



RESEARCH BRIEF RFNG | Rebuilding First Nations Governance

Completing Canadian Confederation with an Aboriginal Order of Government

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Introduction: The Emergence of a New Constitutional Reality

For much of Canada’s history, the constitutional landscape has been defined by two orders of government: federal and provincial. Given our other research into Indigenous rights, we wanted to explore whether a third, Indigenous constitutional order is currently emerging. This emergence is not the result of a single legislative act but is being forged through four primary channels: evolving jurisprudence (legal decisions) regarding Section 35 of the *Constitution Act, 1982*; an increasing number of shared governance agreements over lands and resources; the development of independent Indigenous self-government institutions; and the domestic implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). This evolution is part of a “living tree” constitutional tradition, where Canadian federalism adapts to safeguard the rights of Indigenous peoples while maintaining economic and social stability for all citizens.

A Shared History: Familial Alliances to Colonial Oppression to Rights Recognition

To understand the context for a third order, one must look at the history of Indigenous-Crown relations. Before European arrival, Indigenous nations conducted complex international diplomacy based on established norms and legal orders. Early European settlers often adopted these Indigenous norms to survive and trade, entering into relationships described in familial terms—such as the Covenant Chain alliance between the British and the Haudenosaunee.

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By the mid-19th century, this relationship shifted toward domination and oppression. The new Canadian government negotiated "numbered treaties" (1871–1921) to open land for settlers and resource extraction. While Indigenous nations viewed these as "peace and friendship" agreements, the Canadian government viewed them as "cede and surrender" documents intended to extinguish Indigenous title to their lands – a clash of interpretation that continues to this day. The task of treaty-making was also not completed. The pressure of settlement and the presence of state power meant that no treaties were negotiated in present day Quebec, British Columbia, Yukon and Nunavut.

Following a five-decade gap in treaty-making after 1923, a new era of reconciliation emerged. This shift was catalyzed by the 1969 White Paper—an attempt to unilaterally repeal the *Indian Act*—which sparked nationwide Indigenous political organizing. Key milestones, such as the 1973 *Calder* decision recognizing prior Aboriginal title and the 1974 Berger Inquiry into Northern pipelines, forced the federal government to address unsettled land questions through renewed treaty-making, often referred to as “modern treaties”, or “comprehensive land claim agreements”.

In 1975, the James Bay and Northern Quebec Agreement (JBNQA) became Canada’s first modern treaty, setting a precedent for agreements that re-transfer land ownership to Indigenous governing bodies and establish co-management boards where Indigenous governments and Canadian governments have a shared role in land governance. Modern treaties represent a major step in making room for Indigenous jurisdiction over lands and resources within the Canadian federation.

It is only within the past two decades, well after the constitutional recognition of Aboriginal and Treaty rights, that Canadian courts have begun to reorient themselves, accepting the existence of Aboriginal title, law and self-governance. Increasingly, the Courts have begun to recognize Aboriginal litigant claims of governance and political authority over their members and territories (Satsan et al 2022). But while there is a growing recognition of the right to self-governance, the courts have been reluctant to explicitly affirm a constitutionally entrenched third order of government.



Changes in Land and Resource Stewardship

Land remains a central point of contention but also of innovation in the modern relationship between Indigenous nations and Canadian governments. Since the 1960s, Indigenous political organizing has focused on reclaiming jurisdiction over traditional territories to restore economic bases and fulfill responsibilities to care for the land. Because the courts urge reconciliation between Crown sovereignty and prior Indigenous rights and title, new negotiated agreements are entrenching new practices in land governance across the country.

Modern developments include:

- Co-Management Boards: These joint bodies, established under modern treaties, allow Indigenous, federal, and provincial governments to share management and decision-making power over roughly four million square kilometers of Canada—an area nearly the size of the European Union.
- Indigenous Protected and Conserved Areas (IPCAs): Many of these newly designated regions give Indigenous nations the ability to exercise sovereignty through their own laws and knowledge systems to protect lands and waters.
- The shift to consent: Under the constitutional "duty to consult," the Crown is required to consult Indigenous people on any actions that might affect their rights. With Canada's endorsement and legislated implementation of the United Nations Declaration on the Rights of Indigenous Peoples, the standard is moving toward "free, prior, and informed consent," giving Indigenous nations a more powerful role in deciding whether projects proceed on their territories.

Innovations in Self-Government

Indigenous nations are also finding ways to move past the restrictive *Indian Act of 1876*, which historically designated reserve lands as Crown land and limited Indigenous decision-making. New frameworks, such as the Framework Agreement on First Nations Land Management, allow Nations to opt out of certain sections of the *Indian Act* and adopt their own Land Codes to govern resources and development.

The research also highlights several successful cases where Nations have not waited for another government's permission to assert their jurisdiction and implement their own laws:



- Haida Nation: Recently, the governments of Canada and British Columbia recognized the Aboriginal title of the Haida Nation, acknowledging the Council of the Haida Nation as the legitimate government of the territory.
- Listuguj and Nipissing Fisheries: These Nations developed their own fishing laws and management plans based on Indigenous legal traditions. In both cases, the federal or provincial governments eventually signed agreements to recognize these Indigenous laws, leading to collaborative enforcement and stewardship.

Policy Implications: Completing the Federation

Our report concludes that the emergence of a third order presents an extraordinary opportunity to adjust the Canadian federation. To successfully mesh these orders, we suggest several major policy shifts:

1. Fiscal Equalization: A funding system must be developed for Indigenous governments that mirrors the equalization principle used for provinces, ensuring they have the fiscal capacity to provide essential public services of good quality.
2. Institutional Reorganization: Federal and provincial institutions must stop treating Indigenous groups as subjects of "oversight and control" and instead interact with them as sovereign governments within their own spheres.
3. Public Education: To reduce conflict and foster cooperation, there is a critical need for both the public and professionals to better understand this changing constitutional landscape.

By weaving together these threads of recognition, Canada can move toward a "Braided Federation" where certainty is achieved through clear rights and respected authorities, rather than through the extinguishment of Indigenous sovereignty. The goal is to create a new whole that acknowledges a simple reality: "we are all here to stay".