Indigenous temporal priority and the (de)legitimization of the Canadian state: A book review of *On Being Here to Stay*

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**Introduction**

In the 1997 Delgamuukw decision, Chief Justice Antonio Lamer stated, “We are all here to stay” (Delgamuukw v. British Columbia, para. 186). Michael Asch, in *On Being Here to Stay: Treaty and Aboriginal Rights in Canada*, devotes over 200 pages to the question of “what, beyond the fact that we have the numbers and the power to insist on it, authorizes our being here to stay” (p. 3)? Throughout the book, the ‘we’ of Asch’s question toggles almost imperceptibly. At times it refers to the Canadian state and at other times to the settler population. In the end, Asch

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dismisses the legitimacy of the former to preserve the future of the latter. This review applies a decolonizing critique (Tuck & Yang, 2012), both to place pressure on this slippage between the state and the settler population and to spotlight the risks of preserving settler futurity, subjectivity, and power.

**Delegitimizing Canada's sovereignty to legitimize settlement**

In the context of Canada, decolonization inevitably engages with the topic of temporal priority – who was here first? – and with the complexities of treaty relationships. Asch’s engaging contribution to the discussion serves as both a primer on legislative aspects of these issues and a critical engagement with the debates on contested sovereignties. Drawing on Indigenous knowledge and scholarship, Western political thought, and his research in Indigenous communities, Asch makes two substantial moves to answer the question of what authorizes ‘our’ being here to stay: first, he delegitimizes Canada’s sovereignty over its vast territory on the grounds of Indigenous temporal priority; second, he uses treaties as a ground for viewing settlement in Canada as legitimate. Asch proposes reading treaties as shared understandings between Indigenous peoples and settlers regarding permanent yet open-ended relationships based on kindness, mutual benefit, sharing, obligations, promises, and commitments. Such a reading of treaties is outside Western political thought and is highly indebted to Indigenous knowledges, practices, and interpretations. Asch’s proposition, embodied in a concept of a ‘linking principle’ borrowed from Williams (1997) and Kiotseaton (1645, cited in Schweitzer, 2006), is for the Canadian settler population to fulfill the spirit and intent of the treaties that were negotiated with Indigenous people in order to reconcile our de facto sovereignty with prior Indigenous sovereignty over the same territories. Asch sketches a path that he believes can lead to both Indigenous sovereignty and the persistence of settlement.

*On Being Here to Stay* blends logical argumentation, technical jurisprudence and court case analysis, and textual studies of treaties with creative proposals to move Indigenous-settler relationships forward and (re)negotiate sovereignties. As a reader of this work and as a self-identified settler (as is the case with Asch) who lives on the unceded territory of the Lekwungen and SENĆOŦEN speaking Coast Salish peoples, I come to this review with the intention of engaging with Asch and others who are committed, as I am, to understanding settler peoples’ relationship to Indigenous peoples. In the spirit of pressing Asch’s work further, I attempt to read his text generously while also applying a decolonizing critique inspired by Tuck and Yang’s (2012) ethics of incommensurability. For Tuck and Yang, incommensurability foregrounds what distinguishes decolonization from other social justice undertakings. My review focuses on Asch’s pivotal proposition that prior and continued Indigenous sovereignty over the land we now call Canada undermines the Canadian government’s legitimacy. I also, however, criticize Asch for making arguments regarding historical treaties and contemporary practicalities that justify settlers’ continued occupation of the lands, thus entangling his argument in “resettlement, reoccupation, and reinhabitations” (Tuck & Yang, 2012, p. 1). I present Asch’s main arguments
as accurately as possible while challenging the points that reinscribe colonialism and move settlers to a place of innocence.

**Temporal priority and the (il)legitimacy of the Canadian state**

Asch begins from the premise that it is morally and legally wrong to occupy other people’s lands without their permission, thereby placing the burden of justification on the Canadian state. This formulation stands in contrast to Justice Lamer’s call for reconciling “the pre-existence of aboriginal societies with the sovereignty of the Crown” (R. v. Van der Peet, 1996, para. 31). By recognizing Indigenous sovereignty as prior and therefore legally substantiated, Asch challenges Crown sovereignty over the territory known as Canada, particularly in its relation to Indigenous rights, including land title and self-determination rights.

Asch’s 30-plus years of scholarly activity in the area of Aboriginal rights has helped him develop a clear, concise analysis of the Canadian legislative experience, and he meticulously explicates the legislative history of Indigenous rights. His first two chapters critically examine legal, scholarly, and political approaches toward reconciling Indigenous and Canadian sovereignties. Although the main thrust of his book is on treaty interpretation, he begins with the Calder case put forward by the Nisga’a, claiming title to their territory in a context where a treaty did not exist. Calder v. Attorney-General of British Columbia (1973) demonstrated that, at least in the eyes of the Supreme Court of Canada, Indigenous people have rights, including land title, based on their societies’ existence prior to European settlement. The court failed to find, however, that the Nisga’a maintained their rights when the colony of British Columbia passed legislation asserting its sovereignty. Continuing with cases involving the James Bay Cree, who opposed dam construction on their territory, and the resistance mounted by the Dene, Métis, and Inuvialuit, who jointly resisted a pipeline being built through their territories, Asch brings us up to the 1982 Constitution Act, which severed Canadian colonial ties with the British Crown and established a constitutional foundation for existing Aboriginal and treaty rights. These rights, however, lacked a clear articulation of their substance, particularly on the matters of title and self-determination. Asch explains how negotiations and court rulings such as R. v. Sparrow (1990) and R. v. Van der Peet (1996) have wrestled with issues of Indigenous sovereignty in the context of the Canadian court system. He concludes that, although the courts favour reconciliation through the recognition of rights, they have consistently found that “Aboriginal rights, whatever their content, are subordinate to the sovereignty of Canada” (p. 32), raising the question of how Canada acquired sovereignty over its territory in the first place. To fully explore that question, Asch investigates the temporal priority of Indigenous people on the land and how this fact has been ignored, contested, or dismissed.

To substantiate his position that temporal priority founds robust political rights for Indigenous peoples, Asch devotes all of chapter 3 in response to political scientist Tom Flanagan’s (2008) argument that temporal priority does not apply in the Canadian context. In *First Nations? Second Thoughts*, Flanagan argues five points: (1) that the state form, and
therefore sovereignty as it is understood in international law, was never achieved by Indigenous people; (2) that regardless of temporal priority, international recognition of Crown sovereignty over Indigenous lands legitimizes it; (3) that Indigenous people themselves did not follow rules of priority in that there were multiple waves of Indigenous immigration and multiple changes of sovereignty over the lands prior to European occupation; (4) that recognizing Aboriginal rights is contrary to democracy because it requires treating people differently based on identity; and (5) that European occupation represents a cultural evolution for savage or uncivilized Indigenous people and that Europeanization benefits everyone and therefore justifies occupation. Asch convincingly rebuts Flanagan’s claims by arguing that Indigenous people were organized in societies prior to European contact and that, subsequently, Aboriginal rights – including land title and self-determination – continue to exist into the present. Grounding the principle of temporal priority in legal, political, moral, and logical argumentation, he demonstrates, for example, that within British and international law, temporal priority is a convention that determines how sovereignties are negotiated between states. In reference to the Indigenous peoples of Canada, the question therefore becomes one of meeting a European-imposed criterion for the recognition of statehood. Flanagan argues that Indigenous people did not live in states, principally because at the time of contact they did not intensively cultivate a clearly demarcated territory and they lived in political communities that lacked sovereignty. In contrast, Asch argues for “equality in standing,” such that, “the principle of temporal priority is the presence of an organized society, not the specific form that it takes” (p. 38). He argues further that Indigenous sovereignty cannot be nullified by the exercise of Crown sovereignty or its recognition by the international community. Contrasting a rich history of Indigenous political organization and resistance to colonization with a Eurocentric idea of cultural evolution and international convention, Asch provides the groundwork for his central questions regarding “the consequences of setting up a political community in the territory of an existing political community without permission” (p. 58).

**Settler power, futurity, and subjectivity**

Canada, being a signatory to the 1960 United Nations Declaration on Decolonization, is no different from other settler colonies in having an international legal responsibility to recognize the right to self-determination of Indigenous peoples who were living here prior to settlement. Asch contends, however, that settlers will avoid accepting legal arguments for this right because of its implications. He predicts that Canada’s position will be ultimately determined not by the Supreme Court but by the majority of Canadians. In his words, “the matter is simply too consequential for the Settler majority to respect this principle [of self-determination] solely on the word of nine individuals” (p. 72). Further, in his view, to ask the majority settler population to recognize Indigenous peoples’ right to self-determination “is to virtually ensure that we will ‘choose against it’” (p. 72). He therefore proposes “an approach that encourages [the settler population] to see that the legitimacy of our settlement on these lands is not opposed to the fact
that there were people here living in fully self-determining political societies when we first arrived” (p. 72).

Here Asch makes two assumptions that lead to a moderate and concessionary approach toward decolonization: first, that real power rests in the hands of the majority of Canadians, and second, that such a majoritarian population will deny arguments based on temporal priority due to the implications they bring about. Asch fails to fully consider either the full forces of Canadian law or the subjective dimensions of settler subjectivity. On the first point, Asch himself puts forward a convincing summary of Supreme Court rulings that indicate that Canadian courts are willing to find in favour of Indigenous peoples and uphold their rights against the majority’s favour. This thrust has come to further fruition in the years since the book’s publication with the Supreme Court finding of Aboriginal title in the Tsilhqot’in case (Tsilhqot’in Nation v. British Columbia, 2014). Although the power of the courts undoubtedly depends on the government and the populace’s enactment of their judgments, Asch’s argument that majority power will curtail judicial solutions is overextended. There is insufficient evidence to support the assumption that judgments in favour of Indigenous rights, sovereignty, or self-determination will be undermined by the disapproval of the Canadian majority. It is unacceptable from a decolonizing perspective to argue that because settlers are unlikely to willingly accept what is due to Indigenous peoples by right and reason, an alternative to decolonization must be encouraged.

Relatedly, I find Asch’s second assumption – that the majority of Canadians will deny Indigenous temporal priority due to the consequences that follow – overly pessimistic. While Canadian public opinion may be against the full enactment of Indigenous rights at this time, it may not remain so indefinitely. Shifts in opinion are possible as settlers become educated about their own history and responsibilities. A great push in this direction is the recent Calls to Action put forward by the Truth and Reconciliation Commission of Canada (2015) and the recent moves in BC to include the history of residential schools in public education curriculum. Asch himself acknowledges a subjective dimension to the question of settlement when he ventures that denying temporal priority to Indigenous peoples hinges on settlers avoiding identifying ourselves as thieves (p. 99), but he does not fully explore the possibilities of settlers engaging such identifications. Furthermore, there is little discussion of the minority settler population that stands in support of decolonization and Indigenous self-determination. In chapter 9, Asch does turn to the idea of changing public opinion and “setting the record straight” such that Canadians become more fully aware of their histories and lawful responsibilities. He proposes that, to transcend current colonial relations, settlers recognize themselves, both historically and in the present, as an honourable people who must live and act according to the principle of law. Asch is able here to underscore the importance of changing settler consciousness in favour of his position, but he does not appear to see the possibility of settlers changing in another, perhaps more radical, direction (e.g., Fitzmaurice, 2010; Kouri & Skott-Myhre, 2015; Morgensen, 2011; Regan, 2010; Ritskes, 2013; Veracini, 2008).

Notwithstanding these two criticisms, the remaining chapters take sizable steps in proposing that, at least in territories with treaties, there is a justification for settler occupation
that offers new possibilities for Indigenous-settler relations. Using specific treaties as examples, Asch encourages a view of settlement as legitimate in that settlers gained consent to occupy territory from sovereign Indigenous societies who had the authority to grant it. He argues, however, that although permission to occupy land was granted, the intention was that it be shared in exchange for mutual benefits, not that Indigenous sovereignty be extinguished.

**Cede, release, and surrender**

The main point of contention in virtually all contemporary interpretations of Canada’s treaties with Indigenous peoples is the cede, release, and surrender clauses they contain. These clauses appear to be clear and irrefutable. The one in Treaty 4, for example, reads as follows:

> The Cree and Saulteaux Tribes of Indians, and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever all rights, titles and privileges whatsoever, to the lands included within the following limits. (cited in Asch, p. 76)

However, while for settlers and the Canadian state the clauses meant a complete transfer of sovereignty, Asch tells us that Indigenous people “speak with one voice in asserting that what the Crown asked for was permission to share the land, not to transfer the authority to govern it” (p. 77).

To fully grasp the promises and exchanges made in treaties, Asch argues, a literal and decontextualized reading of treaty documents is insufficient. He cites archival evidence in the form of Indigenous and settler accounts of treaty negotiations to document that the written treaty texts did not accurately reflect the oral negotiations. This approach has legal merit: as recognized by the Supreme Court of Canada in R. v. Badger (1996), the treaty document is a written record of an oral agreement and cannot fully capture the oral negotiations. What Asch specifically argues is that the ‘cede and surrender’ terms that appear in the written texts were not part of the oral negotiations. Importantly, according to the evidence he presents, the spirit and intent of the treaties more closely resembles Indigenous reports than contemporary settler interpretations. Asch then makes the controversial claim that the Crown negotiated in good faith and intended to act honourably and fulfill its treaty promises. The way forward, he argues, is by believing that the Crown negotiated honourably and accepting the interpretations of treaty agreements that Indigenous peoples continue to offer through oral history and documentation.

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2 Following the Royal Proclamation of 1763, which ostensibly recognized and protected the original inhabitants and their territorial integrity, hundreds of treaties were negotiated between settlers and Indigenous peoples around issues of alliance and peace, trade and commerce, and the allocation and occupation of land. Settlers negotiated 11 numbered treaties between 1871 and 1921 to obtain permission to settle on previously occupied lands, guaranteeing in exchange what are now known as treaty rights, or Aboriginal rights.
While Asch clearly believes that “reporting on the disjuncture between promises and implementation can influence governments to act in conformity with the commitment that we made” (p. 162), the honesty and honour he ascribes to Crown negotiators is irreconcilable with the evidence he himself presents. If, as he claims, negotiations did not explicitly deal with the surrender of territory and sovereignty, it is difficult to explain how cede and surrender clauses found their way into the treaty documents except by unlawful – and therefore illegitimate – means. I am left unconvinced that the treaty writers – or at the very least the states that they spoke for – did not intend to extinguish sovereignty. For Asch, however, overlooking this discrepancy is our best hope and he frames it as a simple choice:

If we take the view that we lied, the treaties become worthless pieces of paper and we are back to square one. But if we take the view that we meant what we said, they become transformative, for through them we became permanent partners sharing the land, not thieves stealing it, people who are here to stay not because we had the power to impose our will, but because we forged a permanent, unbreakable partnership with those who were already here when we came. (p. 99)

Here again, Asch slips between the “we” who negotiated treaties and the “we” who may be “back to square one.” Elsewhere, he details how treaties were negotiated between Indigenous peoples and the Crown rather than with the Dominion of Canada. At best, however, his interpretation merely shifts the subordination of Indigenous peoples from the Dominion to the Crown, without preserving Indigenous sovereignty strongly enough. However, notwithstanding these criticisms and the complexities of analyzing treaty negotiations, Asch’s proposal may provide an avenue for formulating new relationships based on a possible shared understanding of terms that legitimize settler occupation but preserve, at least minimally, Indigenous sovereignty.

The incommensurability of linking and decolonization

Asch devotes chapters 6, 7, and 8 of his book to exploring how treaties provide a means to understand Indigenous-settler relations as permanent, open ended, and based on mutual benefit. Claiming that he is not attempting to erase the unjust treatment of Indigenous peoples that has occurred since the treaties were first agreed upon, Asch contemplates, “what implementation in good faith would constitute were we to assume that today we are at the beginning and... are now planning on implementing the political relationship to which we agreed” (p. 100). Importantly, he acknowledges that any way forward must be made with the consent of Indigenous peoples. To develop his proposal, Asch explores the concepts of nation-to-nation relationships and Indigenous-settler coexistence, particularly through Indigenous mechanisms such as the Two Row Wampum agreement between the Haudenosaunee and the Dutch, and then the British, Crowns, and the Cree concept of witaskewin. In mobilizing these strategies, Asch does not explore the complexities of using particular Indigenous practices to arrive at an assurance that “the treaty relationship alone is sufficient to ensure that [settlers] are here to stay” (p. 119).
However, employing these Indigenous concepts engages the nuances of specific treaty understandings while providing settlers with a very general way forward. By the end of the book Asch suggests that settlers adopt a single principle, simplified as ‘do no harm,’ to “orient not only how we interpret all clauses in all treaties but also our interactions with those with whom we have yet to negotiate agreements” (p. 151).

Problematically, Asch does not deal with the politics of using Indigenous representations to further settler reoccupation, bordering on a colonial appropriation of Indigenous knowledge. While his interpretation of the Two Row Wampum and witaskewin seem well supported by Indigenous and settler scholarship, his deployment of them risks what Coulthard (2014) discusses as the assimilative power inherent in state dialogues with Indigenous peoples. For Coulthard, when Indigenous discourse enters into a dialogue with settler power, analyses of economic, military, and political hegemony are always necessary to protect against settler appropriations. Asch’s engagement with Indigenous thought and representations could therefore benefit from greater analysis of material and discursive state power, including a delineation of the checks that must be in place to prevent appropriation and assimilation.

Asch puts forward his “linking principle” (p. 118), based on Lumbee scholar Robert A. Williams Jr.’s (1997) work on American Indian treaty understandings, as his formulation for future relationships grounded in good faith. The linking principle states that settlers have a right to be here and are joined in a permanent relationship with Indigenous people, despite not having sovereignty over the territory we occupy. Contrary to the Westphalian conception of sovereignty, which necessitates that distinct nations be separated by a border and not occupy the same territory, the linking principle understands Indigenous-settler relationships in terms of kinship, marriage, and the joining of two families. Through treaties, Indigenous and settler peoples “became relatives” (p. 125), with each party belonging to both families and sharing the responsibility to sustain them both. This is obviously a paradigmatic shift from a Eurocentric conception of relationship and sovereignty toward an understanding founded in Indigenous principles. The linking principle connects two families on territory that originally belonged to one of them, yet maintains some distinctness between them, and “even though one partner has sovereignty (to use our language), they are equal nations in that each remains autonomous and yet requires the other to survive” (p. 130). Asch uses the metaphor of building a house together. He insists that we settlers learn from Indigenous people, fulfill our promises to act with kindness and beneficence, and transform what we have understood as Indigenous rights into settler obligations (p. 149). His vision therefore hinges on not only the consent of Indigenous people for its realization, but also on a paradigm shift in settler understandings of their commitments and relationships with Indigenous peoples. Such a shift encourages the reestablishment of Indigenous sovereignties, yet may still be incommensurable with decolonization because it moves toward what Tuck and Yang (2012) call settler innocence, futurity, and reoccupation.

Tuck and Yang (2012) emphatically state that, “decolonization brings about the repatriation of Indigenous land and life” (p. 1). Asch indeed advocates for Indigenous sovereignty while also moving settlers to a more innocent position vis-à-vis the continued and
permanent occupation of Indigenous lands. Specifically, by reading treaties as a means to reconcile settlers being here to stay with the reality that there were people already here when Europeans arrived (p. 152), Asch reinvests in a future replete with settler presence. In terms of adopting Indigenous knowledge and treaty interpretations and representations to provide settlers a way forward, I will press my concerns (following Coulthard) on appropriation further by suggesting that this move is formed in a “desire to become without becoming [Indian]” (Tuck & Yang, 2012, p. 14, italics in original). Tuck and Yang explain that settlers persistently adopt native lands, customs, and people to absolve them of their “inheritance of settler crimes and that bequeaths a new inheritance of Native-ness and claims to land (which is a reaffirmation of what the settler project had been all along)” (p. 14, italics in original). Asch walks a dangerous line by inserting metaphors of shared home building and kinship in the process of land repatriation. Following Cree interpretations of Treaty 6, for example, he argues that settlers and Indigenous people adopted one another (p. 125). He goes further to suggest that it is not only necessary that both families support each other’s survival, but that a shared house be built, “in which we can both live” (p. 132). Asch takes great care to engage with Indigenous knowledge in his construction of a shared future, yet his work omits engagements with more critical theorists that advocate refusal (A. Simpson, 2014), rejection (Coulthard, 2014), and decolonization (Tuck & Yang, 2012). In his one engagement with Anishinaabe intellectual Leanne Simpson, he paraphrases her reflections on Indigenous protocols for linking with animal and human others only to insert settlers as “new participants” (p. 132) in these house- and family-building practices. Another glaring omission, which is beyond the scope of this review, is an engagement with how contemporary capitalism functions in the Canadian settler state and how this again makes the problem of settlement more one of power and objective circumstance (Coulthard, 2014) than of misunderstanding, interpretation, and settler reason.

In the end, On Being Here to Stay provides a framework for unsettling the sovereignty of the Canadian state through reassessing decades of court litigation and centuries of treaty negotiation. Asch offers an accessible introduction to the complexities of Indigenous-settler relationships, a nuanced interpretive framework for thinking about treaties and court proceedings, and a compelling vision for a way forward. On Being Here to Stay is an excellent introduction for the newcomer to treaty law and Aboriginal rights, and a provocative, creative work for those interested in rethinking relationships between Indigenous and settler peoples. Asch makes a substantiated argument that plays on the fine border between understanding settlement as illegitimate, in that it was done on lands that were already occupied, and an interpretation that settlement was legitimate because treaties were negotiated in good faith. While his vision depends on considerable shifts in thinking at individual and public levels, he proposes little beyond general consciousness raising and public education to facilitate such a qualitative change. Asch proposes that the way forward is to help settlers see their settlement as justifiable pending the fulfillment of promises made during treaty negotiations. I believe a more substantial interrogation of the subjective dimensions of settlers is warranted, both of those who remain embedded in a colonial mentality and those who are working in solidarity toward
Indigenous self-determination. Furthermore, while Asch’s proposals are directed mainly toward settlers in the hopes of justifying our settlement, there is strikingly little acknowledgement of the Indigenous scholarship that is calling for decolonization in the more radical form of repatriating Indigenous lands. While treaties may offer settlers “the means to reconcile the fact that we are ‘here to stay’ with the fact that there were people already here when we arrived” (Asch, p. 152), decolonization authors such as Tuck and Yang (2012) do not take the facticity of our permanence for granted. For those who are interested in reconciliation, it is unarguable that “returning to the promises we made in the treaties gives us a purchase on where to begin now” (p. 149). However, the more radical interpretation of decolonization as repatriation of Indigenous life and lands is by definition incommensurable with validating our settlement, subjectivity, and future.

References


