Promises Unkept: The Erosion of Indigenous Sovereignty in Canadian Federalism

Term Paper

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Introduction

The roots of Canadian federalism lie in an attempt to reconcile and balance the political desires of both French and British settlers. However, the practice of federalism predates the 1867 Confederation, as political elites from predominantly British and French regions began exercising what can be described as "self-governing communities... proportionality [and] consociationalism" (Federalism in the 21st Century, p. 25). This early form of federalism was founded on principles articulated by the Fathers of Confederation, who stated that the Confederation proposed in 1858 differed from the United States. They argued that, unlike the American system, it did not derive its authority from the people but rather from the Imperial Parliament, which they believed cleansed it from any defect (Constitutional Odyssey, p. 3).

Such words contrasted to a letter written later in 1990, which stated that "the Constitution belongs to the people of Canada, [who are] the ultimate source of sovereignty in the nation" (Constitutional Odyssey, p. 3). This evolution of thought highlights the tension between foundational views of federalism and its modern interpretations, as well as implying the desire to evolve in order to fit society's standards.

In contemporary practice, Canadian federalism operates without a single central authority. Instead, power is distributed between two primary orders of government: the federal government and the provincial and territorial governments. Both levels are democratically elected, reflecting the Greek roots of democracy *demos* (people) and *kratos* (power). The Constitution outlines each order's jurisdiction, ensuring a balance of power and preventing any single entity from monopolizing authority.

While federalism theoretically distributes authority in a balanced manner, Canadian federalism has failed since its inception to incorporate the governance structures and beliefs of those who lived on this land before the arrival of settlers. From its colonial roots, Canadian federalism has systematically marginalized Indigenous governance structures, failing to honor Indigenous sovereignties. By examining the British North America Act and critical aspects of First Nations and Métis histories—particularly the Indian Act, the White and Red Papers, the Manitoba Act. This essay critiques the gap between the promises of Canadian federalism and its realities.

Colonial foundations of Canadian Federalism

The idea of the "new World' began with the doctrine of discovery. The word *doctrine* originated from the Latin word "*doctrina'* meaning instruction or teaching, Contextual to colonialism it implies teachings that are deeply rooted in ideological or religious traditions[1]. Whereas the term *discovery* stems from the old French world *descovrir,* which means to unveil or expose a general understanding of the term means "to find"[2]. Over time, the concept of the doctrine swayed from the 'first experience' to "'finding' land, a nation and even peoples"[3]. The doctrine of discovery was rooted in the idea of superiority with a particular emphasis on race, class and language. The ideologies that underpinned early colonialism in the "New World" were shaped by a constrained imagination, and a limited flow of information. These limitations laid the foundation for the doctrines of discovery, which served to justify colonial expansion. This perspective fostered a supremacist worldview, where those who did not share imperialist

[1] 1. "Doctrine (n.)," Etymology, accessed December 1, 2024, https://www.etymonline.com/word/doctrine.
[2] 1. "Doctrine (n.)," Etymology, accessed December 1, 2024, https://www.etymonline.com/word/doctrine.
[3] 1. Robert J Miller et al., "The Doctrine of Discovery in Canada," *Discovering Indigenous Lands*, August 5, 2010, 94, https://doi.org/10.1093/acprof:oso/9780199579815.003.0004, 94.

religious beliefs or failed to conform to them were deemed lesser beings. Such individuals were consequently afforded diminished rights—lesser rights to liberty, property, and even life itself. This dehumanizing logic was applied broadly to the Indigenous peoples of the so-called "New World[4]."

The search for new land brought forth new agreements and in the context of Pre-Confederation one agreement is known as the Royal Proclamation 1763. This document introduced the concept of "peace, welfare and good government and is fundamental in both Canadian legal history and the histories of First Nations. The Proclamation was not just a formal policy but the first part of a treaty that codified the Crowns relationship to the First Nations as well as recognizing how "First Nations were not passive objects but active participants, in the formulation and ratification of the Royal proclamation"[5]. The second Part of this agreement was the Treaty of Niagara accepted 1764. This treaty extended the provisions of the Proclamation and emphasized that Indigenous perspectives went beyond written agreements[6]. Furthermore, simply, reading one part of the treaty would "conceal first nations perspectives and inappropriately privilege one culture s practice over another"[7].

Following the Royal Proclamation of 1763 the next document that mentioned Indigenous peoples was the British North America Act more commonly known as Constitution act 1867[8].The BNA act was crucial to the formation of the Dominion of Canada, emerging in

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[4] 1. Robert J Miller et al., "The Doctrine of Discovery in Canada," *Discovering Indigenous Lands*, August 5, 2010, 94, https://doi.org/10.1093/acprof:oso/9780199579815.003.0004, 94.
[5] 1. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," essay, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, n.d., 155–72, 169.
[6] n.d
[7] 1. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," essay, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, n.d., 155–72, 170.
[8] Chadwick Cowie, "Reconciling Canadian Political Science: Including Indigeneity in the Discipline.," *TBD*, 2024.

response to the rebellions, and was the “first time that a colony of a European empire had achieved independence without going to war”[9].Furthermore such document formed the political and economic union that included Quebec[10], whereas it excluded the Indigenous peoples, particularly in the drafting of the Constitution. Indigenous nations were not seen as participants in Confederation, and their fiscal relationship with the Crown assuming control, over Indigenous governance through imperialism[11]. This exclusion highlighted the colonial bias that persisted even as settlers pursued partial independence from the British empire. Furthermore, the Constitution Act, 1867 granted power that entirely almost rested with the federal government heavily centralized[12] such that some powers enabled the “federal government to override provinces in certain circumstances”[13]. This centralization of power reflected the settlers' desire for control, but it also reinforced the exclusion of Indigenous peoples, whose rights and governance were sidelined in the process.

In the decades following confederation, provincial governments sought to assert their autonomy, desiring a clear framework based on "formal rules and principles" rather than broader theoretical debates on liberal democracy[14]. Ontario emerged as the "heart and soul" of the provincial rights movement, largely due to the province's strong push against the centralization[15].

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[9] 1. John Saul, “Imagining a Fair Country,” essay, in *A Fair Country: Telling Truths about Canada*, n.d., 156, 156.
[10] 1. Herman Bakvis and Grace Skogstad, “Canadian Federalism: Performance, Effectiveness, and Legitimacy,” essay, in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, n.d., 8.
[11] 1. Sari Graben and Matthew Mehaffey, “Negotiating Self-Government Over & Over & Over Again: Interpreting Contemporary Treaties,” essay, in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, n.d., 181.
[12] 1. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press, 2004), 17-18.
[13] 1. Ronald Watts, “COMPARING FEDERAL SYSTEM IN THE 1990s: Canada,” essay, in *Comparing Federal Systems in the 1990s* (Queens University, 1996), 21.
[14] 1. Robert C. Vipond, “Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada,” *Canadian Journal of Political Science* 18, no. 2 (June 1985): 267–94, https://doi.org/10.1017/s0008423900030250, 268.
[15] N.d

Initially, Confederation was presented as a partnership between the federal and provincial governments, however reality was quite the opposite. This shift towards provincial right brought forth the 1896 federal election. Which marked a pivotal moment in Canada's political evolution. The Liberal party, under Wilfrid Laurier, advocated a more decentralized system of governance, promoting greater provincial autonomy. Laurier's support, particularly in Quebec, was driven by his commitment to preserving cultural rights for the French-speaking minority, which resonated with the provincial rights narrative. Furthermore, While Quebec fought to preserve its unique cultural identity, Indigenous sovereignty continued to be ignored. The Judicial committee of the Privy Council ruled in favor for provincial rights but continued to exclude Indigenous nations from these considerations. This reflects the colonial structures that persisted in Canadian systems, which, while fighting for autonomy, neglected the rights of Indigenous peoples, highlighting the rigid colonial mindset still embedded in the system.

Constitution act 1867 in particular section 91 (24) wrote "Indians and lands reserved for Indians ", this section placed Canada in a position of conflict of interest, for at one hand it was responsible for Indigenous peoples and their land as well as responsible for "negotiating treaties and purchasing their land for the crown"[16]. Eight years later we see the Indian act, 1867 which aimed to consolidate "impacted Indians" into once policy. Such policy codified that Status Indians are to be considered wards of the state. This perception is damaging not only because it places First Nations at the same standard of children Implying the need to be monitored. Additionally, depicting Status Indians as children undermines their own political processes and history that built the backbone of Canada. This framing is not only disrespectful but also

[16] 1. Bob Joseph, "The Indian Act," essay, in *1 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality.* (Indigenous Relations Press, 2018), 7.

perpetuates a colonial narrative that denies Indigenous nations their agency, sovereignty, and contributions to the foundation of the country. It reflects a lingering colonial mindset that seeks to infantilize Indigenous peoples rather than recognize their inherent rights and political systems, which existed long before confederation.

In response to the provincial rights movement patriation of Constitution act 1982 was seen as a turning-point of ideological transition, from a centralized model of government to a decentralized balanced one. However, mistaking that constitution act 1982 is totally new is false for "most of the original 1867 Constitution was retained intact"[17]. The changes in the Constitution act 1982 included Canada being recognized as a sovereign nation, recognition of "Métis as one of Canada's Aboriginal peoples"[18], The Canadian Charter Rights and Freedoms was included within constitution Act 1982, "The existing rights of Canada's aboriginal peoples were constitutionally recognized"[19]. Such denoted ownership, which is heretical to consider for the Indigenous peoples existed long before settlers arrived and therefore the language, in the Constitution act is not only disrespectful but also false contextual to history.

Historical Marginalization of indigenous sovereignties

Marginalization of the Indigenous Nations began 1763 alongside the Royal Proclamation. The best way to understand this is revisit the Wampum at Niagara, the second part of a critical treaty accepted between the Crown and the Indigenous peoples of the land. As mentioned previously, reading the Proclamation is not enough to understand this relationship. Failing to

[17] 1. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press, 2004), 124.
[18] 1. GERHARD ENS and JOE SAWCHUCK, "Introduction," essay, in FROM NEW PEOPLES TO NEW NATIONS: Aspects of Métis History and Identity from things; Eighteenth to the Twenty-First Centuries (University of Toronto Press, 2016), 3.
[19] 1. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press, 2004), 124.

incorporate the Treaty at Niagara disrespects Indigenous institutions that governed for centuries. The Wampum of Niagara, from the settler perspective was viewed to be insufficient due to the lack of written language, but the reality is that they were unwilling to accept something different, they feared diversity for it might invalidate Imperial supremacy.

Over time, settlers and Canadiens entered relationships with Indigenous women, leading to the birth of a distinct Métis people by the early 19th century, the growing Métis population established communities along the Red River and Assiniboine River, in what is now Manitoba[20]. These Métis communities became integral to the western fur trade, providing essential labor for the Northwest Company (NWC), a trading partnership formed by Montréal merchants between 1779 and 1804[21]. In the 1760s, Lord Selkirk, a Scottish noble, sought to "establish an agricultural colony in the red river, which posed an immediate threat to the Northwest Company" and the Métis and Indigenous who relied on the resources[22]. The Métis, recognized by the NWC as a distinct people with rightful claims to the region, resisted Selkirk's invasions. The Métis unrest reached a tipping point in 1816 in the Battle of the Seven Oaks, supported by the Northwest Company and led by Cuthbert Grant the Métis attacked and pillaged Hudson Bay Company posts, later encountering Governor Semple the leader of the Selkirk settlement resulting in a Métis victory. This event symbolized their determination to defend their land, culture, and the establishment of their nationhood. Despite this assertion of nationhood, the Métis and Indigenous peoples were increasingly marginalized in the decades that followed. The Red River Settlement foreshadowed the broader displacement and exclusion of Indigenous nations from Canada's

[20] 1. JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press, 2000), 162.
[21] N.d. 161
[22] N.d 164

political and economic systems, laying the groundwork for their continued struggle for sovereignty and recognition.

Following the Red River Resistances the Manitoba Act came into effect in mid 1870s, Manitoba entered the dominion as a province instead of a territory[23]. At the time the provincial power was rendered useless, for the dominion retained control over the natural resources and the crown land. The final element of the Manitoba act that came into fruition was the clause concerning land. Individual landholders were granted security, 1.4 million acres was set aside among which 240 acres would be granted to Métis families residing in the province at the time of Manitoba's inclusion in Canada[24]. This provision was meant to address immediate land concerns and acknowledge Métis claims. Unfortunately, land grants resolved short term concerns but failed to establish a means of cultural and economic preservation for the Métis due to the lack of collective land.

Prior to the 1982 Constitution, there was two papers published associated with Indigenous affairs, the first commonly known as the white paper was presented to the first session of the 28th Parliament by the Right Honorable Jean Chretien. Canadian Indian, this collaboration of words, denotes ownership undermining indigenous sovereignty. Additionally, "If Indian people are to become full members of Canadian Society they must be warmly welcomes by that society"[25], Such wording may seem to imply acceptance at first, but why is they're a need for status Indians to be accepted when it could be argued the other way around since the reality is that this land, we live in is multinational. I understand such terminology is

[23] 1. JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press, 2000), 204
[24] N.d
[25] 1. Ministry of Indian Affairs and Northern Development, Indian Policy § (1969).

often addressed in an international context, but indigenous peoples have their own institutions, they have their own treaties and have the capacity to be independent. The wording in the foreword implies the need for Indigenous to assimilate to Canadian society. “The goals of the Indian people cannot be set by others…but government can create a framework within which all personal groups can seek their own goals”[26]. This suggested framework is aimed toward removing the presence of status Indians. Though the language implies It is as a suggestion but the reality, is that the Canadian government wished to erase the history/ relationship/ and uniqueness of the indigenous Nations that existed long before the Proclamation.

It's colonialisms nature to absorb and assimilate, uniformity is its goal. Citizens plus, more commonly known as the Red Paper, was published in response to the White paper. The goal of the White Paper was to dismantle the distinct political and legal status of indigenous peoples in Canada, and this was proposed “under the guise[27] of land ownership” which in the long term would result in nothing left for the future generations resulting in most living in urban ghettos. Similar to many governmental publications the Indigenous peoples were not part of the discussion to abolish treaties, abolish Indigeneity of the various nations. The White paper implied that that it was a privilege to have a relationship with the Crown to which the Red paper argued it was a responsibility originating from agreements/treaties such as the Royal proclamation and the Wampum in Niagara. The Royal Proclamation was the first document that codified the relationship the Indigenous have with the Crown but over time, such wording was applied to support the colonizer’s desires, from equal partners to wards of the state.

Legal and constitutional barriers

[26] 1. Ministry of Indian Affairs and Northern Development, Indian Policy § (1969).
[27] 1. Ministry of Indian Affairs and Northern Development, Indian Policy § (1969).

Despite miniscule advances towards the recognition of Indigenous rights through Landmark cases, the Canadian legal system remains rooted with colonial structures. While supreme court cases such as Calder (1973), Delgamuukw (1997) and Tsilhqot'in (2014), have fought for certain indigenous rights. Such decisions still fall short from recognizing Indigenous sovereignty. This section will examine how Canada's constitution and legal framework have limited Indigenous recognition, by critically analyzing each cases limitations as well as the implication of decisions successes.

The issue surrounding Calder 1973, legally speaking was a land claim but for the Nisga'a It was a step toward their rights to occupied lands by settlers[28]. The Nisga'a campaigned along with other British Columbia Nations but were refused by three levels of government: Federal, Provincial and Imperial. Following such behavior the Canadian Parliament banned fundraising to help support land claims. Despite all the backlash the Nisga'a Nation launched a new effort in the 1950s after the prohibition on fundraising was repealed and was Canada's most importance case on the law of the Indigenous title. Calder et al argued that the Indian title had never been abolished and it had been agreed that "territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia" was Nishga community land and that the rights with the title were violated[29]. The argument was dismissed to be later appealed. This initial decision highlights how colonial legal frameworks structurally prevent Aboriginal land claims. As per the Royal proclamation 1763 the Nishga Nation argued the agreement applied to their respective territories.

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[28]1. Christina Godlewska and Jeremy webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a," essay, in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007), 1.

[29] 1. Christina Godlewska and Jeremy Webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a," essay, in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007), 1.

The court argued that "the history of the discovery and settlement of British Columbia demonstrated that the Nass valley, and indeed, the whole province could not possibly be within the terms of the Proclamation" the reasoning being that the area did not come under British Sovereignty until the Treaty of Oregon in 1846[30]. Therefore, the Nisga'a Nation was excluded from the proclamation. The court was split due to the variety in decisions, one side argued that the Aboriginal title had been extinguished

Whereas the dissenting argument from the court was that the "Native peoples have no rights at all except those subsequently granted or recognized by the conqueror" which was false as there are multiple sources of common law stipulating that "Aboriginal rights to possession and enjoyment of lands of Aboriginees precisely analogous to the Nishga situation"[31]. While the issue was not settled it was a very important case as it was the first time the court recognized the Aboriginal title existing in Canada.

Delgamuukw 1997, is a unique case for prior to such ruling, the reality of oral treaties/agreements had been ignored to support the Settler practice of the written word. The initial ruling of this case was that oral evidence presented by the Gitxsan and Wet'suwet'en in their land claim was a myth and had to have clear connection with written or expert evidence to be considered valid in the legal proceedings. Supreme court overruled this ruling 1997, highlighting that Indigenous legal traditions and oral histories should be govern proper weight in land claim cases, Chief Lamer went as far to say oral evidence should be excluded but recognized as valid legal evidence[32]. Though such ruling represented an advancement toward

[30] N.d, 314.
[31] N.d, 216.
[32] 1. Reid Gomme, "Delgamuukw v. British Columbia: When Aboriginal Voices of Law Were Finally Heard," *Political Science Undergraduate Review* 3, no. 1 (February 15, 2018): 32–36, https://doi.org/10.29173/psur46.

accepting Aboriginality, it failed to set proper guidelines to help better understand on the use of Oral evidence contextual to land claims. Additionally, the initial ruling represented the colonial distaste toward ingenuity especially with the use of terns "Myth, legend and folklore"[33].

Like Calder, Tsilhqot'in Nation is a grouping of six bands living in Central British Columbia. Like most First Nations in BC, many had no formalized written documents with the crown. Tsilqot'in Nation initially launched a lawsuit in 1883, challenging resource licensing, in particularly with the logging industry in their traditional territory[34]. Later in 1998 the Tsilqot'in Nation amended their lawsuit to include the claim of the Aboriginal title over their respective territories. This change marked the beginning of the effort to prove that Tsilqot'in Nation did indeed have a claim on 1750 square kilometers of their traditional land. After more than two decades supreme court reached a ruling in 2014, citing that the Tsilqot'in Nation did indeed hold the Aboriginal title to the 1750 square kilometer of land. This case is unique because it was the first time the court accepted that Aboriginal title was accepted over a specific area of land.

Conclusion

In conclusion, Canadian federalism has consistently fallen short in honoring and recognizing Indigenous sovereignty, from its colonial foundations to contemporary constitutional and legal frameworks. While cases like Calder (1973), Delgamuukw (1997), and Tsilhqot'in (2014) have marked progress in recognizing Indigenous rights, they have not delivered full sovereignty, thereby failing to fulfill promises that date back to the Royal Proclamation of 1763. The limitations of such rulings depict that legal recognition is a critical step, but it still fails to

[33] N.d.
[34] 1. Brenda Gunn, "Case Note: Tsilhqot'in Nation v British Columbia 2014 SCC 44," *Indigenous Law Bulletin*, 2014, 27–29, https://search-informit-org.myaccess.library.utoronto.ca/doi/10.3316/ielapa.767501902265462.

grant self-governance as well as freedom of Indigeneity. The Canadian legal system remains entrenched in colonial structures such as Section 91(24) of the British North America Act and the Indian Act, which enable the federal government to maintain control over Indigenous affairs. These barriers perpetuate the marginalization of Indigenous governance systems and traditions, restricting their ability to operate as equal partners within the Canadian federation. Ultimately, the gap between the agreements of Canadian federalism and its outcomes underscores the absence of meaningful recognition of Indigenous sovereignty. Despite constitutional promises and landmark legal decisions, the failure to fully implement these agreements has resulted in persistent inequality. Addressing this gap requires a fundamental shift in how Canada approaches Indigenous rights and governance, prioritizing true reconciliation and the full recognition of Indigenous nations as sovereign entities.

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