8 What Is a Treaty? On Contract and Mutual Aid

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What role should Indigenous law play in how we think about treaties, and are courts equipped to perform it? This chapter argues that it is both an ethical and analytical error to interpret treaties as a unique species of contract. Rather, treaties are constitutional associations: they coordinate the relationship of distinct political communities, constituting a shared political community across them. A treaty is the relationship itself, not the (always contingent) exchange of goods and services it empowers at any given time. It follows that disputes arising are not to be managed by judges analysing a claimed breach of terms. They must be managed politically, as matters of citizenship. This chapter offers insight into one view of Anishinaabe constitutionalism, by way of inviting all now living on Turtle Island into this understanding.

1. From Interdependence

I sat transfixed the first time I heard Elder Fred Kelly speak. On that stifling August afternoon three years ago, Fred paced circles around the interior of the Wauzhushk Onigum (Rat Portage) roundhouse, sharing teachings about Anishinaabe law and about treaty.[1] Crown representatives from six provincial ministries were gathered to learn about the

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1 Fred Kelly, "History and Significance of Manito Aki Inakonigaawin (MAI)" (teaching presented at "Manito Aki Inakonigaawin Knowledge Forum," Grand Council Treaty #3, Wauzhushk Onigum Roundhouse, 20 August 2013).

Grand Council Treaty #3 Resource Law, *Manito Aki Inakonigaawin*,[2] and Fred spoke in a way that invited them in, in a way intended for their understanding. He made all of us laugh.

At one point towards the end of his address, Fred shared words that haven't let go of me. Given the context, it isn't for me to share his artful teaching. Fortunately, he shared a very similar teaching to a packed moot court audience at McGill Law two years later: "You can't sell what you belong to; you can only share it."[3] Fred was of course speaking about his traditional territory. It's more a statement of what is possible than it is of what is good: an ontological claim, not a normative one. I am not other than, but part of, creation. Importantly, as I understand Fred's teaching,[4] *part of* is not *reduced to*: within creation we're all unique. Ours is the gift and the struggle of standing side by side, different and together. Ours, to rise to live in right relation.

I met Fred two autumns past. I caught the ferry from Victoria earlier in the day just to sit with him that evening in Vancouver. I learned so much. At the end of the night, he invited a friend and me to meet for breakfast the next morning, where he continued to share teachings about Anishinaabe law and treaty almost until noon. He shared a dreamcatcher teaching and I understood from it that all of us on Earth are connected to and through spirit. I felt I was hearing the same message I heard him share at the Wauzhushk Onigum roundhouse: we're each unique *and* interdependent.

In a reflection contemplating the personal, interpersonal, and intersocietal aspects of reconciliation following the violence of Canada's legacy of colonialism, and especially of the Indian residential schools'

2 Readers can learn more about MAI here: Grand Council Treaty #3, "Laws and Policies" at http://www.gct3.ca/wp-content/uploads/2016/02/mai_unofficial_consolidated_copy1.pdf. This website contains links to MAI and to a regulation developed under it. I have written about MAI previously in Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" (2011) 9:1 *Indigenous Law Journal* 107 at 142–8.

3 Fred Kelly, "Reconciling Sovereignties: Combining Traditional Law and Contemporary Western Law to see Truth and Reconciliation," public lecture presented at McGill Faculty of Law, Moot Court (NC DH 100), 21 September 2015.

4 When engaging with Elders' teachings, I try to be careful. First, I assess the extent, if any, to which I can speak on what was shared. Second, I insist that what I share is just my understanding of what was shared with me. This is important to assert, because I may have misunderstood the Elder's intended meaning and because even if I did understand, it isn't for me to speak on his or her intentions.

ethnocide program, Fred shared the following insight, which again emphasized this point about interdependence and uniqueness:

> While international conflicts are fought between enemies on a very clear and simple proposition of win or lose, the choice here in Canada is one that must be made among friends and neighbours. We must face the underlying tensions. We must understand them and we must resolve them. Neither side believes that the other is going anywhere. This is home. So, how do we live side-by-side and build a future of prosperity together? We share space in a common land. We constitute a society that is envied by other countries. We are economically interdependent. We have many social ties. Our children are married to one another through which we share generations of grandchildren. So inextricably tied are we that our options are also very clear and simple: we can all win or we can all lose.[5]

What are we – the Indigenous and settler[6] peoples of northern Turtle Island, Mikinaakominis, which many today call Canada – to make of a perspective so contrary to our inherited narratives of who the other is, and perhaps more importantly, of who we are to them? I want to suggest that the language of "friends and neighbours," "side-by-side," "interdependent," "married to one another" and most emphatically, the statement that "we share generations of grandchildren," suggests that the relationship – and a very tightly-connected one at that – is actually *the point*. So tightly are we bound that although we are *distinct, unique* peoples, we are not and have never been *autonomous* peoples: as interdependent persons and communities within creation, we're always-already in relationship. We need not contract into community; we just

5 Fred Kelly, "Confession of a Born Again Pagan," in Marlene Brant Castellano, Linda Archibald, and Mike Degagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* [2008] (Ottawa: Aboriginal Healing Foundation, 2011) at 15, 29.

6 I don't intend my use of the descriptor "settler" to reduce the political identities of non-Indigenous Canadians to the fact of colonization. I doubt many of my Elders would support that move. But in an argument about treaty constitutionalism, where our respective political status on Turtle Island is the very thing at issue, centering settler and Indigenous locations is critical. Second, I take Fred's point that settler and Indigenous identities don't present themselves in a binary relation: many of us (me included) are both. However, the earth-centred Anishinaabe view of treaty constitutionalism I begin to articulate below locates settler legitimacy within Indigenous constitutional orders, shifting the emphasis from these descriptors.

need to learn how to live well together, across our difference, in a relationship that is always changing but which has always been.

In this chapter I argue that this teaching about our relation to one another is the driving force behind both (1) Anishinaabe constitutionalism[7] (how we constitute, sustain and change our political communities over time), and (2) an Anishinaabe conception of treaty. The second point follows from the first when treaty is understood as the intentional deepening of the intersocietal political community that always-already exists.[8] As I strive to disclose the logic of this relational view of treaty, you'll find that I'm not humbly tendering it into today's neoliberal marketplace of ideas. I'm hoping to speak within the discourse of invitation – like Fred Kelly, I want to speak across our difference – but I'm openly hostile to the reduction of treaty to contract.[9]

7 By "constitutionalism" in an Anishinaabe sense, I have in mind the ongoing act of constituting community, not an identifiable set of documents and/or unwritten conventions, preceded by a definite article, which purport to do the same but for all time and except for the never-finished business of interpretation, all up front.

8 I offer two qualifications here. First, I recognize that different Anishinaabeg will have different understandings to share. Like all communities, we're internally diverse in our individual perspectives. The view I offer here is my own. Second, I speak of this as an "Anishinaabe" conception of treaty because that's my identity and it references sources of knowledge available to me. However, I think that although the sources of knowledge vary widely across Indigenous constitutional frameworks, the view I present discloses a logic common to most of northern Turtle Island's Indigenous peoples, which elsewhere I've called "rooted constitutionalism." See for instance the perspectives of Anishinaabe, Nehetho, and Dakota Elders in Oshoshko Bineshiikwe-Blue Thunderbird Woman, Osawa Aki Ikwe (Florence Paynter); Zoongi Gabowi Ozawa Kinew Ikwe, Strong Standing Golden Eagle Woman (Mary Maytwayashing); Nii Gaani Aki Inini, Leading Earth Man (Dave Courchene); Giizih-Inini (Dr. Harry Bone); Zhonga-giizhing, Strong Day (Wally Swain); Naawakomigowiinin (Dennis White Bird); Kamintowe Pemohtet, Spirit Walker (D'Arcy Linklater); and Mah Pe Ya Mini (Henry Skywater), *Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law* (written at Turtle Lodge, 2015; delivered 28 November 2015 at Turtle Lodge) at http://www.turtlelodge.org/wp-content/uploads/2015/11/ScrollBanner_TheGreatBindingLaw_24x36-PROOFv03.pdf. Turtle Lodge: International Centre for Indigenous Education and Wellness, "Manitoba Elders Share a Message with National Energy Board and the Public at Turtle Lodge," 28 November 2015 at http://www.turtlelodge.org/2015/11/manitoba-elders-share-a-message-with-national-energy-board-and-the-public. See also Thomas J. Stillday, "Bawatig/Sault Ste. Marie" (2009) 7:1 *Oshkaabewis Native Journal* at 100, 119.

9 For a thoughtful survey of various conceptions of treaty, see Janna Promislow, "Treaties in History and Law" (2014) 47:3 *University of British Columbia Law Review* 1085.

Here's why. I think that contract (political and social theorists speak more particularly of the "social contract")[10] as a device for both imagining the genesis of political community and for justifying its continuity is a way of voicing a shared commitment to violence. This is of course a very different casting of social contract than what one might more ordinarily find in a university textbook or in contractarians' own works. I'll argue that contract as an account of Canada's constitutional order is uniquely violent to Indigenous persons, peoples, and lands. In the story it tells of itself, Canada is the better-behaved, non-rebellious child of the West's younger, progress-focused generation. What most of us, and certainly most settlers, understand as its constitution bears that genealogy.[11] Because of their common commitment to (1) contract as the source of our shared political community and (2) their reduction of treaties to minor contracts within the prior and unquestioned social contract, I'll argue that both the Crown and the Supreme Court of Canada are structurally committed to violence. Following this, I'll present a different way of thinking about the link between treaty and constitutionalism, one which derives from the logic of mutual aid. Given the availability of this alternative understanding, I'll argue that we ought not to accept violence as the ultimate authorization for citizenship[12] in our shared political community. Finally, I'll argue that through the 1764 Treaty of Niagara, this alternative account of the structure of Indigenous-settler relationships is actual, not ideal.

10 That is, as distinct from the Western legal tradition's sense of contract as voluntary obligation, an artefact of private law.

11 Recent years have seen counter-narratives, but their focus has been on remedying the ethnocentrism of Indigenous *exclusion* from Canada's constitutional story, not *setting aside* the contract. Although I reason differently than either of them, two of the best known counter-narratives are John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) and John Ralston Saul, *A Fair Country: Telling Truths about Canada* (Toronto: Viking Canada, 2008).

12 Throughout this chapter I refer to "citizens" and "citizenship," even though I argue that the social contract and thus the state as a form of political community are inherently violent. The trouble with "membership" is that it sounds like the kind of belonging one has in a choral society, birding association, or points club. In my use of "citizenship" I mean belonging in political community generally, not in the form of the state specifically.

2. The Untargeted Violence of Contract

Before proceeding to this argument, I want to pause to share my view that Canada's origin in and ongoing commitment to contract means violence *for all*, settler citizens – the beneficiaries of the contract – included. I make the point now so you can attend to my use of it throughout the argument, because there is no separate section where I take it up as a standalone critique later.

A condensed version of my argument about the general violence of contract goes like this. Contract is offered as the solution to what is imagined as the problem of radical disconnection. We're told that but for the contract we share, we're disconnected individuals, each left to pursue our own self-interest. As such I have no reason to see you as anything more than a means to achieving my goals. Strange binary, that humanity should position itself on the precarious tip of a force/consent switch: we consent to live together under specified terms for mutual security because outside of the boundaries of the contract is a world of naked force freed from consequence.

Contractarian orthodoxy says that contract saves us from being used as a means to others' ends, most importantly from their violence. I say contract is the very means by which we commit citizenship to violence. Instead of cultivating the kind of genuine non-violent relationships that sustain our connections through periods of conflict, contract is a foundation for political community that commits citizens to non-relationships, on the understanding that the merely formal union of individuals through the device of the contract is sufficient to constrain harmful action. The sovereign, responsible for enforcing the formal union, replaces the need for actual relationships. Instead, only the lesser connection of direct transactional exchange (whether in law, politics, or economics) is necessary. Where individual autonomy is the most important political good, non-instrumental relationships are of secondary importance at best and necessarily so: otherwise the priority of individual autonomy is violated (that is, subject to what the formal union will allow, it's for me to choose with whom and how I relate with others, or I'm unfree).

The trouble with such a foundation for political community follows from the fact that social contract is a fiction. As such, the necessary presumptive citizenship commitment to disconnection, in the absence of lived relationships, allows for the possibility of only imagined and thus easily severable accountability. Citizens might strive to eschew accountability physically, for instance by believing that they can outrun

the law, or that they can avoid detection in the performance of a harm. More frequently and more socially acceptable, they may also seek to eschew accountability discursively, by framing facts in a narrative that best suits their interests. This is a fundamental premise, for instance, of both the common law tradition and party politics in the party system.[13]

Beneath contract's fiction, therefore, is carefully contained violence, always threatening to irrupt the artificial peace and often doing so in ways that cause the settled majority to target minority parties whose needs and correlative demands surpass what the terms of the contract contemplate. While this violence can affect any kind of minority group, Indigenous peoples are uniquely affected by virtue of their prior constitution as political communities in the very territories that contractarian constitutional orders like Canada and the United States now imperially claim as their own.[14]

As such, contract is precisely the way of thinking about our relationship which, in Fred's language, necessitates that we all lose. And I do mean *all* – not just humans.[15] That today we live in the Anthropocene follows precisely from the reality that since the initial rumblings of the European Enlightenment through to today's global marketization of freedom, the West has been in the business of losing creation (in which we *are* all connected) for all of us. The Anishinaabe treaty vision I share below builds from this very different starting point, where the understanding is, rather, that we are and have always been interdependent.

Like Fred, therefore, I believe that we can all win, and I place my hope in folks like you. Not in a state institution or practice, but in living people who care enough about our relationship to pick up a book about treaties. I house my hope in all my relations, Indigenous and settler peoples, coming to realize that our difference is not the foundational

13 While an individual within any kind of political community is free to act unaccountably, I explain below why in political communities where relationships have primary significance, and hence where accountability is imminent, requiring no exercise of imagination through the role of a sovereign, such opportunities are severely constrained.

14 Robert Nichols has a terrific piece on this. See Robert Nichols, "Contract and Usurpation: Enfranchisement and Racial Governance in Settler-Colonial Contexts," in Audra Simpson and Andrea Smith, eds., *Theorizing Native Studies* (Durham, NC: Duke University Press, 2014) at 99.

15 The Reverend Dr. Stan McKay (Cree) explains this well in Stan McKay, "Calling Creation Into Our Family," in Diane Engelstad and John Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: House of Anansi Press Limited, 1992) at 28, 29.

problem of political community, but rather the condition of its possibility. I'm hopeful I can show you that a shared political community need not have as its foundation the reduction of difference to sameness; that we can start instead with our need for one another's unique gifts and constitute ourselves in networks of mutual aid.

I'm hopeful also that if understandably you're nervous to accept this new foundation for our shared political community, you'll nonetheless stand atop it for a short while, even if only strategically, so as to have a vantage point beyond contract from which to gaze back at it. I believe that if you do so, you'll find two things. First, you'll see that our focus on linking our gifts with our needs points our community not towards justice, but harmony and that we get there not by policing autonomy, but by empowering mutual aid. Second, having begun to understand how mutual aid works as an organizing feature of political community, you'll see that fear – cold, nasty, and brutish – is the engine that drives contract onward. Fear is the driving force for the commitment to certainty of mutual security from one another's capacity for violence that the contract is said to have established. That is, contract, unlike the mutual aid of a Covenant Chain, doesn't link us together. It's a chain that binds us apart and anchors us in perpetuity and with certainty to division.

For most of us, that kind of fear is all it takes to inspire our consent. And we don't complain afterwards as contract becomes normalized and the fear that inspired our choosing it subsides. On the contrary, given enough time we cease noticing the binds of the contract against us. They become just another aspect of the world around us: water flowing, grass growing, sun shining, contract binding. Contract has slipped into the nothingness of the day; it is as if it always existed. And so a challenge to contract today has become a provocation of the sacred to be met with righteous condemnation, contract now mistaken as part of creation's order.

3. Autonomy Zombies

What a horrifying foundation for coming together. There's nothing natural about contract. Life under contract is a zombie horror.[16] Each

16 My chapter is concerned with the notion of social contract generally and political theorists will observe from my focus on violence that I often have Hobbes in mind, but here I'm intending an allusion to Rawlsian liberalism in particular because his account is so compelling and powerful today. Rawls wants us to think from

citizen is afforded his or her autonomy and has it respected by the others; none is at serious risk of violence (or lesser diminishments of liberty) from the others so long as they respect this. In large measure this is because all are now effectively the same. Stripped of their identities (memories, minds, habits, dispositions, abilities), there remains nothing over which significant conflict *could* arise. True enough, since each is an isolated unit pursuing interests of its own, intermittent conflicts still arise (for instance over access to valuable resources, like brains, which occasion the odd frenzy). And the particular incidents of what a day brings vary for each. But despite these small differences, each nonetheless ambles about with roughly the same gait (means), chasing different versions of the same thing (ends), being and knowing (or perhaps more accurately, not being and not knowing) just like all the others. Difference exists *within* but never *over* a single, hegemonic zombie MO. All are constrained to live and act under the conditions that bind.

Looking at zombies only ever through zombie eyes fails to disclose anything about the contract (including, for instance, that zombies are zombies) beyond the autonomy it affords them. They just feel free. But seen from another vantage point (*any* other vantage point given how non-discriminating the zombie diet is), what they've contracted begins to look like an affliction. Anything that isn't a zombie but which walks,

the location of an imaginary, pre-political "original position." To get there, he asks us to imagine passing behind a veil of ignorance, causing us to lose all sense of our unique identities (and thus of any possibility of reasoning according to policy preference) such that all judgment must issue from a common, public reason alone. In this way Rawls imagines citizens will agree on what should serve as the foundation for political community and he produces a sophisticated vision flowing from what he takes to be the necessary terms of agreement. Rawls developed this ideas in John Rawls, *A Theory of Justice* [1971] (Cambridge, MA: The Belknap Press of Harvard University Press, 1999) and revised his argument in *Political Liberalism* (New York: Columbia University Press, 1993). For a shorter introduction to Rawlsian thought, see John Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14:3 *Philosophy & Public Affairs* at 223.

It may thus seem that my zombie metaphor misunderstands Rawls, since his very point is that capacity for reason – which absent minds, zombies lack – is the only thing that survives behind the veil. For communities that don't accept that individual autonomy is the greatest political good, Rawls' concept of public reason is incoherent. For those who do give unrivalled priority to individual autonomy, I think Rawls makes zombies of citizens by reducing their difference to sameness; by transforming holders of *situated* reason into undifferentiated pursuers of as much self-interest as fully mutually recognized autonomy will bear.

wiggles, crawls, or blows in the wind is always at risk of being devoured. If you aren't one of the zombies, insofar as they're concerned you exist to feed their appetite. Zombies don't accept that their desire can't be sated; they believe they're progressing towards fullness. The thing with autonomy is that it only serves as a limit for action against those who, from one's own standpoint, are also understood to be autonomous. For many – like zombies – the set of autonomous beings is limited to the parties to the contract. Everyone else is an instrument. Or perhaps the better way to put the point is that everyone else is really just everything else.

From distance or from cover, the things – animals, plants, humans – watch the zombies stagger and drool profanely, haplessly lurching to and fro in pursuit of a burning desire limited only by the liberty of other zombies. For all their otherwise unbound autonomy, it's hard to see that any of them is free. For although the things often fight with each other – their communities are far from perfect – they never lose sight of the fact that despite all conflict, they need one another in order to be free. To them, the zombies aren't a community; They're just bodies roving in aggregate and swaying in the wind. None is capable of the insight that together they've become a plague on the Earth, each a wonderfully autonomous vector. And but for the fact that they lack brains, they might wonder where the violence they've contracted away has gone.

Contract was never alive and as the breeding ground for certainty and perpetuity – for *permanence*, in which change, the pulse of life, has been negotiated out – it yields only undeath in its participants. It has destroyed countless bodies, minds, and lands in violence sustained over centuries. Indigenous peoples, not having signed on but rather having had consent clubbed into them, experience the worst of it. Unsurprisingly, most have failed to contract the virus and remain painfully aware of the daily destruction contract causes. Most vicious of all, almost all of contract's violence has been performed in the name of freedom. But while freedom is the discourse invoked, liberty – freedom construed only in respect of the autonomy of individual persons – is the only meaning assigned. One vision of freedom is allowed to masquerade as the whole of it.[17]

17 The constitutional view from contract poses the question: Liberty or unfreedom? But of course the real question, the challenge that community poses, is always: Freedom or unfreedom? There are logics of freedom beyond liberty.

4. Fear and Treaty: Canadian Structural Violence Past and Present

It sometimes strikes me that many of us think that Indigenous peoples alone cling to origin stories. But no political community exists unstoried. Canada belongs to the family of nations that claims its origin in the mythology of social contract. So, that story goes (this is a highly sanitized version), a bunch of white folks got together and in 1867, through the exercise and upward delegation of their respective wills to a centralized, sovereign authority – the *Constitution Act, 1867* – established the political community, which today is internationally recognized as Canada. Notably absent from the negotiations but not the final agreement was Indigenous peoples. We're not party *to* the contract, yet strangely it nonetheless claims authority *over* us. As a consequence we're not subjects of popular sovereignty and the constitutional story most Canadians tell is thus premised on an insurmountable democratic deficit. The only way to dissolve it is to imagine Indigenous peoples as non-persons. Which is what happened under the law of nations (today, public international law).[18] Thus a fundamental commitment to the non-humanity of Indigenous peoples serves as a necessary condition of the Canadian contract.

This has never changed; Canadians never have given Indigenous peoples a voice *over* the contract. The most they've been willing to do is slowly and in pieces say that we too may live *under* it. As such, we now have most of the rights that other Canadians do,[19] but we remain in a state of subjugation because of one niggling but rather important detail: unlike all other peoples in Canada (including migrant communities), it can never be said of us that we choose this constitutional order for ourselves. Even if I exercise my right to vote, it still cannot be said that I'm a subject of popular sovereignty, for although Canada formally imprints me with the same level of freedom and constraint that it does other Canadians, my capacity to vote, or even to run for office myself – that is, to be one of the contract's contemporary legislators – exists only against the violence of Canada's total prohibition of my ability

18 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113–15.

19 Quirks remain. For instance the *Indian Act* provides that upon my death, the Minister of Indian Affairs may direct the disposal of my property, even where I have a legal will. See the *Indian Act*, RSC 1985, c. I-5, ss.42–50.1, especially s. 46(1)(f).

to choose to live otherwise, under a political community constituted according to the ways of being, knowing, and conception of value that reflect who I am. It's only in the absence of my ability to have the world that controls me reflect me that I may vote or hold office.

Of course, we know well what the majority of Indigenous peoples do choose. As between settler and Indigenous peoples, the cry of Indigenous peoples has consistently been that treaty is the only legitimate justification for the constitution of shared political community on Turtle Island. Treaty, we are breathless from saying, constitutes political community without predication on violence. Why wouldn't settlers choose treaty over social contract as the foundation for our shared political community? On the contract story, citizenship is violent from the outset: instead of sharing, disagreeing, and slowly learning with and from one another – the treaty story – they strive to erase the existence of Indigenous peoples. Canadians have settled *on* Indigenous peoples' lands, *over* their existing constitutional orders, and hence *for* violence to Indigenous peoples. In excluding the peoples who were already here from the formation of our political community, they've accepted violence as a foundational constitutional principle. That's a hideous thing. Why would they do it? And perhaps more important, why sustain it now?

The answer is a hard one to accept but an easy one to apprehend. I think that to many settlers' minds it goes something like this. Fear. The kind of fear that if acknowledged in anything more than one's passing look of guilt at an Indigenous man clutching his blanket on the sidewalk, may never let go of us. Fear that if we acknowledge that Indigenous peoples are actual peoples, we'll have to acknowledge that they had politics and political communities long before settlers showed up. Fear that if all of this was already theirs, it clearly wasn't free for our taking and some kind of justification is required. Fear that because I have none, the home I live in and even my claim to call this country home are baseless and that a reckoning looms for all the years of Indigenous dispossession stacked so heavily upon each other. Fear that I'll lose everything because in the rare moments I contemplate this dispossession and taking over, I already feel the scream that none of this is mine and I know that only one thing allows me to keep it. A thing which can't be spoken publicly because it isn't justifiable at law, at church, at school, or even at the dinner table without recourse to violence: settler supremacy. For all my efforts, there's no principle, no historical moment I can turn to that avoids those two words. The only thing that allows me the life

I have is the bald exercise of power that keeps it from them. Though *I* displaced no one, I'm a direct beneficiary of settler supremacy, and supremacy cannot be justified. And I fear that looking at treaty as they do – this language of partners – risks unwinding the world I know and all I have in it. I have far to fall. So, Indigenous peoples, you are not my partner. And though I hate that you must suffer for it, I accept your suffering.

I think that internal monologues much like this one (although ordinarily less self-aware than this one suggests its holder is) is why Canada never changes when Indigenous peoples speak of treaty relationships and, in particular, why when we talk about being treaty *partners* it insists on hearing only treaty *rights*. What's at stake in the distinction? On the Crown's account, treaty consists of party-differentiated rights distributed through contract that attach to individual citizens of each party.[20] This means that treaties between British and Indigenous peoples don't have first-order constitutional significance; and wouldn't you know it, treaties are omitted from the contract-confederation story. No effort is made to tell a story that we constituted this community together. Instead, treaties magically arise as a second-order constitutional matter of distributive justice: they're how we strive to account for difference within the political community said to be already formed through contract.

5. Settler Supremacy: Three Forms of Canadian Domination of Indigenous Peoples

This foundational, structural inequality has conditioned the range of possibility for Indigenous-Canada relationships ever since. The existing relationship is one of domination exercised over Indigenous persons, peoples, and lands, and taken together, Indigenous constitutionalisms. First, consider Canada's domination over Indigenous persons. Through claimed sovereign authority, Canada purports to establish the framework of freedom and constraint which articulates how I may act and how others may act towards me. It bounds that framework with a monopoly on the legitimate exercise of violence to enforce my compliance. It doesn't care whether its imposed constitutional framework reflects my

20 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, at s. 35(1).

ways of being, knowing, or conception of value. Nor does it care that in the absence of an identity between us it coerces and constructs me without my consent: a fact that should be noted with vicious irony, given that Canada's constitutional order is contractarian.

There are settlers who want to fight about this word, domination. They point to the quality of life that Canada has to offer compared to other places on Earth and say that domination (rendered in scare quotes) never looked so good. But this is a nonsense thing to say for it's an assertion that they've *solved the question of value* and therefore that we should want what they do. But no one can ever objectively claim which values are best for others. Such claims are inherently tautological: liberals will claim that illiberals ought to value liberty above all other values, *but only because they're already liberals*. This kind of claim presumes that Indigenous peoples' sense of value is broken. If we would just warmly accept what settlers have already figured out, we too would know what a good life looks like and we could stop this "we're still different" nonsense and accept that our cage is actually a home.

Domination also characterizes the relationship between Canada and Indigenous peoples. Canada claims total authority over how Indigenous communities may govern themselves. Any community which exercises a community code or traditional governance structure does so because Canada says it may; the only Indigenous communities Canada recognizes as Indigenous are those which bear the stamp of its constitutional imprint. Those seeking instead to act through their own, precolonial constitutional authority, which do not seek their legitimacy through Canada's recognition but rather through a direct appeal to the ways of being, knowing, and conceptions of value of their own citizens – that is, those which find their legitimacy generated from the citizens' bottom-up and not the imperial top-down – are treated as illegitimate by Canada.

Finally, the same holds true with respect to Indigenous lands. Consider the Crown's motivation for entering into "treaty" today. From its perspective, the primary impetus for doing so is to provide a secure property regime and a stable environment for economic development throughout Canada. The Crown openly calls treaties "comprehensive land claim settlements."[21] Under the Harper government,

21 Government of Canada, Aboriginal Affairs and Northern Development Canada, "Treaties with Aboriginal People in Canada," at "Modern Treaties – Comprehensive Claims," http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292.

comprehensive land claim settlements were intended to "establish certainty of ownership and control of lands and resources, and encourage economic activity."[22] Under the Trudeau government, the "Benefits of Settling Land Claims" include, amongst others, that doing so "gives certainty to ownership and use of lands and resources" and that it "propels economic growth by giving certainty and clear rules to investors and the public in general."[23]

In order to effect the level of absolute certainty so described, each and every modern treaty contains an extinguishment clause: a provision in which the Indigenous parties either acknowledge the formal extinguishment of all relevant claims not explicitly contemplated in the enumerated treaty provisions, or in which any such claims technically survive but are forevermore made non-justiciable. As if that weren't sufficiently oppressive, this provision isn't something the Crown bargains for within the treaty dialogue; instead in an exercise of bare power the Crown offers it as a precondition for the possibility of any treaty dialogue at all. Which, if you happen to believe that the interests of one side must be purchased at the cost of the other's, sounds great for settler peoples. It isn't clear how Indigenous peoples fit into modern treaties though, other than as means to empower the end of settler certainty.

Yet far more damning with respect to the land question is that, despite its participation in contemporary "treaty" processes, Canada nonetheless claims radical title to all of Turtle Island, knowing full well that Indigenous peoples were already living on it as persons, peoples, and confederacies of distinct constitutional orders before settlers arrived. As recently as the *Tsilhqot'in Nation* case, the Supreme Court of Canada asserted that Canada acquired radical title simply by willing it so.[24] The Court then enters into contortions. On the one hand it claims that the

22 Government of Canada, Aboriginal Affairs and Northern Development Canada, "Backgrounder – Canada Takes Action to Support Progress in the BC Treaty Process" at https://web.archive.org/web/20140822122335/https://www.aadnc-aandc.gc.ca/eng/1100100016314/1100100016315.

23 Government of Canada, Indigenous and Northern Affairs Canada, "Resolving Aboriginal Claims – A Practical Guide to Canadian Experiences," http://www.aadnc-aandc.gc.ca/eng/1100100014174/1100100014179.

24 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 69.

doctrine of *terra nullius*[25] which existed under the law of nations "never applied in Canada." Yet it brazenly refuses to say how, in the absence of the belligerent racism of *terra nullius*, Canada *did* acquire a claim over Indigenous lands sufficiently powerful to dispossess Indigenous peoples of them.[26] The Court explicitly denies the application of *terra nullius* in Canada and thereby attempts to disclaim a legacy of domination at law, yet amazingly accepts no obligation to articulate how Canada's mere assertion of sovereignty translated to a legitimate claim of radical title. Only under conditions of domination is governance in the face of so flagrant an omission, and even of the need to offer a pretense of its justification, imaginable.

This domination is organized along clear lines: it organizes a power relation that distributes privilege to settlers and oppression to Indigenous peoples. We can more accurately call this domination settler supremacy. It lacks only the open physical state violence to make supremacy obvious. Yet through systematic police racism, sustained policies of economic underdevelopment, the status quo of mass First Nations poverty, the deployment of the state's anti-terror and mass-surveillance apparatuses in contexts of non-violent Indigenous assembly, urban Indigenous homelessness, intermittent military confrontation, and the scourge of missing and murdered Indigenous women, many of us are willing to say that it has that too.

6. Treaty Interpretation Is Properly Framed as a Question of Citizenship, Not Remedy

The structural relation of settler supremacy that characterizes Canada-Indigenous relationships means that even if somehow the Supreme Court of Canada could get the doctrine right, inequality between Indigenous and settler peoples would persist. Yet the overarching theme of this book is treaty *remedies*. It will be clear by now that I think that's the wrong frame for thinking about changing treaty relationships today because it assumes too much, namely that the courts have a leading role to play in reorganizing treaty relationships. The courts are an institution

25 If land was vacant – or "vacant" in the sense that is was populated by non-persons – the settlement of a European population upon it was said to justify its acquisition by the European sovereign.

26 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 69.

internal to Canada's constitutional order and, as creations by and under its authority, are by definition incapable of taking up the very issue at stake in treaty: the coordination of distinct constitutional orders.[27] But the situation with courts is worse still: they lack also the power in practice to account for Indigenous understandings of treaty as honourably as they might *even under* the boot of imposed Canadian constitutionalism.

This is deeply regrettable for although the courts can't play a leading role in changing treaty relationships, they could still play a meaningful role by opening up whatever small space they feel capable of to reflect on their own exercise of power and its implications for the Indigenous and settler parties before them. But the low level (in many jurisdictions, nearly wholesale absence) of the judiciary's cultural competence, the centralization of interpretive authority, and the European epistemological commitments and cultural embeddedness of the courts all necessitate that the vast majority of them are incapable of building a doctrine around treaties that would reflect even a common law translation of Indigenous understandings, which working exclusively within their own framework the courts would see as doing justice by Indigenous peoples. Again, I'm not promoting this. To be very clear, I'm strongly against the translation of Indigenous understandings out of their own ontological and epistemological (and generally, constitutional) frameworks and into the liberal language of Canadian constitutionalism. My point is rather that the courts aren't set up to do even what one would imagine is the honourable thing from their own internal perspective.

Given all of this, just as one should expect, the Supreme Court of Canada consistently chooses to account for the unique political status of Indigenous peoples *within* the contract-confederation story. Instead of situating treaties as the very things which empower settler legitimacy, settler legitimacy requires no justification and is simply presumed (i.e., settler supremacy), and treaties are imagined as contracts executed under the logic of distributive justice,[28] albeit subject to unique

27 Peter Russell has thoughtfully addressed this issue specifically in the context of the legal claims of Indigenous peoples. See Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 *Saskatchewan Law Review* 247.

28 In fairness to the courts, it should be acknowledged that the path for this choice has been cleared by the section 35 framework, which explicitly presents treaties within rights discourse. However, this doesn't in any way mean that the Supreme Court of Canada was required to construct treaties in a narrow, provision-by-provision way, under the logic of distributive justice.

interpretive principles that don't apply to other kinds of contracts.[29] Specifically, they distribute unique rights thought within this framework to account for Indigenous difference.

From an Anishinaabe constitutional standpoint, this is outrageous. Not only is treaty not a form of contract, treaty isn't even the sort of thing capable of giving rise to a legal remedy. Treaties aren't legal instruments; they're frameworks for right relationships: the total relational means by which we orient and reorient ourselves to each other through time, to live well together and with all our relations within creation. They have a legal quality in the sense that they constrain behaviour and they are at once political, social, economic, spiritual, and ecological.[30] They're how we constitute ourselves as communities of communities, across our difference.[31]

As such treaties are at the heart of citizenship on Mikinaakominis, Turtle Island. Instead of framing the crisis of treaty relationships in terms of legal remedies, we should be situating it within a much larger question about what we want citizenship in Canada to mean. That kind of inquiry holds the potential to get us out from under the violence of the contract story, but it can only be achieved with a *structural* program of change: our constitutional dialogue must be open to change over, not merely under the contract. This means that our shared political community will be constituted in respect of the ways of being, knowing, and conceptions of value of the peoples who were already here, already constituted as political communities, already relating to one another across considerable difference. Settlers *should* feel unsettled by this proposal. For most of us, against a constitutional context of normalized, even invisible settler supremacy, feeling unsettled is necessary. After

29 *R v Badger*, [1996] 1 SCR 771 at 41, 52, 76; *Marshall v Canada*, [1999] 3 SCR 456 at 78(3); *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 4.

30 Sociologists and anthropologists may recognize in this description a similarity to Marcel Mauss' "total social phenomenon." While Mauss misunderstood much about the internal organization of Indigenous societies and what this means for both intra- and intersocietal exchange, he had a remarkable grasp on the intrinsic interconnection of all spheres of being that characterize Indigenous lifeways, and this should be acknowledged. See Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, trans. W.D. Halls (New York: W.W. Norton, 2000).

31 For Anishinaabe, Nehetho, Ininiw, Denesuline, and Dakota Elder perspectives on treaty, see the remarkable text by Joe Hyslop et al., *Dtantu Balai Betl Nahidei, Our Relations to the Newcomers: Treaty Elders' Teachings*, vol. 3 (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2015).

that, we can work together. After that, I can tell them why they're legitimate citizens here and that I'll be among those defending their presence against those who would deny their legitimacy. But they're required to know that their legitimacy isn't simply to be presumed – which is exactly what settler supremacy promotes – and they must be able to teach their children how it is that they came to fit into the existing Indigenous constitutional framework.

7. Seeds Planted for a Total Reroot?

Although there continue to be many Indigenous communities appealing to Canadian constitutional authority for change through Aboriginal and treaty rights litigation or through comprehensive claims processes, there are also many who see that the change in our relationship must be *structural*. The Indigenous resurgence movement, for instance, takes this commitment as its starting point.[32] Much of the contention practised and given voice through Idle No More also expressed this understanding. As more settlers come to understand that they always stand in relation to Indigenous persons, peoples, and places and begin to accept responsibility for and in those relationships, many of them are holding it too. In his extraordinary speech, "The Duty to Learn," then Chief Justice of British Columbia Lance Finch argues that both the honour of the Crown and the rule of law impose upon legal actors a duty to learn about Indigenous legal traditions.[33] There are many important statements in Finch's essay, but perhaps most salient with respect to the responsibility of settler peoples vis-à-vis the prior existence of Indigenous constitutionalisms is the following:

> I suggest the current Canadian legal system must reconcile itself to coexistence with pre-existing Indigenous legal orders. This conference poses the question: How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.[34]

32 As a thoughtful example of this robust literature, see Jeff Corntassel, "Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-determination," (2012) 1:1 *Decolonization: Indigeneity, Education and Society*, 86.

33 Hon. Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (paper delivered at "Indigenous Legal Orders and the Common Law," Vancouver, BC, 15–16 November 2012) at 2.1.1.

If Canadians generally took this view, the question of treaty "remedies" would be moot; they'd have recognized that the challenge they face in organizing their relationship with Indigenous peoples is one of citizenship. Especially significant for me is that in Finch's formulation, responsibility for addressing the fact of contemporary state domination isn't left to the institutions of representative government, but is rather to be claimed and picked up individually. I have more to say about this below.

The other statement I wish to draw your attention to is a passage in a book review authored by the Honourable John Reilly (of the Provincial Court of Alberta, retired) in 2012.[35] After having acknowledged that his well-meaning efforts with Indigenous persons involved in Canada's criminal justice system were paternalistic ("I tried to ameliorate the law by imposing treatment-oriented sentences that did not comply with precedents that mandated imprisonment"),[36] Reilly wrote,

> [I]f I had it to do over, I would continue my efforts to ameliorate the criminal law in relation to Aboriginal offenders, but rather than do this on a basis of attempting to right wrongs, past and present, I would advance the following reasoning:
>
> 1. The Aboriginal offender is a member of a separate nation and is entitled to have his traditional laws recognized.
> 2. My jurisdiction over this offender is an anomaly. He should be answering to his own judicial system. The process of attrition by which Canada has assumed jurisdiction over him is contrary to the legality of the historic relationship between Euro-centric Canada and Aboriginal Canada. I only assume jurisdiction by reason of necessity. I find that in doing so I must give recognition to his traditional laws.
> 3. His traditional laws emphasized healing and teaching as the accepted methods of behaviour modification and only resorted to banishment

34 *Ibid* at 44.

35 Hon. John Reilly, review of *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada*, by Grace Li Xiu Woo (2012) 50:1 *Alberta Law Review* at 219.

36 *Ibid* at 221.

> as a last resort. Therefore, in order to give recognition to his traditional laws, I will emphasize healing and teaching in passing sentence and only resort to imprisonment (the equivalent of banishment) as a last resort.[37]

Of course I find things to challenge in these passages too, but these judges' insistence on the ongoing relevance of Indigenous peoples' own legal systems is remarkable given that they worked within a legal system premised on settler supremacy. I felt joy when I read these essays! Public actions like these ones, although not taken while on the bench, promote engagement with Indigenous legal traditions today within *their own* constitutional frameworks. That's the critical awakening all Canadians need to experience.

In its absence, our judiciary absorbs Indigenous experiences and legal traditions into Canada's hegemonic constitutional framework. Canada's theory of constitutional change was first articulated in *Edwards v Attorney General for Canada*[38] in 1929 by the Judicial Committee of the Privy Council (Canada's then-final legal arbiter). Speaking for the council, Lord Sankey stated that "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."[39] Every law student learns this passage as a powerful constitutional commitment *against* originalism. However not many of us are taught that it's just as strongly a constitutional commitment *to* imperialism. The living tree stands alone, self-contained, oblivious to the surrounding creation with which it depends. Instead of relating with and through the myriad others that live in, under, over, and alongside it, the living tree "grows and expands" by absorbing creation into itself and then reconfiguring and re-expressing it within the tree's own forms of trunk, branches, and leaves. Within the given structure – that is, provided that no leaf damages or tries to transform the trunk and branches that sustain them together – each is at liberty to flutter or express itself

37 *Ibid* at 221–2.

38 *Edwards v Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124. (J.C.P.C.). *Edwards* is better known as the *Person's Case*. Within it, five women sought to prove that they were "persons" within the meaning of section 24 of the *British North America Act, 1867*, which regards senate appointments.

39 *Ibid* at 136.

as it wishes. Although the tree will expand and its shape will change, all change occurs within the sole, given structure.[40]

The "living" tree isn't really living at all. Let me suggest that Lord Sankey was right to describe its movement as expansion but mistaken to also call it growth because it has no intention of ever dying. It's unliving, in need of neither care nor renewal for its continuation. It needs only resources, which is how it regards the earth – all others with whom it shares creation. There's nothing in the metaphor about the tree's relationship to the world beyond itself that would impose an external limit[41] on its expansion: other trees, plants, or animals whose needs are impacted, or even transpiration and photosynthesis – its relations with sun, water, and Earth which connect it to the world above and below it. It presumes entitlement to expand forever precisely because it *isn't* growing: growth presupposes interdependent relationships with others, whose needs present limits on one's field of possible action.

But there *are* others. Indigenous peoples and their constitutional orders were already rooted on Turtle Island before Canada's living tree was imported from Britain. I've thus argued that we don't escape settler supremacy if all we're prepared to do is *tolerate* Indigenous legal traditions as a sort of quirky addition to Canada's otherwise uninterrupted constitutional order. We have to transform that very structure to allow Indigenous legal traditions to stand within their own constitutional worlds, not contain and re-express them post-fact within the existing terms of the settler contract.

That's the work of treaty and it places a much larger demand on Canadians than toleration-absorption. And so I'd like to take advantage of the movement supported by folks who think like Chief Justice of British Columbia Finch (as he then was) to urge Indigenous practitioners of Canadian law and Indigenous academics embedded in their

40 For an unpacking of the imperial form of citizenship I'm identifying here, see James Tully, *Public Philosophy in a New Key: Imperialism and Civic Freedom*, vol. 2 (Cambridge: Cambridge University Press, 2008) at 116–17.

41 In *Reference re Same-Sex Marriage*, the Supreme Court of Canada further develops the living tree doctrine. In so doing, the Court takes up Lord Sankey's caveat that Canada's constitution is capable of adaptation "within its natural limit." The Court clearly reads this as only an internal limit, linking it with "an objective core of meaning which defines what is 'natural' in relation to," in this case, marriage. See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 at paras 27–8.

own constitutional orders to plant wherever relevant within their work a vision of treaty originating within their own constitutional order.[42] And that's what I'm about to do.

8. Anishinaabe Constitutionalism

Of course while easy to *say*, the prospect of reaching into our own Indigenous constitutional orders may pose an enormous challenge. As colonized peoples, many of us, myself certainly included, face serious obstacles not only in using but also simply in knowing our own legal traditions, much less the constitutional orders which allow us to make sense of them. My process for coming to understand Anishinaabe constitutionalism is always growing. So far it has involved *kakinamatiwinan* and *izhitwaawinan* (diverse teachings about Anishinaabe *inaadiziwin*: lifeways) with Anishinaabe Elders, knowledge-keepers, and others seeking this knowledge; experiences on the land (*akinoomaagewin/ manido aki inaajimowin*); ceremony (*manido ichigewinan*) and material culture; *dibaajimowinan* (family and community narratives); *aadizookaanan* (sacred stories, from time immemorial); archival records; Anishinaabe-authored texts (contemporary and historic); and perhaps for some controversially, ethnography. Although many ethnographic accounts of Indigenous lifeways and world views are deeply problematic and have proven harmful, if we learn to read them carefully many are also powerful resources for us. I've learned much from them.

I'd like to share a simple sketch of my[43] understanding of Anishinaabe constitutionalism so far. My entire dissertation is an articulation of this framework; to offer more than a sketch here would allow it to take over this chapter.

Garry Potts, formerly chief of the Teme-Augama Anishnabai – an Anishinaabe community which has known its share of conflict with

42 For a brilliant (and much more developed) Cree example, see Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing Ltd, 2007).

43 This is important; others will see differently and each must allow for others' truth. One published version of this teaching is available from Anishinaabekwe Elder Nancy Jones in Ogimaawigwanebiik [Nancy Jones], "All Teachings are Correct," in H. James St. Arnold and Wesley Ballinger, eds., *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013). My understanding is based on what has been shared with me, what I've experienced, and my engagement with diverse Anishinaabe sources.

settler peoples – said the following, which I find such a compelling way into Anishinaabe constitutionalism:

> I remember once coming across an old white pine that had fallen in the forest. In its decayed roots a young birch and a young black spruce were growing, healthy and strong. The pine was returning to the earth, and two totally different species were growing out of the common earth that was forming. And none was offended in the least by the presence of the others because their own identities were intact.[44]

What an amazing image of Fred Kelly's message of interdependence *and* uniqueness! Here each society is its own unique tree, but sharing a common ground and growing together. As such, neither tree is *autonomous*. We're *unique* to be sure, but we're interdependent. As Chief Potts' constitutional observation reveals, both the birch and the black spruce depend on the fallen white pine for their being and for its part, the white pine is returning to the Earth, part of a cycle of growth, decay, and renewal. None stands alone. Each of us, individually and in kind, is small and finite. Even the most towering oak has only a humble slice of life and collapses without its relations to root and sustain it. Unlike Canada's constitutional living tree, Potts' image of trees constituting themselves interdependently recognizes that we're each conscious of our humble smallness within and our dependence upon other orders of creation and those who've come before – all our relations – for our freedom. Freedom isn't experienced when most fully severed from the needs and demands of others; it's experienced only ever with and through them.

Within creation, each being serves as a condition of the freedom of all others. Each of us needs the gifts we don't have in order to be free and, in many instances, simply to survive. As deeply incomplete beings, the ubiquitous need for the gifts we lack means that each of us is inherently connected to all others – and not just human others. Our ontological foundation is one of interdependence; our normative foundation for political community had better be too, lest we allow the conditions

44 Gary Potts, "Growing Together From the Earth" in Diane Engelstad and John Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: House of Anansi Press Limited, 1992) at 199.

which make our unique community possible to overrun the conditions which sustain Earth community.[45] That might result in a climate crisis.

Contractarians who don't outright reject this account of persons, community, and freedom as incoherent are likely to reject it as unethical. They may worry that it surrenders community to the unbound violence of individual caprice. To this anxiety I acknowledge that yes, an interdependent self and an autonomous self are indeed incommensurable understandings. But non-autonomy need not mean unfreedom for interdependent citizens. A self whose mode of being in the world is relational *is not a collective self.* An interdependent self neither stands independent of (autonomy) nor is subsumed within (heteronomy) the groups of his or her life's experience, but is rather constituted *through* his or her membership in groups, including with non-humans.

Far from erasing the moral significance of individuals, the constitutional view from interdependence privileges it: without identifiable, secure, unique selves, the creative order collapses. We need the other's gifts and this simple fact presupposes our recognition of and interest in protecting their unique, respective identities. Without those identities, their gifts disappear. Thus within this constitutional framework, it turns out that most of the time my interests aren't actually served if yours are the cost of my benefit. It's rather like Elder Fred Kelly says: we win and lose together. Since I need your gift, when you're empowered, so too am I. In this way we see that difference between citizens isn't the foundational problem of political community, but rather the condition of its possibility; difference is therefore to be embraced, not overcome. If each bore the same gift, none would have its needs met and the world would wind to a close. Deep diversity isn't an unfortunate consequence of the fact of life; it's what allows for life. Elder Basil Johnston, writing as Epingishmook, put the earthly point like this:

> There are four orders in creation. First is the physical world; second, the plant world; third, the animal; last, the human world. All four parts are so intertwined that they make up life and one whole existence. With less than the four orders, life and being are incomplete and unintelligible. No one portion is self-sufficient or complete, rather each derives its meaning from and fulfils its function and purpose within the context of the whole creation.[46]

45 James Tully, "Reconciliation Here on Earth" (paper presented at "Environment, Sustainability and Society" lecture series, College of Sustainability and King's College, Ondaatje Auditorium, Dalhousie University, Halifax, NS, 20 March 2014) [unpublished; copy with author] at 6, 14 (available also at http://www.youtube.com/watch?v=QGzGvxvHz2o).

In terms of human intrasocietal relations, he offers the same message:

> The community had a duty to train its members as individuals not so much for its own benefit though there was that end, to be sure, but for the good of the person. The man or woman so trained had received a gift from the community which he was to acknowledge in some form; and that form consisted simply of enlarging one's own scope to the fullest of his capacity. The stronger the man, the stronger the community; and it was equally true that the stronger the community, the firmer its members.[47]

If we understand persons as inherently interdependent, the central challenge of community isn't how to constrain transgressions of individual autonomy (a just society), but rather how to meet the condition of ubiquitous need for all (a harmonious society, but one wherein harmony requires conflict). Instead of mutual security, constitutionalism coordinates mutual aid. We don't need to contract into community for that. But if there's no contract and thus no sovereign to legislate for citizens and to enforce order over them, in what does a constitutional order premised on mutual aid inhere?

The answer is each of us. Law doesn't live in a set of abstract rules external to our lives or in the small set of duly-elected or carefully trained arbiters of them. It lives inside every citizen. In our bodies, minds, hearts, and spirits. Mutual aid – the sharing of our gifts to meet each other's needs – is embodied in our practices of self.[48] Instead of obedience to formal rules knowable by all, our behaviour is conditioned through a carefully-developed orientation towards the other. Thus the

46 Basil Johnston, *Ojibway Heritage* [1976] (Toronto: McClelland and Stewart, 1990) at 21.

47 *Ibid* at 70.

48 For an accessible introduction to this idea, see Robin Kimmerer, "Returning the Gift" (2014) 7:2 *Minding Nature*, 18.

image of "the gift" is not any particular good held within or service offered through an outstretched hand, but the act of reaching.

Critics may worry that this is nothing more than a romantic idea if it isn't enforceable. In the absence of a contract-constituted sovereign with a monopoly on the legitimate exercise of violence, how is the community to enforce compliance from individuals?

The answer comes in two parts, only one of which I can share here. The other, *onjine'itizowin*, requires an immersion in Anishinaabe world view beyond the bounds of what this paper can provide.[49] It regards the fact that within Anishinaabe constitutionalism, persons are interdependent not only in a political-ecological sense, but also spiritually. As such, it isn't always the case that humans need to take action to address harms done.

The part of the answer I can take up here concerns relational force, which is informal, decentralized, and persuasive. To a contractarian sold on the supposed guarantee of enforcement that the social contract is said to provide, this may seem frightful. But where each citizen understands that he or she needs the others to be free and, in some instances, simply to survive, the cost of failing to meet one's responsibilities of mutual aid is prohibitive. First, no interdependent self can run the risk of falling outside of right relation with the community for fear of its refusal to meet his or her needs.[50] Citizens are thus raised to exercise enormous self-control for the very reason that diffuse, persuasive authority *is* enormously powerful and they wish to avoid having it brought to bear on them. Within the logic of mutual aid, a society doesn't have a sovereign *because the role of the sovereign would be redundant*. Our leaders, *ogimaag*,[51] are rather spokespersons and facilitators.

Second, part of Anishinaabe constitutionalism includes the citizenization processes we've developed to ensure that our community members are taught how to create and sustain diverse but always respectful

49 I've learned about *onjine'itizowin* from different sources, but most directly from *nokomis* (my grandmother), Bessie Mainville of Couchiching First Nation.

50 It's important not to conflate harm and dissent here. As I said above, mutual aid requires vibrant, empowered individuals. We have strong, long-established practices of dissent.

51 "Leaders." "Chiefs" is and has always been an awful translation because it suggests leadership vested with coercive authority, which is precisely to misunderstand leadership outside of social contract, within mutual aid.

relationships. Citizens are motivated to behave accordingly by the social affirmation they receive for doing so. The winter telling of the *aadizookaanan*, our sacred stories, is a critical Anishinaabe citizenship institution that identifies different kinds of relationships and how to orient our behaviour to the diverse kinds of others within them. They not only disclose normative content, but owing both to their intentional ambiguity and their demand for listener agency in individual meaning-making, also instil skills for normative reasoning and discernment. They not only teach us about law, but also empower us to reason with it in new situations.

But even if as a general matter this relational logic of force is understood, what about when responsibilities aren't met? Even in a good system, even the most respectful and well-intentioned of us sometimes behaves badly. For such occasions, does the diffusion of power in a society organized around mutual aid really have teeth or are the boundaries around mutual aid too fuzzy to give rise to anything actionable? How could one citizen try to hold another to account, saying he or she has, in some specific way, failed in his or her practices of self towards another? This is an important question. After all, without the supposed certainty of contract, how are citizens to identify the boundaries of appropriate behaviour?

My answer proceeds by identifying a deep flaw in the objection. From the internal view of Anishinaabe constitutionalism, the absence of certainty isn't a structural failing in dire need of justification, but rather the only coherent position. For dynamic, living relationships, the *a priori* imposition of certainty is both incoherent and strangling. It requires an orientation to nonsense and death. Instead of the universality, abstraction, formality, and certainty of rights distributed through contract and policed by a sovereign, citizen behaviour is conditioned by substantive, living bundles of responsibility that empower and constrain the sharing of gifts. And here's the critical bit: being *substantive*, these bundles can't be articulated *formally*, across widely differing contexts. Each kind of relationship calls for a shift in responsibility. The practices of self that a father engages towards his daughter vary markedly from those which a trapper engages towards her kill, or an educator to his community. More complicated still, every particular relationship calls into being its own unique set of responsibilities. The gifts that one father is called to provide for his daughter may vary from those of another father: the specific nature of the gifts will be a function of their respective daughters' needs, and as unique persons, the needs of the daughters, despite substantial overlap, will vary.

When our own constitutional orders governed our lives, beginning when we were children, Anishinaabeg internalized how to think about mutual aid and thus how to identify the complex, shifting responsibilities we carry as we move through each of the four hills of life. This isn't magic; no one's born knowing. It requires a discipline and follows a logic very different from that of Canadian law. On the understanding that people exist interdependently instead of autonomously in the world, the work of normative ordering is to coordinate right relationships through mutual aid, not to resolve rights-claims through contract. It's about a particular way of being-with, not claiming-over. The logic of mutual aid replaces the need for a theory of obligation.

A. The Logic of Mutual Aid Replaces the Need for a Theory of Obligation

That speaks of the means of normative ordering under Anishinaabe constitutionalism; now, the ends. Having no concept of autonomy to be violated and thus no rights to be vindicated, the goal towards which Anishinaabe constitutional order strives isn't justice, it's harmony. Importantly however, this isn't harmony in the romantic sense of non-conflict. This is harmony understood as the ceaselessly changing but grounded state of interdependent selves engaged with each other in personal practices of mutual aid, which we may call *living in right relation*. And that necessitates conflict. Wolves eat deer; neighbouring communities disagree over land use; fathers and daughters fight. Each needs healthy conflict if it is to grow strong and be fully empowered to share its gifts with all others.

I think this clarified understanding of what harmony means speaks to Borrows' concern that "the rejection of Canada's discriminatory constitutional principles should not be replaced with another false narrative. We should not construct an unremittingly positive, glorious past."[52] I agree: false, ideal stories about Indigenous constitutionalism are unhelpful. I'd go further and say that to the extent that they create nervousness around the possibility of leaving the existing violence of Canadian constitutionalism behind, they're harmful. If we're going to consider constitutional alternatives, we ought not to bother unless we're prepared for the hard work of understanding them on their own terms.

52 John Borrows, "Canada's Colonial Constitution," chapter 1 in this volume.

However, we should also be clear that an obstacle to doing that can be having too romantic a vision of *Canadian* constitutionalism. That is, we must also identify the other side of the tension Borrows raises: we have to exercise equal care to guard against allowing conservative, pro-Canada deference to predispose us to the view that anything that deviates from the statist constitutional status quo is automatically taken as dreamy and romantic,[53] and thus dismissible without even stopping to inquire whether it might operate according to a rigorous but distinct and thus not immediately discernible logic. Difference itself isn't dangerous. Cynicism sure is though. If we give too much oxygen to it and unreflectively mistake the given constitutional order as the one we *ought* to have as opposed to the one that has proven most effective in exercising power over us, we run the risk of eliminating genuine alternative constitutional pathways before walking them. It seems to me that essentialism road runs in both directions, and that the right constitutional path will steer clear of it no matter which way its arrows point.

9. The Treaty of Niagara, 1764

Above I've shared my understanding that Anishinaabe constitutionalism responds to the problem of ubiquitous individual need, functions through the logic of mutual aid, and is pointed towards harmony (as right relations, not as non-conflict). This differs profoundly from liberal constitutionalism which centres instead on the risk of one person being used as a means to another's end (and in particular, of violence) that follows from the problem of radical individual disconnection, functions through the logic of contract, and is pointed towards justice – the contract's enforcement. I then observed that the account a society offers of treaty follows from its constitutional self-understanding: treaties are a constitutional form insofar as they constitute shared political community. As such, settler society's contract treaty narrative perpetuated formally through the executive and judicial orders of Canadian government merely reinscribes the original colonial violence of liberal constitutional imposition over Indigenous persons, peoples, and lands in the face of existing Indigenous constitutionalisms.

53 Jeffrey Simpson, "Too Many First Nations People Live in a Dream Palace," *Globe and Mail*, 5 January 2013.

With both pictures in view, I suggested that treaty vested in Anishinaabe constitutional forms is a better option because it empowers us to build a shared political community across our deep diversity without recourse to the violence of settler supremacy. I suggested that the fear that stops settlers from choosing this other path is deeply regrettable, because it offers a constitutional vision in which settler lives can be accounted for and legitimized.

Now I want to develop the argument further still: this alternative vision of treaty is actual, not ideal. It isn't a dream to be realized one day, forever in the future. The Treaty of Niagara, 1764 represents the intercultural achievement of this understanding on Mikinaakominis, and Indigenous peoples have never legitimated a new constitutional relationship, although we have struggled to participate as best we can within Canada's imposed, displacing constitutional order. I can't make the case for this claim convincingly here; to do so would require this argument to be its own paper. I aim rather just to offer an initial sketch.

The Treaty of Niagara, 1764 is our (i.e., Indigenous and British-become-Canadian)[54] commitment to a relationship based in practices of mutual aid, oriented towards harmony. This treaty understanding is visually represented in the bead patterning of the two wampum belts which together physically embody the relationship (many other wampum belts contributed to the dialogue that led to this ultimate characterization).[55]

Our orientation towards one another is represented in the 1764 Covenant Chain belt. At its centre it depicts two human figures holding hands. The creator(s) of the belt beaded hearts for each of these figures and importantly they were beaded differently, identifying them as representatives of peoples who remain distinct.[56] Thus more than 250 years ago we had the same teaching that Elder Fred Kelly offers today: we

54 By 1764 New France had fallen and thus residents of what had been New France were also represented by Britain.

55 Some of these other belts are described or simply mentioned in Sir William Johnson and various *ogimaag*, "An Indian Congress, Contemporary Copy [Niagara July 17-August 4, 1764]," in Milton W. Hamilton and Albert B. Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: The University of the State of New York, 1953) at 278.

56 A. F. Hunter, "Wampum Records of the Ottawas," in *Annual Archaeological Report 1901: Being Part of Appendix to the Report of the Minister of Education Ontario* (Toronto: L. K. Cameron, 1902) at 52. This amazing document provides the exact bead count (10,076) and positioning of beads in the belt, and it offers an image made from a facsimile copy of the belt.

are interdependent *and* unique. Neither community absorbs the other but neither community stands alone. This belt exists as testimony to the simple fact that the heart of the Treaty of Niagara, 1764 isn't any particular exchange, but rather our choice to stand together in a relationship strengthened beyond what the given relationship through which we're always already connected provides for. Once this connection is affirmed, then exchange, as a second-order consideration, follows.

The next step – mutual aid, in which each shares its gifts to help meet the needs of the other – is embodied in the Twenty-Four Nations Belt. On the far left of the belt is an image of Mikinaakominis. To the right of it are twenty-four figures holding hands. On the other end of the belt the figures connect to a British vessel. Reminding the British of the Treaty of Niagara, 1764 almost ninety years earlier, *ogimaa* Assikinawk, keeper of the Niagara wampum belts, explained this belt's meaning precisely in the language of British aid. Deploying the belt's metonymic function, he orated the following British commitment, spoken as if from their representative's mouth:

> My children, see, this is my Canoe floating on the other side of the Great Waters, it shall never be exhausted but always full of the necessaries of life for you my Children as long as the world shall last.
>
> Should it happen anytime after this that you find the strength of your life reduced, you Indian Tribes must take hold of the Vessel and pull, it shall be in your power to pull towards you this my Canoe, and when you have brought it over to this Land on which you stand, I will open my hand as it were, and you will find yourselves supplied with plenty.[57]

This is to say that at the Treaty of Niagara, 1764, Sir William Johnson, Superintendent of Indian Affairs of the Northern Colonies and the highest ranking representative of the British Crown, made a point of engaging us in our own constitutional forms, making the British

57 National Archives of Canada, Record Group 10, vol. 613 at 443, as cited in Darlene Johnston, "Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism" in Micheline LaBelle, Rachad Antonius, and Georges LeRoux, eds., *Le devoir de mémoire et les politiques du pardon* (Québec: Presses de l'Université de Québec, 2005) at 153n32 and in Darlene Johnston, *Respecting and Protecting the Sacred, A Report Commissioned for the Ipperwash Inquiry*, 24n67 (2006), Attorney General at http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf.

people participants within Indigenous constitutionalism.[58] Thus wonderful as it is, Chief Justice of British Columbia Finch's injunction for Canadians to find their place within existing Indigenous legal traditions isn't trailblazing, but rather a call for a return to an understanding already achieved.

As an important aside, achieved *between whom* exactly is a critical question. By 1764, the Haudenosaunee had already enjoyed a mutual aid relationship with the British peoples, also represented by the Covenant Chain, for 100 years. They attended Niagara at Johnston's request but the purpose of the treaty was to extend the Covenant Chain to the Western (or Ottawa) Confederacy, which consisted of the Great Lakes Anishinaabeg and their allies.[59] Anishinaabeg travelled from at least as far away as "the North West Side of Lake Superiour [sic]" and Cree came from "the Neighbourhood of Hudsons Bay."[60] There remains a question about those peoples who lived east of Niagara, such as the Algonquian peoples of the eastern seaboard. I have yet to do this research, but existing work by Sákéj Henderson, while of course recognizing important differences, suggests direct continuity with the Anishinaabe treaty understanding I've shared above.[61] Then there are the Indigenous peoples who, for various reasons, chose not to attend. These included the Dakota[62] to the far west, the Pottawatomi,[63] and

58 For example, see William Johnson, [Untitled Document] dated 31 July 1764, in Milton W. Hamilton and Albert B. Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: University of the State of New York, 1953) at 309–10, in which Johnson deploys both the material and oratorical forms of wampum belts in treaty-making.

59 William Johnson, "Nations at the General Meeting," in Alexander C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany: University of the State of New York, 1925) at 481; "Memorandum on Six Nations and Other Confederacies," in Alexander C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany: University of the State of New York, 1925) at 240, 243–4.

60 "William Johnson to Thomas Gage, Johnson Hall August 22d. 1764," in Milton W. Hamilton and Albert B Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: University of the State of New York, 1953) at 336, 337.

61 James (Sákéj) Youngblood Henderson, Marjorie L. Benson, and Isobel M. Findlay, eds., "Aboriginal Treaty Order of North America," in *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell Thomson, 2000) at 94–9, especially at 98.

62 William Johnson to Thomas Gage, "To Thomas Gage," in Milton W. Hamilton and Albert B. Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: University of the State of New York, 1953) at 336.

63 William Johnson to Cadwallader Colden, "To Cadwallader Colden, Johnson Hall, August 23d. 1764," in Alexander C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany: University of the State of New York, 1925) at 511.

groups of Shawnee, Delaware, Seneca, Anishinaabeg, and Wyandot who opted instead for war with *ogimaa* Pondiac,[64] although many of these later joined the treaty. Although it isn't determinative, we should note that Johnson's intent was that "all Nations of Ind[ians]" in what Britain identified as the northern territory – which covers much of what is today called Canada – were to be included in the treaty.[65] Of course whether a community that didn't attend understands itself as part of the Niagara treaty relationship is for it and not for Johnston, me, or anybody else to decide.

10. Treaty Citizenship: Beyond the Binary of Settler Supremacy/Illegitimacy

If treaty is a constitutional form and the Treaty of Niagara, 1764 in particular is how settler and Indigenous peoples constituted a shared political community respectful of existing Indigenous constitutional orders, then it's this living relationship and not a state called Canada that serves as the foundation for settler citizenship. I don't mean that treaty is the substantive keystone of citizenship; rather it's the condition of the possibility of any settler citizenship at all. This is the thickest sense of "we're all treaty people."[66]

In making so strong a claim, I'm careful to note Borrows' worry that "The strength of the treaty narrative makes it difficult to develop policy with some First Nations. Any step which does not accord with the original treaty relationship is deeply suspect."[67] To the extent that Indigenous persons and peoples hold this view, I too am concerned. Having Indigenous peoples be the ones to call for contract doesn't make any of its problems disappear. But I don't share Borrows' worry in a strong way because as I've been explaining, I don't think this is what most of us are calling for. For the most part I don't understand

64 Thomas Gage to William Johnson, "From Thomas Gage, New York August 15th: 1764," in Alexander C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany: University of the State of New York, 1953) at 508, 509.

65 "William Johnson to Thomas Gage, Johnson Hall August 22nd, 1764" in Milton W. Hamilton and Albert B. Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: University of the State of New York, 1953) at 336–7.

66 This is illustrated in a wonderful graphic publication of the Anishinabek Nation in Maurice Switzer and Charley Hebert, *We Are All ... Treaty People* (North Bay, ON: Union of Ontario Indians, 2011).

67 John Borrows, "Canada's Colonial Constitution," chapter 1 in this volume.

Indigenous claims for a return to our treaty relationship as originalist calls for a return to a timeless contract. In fact I hear a yearning to get out from under contract and into partnership. The "return" I hear far more often isn't directed at times past, but towards our formerly shared understanding that we're interdependent, that we need each other, and that if we would think of ourselves as partners in open-ended creation rather than as adversaries in zero-sum negotiation, we could all win. It isn't originalist because our needs and hence our responsibilities to one another are always changing. The core temporal value that the call for "return" invokes isn't stasis, but renewal.

Living in right relation would mean that Indigenous peoples are free to live on Mikinaakominis within treaty confederacies composed of their own unique constitutional orders. It would mean that any settler constitutional order will have to reconcile itself to the confederal treaty superstructure that holds distinct Indigenous constitutionalisms together: interdependent but unique; aiding one another through their differences. Importantly, because Indigenous constitutional orders are designed to orient Indigenous societies in right relationship with the rest of the creative order (i.e., the earthway), the confederal constitutional structure shares their creative-ecological orientation and requires that as existing treaty partners grow and change and as new constitutionalisms join the treaty relationship, each unique constitutional order within it sustains that foundational understanding for itself.[68] As a participant in the treaty order, this means that settler peoples have to reconcile their liberal foundation with the Earth-first relationalism of the treaty superstructure.[69] That won't be an easy task. For one thing, an Earth-first orientation is incommensurable with Earth-alienation, a foundational postulate of liberalism (i.e., how was Earth represented in the contract?). Stated bluntly, any contractarian account of political community on Mikinaakominis will have to give way.

68 By way of pre-empting Rawlsian critics, this is nothing like an overlapping consensus: it's only the starting point of an ontological claim of an interdependent self and the concomitant relational mode of being which are common throughout the confederal treaty order, not determinate norms or even processes of norm-generation. Further, the treaty order derives from the participation of its members in their unique situatedness, not stripped of their identities.

69 I take this up in Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows, and James Tully, eds., *Resurgence and Reconciliation* (Toronto: University of Toronto Press, forthcoming).

That's what reconciliation in the Canadian context means. Once it's accomplished settler people will[70] be able to claim that they truly belong here – that's a gift that Anishinaabe (and I suspect many other indigenous) constitutionalism offers to all. Settlers are part of creation and they aren't to be left out. More important, their political status won't be predicated on violence. That should be a foundation for citizenship that everyone demands. And as for Indigenous peoples, if our constitutional orders were again vibrant and empowered to govern our lives (and the violence that does so now was ended), presumably many more of us would find good reason to *want* to identify as citizens of a shared political community.[71]

All my relations, the arrangement our ancestors made in 1764 is so very different from our reality now. There was a time when we agreed to live in right relation together, when Indigenous peoples were understood as partners, not as minorities seeking toleration.[72] It isn't a vision of treaty that can ever be achieved so long as we're content to think of treaty as a contract, in the way that the Crown and the courts do and which section 35 has been interpreted to demand. I have a stark view of

70 I mean that the claim becomes possible, not that it is accomplished. This shift would of course be the beginning, not the end, of a constitutional dialogue.

71 See the remarkable dialogue between Mary Ellen Turpel-Lafond and Trish Monture on this tension in M.E. Turpel and P.A. (Trisha) Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15:2 *Queen's Law Journal* 345, 347.

72 Sir William Johnson's papers clearly indicate his knowledge that Anishinaabeg understood themselves as free peoples standing in partnership with, not subjection under, British constitutional authority and that any effort by the British to exercise sovereignty over them would destroy the existing relationship: "Sir William Johnson to the Lords of Trade, Johnson Hall Novr 13. 1763," in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons and Company, 1856) at 572, 575; "Sir William Johnson to the Lords of Trade," in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons and Company, 1856) at 661, 665; "Sir William Johnson to the Lords of Trade, Johnson Hall, October 30, 1764," in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons and Company, 1856) at 670, 674; "William Johnson to Thomas Gage, Johnson Hall Octbr. 31st. 1764," in Milton W. Hamilton and Albert B. Corey, eds., *The Papers of Sir William Johnson*, vol. 11 (Albany: University of the State of New York, 1953) at 394, 395. See also "Journal of Colonel Croghan's Transactions with the Western Indians" in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 7 (Albany: Weed, Parsons and Company, 1856) at 779, 788.

that vision: thus far, the concept of treaty rights – and section 35 more generally – has been one more tool to effectively neutralize the unique political status of Indigenous peoples by transmuting claims for partnership *with* a reformed, non-contractarian settler society into claims for recognition *under* Canada's imposed constitutional order.

If ever we're to live in right relationship again we'll have to inspire Canada to decolonize itself.[73] There are many things that could mean but one thing it *must* mean is education. We have to make clear the relationship between colonialism and Canadian citizenship *today*. Insofar as Canadians can thoughtlessly relegate colonialism to the past, the cognitive barrier to empowering Indigenous freedom will remain unbreakable. Canadians pride themselves on a (carefully-tailored) narrative of what their nation stands for and of what they think their membership in it says about them. At the same time, the vast majority of Canadians don't identify as agents of colonialism, thinking they have no personal connection to that word. Colonization is taken as an historical fact – one completed long before any of us living today were born. Since they're not causal agents of colonial harm, they bear no contemporary responsibility for its violence.

73 There's a contemporary indigenist line of thought that disagrees with the attribution of onus in this statement, thinking instead that it isn't up to us to do anything with respect to Canada's process of decolonization. I understand that feeling. Yet I can't help but hear a discourse quietly invoked that I find worrisome. It seems to me that what we're really saying in forwarding that view is that we *ought* (obligation) not to have to do it because at no time did we undertake to do so – which is to deploy the logic of contract. This follows, we say, from the fact that it's about them, not us. But if instead of turning to contract we think that we're always already in relationship with settler Canadians, that we all win or we all lose because it's always about both of us, and that the goal of intervening is harmony as right relations, not justice – then as plainly unfair as it is (and it is plainly unfair, infuriating, and worse), the only thing that makes sense is to address what's wrong in the relationship. Both the normative and the strategic questions are thus all about *how*, not *whether* to engage. I fully support the commitment to prioritize the thickening of our own cultural vitality that sits at the heart of the Indigenous resurgence movement. While this means a turn away from settler constitutional forms, it doesn't mean that we reject settler people. There are practices of Anishinaabe constitutionalism which derive from our connections with other societies (for instance the jingle dress and the traditional drum) and hence which go directly to the very sense of self we want to thicken. I reject the possibility of a turn-away from settler *people* because of its anti-relationalism which I cannot square with Anishinaabe constitutionalism.

Colonization *isn't* completed. It isn't reducible to an imagined initial act of settler arrival and Indigenous displacement. It's a relationship Indigenous peoples and settlers live out today through the three forms of domination that constitute settler supremacy and which culminate in the imposition of settler constitutionalism over existing Indigenous constitutionalisms. Canadians enjoy the incredible level of privilege they do *because* Indigenous peoples remain colonized. Indigenous suffering is the cost of the settler benefit that Canadian citizenship allows to be taken for granted. Contemporary settlers are responsible not only because indirectly they *are* causal agents, but also because they benefit, and the ongoing desire to sustain this benefit for settler citizens is among the most important factors in Canada's daily decision to continue its colonial relationship with Indigenous peoples today.

We'd all be much further ahead if settler children and youth were educated about this. But beyond including these truths as mandatory components of elementary and secondary school curricula, there's much more we can do. When I look to my *nokomis*, Bessie Mainville, I see how it's possible to live the practices that generate right relationship within my own life, even under conditions of contemporary colonialism. Our Elders aren't waiting for Canadian institutions to internalize a commitment to right relations. No, they start with themselves. They endeavour to carry their responsibilities through practices of self that are intended to draw them into right relation with the world around them. My sense is that from their perspective this is simply what engaged citizenship means. Our Elders lead, as they always have, through example. Albeit clumsy, unskilled, and with a colonized mind, I'm learning how to follow. As I understand it, you're welcome to follow, too. One need not be an ethnic Anishinaabe to follow Anishinaabe constitutionalism (or more generally, the rooted mode of constitutionalism of which Anishinaabe constitutionalism is but one kind). Though your stories may be different and you and I may not read the Earth in just the same way, this is a constitutional framework available to all. I hope you understand that I've chosen to share my deep criticism of liberal constitutionalism and to call settler supremacy exactly what it is in order to make this invitation possible.

And as I grow my understanding of what it means to exist interdependently, to be a fully relational self, and to discover the extraordinary strength that comes from seeing the world and myself in it that way, I'm also learning this: on my own I have no power over anything but myself. But, all my relations, when we accept our interdependence and

aid one another, I believe no form of state violence can stop us from calling a community beyond settler supremacy into being. We have only to learn and to live these practices for them to manifest as mass resistance to the violence of contract. We don't need to tear the state down (or the contract up). We can simply make it redundant. If that seems an overwhelming prospect to you, fortunately there's experience and leadership in the Indigenous communities of Mikinaakominis, and I bet that if you dedicate yourself, those are gifts most of them are willing to share.

The Anishinaabe conception of constitutionalism and thus also of treaty that I've presented in this chapter is captured in this quotation taken from a talk by Anishinaabe Elder Ed Onabigon:

> This is the way it has to be. Just like those trees, look at them, there's maybe fifty, sixty plants right in front of us. But they're all connected, they're all reaching out, and they never have to worry, they're each doing their job. So is each and every one of those blades of grass – they're unique, they're all unique. If you take any two, they're not exactly the same, just as with people. That shows us the harmony and balance, and that they adapt to their environment. Man and woman have to do the same thing, adapt and see our connection to everything around us.[74]

By offering contract as the sole framework within which we can imagine treaty, Canada succeeds in silencing my Anishinaabe understanding. The problem I have isn't that my view isn't sufficiently persuasive to carry the day. It's that I may not speak it.[75] A judiciary vested in colonial supremacy and concerned with a citizenry that benefits from it isn't willing to hear. It has explicitly said so.[76] It's as if the Treaty of Niagara, 1764 never happened.

74 Ed Onabigon, "Elder's Comments," in Roger Neil, ed., *Voice of the Drum: Indigenous Education and Culture* (Brandon: Kingfisher Publications, 2000) at 282–3.

75 Johnny Mack makes a similar point in Johnny Mack, "Hoquotist: Reorienting through Storied Practice," in Hester Lessard, Rebecca Johnson, and Jeremy Webber, eds., *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) at 287, 298.

76 *R v Van der Peet*, [1996] 2 SCR 507 at para 49; *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 51; *Tsilhqot'in*, at para 50.

To my mind this leads to two simple questions about responsibility. For settler Canadians: As beneficiaries of settler supremacy, is citizenship premised on domination good enough for you? And as for Indigenous peoples: *Can* citizenship in a state imagined through a social contract allow us to meet our responsibilities to the land, to those who came before us, to those yet to come, and to all of creation? Can policy development within a state framework ever afford us the freedom these responsibilities call us to exercise? I've given my answer. But however one might reply to these questions, it's at least clear that they aren't challenges we can litigate to a meaningful close.

I'm certain the relationship with Canada that I've inherited isn't what my ancestors agreed to at Niagara, or what my *ogimaag* Manidobines, Powassin, or Blackstone intended in 1873 at the congress that finally resulted in the Treaty 3 relationship. I don't intend to disappoint them.