

Canadian Justice, The Rule of Law and the Rob Ford Affair

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Rob Ford, now universally referred to as “the crack-smoking mayor of Toronto,” continues to astonish us—not just because he can’t open his mouth in public without bullying, lying, confessing to some further crime, or saying something obscene about his wife—but also because of what his ongoing saga suggests about the state of Canadian justice.

It seems that if you’re white, male, rich, and powerful, you can do outdoor drug deals in front of police surveillance teams without fear of interruption, let alone arrest. Ford doesn’t even bother now to dismiss police summaries of his lawbreaking as “allegations”; he calls them “revelations.”¹

But amid the fuss around these Fordian slips, a concurrent story that also reveals something about Canada’s present-day problems with legality has gone almost unnoticed. On October 21, the Toronto Transit Commission (TTC) announced that it was refusing to carry advertisements from a human rights group, Canadians for Justice and Peace in the Middle East, which show the accelerating disappearance since 1947 of land held by Muslim and Christian Palestinians in historic Palestine.²

The ad copy apparently suggested that the ongoing taking of Palestinian land by the state of Israel has involved unfairness and illegality. After consulting its lawyers, the TTC declared that the land taking hasn’t been illegal, and that no court ever said it was—therefore, no ads.

This statement rivals Mayor Ford in its mendacity. For in July 2004 the International Court of Justice found Israel’s theft, colonization, and settlement of occupied land to be in violation of the UN Charter, the Fourth Geneva Convention, and five other charters of international law, as well as repeated UN Security Council resolutions. An interesting story, one might think: but the Toronto media buried it with unseemly haste.³

Why should Canada’s political class and mainstream media not want Canadians to be informed about an overseas instance of land theft and settlement (one which our present government, by the way, supports with particular vehemence)? Two other recent events may suggest an answer.

The first is the visit to Canada of James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, which ended on October 15. The second is the RCMP’s October 17 assault on the non-violent anti-fracking blockade by the people of Elsipogtog near Rexton, New Brunswick—an attack which looks uncannily like an ‘up-yours’ response by the Harper government to Anaya’s parting remarks. Both events raise important issues of

legality.

The statement Anaya issued on concluding his visit included mention of “the frustration expressed to me uniformly by aboriginal leaders that their self-governance capacity and economic development [...] remain impeded by multiple legacies of the history of colonization, treaty infringements, assault on their cultures, and land dispossession suffered by their peoples.”

Adding that negotiations are often undermined by rapid resource development “within lands that are the subject of protracted negotiations,” Anaya recommended that the government adopt a “less adversarial” and “more generous and flexible approach,” one which would acknowledge that “the public interest is not opposed to, but rather includes, aboriginal concerns.” He proposed that “resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the aboriginal peoples concerned.”⁴

On the very next day, Stephen Harper borrowed rhetoric from the era of the fifty-year-old TV series *Wagon Train* for a Throne Speech that re-stated a settler-colony view of Canada excluding any aboriginal perspective: “This is Canada’s moment; together we will seize it. And as we do, we draw inspiration from our founders, leaders of courage and audacity. [...] They were undaunted. They dared to seize the moment that history offered. Pioneers, then few in number, reached across a vast continent. They forged an independent country where none would otherwise have existed.”⁵

As Corey Snelgrove has remarked, Harper’s words evoke the doctrine of *terra nullius*, a Latin term used by early colonizers of the Americas to define the lands they coveted as legally empty and their inhabitants as non-persons.⁶

One day later, on October 17, the federal police force, the RCMP, was ordered to attack the Elsipogtog blockade—the legal basis for this action being a provincial court injunction that was rescinded five days later.⁷

The actual standing of this issue in Canadian law is precisely the opposite of what most Canadians believe it to be. Those who have been in violation of the highest law are the New Brunswick government, the Harper government, the RCMP, and SWN Resources, the would-be frackers.

Why do Canadians not know this? Because, once again, Canada’s political class and much of the mainstream media have been (to put it charitably) economical with the truth.

One important exception to the mainstream media’s combination of silence and misinformation is a recent article by Métis writer Chelsea Vowel in the *Toronto Star* (“The often-ignored facts about Elsipogtog,” November 14, 2013), which explains two essential judgments of the Supreme Court of Canada.⁸

The first of these, the Supreme Court’s 1997 *Delgamuukw* decision, determined that under Canadian law, Aboriginal title to most of British Columbia had never been extinguished—meaning that other parts of the country where no treaties giving up land ownership were ever signed had likewise never been acquired by the Crown. The second, the 1999 *Marshall* decision, determined both that Mi’kmaq fishers in Atlantic Canada

retained their right to make a living by fishing, and confirmed that the Mi'kmaq and Maliseet Peace and Friendship Treaties of 1760-1761 did not involve any surrender of land or resources.

As Vowel writes, "This cannot be emphasized strongly enough: the Mi'kmaq never gave up legal right to their land or resources. Canada does not own the land that the people of Elsipogtog are defending. This is not conspiracy theory, or indigenous interpretation. This is Canadian law, interpreted by the Supreme Court of Canada, applying Canadian constitutional principles."⁹

Legal experts have no trouble understanding this. Michael McClurg, a specialist in natural resources law with the Toronto firm Olthuis Kleer Townshend, has written that "the rule of law in this case would arguably dictate that the protesters have every right to be on their traditional land and that in fact, others, including the Crown and resource extraction companies, are trespassers."¹⁰

Bill Gallagher, a lawyer in the same field, notes that First Nations groups have won more than 180 recent victories in Canadian courts. In a recent CBC Radio interview he remarks that in New Brunswick, "There are seven high-level court cases that have been sitting on shelves through previous governments. These are appellate level decisions, Supreme Court of Canada level decisions, that are declaratory: the natives have won on a very profound point of law, [and] the parties that have lost, governments and interveners and industry, have been given a series of admonitions...."¹¹

Governments have not merely ignored these admonitions; they have often directly violated them. In 2000, for example, Mi'kmaq people at Burnt Church who asserted their rights according to the Marshall decision "were subject to racist violence," Dru Oja Jay writes, "from both the Department of Fisheries and Oceans, which literally ran over boats of people trying to fish, and non-Native mobs, who attacked people trying to fish and destroyed [lobster] traps and boats."¹²

Michael McClurg observes that people in government can learn—from the Report of the Royal Commission on Aboriginal Peoples, for example, or the Ipperwash Inquiry Report—how to behave in "conflicts over resources, including appropriate police responses." But their reactions to Elsipogtog give one, he says, "a strong sense of history repeating itself."¹³

It's time for politicians like Prime Minister Stephen Harper and New Brunswick Premier David Alward to grow out of their Wagon Train mentality, and start obeying Canadian law.

Notes

1This slip was pointed out by late-night comedian Jimmy Kimmel. Ford's impunity extends beyond drug-dealing, gang-related activities, sexual harassment, and DUI even to parking violations: his black Cadillac Escalade SUV sat for three hours on November 17 in a no-parking zone outside the Sun Media studio where he was taping a show without being ticketed; see Shawn Jeffords, "Mayor Rob Ford parks illegally," Toronto Sun (17 November 2013), <http://www.torontosun.com/2013/11/17/mayor-rob-ford-parks-illegally>.

2Tess Kalinowski, "TTC rejects controversial Middle East ad campaign," Toronto Star (21 October 2013), http://www.torontostar.com/news/gta/2013/10/21/ttc_rejects_controversial_middle_east_ad_campaign.html.

3See my article "Toronto Transit Commission (TTC) Rejects Ads Concerning the 'Disappearance of Palestine'," Centre for Research on Globalization (2 November 2013), <http://www.globalresearch.ca/toronto-transit-commission-ttc-rejects-ads-concerning-the-disappearance-of-palestine/5356515>.

4James Anaya, "Statement upon conclusion of the visit to Canada," James Anaya: United Nations Special Rapporteur on the Rights of Indigenous Peoples (15 October 2013), <http://www.unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.

5"Seizing Canada's Moment: Prosperity and Opportunity in an Uncertain World," Speech From The Throne (16 October 2013), <http://www.speech.gc.ca>.

6See Corey Snelgrove, "Rex Murphy and the Frames of Settler Colonial War," Corey Snelgrove: Musings: Generally of the Political and Social Variety (21 October 2013), <http://coreysnelgrove.wordpress.com/2013/10/21/rex-murphy-and-the-frames-of-settler-colonial-war/>.

7In exploring this issue, I have benefited from the work of Âpihtawikosisân, "Resources on Elsipogtog," âpihtawikosisân: Law, language, life: A Plains Cree speaking woman in Montreal (23 October 2013), <http://apihtawikosisan.com/author/apihtawikosisan/>.

8Chelsea Vowel, "The often-ignored facts about Elsipogtog," Toronto Star (14 November 2013), http://www.thestar.com/opinion/commentary/2013/11/14/the_oftenignored_facts_about_elsipogtog.html.

9Ibid.

10Michael McClurg, "Do we need the 'rule of law' in New Brunswick to deal with native protestors?" Olthuis Kleer Townshend - LLP (23 October 2013), <http://www.oktlaw.com/blog/do-we-need-the-rule-of-law-in-new-brunswick-to-deal-with-native-protestors/>.

11"Sharing Resources," Interview with Bill Gallagher, CBC Radio One New Brunswick (6 November 2013), <http://www.cbc.ca/shift/2013/11/06/sharing-resources/>. See also Bill Gallagher, "Will the Canadian Native Legal Winning Streak Hit 200?" Bill Gallagher/Strategist/Lawyer/Author (4 August 2013), <http://billgallagher.ca/2013/will-the-canadian-native-legal-winning-0streak-hit-200/>.

12Dru Oja Jay, "Elsipogtog: 'Clashes' 400 Years in the Making: Corporate media coverage creates ignorance, which enables violence," The Media Co-op (18 October 2013), <http://www.mediacoop.ca/story/elsipogtog-clashes-300-years-making/19357>.

13McClurg, "Do we need 'the rule of law'."

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