FEDERALISM-E

Counteracting Settler Legal Systems: Oral Histories, The *Indian Act*, and Reconciling Indigenous Law in Canada

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The incontrovertible differences between Canadian federal law and Indigenous legal systems can perhaps be best observed in comparing common law doctrines such as the *Indian Act* with that of Indigenous oral histories. The former is a pernicious document that exists in principle to suppress traditional Indigenous practices, only shifting or diversifying its stipulations in order to maintain cultural erasure. On the other hand, Indigenous oral histories are a dynamic body of experiences which continue to develop and whose roots run deeper than recorded colonial history. The emergence of contention between Indigenous peoples and Canadian settler law surrounding land claims has solidified Indigenous demand for equal consideration in public policy. As a result, Canada's provincial and federal governments have begun to engage in processes of acknowledgement and reconciliation with Indigenous governance and authority. Emerging discourses have forced a reevaluation of colonial legislation such as the *Indian Act* as well as prompted scholars and policy makers to contemplate how Indigenous-federal relations will shift in the near future. Among the most important intersections of these legal systems is found in the procedures and outcomes of Supreme Court cases as they pertain to Indigenous oral histories. By analyzing particular Supreme Court cases, the ensuing academic commentary, and their implications for future legal precedents, one can better understand how to transition to a legal paradigm that includes Indigenous law, one defined by equity and justice while simultaneously respecting superseding authority over Indigenous lands and waters. By looking forward, governments can institute a desire-based framework that generates top-down and bottom-up strategies of addressing Indigenous and Canadian relations, affirms the goal of Indigenous sovereignty, and recognizes the diversity needed in Canadian judicial systems.

Indigenous oral histories have had a long and complicated relationship with Canadian courts, as colonial government structures have historically continued to undermine Indigenous authority. A primary example of this power imbalance is the *Indian Act*, a piece of legislation enacted in 1876 which sought to completely restructure Indigenous cultural, societal, and economic practices with the ultimate goal of cultural assimilation of Indigenous peoples. Many aspects of this legislation exist solely to prevent the exchange of cultural knowledge. Consider the potlatch, a social ceremony practiced by First Nations of the Pacific Northwest Coast such as the Coast Salish, Kwakwaka'wakw, Nuuchah-nulth, and the Dene of the interior western subarctic. The ceremony is instrumental in legal processes like conferring names, statuses, and granting sacred rights, though it was banned in an 1884 amendment to the *Indian Act* in an attempt to extinguish these practices.¹ Subsequent policies within the *Act* have been equally restrictive, such as Section 141, which barred status Indians from seeking legal counsel.² However, the resilience of Indigenous communities has ensured that these assimilation tactics have failed, while ongoing grassroots movements and protests have led to a stronger sense of Indigenous self-determination. This contentious past must be taken into account when assessing goals for settler and Indigenous legal relations, as it is imperative to recognize these laws as the groundwork from which Supreme Court policy towards Indigenous culture draws from.

More recently, the 1982 *Constitution Act* affirmed the protection of Indigenous rights within the settler state, delegating responsibilities to the Supreme Court to resolve any further

¹ An Act further to amend "The *Indian Act*." S.C. 1884, c 27.

² *Indian Act*. R. S.C. 1927, s. 141.

constitutional issues.³ This means that claims of Aboriginal title are no longer in the hands of unqualified parliamentarians elected by a majority of non-Indigenous peoples who lack qualifications to moderate Indigenous issues. Rather, these claims are dealt with through unelected constitutional judges in a lethargic and widely interpretive court system instead. With this transition came the era of Comprehensive Land Claim Agreements, where Indigenous communities have begun to assert their title over ancestral lands. This assertion is required in the eyes of the Canadian courts only, as much of the land was unceded and thereby never truly belonged to the settler state to begin with. Oral histories would play a large role in this assertion, as they are key to understanding connections to these territories within an Indigenous context. However, the court's attitude and treatment of these customs has been troubling at best.

The 1997 Supreme Court case *Delgamuukw v. British Columbia* was groundbreaking in its recognition of oral histories as evidence of Aboriginal title. Brought forth by the Wet'suwet'en and Gitksan nations, the trial would decide the title to territory in northern British Columbia, a jurisdiction which notably had never signed any treaties with the Canadian government. The Supreme Court overturned an earlier judgement from lower B.C. courts that had claimed Aboriginal title did not exist in law, allowing an appeal and leading to a retrial.⁴ The Supreme Court's ruling not only defined the scope of Aboriginal title, but ensured it was a constitutionally protected right that cannot be extinguished by the provinces, although it could be "infringed upon."⁵ Additionally, it set the precedent for all future cases in that it established that Indigenous oral history must be granted the same importance as written Canadian history within settler courts.⁶ The complex nature of the case represented years of work that had been done by Wet'suwet'en and Gitksan peoples to record their economic structures, governance systems, and spiritual connections to the land.⁷ Of course, the verdict only served to prove what these communities had known all along; oral histories matter. Although it was not a concrete solution, it nevertheless was a step forward for the recognition of Indigenous sovereignty. Wet'suwet'en and Gitksan reactions to the ruling were cautiously optimistic. It seemed that this new ruling would make up for the ignorance and pain caused by B.C. Chief Justice Allan McEachern, who had displayed blatant racism in his remarks towards Indigenous peoples in the lower court's previous judicial decision. Members of the two nations saw this as a victory for Indigenous resilience, stating, "The power of the blanket' is still very alive, and we're going to carry it forward," in reference to songs and stories shared during feast hall ceremonies.⁸ Wet'suwet'en Chiefs hailed it as an example of both regional and cultural harmony. Most promisingly, they were optimistic that the decision would lay the groundwork to further advance Indigenous interests in settler court systems.

³ The *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴ Stan Persky. *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*. (Vancouver: Douglas and McIntyre, 1998), 2.

⁵ Ibid.

⁶ Stan Persky. *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*. (Vancouver: Douglas and McIntyre, 1998), 2.

⁷ Val Napoleon. "Delgamuukw: A Legal Straightjacket for Oral Histories." *Canadian Journal of Law and Society* 20 (2005): 123.

⁸ Stan Persky. *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*. (Vancouver: Douglas and McIntyre, 1998), 2.

However, there were still pertinent issues with regard to how the courts treated oral evidence. Central to the ways in which both peoples proved territorial connection was Gitxsan *adaawk*, a collection of sacred oral traditions relating to ancestral histories, Wet'suwet'en *kungax*, a spiritual song or dance, and the feast hall where both communities share their oral stories.⁹ *Adaawk* is a main principle of Gitxsan law, a dynamic documentation of both past and present rules in Gitxsan society.¹⁰ Due to its centrality, it played a prominent role in court proceedings, which called into question its limits within the common law system. The courts struggled to comprehend how *adaawk* could be both a recollection of the past as well as a record of recent events. The main problem, as illustrated by Indigenous legal scholar Val Napoleon, was that *adaawk* was being treated the same way as Western social sciences like history and anthropology. She argues that *adaawk* must be seen as a distinct entity, one that cannot be invalidated or dissected by common law courts as it exists as an eternal truth of Gitxsan law.¹¹ She concludes that *adaawk* must be offered as a complete system that in and of itself proves territorial occupation, otherwise any subsequent trials would simply be, “. . . one legal system (Western) judging another (Git[x]san).”¹² Although the *Delgamuukw* case was revolutionary in setting a precedent for common law, it failed to contextualize Indigenous legal structures as authorities in their own right.

It would not be until 2014 that the courts would officially establish Aboriginal title outside of reserve lands. In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court unanimously declared that the Tsilhqot'in Nation had claim to territory in central British Columbia after Canadian forestry company Carrier Lumber was issued a license to exploit their land and resources. It was another landmark decision, but one that further complicated the approach to oral evidence. Based on previous judgements, the Supreme Court separated oral history from what it referred to as “oral traditions,” otherwise known as *Dechen Ts'edilhtan* or Tsilhqot'in law.¹³ This separation allowed the courts to give virtually no legal weight to crucial aspects of *Dechen Ts'edilhtan*. Concepts such as *gwenIg*, which refers to stories that articulate knowledge and spiritual connections to the land, were cast aside as “myths” and “legends” instead of being recognized as underlying proof of Tsilhqot'in cultural presence.¹⁴ By doing this, the Canadian state undermined its declaration of title by continuously refusing to legally recognize integral parts of Indigenous culture. It also set in place a precedent that refused to acknowledge the intricacies of each Indigenous nation's history, practices, and perspectives by categorizing them in strictly homogeneous Western notions.

Since this case, there have been some promising developments in the Canadian court's approach. In 2019, the Secwepemc nation celebrated a court motion that allowed a group of

⁹ Stan Persky. *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*. (Vancouver: Douglas and McIntyre, 1998), 14.

¹⁰ Val Napoleon. “*Delgamuukw*: A Legal Straightjacket for Oral Histories.” *Canadian Journal of Law and Society* 20 (2005): 145.

¹¹ *Ibid*, 153.

¹² *Ibid*, 155.

¹³ Lorraine Weir. ““Oral Tradition” as Legal Fiction: The Challenge of *Dechen Ts'edilhtan* in *Tsilhqot'in Nation v. British Columbia*.” *International Journal for the Semiotics of Law* 9 (2016): 160.

¹⁴ *Ibid*, 184.

Elders to testify together in their ongoing title case.¹⁵ Canadian courts usually require depositions to be given individually, however by recognizing a panel-like method, the court is aligning itself with the Secwepemc traditions of reciting oral history as a collective. These kinds of accommodations help to integrate Indigenous legal practices into common law systems, but they are still problematic in their assertion of common law as the default authority. To rectify this power imbalance, certain fundamental perspectives within the settler court system must be addressed in order for the Canadian government to truly reconcile with Indigenous nations.

First, oral histories should not be treated as relics. Settler courts have struggled to interpret oral histories within the narrow framework of Eurocentric historical record keeping. These traditions must not be approached as cultural artifacts that are stuck in the past, but instead as relevant and versatile documents. The Tsilhqot'in Nation's *gwenIg*, for example, not only included stories from previous generations, but continued to expand up to and including the 2014 land claim case. Throughout the legal proceedings, Elders shared guidance that both related to the past and reflected current feelings felt by their community, thereby adding to *gwenIg*.¹⁶ If Canadian courts acknowledge this principle, it will enable a broader appreciation for the diversity of Indigenous legal systems, and Canadian courts can hopefully move away from stereotypical perspectives that cast Indigenous governing practices as unmodern and archaic.

Second, oral traditions cannot be treated as a monolith. In their procedure of deciphering and granting Aboriginal title, judges have interpreted different oral traditions across cases using troublingly similar methods. To ensure that respect and care is given to each title case, it is imperative that Indigenous cultures are not conflated as one monolithic entity. Both Gitksan *adaawk* and Tsilhqot'in *gwenIg* should not merely be identified as culturally distinct in comparison to Canadian legal systems, but should be treated as two separate legal systems themselves. Differentiating Gitksan, Tsilhqot'in, and all other Indigenous legal practices affirms that the commanding authority of that nation's legal structure exists solely within the nation itself. This would provide equal footing for meaningful nation-to-nation relations with the Canadian state, removing the need for settler courts to authenticate Indigenous legal paradigms.

Finally, the Canadian government must be prevented from infringing upon Indigenous sovereignty. This has historically been the most difficult position for Canada to reconcile, as our nation's past governments have repeatedly violated treaty agreements. The federal government is still making up for these violations, just recently paying the Bigstone Cree Nation \$231 million for failing to grant an appropriate amount of land as was promised to them when they originally signed Treaty 8 back in 1899.¹⁷ It is pivotal to ensure this pattern is not repeated with modern treaties and agreements. As dictated in the *Delgamuukw* decision, Aboriginal title may be infringed upon by the Crown for such purposes as "economic development," provided that there is adequate consultation as well as fair compensation.¹⁸ This precedent completely erodes the

¹⁵ Andrea Palframan. "Secwepemc win motion for elders to give oral history evidence as a group." *Raven*, June 10, 2019.

¹⁶ Lorraine Weir. "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*." *International Journal for the Semiotics of Law* 9 (2016): 186.

¹⁷ "When the government fails to honour its commitments." *CBC News*, May 30, 2011.

¹⁸ Stan Persky. *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*. (Vancouver: Douglas and McIntyre, 1998), 20.

model of relationship between Indigenous nations and the Crown that was laid out in the Royal Proclamation of 1763, which explicitly forbade governments from “molest[ing] or disturb[ing]” Indigenous nations.¹⁹ In order to protect Indigenous land from capitalist interests and pressure, valid consent must take precedence over consultation. The government must update Section 35 of the 1982 *Constitution Act* to not only affirm Aboriginal title, but also specify that it cannot be infringed upon under any circumstance in order to truly enshrine Indigenous political and legal sovereignty.

In addition to these top-down requirements, Indigenous scholars and legal experts have been making tangible advancements in bottom-up domains like education to spark meaningful reform within the Canadian legal system. One such example is the creation and development of the University of Victoria’s joint Canadian common law and Indigenous legal orders degree program. The program, founded in part by the aforementioned Val Napoleon and Indigenous legal academic John Borrows, acts on a call by the Truth and Reconciliation Commission to help develop Indigenous legal institutions in order to better understand, interact with, and use Indigenous law effectively.²⁰ This initiative provides a framework for a new generation of young lawyers, lawmakers, and academics to work within and learn from, demonstrating that a harmonious relationship between the two legal orders is possible.

In discussing Canada’s legal landscape, Napoleon remarks that; “Canada is multi-juridical,” and that Indigenous representation, “. . . would bring another legal perspective and another set of tools and way of understanding human problems to the table.”²¹ By authenticating and respecting Indigenous law and traditions, Canadian courts will gain powerful allies in that of Elders and Indigenous scholars from all different nations. Resilience to the assimilatory tactics of the *Indian Act* has proven to these courts that they can no longer ignore the authority of Indigenous legal systems, but instead must work alongside and recognize them as their own entity. Indigenous nations and their practices have immense amounts of wisdom to offer, and their oral stories must be understood by the settler courts as crucial to respecting Indigenous tradition and sovereignty. Using John Borrows’ idea of the “seventh generation,” it is up to today’s scholars and legal experts to continue opposing colonial devices and implement the foundations of nation-to-nation relationship building. Only through these changes may the courts realize that Canada has always been, long before the creation and implementation of the *Indian Act*, a multi-juridical land.

¹⁹ John Borrows. “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government.” (*Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. Vancouver: University of British Columbia Press, 1997), 155.

²⁰ “World’s first Indigenous law degree to be offered at UVic.” *UVic News*, February 21, 2018.

²¹ Chris Wattie. “Hope for Indigenous Supreme Court justice swells as appointment recommendations loom.” *The Globe and Mail*, October 22, 2017.

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