associated questions of jurisdiction.

While the early settler colonial project relied upon the notion that treaties represented political agreements insofar as they would promise to uphold claims to Crown sovereignty, it also needed treaties to represent an endpoint for Indigenous peoples' political authority and jurisdiction. Beyond this initial stage in the relationship, contemporary Crown governments have required a means of continually maintaining the legitimacy of their claims to jurisdiction over Indigenous peoples while also sustaining the concomitant subordination of Indigenous political authority. One way in which federal and provincial governments have sought to achieve this has been through the reproduction of symbolic commitments to treaty implementation, alongside the simultaneous depoliticization of treaties through a variety of means, which will be explored in subsequent sections. I argue that this simultaneous acknowledgment and denial of Indigenous governance has consistently functioned as a containment strategy with respect to the implementation of a nation-to-nation relationship under the numbered treaties.

The Culturalization and Depoliticization of Contemporary Treaty Relationships

Since the negotiation of the numbered treaties, federal and provincial governments have sought to delimit, in varying ways, the powers of governmentality that Indigenous peoples might assert by way of treaties. While an exhaustive overview of the federal government's shifting approach to treaty implementation is not possible within the parameters of this article, of particular relevance to the current conversation is the way in which the racialization, culturalization and depoliticization of treaties have functioned to delimit the potential implications of a more robust understanding of treaties over time.

In the early days following the signing of treaties, the Canadian government's willingness to enact its treaty responsibilities was in many ways dependent upon Indigenous peoples' individual behaviour and compliance with the national Indian policy (Daschuk, 2013). Indian status eventually became a requirement for the exercise of treaty rights, and being a treaty Indian and Canadian citizen were seen as mutually exclusive categories. Colonial legislation aimed to administer the rights associated with treaties through the status Indian registry, constructing

the mythology of the "treaty Indian" and linking the implementation of treaties to Indigenous individuals (Milloy, 2008: 10). Not unlike the forms of depoliticization mentioned in the previous section, these processes were also decisively gendered (Milloy, 2008: 10). Such legislative policies increasingly shifted public perception surrounding treaties away from the nature of the relationships between treaty partners and toward a narrow spectrum of rights exercised by individuals.

The process of linking treaties to individual Indigenous bodies abstracts them from their purpose and intent relative to the rest of Creation. In other words, the land question and matters of political jurisdiction are obscured from treaty discussions. This process not only diminishes the status of treaties as political agreements between governments but also deterritorializes them. As Lynn Gehl (2015) notes, the criteria for determining who would exercise treaty rights initially included all people who resided with Indigenous people within a treaty area. Increasingly, the Canadian federal government began limiting the number of people entitled to Indian status through various legislative processes such as enfranchisement, as well as the forced removal of status from Indigenous women who married non-status men and from the children of such unions (Boldt et al., 1985). Treaties gradually became associated with questions of race and identity, detracting from their overarching purpose as land-use arrangements intended to outline the rights and responsibilities of Indigenous and non-Indigenous people in shared spaces.

Contemporary treaty politics have been shaped not just by liberal multicultural discourse, which has prompted Indigenous peoples to engage in efforts to distinguish ourselves from other minority rights holders in Canada, but also by ongoing state efforts to contain the exercise of Aboriginal and treaty rights to the realm of cultural practice. As scholars such as Mark Rifkin (2017) have noted, the linking of Indigenous polities to matters of race and culture imposes boundaries around the possibility of looking to Indigenous nations as political orders in and of themselves. Writing with respect to the US context, Rifkin notes that determinations of Indigenous political authority through reference to race and blood contain the exercise of Indigenous self-governance, noting that when Indigenous sovereignty is defined through reference to a biological "Indianness," it is both depoliticized and despatialized, turning political authority into the equivalent of identity. Indigeneity then defines the limits of Indigenous sovereignty, substituting "the reproductive transmission of racialized substance … for the geopolitical dynamics of Indigenous peoples having to exist on territory forcibly incorporated into the settler state" (2017: 170). In the Canadian context, the linking of treaties to Indian status similarly imposes racial limits surrounding the exercise of Indigenous jurisdiction and political authority as affirmed in treaties, ultimately substituting Indian blood or ancestry for political arrangements between Indigenous people and the settlers' state. As Rita Dhamoon observes, the effect of the colonial legacy is the creation of a "racialized and Indigenous cultural identity that previously organized on the basis of nationhood" (2010: 126). In the process, treaties become primarily associated with a "status" held by individual bodies rather than with political relationships that affirm the continuity of pre-existing forms of Indigenous governance vis-à-vis federal and provincial governments. The treaties, by being linked to identity under the Indian Act, have become not only conflated with racial or cultural distinctiveness but narrowed by the Indian Act's highly gendered articulations

of Indigeneity. As a consequence, identity, race and ultimately gender function to overwrite questions of Indigenous political jurisdiction, nationhood and governance relative to treaty agreements.

It would be inaccurate to suggest that the culturalization of treaty rights is a project devoid of political significance, as the ability to exercise cultural practices and participate in one's cultural community is certainly an important aspect of political life. While there are many dimensions of governance inherent in Indigenous peoples' cultural and ceremonial practices, these are severely constrained when not accompanied by the legal and political jurisdiction necessary for Indigenous peoples to govern ourselves in other realms of life. Taking culture as the primary frame through which to work toward treaty implementation shifts the focus of treaty politics away from the continuity of Indigenous legal and political orders. As Glen Coulthard has demonstrated, there is a distinction between strategies aimed at "cultural and symbolic" forms of change and strategies aimed at attending to the structural dimensions of oppression (2007: 437). As a consequence of this culturalist orientation, Indigenous understandings of treaties are vacated of legal significance, rendering our interpretations of treaties legible only as the "spirit and intent" or the "symbolic" version. These continue to exist by way of contrast with the purportedly authoritative settler record and the terms and assumptions exercised within its legal and political institutions.

In delineating the contours of treaty rights, the Canadian courts have constructed culturalist criteria such as those outlined in *Van der Peet,* which limit constitutional protection to select practices perceived as integral to the cultural distinctiveness of Indigenous peoples (*R. v. Van der Peet*, 1996). This, in turn, suggests that Indigenous rights that fall outside the category of culture are not entitled to receive constitutional protection. And while the courts have generally taken up treaties as collective in nature (Allodi-Ross, 2017: 157), neither these collective nor cultural orientations have given rise to a recognition of the right of self-government affirmed in treaties. The following section explores the disconnect between the symbolic recognition of a nation-to-nation political relationship between Indigenous peoples and the Crown under the treaties and the ways in which treaties have been implemented within Canadian institutions.

Nation-to-Nation Treaty Relations and the Containment of Indigenous Governance

In recent decades, treaties have occupied a central role in federal government's framing of its commitment to improving relations with Indigenous peoples. References to the treaty relationship have been prominent in Prime Minister Justin Trudeau's speeches, from his early campaign statements to his repeated calls for the renewal of a nation-to-nation relationship with Indigenous peoples—a relationship which he qualifies as one "that is guided by the spirit and intent of the original treaty relationship" (Trudeau, 2015, 2018). Yet as Hayden King and Shiri Pasternak note, even while "Trudeau is praised internationally for making the relationship with Indigenous peoples, as he says, his 'most important,'" many have critiqued these gestures as "symbolism over substance" (2018b).

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For instance, the "Overview of a Recognition and Implementation of Indigenous Rights Framework," currently being developed by the federal government, employs the language of Indigenous nationhood and is purported to represent a move toward implementing self-government; however, it continues to frame self-government as delegated and flowing from federal recognition (CIRNAC, 2018). It suggests that recognition is itself contingent on the successful conclusion of a negotiation process and neglects the particular constitutional relations and conventions established through treaties. As King and Pasternak have argued, this initiative fails to engage with treaties as "meaningful, international land-sharing agreements between nations" (2018a: 18). It claims to have departed from previous approaches to self-government, yet it fails to acknowledge self-government as affirmed in treaties and under Indigenous and international law. As Mary-Ellen Turpel-Lafond, Wilton Littlechild and Ed John indicated in a letter to Prime Minister Trudeau that outlined concerns relating to the proposed framework: "From the viewpoint of reflecting existing human rights, treaties, constitutional law and international norms and principles, the process does not align with the commitment … described" (cited in Barrera, 2018). Among other critiques, the authors characterized this initiative in its current form as running the risk of being "a retrograde instead of a progressive initiative" (cited in Barrera, 2018). Indeed, the process to date has been reminiscent of the unwillingness of federal and provincial governments to recognize a robust and unqualified right to Indigenous self-government during the negotiation of the Charlottetown Accord (Russell and Jones, 1995: 47–48).

Indigenous peoples have exercised powers of governance prior to contact with Europeans and continue to do so in many ways, yet while the courts assumed much of the responsibility for determining the meaning of section 35 of the Constitution Act following the defeated Charlottetown Accord, they have not demonstrated a willingness to revisit the constitutional division of power to allow greater space for Indigenous governance. Note Macfarlane JA's reasoning in *Delgamuukw*, which suggests that "the rights of self-government encompassing a power to make general laws governing the land, resources, and people in the territory are legislative powers which cannot be awarded by the courts. Such jurisdiction is inconsistent with the *Constitution Act,* 1867 and its division of powers" (*Delgamuukw v. British Columbia*, 1997: para. 36). Yet at the same time as the Constitution Act has been invoked to guard against the forms of structural change sought by Indigenous peoples, the courts have not shied away from revisiting the constitutional division of powers as it pertains to the jurisdiction of federal and provincial governments.

In instances where the courts have revisited the division of powers relative to treaties, they have done so in a way that diminishes the nation-to-nation relationship between treaty First Nations and Canada. For instance, the court in *Grassy Narrows* employed a "doctrine of constitutional evolution" to suggest that the provinces could now "stand in Canada's shoes" with respect to fulfilling the Crown's treaty responsibilities. This distorts and minimizes the status of treaties as unique constitutional agreements with the Crown. Furthermore, it creates additional ambiguity for Indigenous peoples; as McIvor and Gunn note, *Grassy Narrows* is likely "to result in significant uncertainty" with respect to "the type of protections

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Indigenous Peoples can expect for their constitutionally-guaranteed rights" (2016: 158). Specifically, they argue that in removing "an established aspect of constitutional protection formerly guaranteed to Indigenous people," *Grassy Narrows* "puts at risk the established special relationship … grounded in the Royal Proclamation of 1763" and has the potential to be regarded "as a basis on which to re-write the Constitution so as to undermine Canada's exclusive responsibilities to Indigenous Peoples" (160). Further, while the *Grassy Narrows* trial Court found that the Indigenous parties to Treaty 3 had received a clear, oral promise of an unlimited and perpetual harvesting right, this oral promise was ignored upon appeal (Townshend, 2017: 302), illustrating the inconsistency between the symbolic commitment to respect Indigenous understandings of treaties and the failure to implement this commitment in practice.

While the courts have crafted principles of treaty interpretation that are geared toward moving away from static, literal or Eurocentric readings of treaties,[4] when these canons of treaty construction are employed, they have not operated to account for interpretations of the nature of the treaty relationship under Indigenous legal orders. That is, the subordinate nature of Indigenous peoples' legal and political status is upheld at least in part through a reliance on Western frames surrounding the nature of treaties and in part as a result of a broader failure to take seriously Indigenous legal and political principles in contemplating the nature of the Indigenous-state relationship. Consider McCrossan and Ladner's argument that despite the declaration of title in *Tsilhqot'in*, the judicial reasoning employed in this case is, in fact, geared toward the elimination of Indigenous laws, jurisdictions and territorial relationships, as it privileges the current configurations of provincial and federal power, which "conceptually exclude and undercut Indigenous legal orders and territorial responsibilities" (2016: 412). They note that this represents a contemporary manifestation of settler colonial logics of elimination: even when Indigenous peoples' self-determining status is acknowledged, such gestures are restricted by the court's deference to federal and provincial laws and its concomitant failure to engage with Indigenous laws. This failure to engage with Indigenous legal and political knowledge can also restrict the exercise of Indigenous governance in treaty contexts in a number of ways, including but not limited to the forms of legal and political repression that result from representations of treaties as mechanisms of extinguishment. With respect to the question of extinguishment, Kent McNeil writes that

> … voluntary extinguishment of Aboriginal title, while permissible in Canadian law, may not be permissible in Aboriginal law. The Supreme Court has said repeatedly that the treaties have to be interpreted as the parties, especially the Aboriginal parties, would have understood them at the time. As the Aboriginal parties to the treaties would presumably have acted in accordance with their own laws, they cannot have intended to surrender their entire interest to the Crown if that would have violated those laws. Aboriginal understandings of the treaties therefore need to be assessed in light of relevant Aboriginal laws. (2001: 307)

McNeil highlights the need for treaty interpretation to be guided not just by Canadian law and its tokenistic recognition of the "Indigenous perspective" but

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by the laws of the Indigenous peoples who are also party to the treaty. Contrary to Poelzer and Coates's suggestion that it is Indigenous peoples who must come to terms with the division of power under the Canadian federation and adjust our political aspirations accordingly (2006: 164), McNeil's perspective instead points to faults in the logic underlying the perceived extinguishment of Aboriginal title under treaties. That is, the perceived extinguishment of Indigenous jurisdiction in treaty territories (which creates space for federal and provincial claims to jurisdiction) is created and upheld through an interpretation of treaties that is grounded in Western law and that fails to consider the Indigenous laws that would inevitably invalidate it. In recognition of this oversight, McNeil suggests that perhaps it is settlers who have a responsibility to familiarize themselves with Indigenous legal orders and then revisit mainstream institutions, structures and processes on that basis.

As indicated earlier in this article, Treaty Elders and Indigenous legal scholars have repeatedly stated that in Indigenous legal systems, land is not a property that can be transferred or sold. Indigenous peoples understand treaties to represent land-use arrangements that are intended to delineate frameworks of nonhierarchical co-existence between nations. Indeed, as Leroy Little Bear observes of the relationship between humans and Creation, Indigenous law would not have permitted the notion of transferring land to the Crown: "The standard or norm of the aboriginal peoples' law is that land is not transferable and therefore is inalienable" (1986: 243; cited in McNeil, 2001: 305). This disconnect points to the need to revisit many of the foundational assumptions regarding treaties that are perpetuated in federal and provincial institutions, including but not limited to the notion that Indigenous title to the land has been extinguished in regions where the numbered treaties have been negotiated. This could lead to further conversations whereby treaties are understood as much broader than questions of culture or of mediating cross-cultural relations—which is, in fact, part of the purpose of treaties but certainly not their only purpose.

The reduction of treaty partners' broad range of rights and responsibilities to questions of culture, along with the racialization and gendering of treaties through the construction of the "treaty Indian," conflates Indian status and treaty rights and contains the breadth of the legal and political implications of treaties as they are understood by many treaty partners. It simultaneously gives the impression that treaties are being implemented (albeit in a narrow state) while masking the ongoing subordination of Indigenous legal and political systems and dispossession of land.

The proper foundations, function and exercise of Indian governments have been suppressed in many ways through these narrow engagements with treaty relationships. In the process, specific boundaries have become erected around the possible ways that they can be invoked and applied in contemporary contexts.

Treaty Relationships and the Politics of Incoherency

In a recent article surveying the last 50 years of scholarship in Canadian politics, Kiera Ladner (2017) suggests that scholars in the discipline of Canadian politics have generally failed to engage with Indigenous politics and governance as political orders in their own right. She notes that while there certainly have been

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concentrated efforts to accommodate Indigenous cultural difference within Canada's multicultural horizon, there has been significantly less attention paid to the foundational relationship between Canadian and Indigenous legal and political orders. Ladner's observations echo Joyce Green's (2000) call for political scientists to engage in critical reflection surrounding the way in which Indigenous peoples are being taken up relative to the Canadian body politic. Here Green argued for a move away from analyses of Indigenous politics as issues of cultural difference, demonstrating that this characterization is highly damaging to Indigenous peoples' political imperatives. She emphasized the need to engage with the political significance of Indigeneity beyond realms of identity and culture, advocating for a focus on the unique "historical, political and legal location" of Indigenous nations vis-à-vis the Canadian state.

This article has attempted to respond to these calls by positioning treaties as the locus of Indigenous peoples' relationship with Canada and by confronting the processes that serve to continually contain the full breadth of this relationship. I have argued that while the Canadian state requires the continuity of treaties to legitimate its claims to sovereignty and jurisdiction, it also requires the ongoing subordination of Indigenous political orders. Part of the way (but not the only way) in which this has been achieved over time has been through the linking of treaties to a racialized or cultural identity rather than to a distinct political relationship. This selective recognition and construction of treaties reinforces colonial relations by depicting treaties as the endpoint for Indigenous legal and political authority while also containing the transformative possibilities that emerge when treaties are viewed as the site of Indigenous peoples' unique political relationship with the Crown. The disjuncture between symbolic and material commitments to a nation-to-nation relationship then functions as a strategy that continually reproduces structures of political domination and dispossession of land by selectively upholding certain aspects of Indigenous understandings of treaties (such as agreement to share the land and to retain cultural practices), while minimizing dimensions that threaten to disrupt current configurations of power (such as the redistribution of power, jurisdiction and resources).

The incoherency surrounding treaties impacts both Indigenous and non-Indigenous understandings of the rights and responsibilities of all treaty partners, contributing to the cultivation of popular misconceptions and stereotypes. It is in this climate of ambiguity that simplistic mythologies thrive, as they provide an easily comprehensible narrative that doesn't require individuals to revisit their pre-existing assumptions or deconstruct the status quo. Indeed, the lack of clarity surrounding treaties sustains a number of mythologies that fuel racial divides between Indigenous and non-Indigenous peoples in Canada, such as the notion that all Indigenous peoples are excused from paying federal taxes or receive free post-secondary education, health and dental care as treaty rights. Such perceptions are not only highly inaccurate but also abstract the conversation away from the underlying treaty relationship and toward competing assertions and counter-assertions surrounding fixed treaty terms. These representations also turn Indigenous challenges to systems of settler colonialism into Indigenous grievances or claims against the state, subsuming them within the broader spectrum of minority and cultural politics in Canada. With these seemingly logical explanations of Indigenous

"entitlement" or "dependency," many members of mainstream society then default to treaty mythologies as a pretext for not engaging in a deeper understanding of treaty relationships.

Failure to understand the relationships of political nonsubordination that Indigenous peoples agreed to in taking treaties gives the impression that contemporary recognition or accommodation of treaty rights amounts to special treatment toward Indigenous peoples. This, in turn, suppresses the possibility of mobilizing the popular will to implement treaties. On the contrary, the articulation of treaty rights can result in a form of reactionary politics, cultivating a climate of resentment among proponents of equal rights discourse (Dudas, 2008). The assumption that Indigenous peoples are already the beneficiaries of greater rights and recognition than they deserve sustains the mythology that the state is honouring its responsibilities under treaties and that it has been nothing less than benevolent toward Indigenous populations.

The "politics of incoherency" surrounding treaties can be understood as part of a broader process of "colonial unknowing" that functions to sustain settler claims to sovereignty by disavowing the current and constitutive nature of colonialism (Vimalassery et al., 2016: 13). As Vimalassery et al. explain, colonial unknowing represents a process of dissociation that establishes "what can count as evidence, proof, or possibility" in order to "render unintelligible the entanglements of racialization and colonization" (13). In other words, it refers to the failure to think relationally about the interconnected and co-constitutive nature of various dimensions of colonialism. Colonial unknowing reproduces the disjuncture between contemporary structures of colonialism as "simultaneously everywhere and nowhere," as they remain differently and selectively understood by those who experience them and those who benefit from them. This process involves not only selective inclusion and exclusion of differing narratives, such as those surrounding treaty relationships, but also a dissociation of the past from the present, which as Stark (2016) notes, can attribute to treaties a false and troubling finality. It is inconsistent with a relational mode of analysis that, in the context of treaties, can work to challenge treaty mythologies by illustrating how they have served to maintain a colonial political relationship, even one that has evolved over time.

In problematizing inconsistencies, dichotomies and selective forms of recognition, I am not advocating for a fixed, static definition of treaty terms. Treaties are intended by Indigenous peoples to be dynamic, relational and contextual. While Indigenous peoples' relationships with newcomers would undoubtedly change in response to shifting social and environmental conditions, the values and precepts underlying the relationship are intended to be applicable to multiple contexts into the future. Treaties affirm the continuity of different ways of being in shared spaces and provide a framework to help navigate those tensions and inconsistencies as they arise over time. Treaties, then, are not immutable objects; they are iterative and cyclical and based on ongoing interaction and renewal. This should not be interpreted as suggesting that Indigenous understandings of treaties are themselves in flux; on the contrary, Indigenous oral histories and knowledges of treaties have remained consistent since their signing, and they accord more closely with the Crown's written records of negotiations than the written text does (Asch, 2014: 82). With this knowledge passed on from generation to generation,

Indigenous peoples continue to work in many contexts to honour the continuity of treaties as we understand them.

The intent of this article has been twofold: first, to highlight the need for scholars of Indigenous and Canadian politics to take seriously the political significance of the numbered treaties and to hold the Canadian state accountable for the ways in which treaty relationships continue to be selectively interpreted and misinhabited in practice. The secondary call that I have advanced has been for scholars to not just consider or include Indigenous political perspectives into theorizations of Indigenous-state relations but to think carefully and cautiously about how it is they are engaging with Indigenous political orders such as those affirmed in treaties. That is, we must be mindful to not reproduce symbolic framings of the treaty relationship in ways that obscure the material forms of dispossession and subordination that selective interpretations and representations of treaties can function to sustain. Throughout, I have demonstrated the rationale for this call; that is, that the incoherency and mythologies surrounding treaties serve to uphold structures of settler colonialism by obscuring the associated legal and political commitments of treaty partners. Conversely, when these mythologies are challenged, those challenges can represent an important way of revisiting how it is we understand and engage with the relationship between federal, provincial and Indigenous governments.

Notes

1 Here I note that the treaty mythologies of Indigenous cession and surrender of land and political authority that are outlined in this article are also reproduced by many Indigenous peoples in many contexts, and particularly by Indigenous peoples who are not parties to the numbered treaties.

2 The notion of political deficiency among Indigenous peoples is reflected in early Crown correspondence; as Captain William Butler wrote to Lieutenant-Governor Archibald in 1871: "Law and order are wholly unknown in the region of Saskatchewan, in so much, as the country is without any executive organization, and destitute of any means of enforcing the law" (quoted in Morris, 1880: 77). Similarly, Edward McKay (1873) wrote to treaty negotiator Alexander Morris: "The whole country and people are in a restless state, the laws against liquor and poison are utterly ignored, in consequence of being no executive Govt." These remarks refer both to the absence of settler orders of government, as well as the presumed absence of Indigenous legal and political formations.

3 When I refer to the Crown in this article, I am referring to the Crown in right of Canada. I recognize that many Indigenous peoples maintain that the political frameworks created under treaties remain with the Queen of England, or the Crown in right of the United Kingdom, as Indigenous peoples did not consent to the devolution of British responsibilities toward Indians to Canada.

4 The courts have indicated that treaties are to be given large, liberal and generous interpretations, with any ambiguities to be resolved in favour of the Indigenous signatories. Furthermore, treaties are said to represent "an exchange of solemn promises between the Crown and Aboriginal Peoples," no "sharp dealings" are to be sanctioned, "technical or contractual interpretation of treaty wording should be avoided," and any ambiguities "must be resolved in favour of [Indigenous parties to treaty]" (*R. v. Badger*, 1996). Further, treaties must be understood in light of historical and cultural context, and with adequate regard for extrinsic evidence such as oral accounts, and must be "given the sense which they would naturally have held for the parties at the time" (*R. v. Marshall,* 1999).

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