

Governing over Contradictions of Law and Indigenous Rights

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Canada proudly calls itself multicultural and accepting, yet it continues to struggle in its relationship with the Indigenous peoples of the land. Since the beginning of colonisation, European settlers have ignored the sovereignty of Indigenous peoples by assuming ownership over their affairs and lands, despite the laws and written agreements made between them. Even though the government has made several promises for reconciliation and the establishment of a “nation-to-nation relationship,” Indigenous peoples do not have direct legislative power.¹ This discrepancy between written laws and the government’s actions reveals inconsistencies between the image it wants to portray and its actions on Indigenous rights. Major constitutional changes are necessary to enact the promised principles of reconciliation. In this paper, I explore the discrepancies between governmental action and promise regarding its relationship with Indigenous peoples, in an effort to understand contradictions in the law. By highlighting the government’s failure to make substantial progress on written promises in laws and policies, I ultimately argue that the current weighing of principles is preventing the establishment of a nation-to-nation relationship within Canada.

The government, as a body of lawmakers and implementers, is only bound to the laws it creates to the extent that it allows itself to be. Although they claim to treat all people equally and honourably, nothing legally binds them to moral action. To maintain public support, government officials feel obligated to act morally or to take a stand on certain issues, but it seems as though most people in power are more concerned with advancing their own agenda than respecting all peoples.

For instance, the rights of Indigenous peoples have been consistently ignored throughout history. In written law, treaty rights were recognised in 1982 with the enactment of the *Charter of Rights and Freedoms*. Section 35 of the Charter solidifies the agreements made between the settlers and the Indigenous Peoples of the land.² These rights vary from one treaty to another and are not easily defined, but the government formally recognises that Indigenous groups have the right to self-government.³ In practice, however, these rights are not well respected, as is demonstrated by the many court cases in which Indigenous peoples have had to fight for their rights.⁴ It seems as though government leaders easily forget about the rights of the Indigenous peoples as they work on their own agendas. In 2018, Prime Minister Justin Trudeau recognised that Indigenous peoples in Canada should not have to fight for their rights, and he has promised to facilitate a better relationship between the government and Indigenous peoples.⁵ This kind of promise is not new: in 2015, the Truth and Reconciliation Commission of Canada (TRC) suggested several calls to action, including the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶ According to a TRC tracker, only ten of the ninety-four recommendations have been implemented thus far, and thirty-three remain untouched.⁷ Moreover, the Trudeau government recently released a document of principles for their relationship with Indigenous peoples. It emphasises Indigenous rights, reconciliation, self-government, and the duty of the Crown to act honourably in their relations with Indigenous peoples.⁸ While these promises and policies may seem well-intentioned, the Canadian government has done little to uphold them in practice. Indigenous peoples and communities have successfully fought in Supreme Court cases, but these are slow strides toward full recognition of their legal rights. The government has made few proactive attempts to change the way it legislates and governs in order to carry out its promises to the Indigenous peoples.⁹

Although the government's promises suggest a willingness to better treat Indigenous peoples, the power structures ingrained in our country do not allow for actual recognition of Indigenous rights. It is still the case that Indigenous peoples continue to be under the legislative authority of the federal government in section 91, subsection 24 of the Constitution.¹⁰ They are the only societal group included in this list that outlines the bounds of federal control. Furthermore, the *Indian*

Act continues to dictate the powers and rights of Indigenous peoples in their own communities and determines which services the government provides. The existence of this document does not reflect the image of a self-governing people.¹¹ These two examples demonstrate the tension between Canada's grounding laws and their promises for Indigenous rights, thus making reconciliation improbable unless the government is pressured to relinquish some power.

Legal theorist Ronald Dworkin distinguishes between principles and rules. A principle is a standard we hope to live up to, whereas a rule has clear and distinct boundaries making it either applicable or inapplicable, depending on the situation.¹² Due to the nature of rules, a valid rule cannot be in conflict with another rule—otherwise, the rule is invalid. Dworkin argues that applicable rules for each situation must either be judged by appeal to further rules or by appeal to principles that can guide the application of a rule. The application of principles, on the other hand, requires discernment of their importance and weight, for they are not binding in the same way as rules. These two logically distinct components of law guide the actions and decisions of all spheres of government.¹³

As it is, the Canadian government values the principles that facilitate its exercise of power more than it does the rules that promote the rights of Indigenous peoples. For instance, section 91, subsection 24 of the Constitution continues to place Indigenous peoples under the care of federal jurisdiction despite the recognition of treaty rights in section 35, subsection 1 of the Charter.¹⁴ Dworkin's framework may help explain this: the Canadian government's actions contradict its promises, for its grounding principles are weighed in favour of the preservation of its own power. Section 91 of the Constitution is similar to Dworkin's description of a rule: it is unchanging, making Indigenous affairs the responsibility of the federal government. The rule is noteworthy in terms of the separation of powers in Canadian federalism. In contrast, section 35 of the Charter recognises the treaty rights of Indigenous peoples, which are not well defined or uniform across Canada, and it includes the right to self-government.¹⁵ This law is more of a principle because it is less direct and lends itself to a moral understanding of rights. The recognition of these rights is secondary to the binding rules of governmental structure, in part because the practical workings of the system are necessary in order to guarantee the rights of the people.

Some may argue that without the existing structure the government would be unable to help Indigenous peoples realise their rights and achieve self-governance. However, it is more likely that the power structure of Canadian law impedes the actualisation of Indigenous political sovereignty in Canada, because the current governmental framework leaves little space for Indigenous self-governance. The basis for governmental power, as represented by the rules laid out in section 91 of the constitution, outweighs all other principles in governmental affairs. Another aspect of maintaining control is the promotion of widely valued principles, such as individual rights and freedoms, even though they are secondary. For instance, if the government had not adopted UNDRIP and other policies that promise a change in its approach to Indigenous issues, they would have appeared unsympathetic toward particular fundamental human rights (or principles) highly valued by most people. The government adopts new laws for the sake of its public image, but the urge to conserve its power is stronger than the desire to uphold the promises it makes. This inclination is especially apparent in the context of promises that would undermine federal power, such as the establishment of true Indigenous sovereignty.

A recent Supreme Court case, *Mikisew Cree First Nation v. Canada*, demonstrates these very principles and the unquestionable importance of the separation of powers in Canada. In 2012, the government was attempting to pass legislation that would change environmental protections in the law, and the Mikisew Cree First Nation asserted that they should have been consulted during the procedure. They argued that the change to environmental protections had the potential to interfere with their right to live off of the land. The treaties indicate that the government has a duty to consult Indigenous peoples when their actions may undermine Indigenous rights. In this case, the Supreme Court justices unanimously agreed that the government does not have to consult Indigenous peoples in matters that may be intrusive when they are merely making a law. They ruled that the duty to consult is only binding when the government acts in a way that affects Indigenous communities and not when they pass legislation that may affect Indigenous communities. The justices determined that Parliament has the power to create laws as they wish. The government's role is separated from that of the courts to protect the impartiality of judicial decisions and to prevent elected officials from coercing judges to apply the law in particular

ways. If there was a duty to consult during the legislative process, the judiciary would need to interfere with legislative powers whenever an Indigenous group felt that they were not adequately consulted; this interference would disrupt parliamentary sovereignty and privilege.¹⁶ In order to retain the Canadian governmental structure, the judiciary is barred from interfering in the legislative process, and this fundamental standard evidently outweighs principles for Indigenous rights.

In this case, the justices proclaimed that although legislative action does not trigger the duty to consult, the Crown is still obligated to act honourably. According to them, “the honour of the Crown governs the relationship between the government of Canada and Indigenous peoples,” which suggests that the Crown has a duty to consider the needs and rights of Indigenous peoples during the lawmaking process.¹⁷ The term ‘honour’ is even more difficult to define and apply in practice in comparison to the notion of ‘adequate consultation.’ Furthermore, if the government is expected to act honourably in their relationship with Indigenous peoples, the Courts would still have a role in adjudicating disputes during the lawmaking process if an Indigenous group felt that the government had not acted honourably. If the judiciary favours detachment in lawmaking so as to not overstep their boundaries in the federation, then there is little chance for Indigenous peoples to participate in the process. Rather, Indigenous voices are only being heard in government as laws are being acted upon, not as they are made. Furthermore, judges appeal to a general principle when they interfere in such cases and rule on the basis of ‘honour.’ However, in past government dealings, an appeal to the morality of the government has had little effect on their actions, for there is no rule that is morally binding. The elected officials need only display an intent to act in good faith for the sake of all people. Given that there is no concrete prescription of what honour entails in government actions, this principle would be easier to evade than a rule.

The decision in *Mikisew Cree First Nation v. Canada* makes it clear that the government values its own power over the accommodation of other nations in the land. The Justices merely followed the law to maintain the system; however, it is sometimes necessary for the judiciary to go beyond the law for the sake of justice. Since the contradictions in law cannot be solved by the direct application of rules, principles are necessary for judicial arbitration.¹⁸ However, it seems as though certain

principles have become ingrained into the legal system through the cumulative acts of judges, thus preventing other principles from taking precedence.¹⁹

As the government's actions continue to be at odds with its laws and its promises toward the Indigenous peoples, progress on these promises is becoming less probable in the eyes of the public. And yet, from the perspective of Indigenous and non-Indigenous peoples in Canada, principles for integrity and human rights easily trump principles to maintain governmental powers and control. The government tries to portray good intentions in order to appear as though they are in line with the public's values. Nevertheless, as *Mikisew Cree First Nation v. Canada* demonstrates, the desire for control and power outweighs principles for respecting human rights valued by the public. It is unjust that a sovereign people could be denied the right to be consulted on issues that pertain to their lands and their environment. Despite UNDRIP and the calls to action from the TRC, Indigenous peoples are still ultimately under the rule of the Canadian government.

This discrepancy between the government's actions and promises toward Indigenous peoples in Canada is cause for concern. It calls into question what counts as law and shows that written law is limited when it comes to enacting change. The words are only a guideline; the government has the power to decide how laws are enacted, interpreted, and created. If the government were to honour the sovereignty of Indigenous people in Canada, they would surrender some of their own power to Indigenous groups, thus making it more difficult to unilaterally formulate laws in Canada. However, there is nothing that compels the Canadian government to willingly concede power, except an ambiguous call to act 'honourably.'

Ultimately, as past action has demonstrated, the current structure of government does not allow for a nation-to-nation partnership between Indigenous peoples and the federal government; rather, it is designed to value power and control over Indigenous rights. In a true nation-to-nation relationship, Indigenous peoples would play a role in policy and lawmaking alongside the federal government. The Mikisew Cree First Nation complaints in the above case exemplify the Indigenous peoples' demand to be consulted and involved in lawmaking. However, instead of being included, they have been dismissed for the sake of federal sovereignty. If the government genuinely accepted the sovereignty of

Indigenous peoples in Canada, they would make space for their contributions in the conversations that lead to future governmental actions. Indigenous peoples should already have a say in the decisions that affect their lives. Furthermore, they are a sovereign people who should not be under the control of the federal government, as is indicated in section 91 of the Constitution. Even though these kinds of changes would require significant constitutional reform, the government ought to seek meaningful ways to work toward reconciliation. Rather than one group constantly overpowering the other, a nation-to-nation relationship ought to resemble a partnership between the government and Indigenous groups.

In conclusion, the government should transform the distribution of powers to grant Indigenous peoples their rightful sovereignty. Furthermore, for the sake of integrity and respect to the public, the law ought to reflect the reality of the government's actions in our country. The government cannot value their own power over the rights of Indigenous peoples if they hope to adhere to policies like the TRC and UNDRIP. Merely adopting these guidelines into written law does not guarantee that they will be obeyed, so long as pre-existing laws are deemed more important. Section 91 of the Constitution continues to remind us that Indigenous peoples remain under the control of the federal government and that Supreme Court rulings demanding 'honourable' action are insufficient to instigate change. If the government truly valued the rights of Indigenous peoples, it would change its governmental structure to allow for Indigenous rights and sovereignty.

NOTES

1. A recent example: “Statement by the Prime Minister of Canada on National Aboriginal Day,” Justin Trudeau, Prime Minister of Canada, last modified June 21, 2017, <https://pm.gc.ca/eng/news/2017/06/21/statement-prime-minister-canada-national-aboriginal-day>.

2. *Canadian Charter of Rights and Freedoms*, s 35, Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3. “Treaties and agreements,” Crown-Indigenous Relations and Northern Affairs Canada, last modified September 11, 2018, <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>; and “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,” Crown-Indigenous Relations and Northern Affairs Canada, last modified September 15, 2010, <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

4. See for example the cases covered in J. E. Bickenbach, Keith C. Culver, and Michael Giudice, eds., *Canadian Cases in the Philosophy of Law*, 5th ed. (Peterborough: Broadview Press, 2018), 331–73.

5. “Government of Canada to create Recognition and Implementation of Rights Framework,” Justin Trudeau, Prime Minister of Canada, last modified February 14, 2018, <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>.

6. *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, (Winnipeg: National Centre for Truth and Reconciliation, 2015), 5, http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf; and Tim Fontaine, “Canada officially adopts UN declaration on rights of Indigenous Peoples,” *CBC News*, August 2, 2016, <https://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.

7. Jorge Barrera et al., “Beyond 94: Truth and Reconciliation in Canada,” *CBC News*, last modified November 30, 2018, <https://news-interactives.cbc.ca/longform-single/beyond-94?&cta=1>.

8. “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” Department of Justice Canada, last modified February 14, 2018, <https://www.justice.gc.ca/eng/csj-sjc/princi>

ples-principes.html.

9. Although, as mentioned above, Trudeau is aware of this trend and promised to create Recognition and Implementation of Rights Framework to be put in practice by Oct 2019; Justin Trudeau, Prime Minister of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework.”

10. *Constitution Act, 1867* (UK), 30 and 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, no. 5.

11. *Indian Act*, RSC 1985, c 1-5.

12. Ronald Dworkin, “The Model of Rules I,” in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 22.

13. Dworkin, 24-27.

14. *Constitution Act, 1867* (UK), 30 and 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, no. 5; and *Canadian Charter of Rights and Freedoms*, s 35 (1), Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

15. “Treaties and agreements.”

16. *Mikisew Cree First Nation v. Canada*, 2018 SCC 40, [2018] LEXUM no. 37441; and “Case in Brief: Mikisew Cree First Nation v. Canada (Governor General in Council),” Supreme Court of Canada, last modified October 11, 2018, <https://www.scc-csc.ca/case-dossier/cb/37441-eng.aspx>.

17. *Mikisew Cree First Nation v. Canada*, 2018 SCC 40, [2018] LEXUM no. 37441.

18. Dworkin, “The Model of Rules I,” 27.

19. Dworkin argued that judges are like chain novelists who operate from preceding laws and existing legal norms. Due to their dependence on previous laws, existing inequalities and power imbalances are more difficult to erode through judicial arbitration. See Ronald Dworkin, *Law's Empire* (Oregon: Hart Publishing, 1986), 228-32.