

**Reserved Responsibilities: A comparative analysis of settler colonial narratives of
Canadian federalism and sub-national jurisdictional responsibility for Status First Nations
peoples living on-reserve in Manitoba, British Columbia, and the Northwest Territories**

by

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Abstract

This study analyzes the role settler colonialism has had on Canadian federalism. It argues that a governance relationship between provincial and territorial governments, as sub-nationals of the Canadian federal government, does exist with status First Nations peoples living on-reserve. This can be evidenced in the Constitution (*British North America Act, 1867* (BNA Act) and later the *Canadian Constitution Act, 1982*), legislation, case law, and political and public administration practices of Canada. Yet this relationship is most often overlooked in Canada's prevailing narrative of federalism in favour of the more straightforward relationship between the federal government and status First Nations peoples living on-reserve. This narrative of federal jurisdictional responsibility ignores traditional Indigenous governments and Indigenous sovereignty, which has allowed the subnationals to increase their presence on-reserve in ways that go unmonitored or evade responsibility.

This dissertation principally relies on two main bodies of primary sources: interviews and budgetary and annual government reports. To a lesser degree, archival sources were used in this study. There are four levels of comparative analysis: between the settler colonial state and Indigenous nations, between Canadian notions of federalism and Indigenous-related policies, between the Canadian federal government and the provinces and territories, and between 2 provincial sub-nationals (Manitoba and British Columbia) and one territorial sub-national (Northwest Territories). The study draws on three overlapping bodies of theoretical literature: colonial studies (including, imperial, settler, and de-colonial studies), Indigenous-centred scholarship, and Canadian public administration.

This thesis concludes that Canada, as a settler colonial society, has a narrative of federalism that evokes neo-colonial tendencies. Federalism has been used as an enabling

structure for the federal government to marginalize Indigenous peoples' land ownership and sovereignty and create jurisdiction for the sub-nationals to control Indigenous peoples' lands and circumvent Indigenous sovereignty. This is not a convenient accident: the framework of federalism and jurisdictional responsibility for Indigenous-related matters was set during an era of shifting from imperial to settler colonialism, and this framework continues to support settler colonialism which, in many ways, operates as neo-colonial. By looking closely at the evidence of neo-colonialism in Canadian federalism, opportunities for de-colonialism and Indigenous sovereignty become evident.

Table of Contents

Abstract.....	2
Acknowledgements	6
Introduction.....	7
<i>Research Positionality</i>	7
<i>Nature of the Problem: the settler colonial narrative of federalism</i>	11
<i>One narrative of Canadian Federalism</i>	30
<i>Is the narrative of Canadian federalism neo-colonizing?</i>	35
<i>Defining Concepts</i>	44
<i>Overview of Chapters</i>	47
<i>Research Methodology and Methods</i>	50
<i>A Note on Terminology</i>	62
Chapter 1: The settler colonial narrative of Canadian Federalism and Section 91(24)	67
<i>The Federal Jurisdictional Scope</i>	68
<i>The Provincial Jurisdictional Scope</i>	82
<i>S.91(24) and Indigenous Self-government</i>	96
<i>Conclusion</i>	97
Chapter 2: Evolving Canadian Federalism and the Indigenous/sub-national Governance Network	98
<i>Colonial Federalism</i>	100
<i>Classic Federalism</i>	102
<i>Collaborative Federalism</i>	105
<i>Competitive Federalism</i>	108
<i>Competitive Federalism and New Public Management</i>	118
<i>Devolution and the Courts</i>	123
<i>Devolution: Opportunity or threat to Indigenous sovereignty?</i>	128
<i>Conclusion</i>	136
Chapter 3: Manitoba and the politics of hydroelectricity	141
<i>Manitoba’s Prairie Political Culture</i>	142
<i>Modern Politics of Land and Water</i>	157
<i>Conclusion</i>	181
Chapter 4: From the Royal Proclamation of 1763 to the modern Treaties: Enhanced Provincial Jurisdiction in British Columbia	183
<i>The Royal Proclamation of 1763 and the role of the province in Settler/Indigenous Relations</i>	183
<i>Indigenous Land Claims and Provincial Land Management</i>	192
<i>Conclusion</i>	220
Chapter 5: The Northwest Territories, Devolution, and Land and Resource Management	222
<i>Colonialism, Political Development, and Devolution in the North</i>	223
<i>Treaties, Modern Land Claims, and Natural Resource Management</i>	240
<i>Aboriginal Self-government and the G.N.W.T</i>	262
<i>Conclusion</i>	272
Chapter 6: Enhanced sub-national presence in the Indigenous/State Governance Network	273

<i>Enhanced sub-national Bureaucratic Responses</i>	274
<i>The Enhanced sub-national in the Service Delivery of Healthcare and Education</i>	285
<i>Conclusion</i>	320
Conclusion: Settler Neo-colonialism and Canadian Federalism	322
<i>Neo-colonial Provincial Encroachment and Citizenship</i>	331
<i>Final Thoughts</i>	337
Bibliography	339
End Notes	378

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Introduction

Settler colonial narratives of Canadian federalism contributed to the development of federal jurisdiction for Indigenous peoples, which has come at the expense of Indigenous peoples' sovereignty. Federalism has been used as an enabling structure for the federal government to marginalize Indigenous peoples' land ownership and sovereignty. Evolving understandings and applications of federalism have created jurisdiction for the sub-nationals to participate in regulatory matters concerning Indigenous peoples and their lands. I argue that this sub-national encroachment into the jurisdiction of settler governance for Indigenous peoples is a result of neo-colonialism.

Research Positionality

The question of provincial and territorial jurisdictional responsibilities for Indigenous peoples has been touched upon at various but rare points in Canadian history. In fact, not much attention has been paid to this subject since the publications of Long and Boldt's *Governments in Conflict? Provinces and Indian Nations in Canada* (1988) and Hawkes' *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (1989). One such point of attention was a national conference at Carleton University in 1988 where the Honourable Ian G. Scott, Ontario's then Attorney General and Minister Responsible for Native Affairs, said:

I believe ... that our failure to make the advances that not only aboriginal peoples, but all Canadians of good will anxiously seek ... may be traced directly to our willingness or inability to grapple this federal system with the basic question of jurisdiction and responsibility: What level of government is responsible for what? (Scott 1989, 351-352).

The reality that this question remains unanswered today, over 25 years later, by Canadian scholars, the courts, and political actors is, to me, both astounding and irresponsible. It is this lack of clarity in the narrative of Canadian federalism concerning the jurisdiction for First Nations peoples on reserves that is impetus for this thesis.

As Scott states, the lack of definite jurisdictional responsibility presents a limit (“a failure to make advances”) for both Indigenous peoples and wider Canadian settler society. What is this limit? While this statement can be interpreted in many ways, I have read the limit Scott attributes to jurisdictional uncertainty as a limit reflected or evidenced in socio-economic indicators. It is well-documented by Indigenous and non-Indigenous scholars, communities, and governments that wide socio-economic gaps exist between mainstream and marginalized populations in Canada (Adams 1975; Campbell 1973; Wagamese 1994). This gap often presents itself as Indigenous populations making up the marginalized groups in society. In an interview, Dr. Kathi Avery Kinew of the Assembly of Manitoba Chiefs stated, “Indigenous peoples are totally marginalized economically and socially. It’s very hard to have hope in this morass of oppression” (2014). In addition to Scott connecting a lack of clear jurisdiction to these socio-economic limits, so too does Kinew. On oppression, Kinew (2014) states, “We still live in an oppressed state. It lingers in the mind and spirit. It holds people back as well as the monumental stuff in the interplay of jurisdictions.” The connection of this socio-economic gap, or what Scott described as a “a failure to make advances,” therefore, connects inherently to jurisdiction. Put another way, jurisdictional issues contribute to the “morass of oppression” that Indigenous peoples face in settler colonial Canada.

It is well-documented by scholars that this socio-economic standing of Indigenous peoples in Canada is a result of colonialism (Frideres and Gadacz 2012, 1-24). This is because

colonialism is embedded in the structures of our society. To illustrate, Ermine (2007) has written that “Currently, the situation, and very often the plight of Indigenous peoples, should act as a mirror to mainstream Canada. The conditions that Indigenous peoples find themselves in are a reflection of the governance and legal structures imposed by the dominant society” (200). This plight of Indigenous peoples—the result of colonial inequality that leads to social and economic marginalization—is the result of settler colonialism: hence, this inequality is a mirror to society that reflects the system’s inclination to such inequality.

It is, in fact, the outcome of inequality that results from colonialism that was the motivation for my research. While this may seem a typical or a common motivation for most social advocacy work, I point it out because it reveals two important aspects of my research position. First, I am Metis and this is extremely important to my personal identity. Being Indigenous and growing up in Winnipeg’s inner-city has framed how I view Canada as a nation. I come to this research with a lifelong understanding of seeing the oppression that Scott and Kinew connect to the result of these jurisdictional debates. My strongest childhood memory is of the daily ways this oppression is expressed. As a member of the Metis Nation I do not have an Indigenous identity connected to s.91(24). I am not status First Nations, which is a personal challenge in connecting to such issues of sub-national jurisdiction. Therefore, I do have an Indigenous identity, but one that remains outside of the scope of colonial effect of this study.

Second, I am indebted to the Canadian government for my education, healthcare, and other benefits the state has provided me. I am a product of the settler colonial state. In some ways I feel indebted to what it has given me. In other ways I feel the restriction and loss that the colonized feel. Perhaps most importantly, I am a product of settler Canada, and so I have been colonized in some ways; this has required me to de-colonize my thinking. Many Indigenous

writers have explained this better than I. Adams writes in *Prison of Grass* (1975) about the impact of colonialism on the thinking of Indigenous peoples. Colonialism becomes internalized and “Because it operates subconsciously, it is not clearly understood at the conscious level” (167). We, as Indigenous peoples, can even perpetuate settler colonialism. We are surrounded by colonialism. It envelops us, Indigenous and non-Indigenous alike. For me, being a product of a society that is settler colonial while being Indigenous has presented me with an internal struggle in which I am thankful, because as a Canadian I received public education and healthcare, and also resentful of the injustices of the impacts of colonialism in Canada.

These two aspects, having Indigenous heritage and an oral tradition of Indigenous knowledge from my Elders, and being a product of a colonial society, help to shape my frame of analysis and also my intent for this work: I do want to benefit the democratic project of Canada. In other words, I want to help de-colonize it. I see value in my society, but a deep need and opportunity for improvement. I believe this work, my thesis, is significant to moving Canada towards decolonizing what is a settler colonial governance system. When I began to look at the devolution of the federal authority to provincial governments concerning status First Nations peoples living on-reserve, I wondered if there was benefit to examining this shift from the federal to provincial government. What does it matter if jurisdiction shifts amongst differing levels of colonial state governance? Does it matter if it is the federal government or the provinces that exercise settler colonialism? Does this shift not just continue to replicate colonial governance? How does demonstrating this shift implicate sovereignty or self-determination in a way that gets us closer to these goals of de-colonialism and self-government? The answer to these questions is that evidencing this shift in jurisdiction does move us closer to Indigenous nations’ sovereignty. If this shift occurs with neo-colonial intent or effects, it must be decolonized or this shift will

continue to embed colonial inequality and disenfranchise Indigenous peoples. Entrenching the Indigenous right to sovereignty into this narrative of Canadian federalism will make the democratic project that is Canada a more equitable endeavor. I do believe that exploring the ways that colonialism is embedded in the narrative of Canadian federalism is important to the wider goal of sovereignty.

Nature of the Problem: the settler colonial narrative of federalism

There is a governance relationship between the sub-nationals of the Canadian federal government and status First Nations peoples living on-reserve, and this can be evidenced in the Constitution, legislation, case law, and political and public administration practices. In Canada, however, the role of provincial and territorial governments in First Nations communities has been overlooked or omitted in the narrative of Canadian federalism. Canada is a settler colonial nation (Barker 2009), and the influence of settler colonialism has shaped and formed the narrative to its advantage by narrowing the discourse of jurisdictional responsibility and actions of provincial and territorial governments for First Nations peoples that reside on-reserve, placing Indigenous peoples on the periphery of the narratives of Canadian federalism.

Federalism is a political system based on a division of powers and responsibilities between different levels of government (a detailed discussion of Canadian federalism can be found in chapter 2). Smith (2004) writes that federalism is defined by a constitution that retains the levels of government and the powers specified to each level (8). The *British North America Act, 1867* (BNA Act) and later the *Canadian Constitution Act, 1982* delineates these powers between federal and provincial governments. For example, the main list of federal powers can be found in section 91 of the *BNA Act*, while provincial powers are dealt with in section 92 and concurrent (shared) powers can be found in section 94. These jurisdictions are laid out in the constitution, but they can change over time because Canadian federalism is a flexible system of

governance with powers and responsibility flowing back and forth between the federal and territorial and provincial powers. Today, significant changes have been made in modern governance practices as the federal government decentralizes and devolves powers to the provincial and territorial governments, or the sub-nationals.

Under this practice of federalism, the federal government has jurisdiction for First Nations peoples who are registered through the *Indian Act* and who live in First Nation reserve communities. This relationship is established in the *British North America Act, 1867* which states in s. 91 (24) that “Indians, and Lands reserved for Indians” are a head of power for the federal government (Canada 1867). There is further judicial recognition of the federal government’s trust-like and fiduciary-like obligation when acting on behalf of Aboriginal peoples (*R. v. Guerin 1984*). This constitutional statement and this court ruling forge a special relationship between the federal government and First Nations peoples. In modern terms, we describe this as the federal government having jurisdiction or a jurisdictional responsibility for First Nations peoples. This responsibility and obligation are complex and chapters one and two provide a fuller discussion on how these principles relate to s.91(24).

There is, however, also a governance relationship between provincial and territorial governments and status First Nations peoples. This remains an ignored subject in the narrative of Canadian federalism. Instead, attention to the jurisdictional relationship of state/First Nations peoples who live on-reserve is often cast as a purely federal domain of state responsibility. There is much evidence of the governance relationship between the sub-nationals and First Nations peoples and this relationship can be seen through the constitution, case law, and legislation. The sub-nationals have both political and legal responsibilities for status First Nations peoples (Hawkes 1989) and this role has consistently increased since the end of World War II

(Henderson 2003).¹ In this sense, we can describe this governance relationship as both sub-national jurisdictional responsibility for First Nations peoples and also, in many circumstances, involvement without jurisdictional responsibility. Much of this dissertation is concerned with this distinction of sub-national involvement on reserve—as jurisdictional responsibility or involvement without jurisdictional responsibility—because this seems to be where neo-colonialism is evident.

While I am interested in the narrative of Canadian federalism that overlooks sub-national involvement on First Nations reserves, there are many other narratives of Canadian federalism. As Otis and Papillon (2013) write, “The Canadian federal system as we know it is but one way among many of translating the federal principle in practice” (12). Chapter 2 looks closely at how understandings and approaches to federalism have evolved conceptually and practically in the Canadian federation. Among this evolution, the major episodes of federalism that I have included are colonial, classic, cooperative, competitive, constitutional, and the contemporary expression of new public management, Treaty federalism, and multilevel governance. Some of these expressions of federalism are based on cooperation and others are described as federal unilateralism, and thus maintain subjectivity of Indigenous negotiating partners. Murphy (2003) argues, as one example, federal unilateralism was evident as recently as 2002 when the federal government walked away from Indigenous self-government talks (13). And yet Papillon (2008) argues that multi-level governance has resulted in the building of new partnerships between various levels of government and Indigenous nations (14). Thus, some argue that federalism can be a means to enhance Indigenous sovereignty in the Canadian federation, while others disagree and demonstrate how federalism maintains colonial frameworks for Indigenous/state governance.

Throughout this evolution of federalism, however, the narrative of federal responsibility, and the dismissal of provincial responsibility, has persisted.

While there are many narratives that concern Canadian federalism, this thesis is concerned with a narrative of Canadian federalism that is impacted by settler colonialism. Narratives in settler societies are shaped in many ways by settler interests to exclude Indigenous peoples' interests. O'Brien (2010) argues that settler colonial society constructs "replacement narratives" to erase Indigenous peoples' histories, replacing these with settler histories. In a similar vein, Thrush (2007) coined the term "place-story" to describe a process in which settler colonial stories of place exclude Indigenous peoples' historic ties to an area—their traditional, ancestral lands. Place-story is closely related to replacement narratives: these narratives are created by settler colonialists to serve the interests of settler society at the disempowerment of Indigenous peoples. Further to this, Buss (2011) argues that the place-story created by past historic settler narratives continues to frame contemporary narratives. These strands of theory, or the concepts of replacement narratives and place-stories, tell us that settler colonial societies have historical narratives that inform contemporary settler society, and these have been developed in ways that continue to omit or silence Indigenous peoples from this narrative. This thesis is interested in the narrative of Canadian federalism and wonders whether settler colonialism has influenced a narrative of federalism that overlooks or omits the settler sub-national jurisdiction practices on First Nations reserves?

Important to this thesis is the use of narratives in settler colonialism by settler society and the settler state to advance the interests of the settler colonial structure at the expense or disadvantage of Indigenous peoples. Wolfe (2006) has described this phenomena in settler colonial projects through his use of the term the "logic of elimination" which he coined to

describe settler colonialism as a pervasive structure, not an event, that is both built on the destruction of Indigenous peoples and requires this destruction to continue function. Wolfe (2006) explains that settler colonialism is about territory: access to and control over it (388). When Europeans claimed title to North America's territory, they exercised the elimination of Indigenous peoples' title; this logic continues to present-day (393). Similarly, Veracini (2008) explains such a premise—a society built upon and that requires a continued destruction of Indigenous peoples—within settler colonial narratives that were created to “disavow” Indigenous peoples of presence, use, and history on land while simultaneously instilling settler “fixity” or legitimate use of land and resources. For these authors, settler colonial narratives disrupt Indigenous peoples' presence in ways that serve settler society at the expense of Indigenous peoples. This thesis queries whether the narrative of Canadian federalism, that which omits the role of the sub-nationals in favour of the central order of government, serves the interests of settler society at the expense of Indigenous peoples' disempowerment?

In Canada, settler colonial narratives have intrinsically shaped settler and Indigenous peoples' relations by serving settler interests at the expense of Indigenous peoples' livelihoods. This includes the Canadian legal system, and these narratives further inform the structures of Canadian government and society. Bhandar (2004) argues that the “legal-historical narratives” of the founding Canadian state and settlement of the territories have resulted in the myth of a legitimate assertion of colonial sovereignty. Bhandar (2004) writes “Narratives about settlement and the assertion of sovereignty are central to the legitimacy and foundation of the law itself” (837). She explains that legal-historical narratives are created to legitimize settler colonial laws and these laws are in turn re-legitimated through these narratives. Similar to Wolfe's “logic of

elimination”, for Bhandar society is both built on and requires for its continuance the destruction of Indigenous peoples, but this equation is built into the settler colonial legal structure of Canada.

McCrossan (2015) has similarly argued the erasure of Indigenous peoples through the Canadian legal system and argues that judiciaries in Canada have a guiding narrative that Indigenous interests must yield to settler interests (so Indigenous territorial displacement and dispossession). This settler colonial narrative is derived from past colonial constructs that continue to inform contemporary legal outcomes: McCrossan (2015) writes, “it temporally collapses the ‘Canadian’ present into the ‘British’ past to arrive at a single vision of territorial uniformity” (28). This allows the courts to continue to produce and reproduce notions of Canadian sovereignty over Indigenous peoples and their territories (McCrossan 2015, 20). McCrossan and Ladner (2016) have argued that the courts cannot understand Indigenous traditional legal orders and dismiss that they predate Canada: “...the court continues to perpetuate the myth that without settler-colonial governments, no one would be regulating vast areas of the country” (422). The narrative used by the courts is based on courts assumption that Crown sovereignty is presented as legitimate and permanent, and this assumption is translated and reproduced by the courts whenever their existence is threatened by Indigenous rights to territory (McCrossan 2015, 35). The courts then deny Indigenous claims of sovereignty through the use of the narrative of Crown sovereignty (McCrossan 2015, 31). This thesis asks how, then, do narratives of federalism similarly deny Indigenous peoples right to sovereignty by reinforcing settler colonial narratives of federal jurisdiction for Indigenous peoples?

While colonialism is certainly a complex concept, we can understand it as the settlement that results from imperial expansion, and has political, economic, and social effects (Ashcroft, Griffiths, and Tiffin 2000, 40-41). In many contemporary discourses of colonialism, there is

growing recognition of two distinct forms of colonialism: imperial colonialism and settler colonialism (Barker 2009). While these forms of colonialism have similarities, they also have important differences that contribute to shaping the narrative of Canadian federalism. Both forms of colonialism exert a set of economic, political, and cultural values and procedures onto another people that have their own set of values and procedures. From the perspective of settler society, to read the canons of colonialism such as Said (1977), Memmi (1965), and Fanon (1961), these parallels are quite clear, and can include factors that lead up to and outcomes that result from the colonizer's attempts to subordinate the economic, political, and cultural expressions of the colonized people. Indeed, settler colonialism is a derivative of imperial colonialism.

Beyond these parallels, distinction can also be made between the processes of imperial and settler colonialism. Imperial colonialism is a process where a distant, foreign power (colonial) dominates a people (colonized) through the foreign power's ideology and settlement (Ashcroft, Griffiths, and Tiffin 2000, 111), while settler colonialism is the process of a settler population derived from the foreign power establishing itself locally and working toward making Indigenous history, place, and presence obsolete for the benefit of the colonial settlers. In this, there is a shift in the source of influence from the distant colonial power to the local colonial power, the settler population, and their structures of economy, politics, and society (Frideres and Gadacz 2012, 1-24). With this shift comes a need for replacement narratives and place-stories that will omit the lived histories of the Indigenous peoples on their lands and their ongoing connections to the area and to enable past and continued settlement of the land by the settlers.

Colonialism has been built on a practice of taking land from Indigenous peoples for economic gain of the colonial power, and this is central to both the motivation of colonialism and its outcomes of inequalities (Asch 1997; Kulchyski 2007; Monture-Angus, 1999). Throughout

this dissertation, the conversation on land is ever-present. This is especially true of the way land has been settled and continues to be settled and exploited by the settler, Canadian government and its society. Before starting this conversation, it is important to recognize one of the results of colonial land acquisition is its impact on Indigenous peoples' relationship with land and rights. As colonial powers asserted their legitimacy of rights to the lands, this came at the expense of Indigenous peoples' rights to land: reasserting traditional and continued rights to land is the cornerstone of contemporary Indigenous rights movements and Indigenous/state relations.

A key practice in the taking of lands in colonial projects is a colonial power asserting its authority over a people. To justify this practice, international legal concepts, such as *terra nullius* and the doctrine of discovery have been used (Venne 1997; Borrows 2015). *Terra nullius* is Latin for 'vacant lands' and asserted that if a foreign power traveled to a land that was not being cultivated (in terms of resource extraction and exploitation) to the degree that the foreign power thought reasonable, the lands could be considered vacant and this consideration enabled the foreign power to exert its authority or sovereignty over these lands. Sovereignty is the authority to govern autonomously or independently (or without intrusion from an external power). As Venne (1997) explains, *terra nullius* is an international concept that was designed to divest Indigenous peoples of legal status to lands (185). *Terra nullius* literally means that lands are vacant; the legal concept was used by imperial colonialists to take lands from Indigenous peoples for use by European powers (Venne 1997, 185). When *terra nullius* is exercised in this way, the European power is exerting its sovereignty over Indigenous peoples, in effect taking away or diminishing the Indigenous nations' sovereignty. *Terra nullius* is used to justify this taking of lands (as it claims lands are empty and unused), but as this dissertation will explore, the basis of

this justification is tenuous and often at the heart of many Aboriginal title and Aboriginal rights court cases in Canada.

The doctrine of discovery asserts that if land is occupied by peoples who are not organized, socially and politically, to a degree that meets criteria set by the foreign and soon to be colonial power, it can be taken by that colonial power that is said to have discovered the lands. On the doctrine of discovery, Borrows (2015) explains that this was enabled by the notion that Indigenous peoples were inferior to other peoples as they were deemed to have insufficient social and political organization in these regards (702). And Patton (2001) writes, “According to this doctrine, a ‘civilised’ power could claim territory occupied by native peoples considered so primitive as to be without laws and without a sovereign” (32). Clearly, the two concepts of *terra nullius* and doctrine of discovery are intertwined: these concepts both enabled European powers to conquer Indigenous lands (and their rights to their lands) by legally and morally justifying these actions based on a premise that the lands were “empty” and “unused” by criteria constructed by European powers. It is no coincidence that when these Indigenous peoples did not meet the criteria developed and implemented (or tested) by European powers, it was the European power that would benefit from the Indigenous peoples’ “shortfall”.

The concepts of doctrine of discovery and *terra nullius* were used to undermine Indigenous peoples’ worldviews, including their social organization, governance and legal systems, and political practices, and superimpose European worldviews. European laws and economic practices were introduced to effectively disconnect Indigenous peoples from land so the land could be used to serve colonial interests such as settlement or, as happened in Canada, the settlers’ economies of the fur trade.² While European laws have not universally recast Indigenous worldviews, they have made it challenging for Indigenous worldviews to be

practiced. One example of the exercise of the doctrine of discovery concerns lands that, as acquired by colonial powers, were ascribed with new meanings and new histories that helped to generate new settler place stories. Some examples of this include renaming places, recording explorer and settler histories and not those of the Indigenous peoples, or recasting the value of land as demonstrated in the language that land is described in (Buss 2011; O'Brien 2010; Thrush 2007). Put simply, the justification imbedded in the concepts of doctrine of discovery and *terra nullius* allows land to be taken from Indigenous peoples to serve colonial settlement requirements. And in the process, Indigenous peoples' worldviews, such as their systems of ownership, were discounted as invalid and displaced.

The doctrine of discovery and *terra nullius* are some of the practices and perceptions that coincide with colonialism that enabled the lands of Indigenous peoples to be overtaken by a colonial power. Yet, today we know these lands were not "empty" nor "unused." Brown (2001) describes the colonial portrayal of the lands as the empty, barren land that had to be filled; the land of course was not empty upon contact, but it was in-part emptied by colonial projects of relocation and settlement. Today, many have demonstrated that the doctrine of discovery is unfounded (see Asch 2000, 154; Macklem 2001, 113); these lands were occupied and used by various Indigenous nations that practiced governance, commerce, and social organization (Borrows 2015). We know that the lands were not empty because there are Indigenous oral traditions that give evidence of occupation and use, continued Indigenous legal traditions and governance structures to demonstrate organized social and political societies, and anthropological and archeological records and travel accounts of early settlers also document use and occupation of lands by Indigenous peoples. However, the courts continue to rely on proof of continuous social organization to establish title (Borrows 2015, 714) or pre-contact and

continued occupancy to establish title (Hanna 2015, 368). This occupation and continued use has been proven by Canada's judiciary in several court cases on Aboriginal title. For example, *Delgamuukw* (1997) required a First Nation to prove exclusive occupation prior to European contact and a continuity of occupation from pre-contact to present day (Hanna 2015, 368; Gunn 2014, 27). And in the recent *Tsilhqot'in* (2014) ruling, Borrows (2015) interprets this ruling to hold that social organization is a foundation to a lawful society and this is fundamental to affirming Aboriginal title. Borrows (2015) writes, "Social organization can be seen as synonymous for self-government" (714).

While evidence exists that the doctrine of discovery and *terra nullius* were measures unfounded by fact and created to take lands from Indigenous peoples to serve colonial economic interests, the result of these practices has been damaging to Indigenous peoples' connection to their land and their rights to their lands. These measures enabled colonial powers to assume control over lands that then belonged to Indigenous nations (and who continue to have ancestral ties to) and this impacted Indigenous peoples' rights to their lands. As the Royal Commission on Aboriginal Peoples (1996b) has written, "This doctrine also gave the discovering European nation the exclusive right "of acquiring the soil from the natives." The European doctrine of discovery resulted in an impairment of the rights of Indigenous peoples" (34). This impact has not been absolute and Indigenous peoples have managed under the pressures of colonialism to practice traditional laws, culture, and their languages, and today many colonised states are in varying stages of de-colonialism and reconciliation (Alfred 1999). However, as Anaya (2012) has demonstrated, the impact of these measures on Indigenous peoples—some of whom were separated from their lands or separated from practising their laws on their lands—continues to present challenges to Indigenous rights. He writes, "This doctrine shamefully persists in the

jurisprudence of national judicial systems and in many of the domestic laws and regulatory regimes that affect Indigenous peoples” (Anaya, 2012). Thus, while many Indigenous peoples continue to practice legal traditions and customs associated with their ancestral lands, these peoples and those who were unable to exercise these connections to their ancestral lands might continue to face legal, geographical, and other colonial-based restrictions from such activities.

In the Canadian context, Borrows (2015) argues the concept *terra nullius* continues to exist. He writes, “Canadian law still has *terra nullius* written all over it” (702). Borrows explains that while the recent court case *Tsilhqot'in* (2014) (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256) states that the lands in what became Canada were not deemed *terra nullius* (and thus the justification for the sovereignty of state over Indigenous peoples lands was not gained through this concept), the case in fact then reinforces a notion of *terra nullius* by citing the court case *Guerin* (1984), which concerned the Musqueam Nation in B.C. and states “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province” (Borrows 2015, 723). This means that while *Tsilhqot'in* states lands were not *terra nullius*, the case also relies on a previous court ruling that did use the concept of *terra nullius* to support Crown sovereignty, which Borrows argues negates the statement that the lands were not *terra nullius*.

The reason for this logic in the courts could be due to the constraints felt by settler colonial states in reconciling past episodes of colonialism that have served settler interests at the expense of Indigenous interests. Bhandar (2004) has explained that settler colonialism in Canada can only go so far in reconciling the impact of settler colonialism and the narratives it employs to support it because the legitimacy of settler colonial structures are based on narratives of a false notion of legitimate acquirement and also, through the practices of settler colonial structures,

these narratives reinscribe this false legitimacy. For example, on the Aboriginal and Treaty rights written into s. 35 of the *Constitution Act, 1982*, she writes, “I argue that the production of historical narratives about the founding and settling of Canada serves a dual purpose: the production of historical narratives that recognize the injustice of colonial settlement is central to the recently recognized objective of reconciliation; and, at the same time, it is a means through which the law reestablishes the unquestioned and unproblematized legitimacy of the colonial assertion of sovereignty.” (Bhandar 2004, 832). Thus, the legitimacy of settler state is written into a narrative of legitimacy that is then reestablished through the actions of the structures of the settler colonial state. For this reason, court cases and judicial rulings such as the *Tsilhqot'in* (2014) decision continue to assume that the existence or diminishment of Aboriginal title continues to exist upon establishment and recognition of the Crown and not Indigenous-derived tenets of sovereignty (Borrows 2015, 726).³ The court’s activities, therefore, continue to employ or “reestablish” this assumption through the narratives in which it rests its decisions upon.

The construction and implementation of the doctrine of discovery and *terra nullius* enabled settler governments and society to effectively limit and control Indigenous peoples’ access and rights to their lands and sovereignty. These tactics exist in both imperial and settler colonial orders (yet, more so in the latter). As stated, however, differences do exist between imperial and settler societies. For example, the role of the Indigenous population under regimes of imperial and settler colonial societies also differs. According to Wolfe (1999), imperial colonialism requires Indigenous peoples’ labour and perpetuation of the colonial regime (1). Imperial colonialism, therefore, is the expansion of the colonial power through military and trade and it uses (even requires) the Indigenous populations to maintain the momentum of these activities on the territory of the colony (see Memmi 1965; Smith 1999). Settler colonialism,

however, is based on the premise of the displacement of the Indigenous peoples by the settler community in order to access the land and its resources; the settler population has little use for the labour of the Indigenous populations (Wolfe 1999) and, therefore, does not use the Indigenous population to maintain the colonial project—it pushes the Indigenous populations to the margins of the colonial project. To last, settler colonies need to import labour from outside to such an extent that settlers and their descendants become the majority of the populations. In Canada, one example of this marginalization is evident through the reserve system, which is a literal, physical marginalization of the various and distinct First Nations populations.

Early periods of the colonial project in Canada relied on Indigenous populations for basic survival, and this included settlers learning the geographies and climates to adjust practices of travel, food cultivation, and shelter-building (Miller 1989, 3-20). Political relations were often built on shared alliances and economic systems of exchange (a significant reason for the imperial power's very presence was to access the resources and have a new market for imperial-made goods). Over time, however, settler colonial societies—through power shifts and population growth—no longer relied on these Indigenous populations. Settler societies expanded control over lands through military and political diplomacy and economics, and along with this expansion of control developed corresponding attitudes that the Indigenous populations were impediments to settlement and needed to be removed through assimilation, physical removal, or marginalization (Milloy 1999; Shewell 2004; Ray, Miller, and Tough 2000). Hence, Indigenous nations were displaced under the regime of settler colonialism in Canada.

Indigenous peoples, however, have always maintained varying degrees of autonomy or agency, or the ability to exercise decision-making, even when their sovereignty was abrogated by these colonial forces (Borrows 2010, 59). While this has not always been evident due to the

replacement narratives that often omit Indigenous peoples' presence in settler colonial society, agency in settler society does exist. For example, in Canada First Nations peoples were marginalized through policies such as the reserve system and yet one result of the reserves is that these community structures have enabled continuance of cultural knowledge systems. Instead of propagating the colonial project through the state's assimilation agenda (such as that which can be found in the *Indian Act*, the Residential Schools system, and countless other Indigenous-related policies), the Indigenous-centred knowledge systems (cultures, social structures, and languages) often continued to exist alongside or outside of settler colonial knowledge systems (Battiste and Henderson 2005; King 1997; Hubbard 2008; Alfred 1999; Simpson 2004). Thus, the traditional Indigenous-centred knowledge systems often remain intact in settler colonialism and are not assimilated into the mainstream settler colonial knowledge systems, nor are they overridden by the settler colonial knowledge systems.

This continued agency is important for a number of reasons, such as the livelihood and continuance of cultural, language, or traditional knowledge systems in contemporary Indigenous communities. This is specifically important to this study because much of this thesis looks at the jurisdictional responsibility between the federal and sub-national governments as related to Indigenous peoples and their lands. This is the scope of this project. It is not meant to exclude the role of Indigenous traditional governments or Indigenous sovereignty. Many Indigenous governments and nations have never ceded their sovereignty and have successfully negotiated modern self-government agreements. These Indigenous nations are very much a part of the landscape of Canadian federalism. But, as is a feature of settler narratives, the place-story or replacement narrative that influences the narrative of Canadian federalism inherently omits the Indigenous nation and limits the conversation to the settler governments. At times, this thesis

will touch upon implications of neo-colonialism in the narrative of Canadian federalism for Indigenous self-government, but the main focus is on unpacking (understanding and analyzing) influences of settler colonialism on this narrative and exploring possible neo-colonial activity. This is because while the agency of Indigenous peoples is an undeniable factor in settler colonial society, its presence is often overlooked by the narrative of Canadian federalism.

Another aspect of settler colonialism that differs from imperial colonialism is that this marginalization of Indigenous peoples results in a normalization of settler society. Marginalization is complex: Ashcroft, Griffiths, and Tiffin (2000) write “The marginal therefore indicates a *positionality* that is best defined in terms of the limitations of a subject’s access to power” (121). These authors and others such as Blaut (1993) describe marginalization as a removal to a peripheral place in society, a place that is limited by the central or core powers in society. The process of marginalization is important to this project, because the narrative of federalism has placed Indigenous people on its periphery or it has marginalized their role. This project finds clear evidence of this marginalization in Canadian federalism: by looking at the nature of Canadian federalism between the central and sub-national governments, this dynamic of settler place story or replacement narrative influences the narrative of Canadian federalism which relies on and helps recreate Indigenous peoples’ placement on the periphery or in a marginalized role. This is clear in the very premise of federalism: is it a federal or provincial matter of responsibility? In contrast, a non-marginalized premise would ask: is it the settler state or the Indigenous nation that is responsible? Narratives of Canadian federalism that frame relations as a question of federal or provincial responsibility—and not Indigenous self-determination—reinforce this marginalization as normative.

Evidence, therefore, of normative marginalization of Indigenous peoples in the narrative of Canadian federalism is clear. Further to this, the narrative of Canadian federalism restricts itself to that of the federal government, and ignores the very real role of the sub-national. Normalization implies that something is expected or not questioned: it is normative. There are many cases of normalization in any society or individual experience; however, the normalization of marginalization means that Indigenous positionality on the periphery is normative and so too is settler positionality in the centre. Schick (2009) argues that "... the history of unearned white privilege and entitlement is rarely named, nor is its complex progress challenged..." (113). Schick is describing a privilege amongst settler society that is not "named" because it is normative. Settler privilege can become a normative and unchallenged feature of settler colonial society. Normalized privilege, or centreing, results in normative marginalization: the positionality of Indigenous peoples on the periphery will result from such privileging of settler populations at the centre. An example concerning this narrative of Canadian federalism is that Indigenous nations have for so long been denied sovereignty by the state—and yet Indigenous nations have always advocated to maintain their sovereignty—by the structure of federalism that maintains settler government's jurisdiction for Indigenous peoples at the expense of their sovereignty (in settler governance) and posits this narrative of federalism as a query of central or sub-national responsibility. Today, as will be discussed in Chapter 2, various forms of Canadian federalism have emerged that provide varying degrees of self-determination for Indigenous nations. However, as Papillon (2008) argues, while newer approaches to federalism such as multilevel governance can offer an alternative to Canadian federalism's dualistic governance, Canadian federalism has been and continues to be unreceptive to the idea of shared and overlapping sovereignty with Indigenous nations (31). In many ways settler society has simply

dismissed Indigenous peoples' sovereignty in the narrative of Canadian federalism. Clearly, the marginalization of Indigenous governments to that of the Canadian government is normative.

Interestingly, Phillips (2011) argues that another distinct marking of many settler societies, such as Canada, Australia, and New Zealand, is that due to immigration they, like their once imperial colonial nation of Britain, have come to embrace the political philosophy of multiculturalism (8). I point this out because in addition to being a marking of settler colonialism, Bannerji (2000) is critical of how Canadian multicultural policy contributes to the normative marginalization of Indigenous peoples. Canadian multiculturalism, Bannerji explains, perpetuates a pan-Canadian core culture that marginalizes other cultures as the other (10). Furthermore, multicultural implies cultural expression as sufficient evidence of social inclusion and equality; multiculturalism shifts the dialogue from rights recognition such as sovereignty, to cultural expressions. The concern with this is that cultural activity can overshadow rights debates: cultural activity can be mistaken for affirmation of rights recognition. For example, Papillon (2008) writes, "Accommodationist models based on cultural protection and minority rights do not answer the fundamental challenge Indigenous peoples pose to the legitimacy of existing states and constitutional orders" (33). However, from a settler societal perspective, Bannerji (2000) has argued that (post)colonial societies are constructs of colonialism and multiculturalism perpetuates and legitimizes mainstream Canada and the exclusion or marginalization of those outside of the mainstream (9-10). A feature of settler colonialism, therefore, can be multiculturalism, which is a policy that casts cultural expression as markers of social inclusion but this is not in fact guaranteed rights recognition. I would argue that the framework of Canadian federalism and Indigenous-based policies is an expression of this normative marginalization that posits cultural expression over rights recognition and the

narrative of federalism that focuses not on Indigenous sovereignty but state responsibility further reinforces its normalization.

The concern of this thesis is with how these features of settler colonialism influence the narrative of Canadian federalism. Imperial colonialism in Canada is well-documented (Dickason 1984; Dickason and McNab 2009; Tobias 1983; Alfred 1999; Hall 2003) and much of Canada's political and economic systems are founded on those developed in Europe and transported to North America. The original occupants of these lands—then known in the Treaty 1 regions, where I write from, as Turtle Island—are the First peoples or Indigenous peoples that lived here when Europeans arrived, and have their own political and economic systems. In some instances, these Indigenous-based methods and the transplanted European methods merged together. For example, Borrows (2002, 2010) illustrates a merging of Indigenous and European legal traditions that continue today to influence the judicial system in Canada. Others have demonstrated similar merging of Indigenous and European practices in Canada, and these settler colonial practices that have and continue to shape Canada's political and economic systems (Ralston Saul 2009; Depasquale 2007). In other instances, the European powers overpowered and supplanted Indigenous powers to form the foundations of Canadian settler colonial society (Dickason, 1984). This can be most clearly illustrated by the two primary systems of court law in Canada: Common Law, derived from the British legal system, and Civil Law, derived from that of France. With so many institutional structures of Canadian governance shaped by this shift from imperial to settler colonialism, is federalism too shaped by this shift?

This thesis is concerned with the on-going omission of this sub-national jurisdiction and First Nations peoples in Canadian federalism. Specifically, the governance relationship between provincial and territorial governments and status First Nations peoples who live on-reserve is

often overlooked in favour of their more straightforward relations with the federal government. This thesis will ask why this jurisdiction is omitted. In a sense, it is marginalization in the narrative of Canadian federalism. In settler society, those narratives that marginalize Indigenous peoples often do so, as discussed, to disempower Indigenous peoples in ways that serve the interests of settler society. The questions emerge: why would we consistently discuss only federal responsibility? Who does this narrative of federal jurisdiction benefit? Or, perhaps, who benefits from ignoring the sub-national jurisdiction? Through these questions, this thesis hopes to shed light on the presence of settler colonialism in the narrative of federalism in Canada, and practices of neo-colonialism in the interpretations of jurisdiction according to Canadian federalism.

One narrative of Canadian Federalism

Canadian federalism involves a complex approach to governing a country. Due to this complexity there are many possible narratives to explain its various expressions. This thesis is concerned with the narrative that describes federalism and its relationship with First Nations peoples living on-reserve. There are three distinct but interconnected factors in Canadian politics that make this jurisdictional relationship both complex and contribute to the tendency of dismissing the sub-national's role. The first two factors are closely related to Canadian federalism, having to do with the division of powers, and include both devolution and jurisdictional ambiguity. The third factor includes the many competing political tensions that arise due to these complexities of federalism. These three factors contribute to the omission of sub-national involvement with and responsibility for First Nations peoples on-reserves, or the narrative of Canadian federalism.

The first factor that contributed to the complexity of jurisdiction of First Nations peoples arises because of on-going changes in the expression of Canadian federalism due to its

flexibility. Again, federalism is a system of government used by federalist states, such as Canada, to distribute powers amongst the various levels of the state. As explained, the Canadian division of powers and corresponding responsibilities of these levels of the state are found in the *BNA Act (1867)* and the *Canada Constitution Act, 1982*. Important to this discussion, federalism is “not a fixed or exact thing,” it has a “fluid, even elusive quality” (Smith 2004, 8). This is because, according to Hogg (2004), federalism is used in Canada to ensure compromise and to unify a nation built on diversity (115). The Supreme Court of Canada (SCC) has recognized this flexibility of federalism in *Re: The Secession of Quebec (1998)* and wrote that federalism is “a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today” (Bavkis and Skogstad 2002, 35).

The role of the provinces in federalism, that is, a description of their powers, is explicitly set out in the *BNA Act* of 1867, section 92. The territories’ division of powers was set later by parliamentary acts, when they became separate jurisdictions and “joined” confederation, as will be discussed in more detail in Chapter 5. This role of the sub-nationals has additionally evolved, and the role of the sub-national has been enhanced in most matters of governance. When considering the history of this practice of federalism, which is based on cooperation among the levels of government, the contemporary expressions of federalism, and how the federal government administers its public expenditures and service provision, there has been a shift seen in the increasing involvement of the sub-nationals. This has happened through devolution, or the off-loading of responsibilities from upper levels of government to lower levels (Sancton 2002; Strick 2002; Roberts 2002). Have these shifts in federalism enhanced the presence of sub-nationals in matters of jurisdiction of Indigenous peoples in Canada or have the sub-nationals increased their involvement without jurisdictional responsibility?

The second factor that contributes to the omission of a formal recognition of the governance relationship between the provincial and territorial governments and status First Nations peoples living on-reserve is the ambiguity of contemporary jurisdictional arrangements. This ambiguity results in an overlap of responsibility or a vacuum of authority which can cause conflict as areas of responsibility may not be clear, which will be explained in more detail in Chapter 2. This ambiguity arises because while section 91(24) clearly provides Canada's federal government exclusive legislative authority in relation to "Indians and Lands Reserved for Indians," the role of the provinces in this subject matter has been made "unclear" (Edmonds 2010, 231). This lack of clarity will be discussed in-depth in Chapter 1. The result of this jurisdiction being "unclear" has allowed all levels of government to use the indeterminacy of jurisdiction, or ambiguity, to their own advantage. As I will argue in this thesis, there are many instances where the federal, provincial and territorial governments have used jurisdictional ambiguity surrounding duty to Indigenous peoples for the advancement of state-centred agendas at the expense of Indigenous disempowerment.

The third contributing factor concerns the conflicting political agendas of the federal government, the sub-national governments, and Indigenous peoples. These differing political agendas, or needs and interests, further contribute to the ignored relationship between the sub-national governments and First Nations peoples living on-reserve. For example, each of the governing bodies, the federal, provincial, territorial, and Indigenous governments, has both differing resources available to them and differing responsibilities bestowed on them, and they present competing agendas shaped by their interests and needs. This leads to sets of agendas that support the on-going narrative of Canadian federalism and federal jurisdiction of those First Nations peoples living on-reserve with Indian status.

The political agenda of the federal government in the Indigenous/state governance network is based on legal grounds and political will. The central state has demonstrated an interest in decentralizing its powers (and thus responsibilities) to lower levels of government (Dunn 2002). The federal government argues that it has a power, but not a responsibility, to provide for some Aboriginal peoples (namely, status Indians who live on-reserve) (Pratt 1989, 21). This level of government is bound through law to uphold their responsibilities to Indigenous peoples as outlined in the constitution, Treaties, and case law. They have, therefore, legal, financial, and management interests in maintaining this narrative of federalism should responsibilities be shirked by devolution.

The provincial and territorial governments, or the sub-nationals, also have a set of political agendas. These vary across the country; however, in general the sub-nationals are interested in expanding responsibilities that increase their assets and financial strength (Sancton 2002). They are not interested in assuming responsibilities that increase service deliveries or increase public spending. As Jhappan (1995) explains, “hence, the provinces were happy to let responsibility for Aboriginal peoples rest in federal hands, while they enjoyed the economic and other benefits of the lands and resources appropriated from them” (167). Sub-nationals, for this reason, often argue that they provide services to citizens equally; they do not provide “special” services to peoples based on being Aboriginal. This internal tug-of-war of willing encroachment and unwilling devolution is evident in on-reserve sub-national involvement. The sub-nationals, therefore, are often uninterested in deepening service delivery costs to status First Nations peoples (and yet they do), which they argue is a federal responsibility. They are, however, interested in maintaining and expanding authority over natural resources as a source of wealth. These resources are often found on-reserve, Treaty lands, and unceded ancestral lands. Once

again, it has been the structure of federalism that has enabled the marginalization of Indigenous peoples' land ownership and sovereignty by the federal government to create opportunities for the sub-nationals to control Indigenous peoples' lands. Land management and regulation is a key political incentive for the sub-nationals to increase interaction between themselves and Indigenous peoples.

The agendas of Indigenous peoples are also varied; however, Indigenous sovereignty movements are often based on nation-to-nation status as many argue to be recognized by the *Royal Proclamation of 1763* and the Treaties. Any political relationship with the provinces or territories can be said to jeopardize this status and therefore Indigenous-centred agendas of sovereignty are seen as often better served by negotiating with the federal government, not the provinces and territories (Long and Boldt 1988). When the federal government sought to formally devolve the responsibility for First Nations peoples to the provinces, the opposition of the First Nations peoples was enormous. The *White Paper* of 1968-69 proposed federal devolution to the provinces which was met with outrage from Indigenous peoples (Canada Indian Affairs and Northern Development 1969). The *White Paper* also set a course for a new phase of resistance not just to devolution but also to Indigenous rights suppression, and this resistance led to section 35 on Aboriginal rights being included in the Constitution Act, 1982 (Turner 2006, 13). Thus, it is evident, the opposition to devolution that launched the rights-recognition in the constitution demonstrates that there is a connection between jurisdiction of the settler colonial state for Indigenous peoples and Indigenous peoples' rights or sovereignty.

These three sets of political tensions demonstrate that in this narrative of federalism, there are various political tensions that are contributing to the neglect and often omission of a formal stated governance relationship between the provinces and territories and status First Nations

peoples living on-reserve. Because federalism is flexible, pressures do arise due to devolution, jurisdictional ambiguity, and competing political tensions, all of which contribute to the omission of formal recognition of the sub-national involvement with and responsibility for First Nations peoples on-reserves in the narrative of Canadian federalism.

Is the narrative of Canadian federalism neo-colonizing?

The omission of the sub-nationals in the narrative of federalism (the sole jurisdictional responsibility of the federal government for Indigenous peoples), I argue, is a result of settler colonialism and it suggests neo-colonial activity. The original impetus for this project was derived from my studies in public administration, and my past employment with the Manitoba Government. Here my interest in governments and citizens came to question the seemingly shifting role of the provincial government in reserve governance. Towards the end of my doctoral studies I had the opportunity to participate as a research fellow at the Newberry Consortium in American Indian Studies, in Chicago, Illinois. The focus of this fellowship was on narratives of both literature and physical space where Indigenous peoples were ignored by history, pushed to the margins of land: settler narratives of history that benefited the settler colonial project at the expense of disempowered Indigenous peoples. It was during this fellowship that I began to question not just why enhanced provincial and territorial engagement with status First Nations peoples living on-reserve is ignored, but whether or not this is akin to the silencing techniques of historical colonialism. If so, it seemed plausible that the ignored sub-national jurisdiction for First Nations peoples living on-reserve could be an extension of colonialism—or even a feature of neo-colonialism—through the empowerment of the settler governments at the expense of the disempowerment of the First Nations peoples. This disempowering of First Nations peoples in Canadian history is similar to other documented colonial projects that silence the presence, participation, and contributions of Indigenous peoples

through the colonizer's narratives of history and place. If silencing has been used in colonial projects to aid colonialism, is the omission of the role of provincial governments a similar symptom? While ignoring a tendency can be a way of covering up colonial erosion of rights, it is not clear if the tendency itself is an extension or mitigation of colonialism. The question then becomes: if we dismiss the sub-nationals' jurisdictional role in reserves, are we exercising neo-colonialism? If such a neo-colonial tendency exists, can it be further argued that de-colonial opportunities also, then, lie within these governance relationships? That the role of settler colonialism has encouraged a dismissal of the sub-national activity in Indigenous-related jurisdiction in Canadian federalism, and enabled an exercise of neo-colonialism within this same narrative of Canadian federalism, is the thesis of this dissertation.

The antithesis of this query is that no such influence or exercise exists in the omission of the role of the sub-nationals' jurisdiction in First Nations reserves. Perhaps this omission is merely overlooked due to the natural flexibility of federalism. It is true of federalism that powers shift between levels of government. As will be discussed more fully in Chapter 2, since the 1980s federalism has shifted from the devolution of federal powers to the sub-nationals. Perhaps, then, the role of the sub-nationals is ignored because its presence is merely a function of wider public administrative trends. One of the defining features of this period of devolution is the heightened occurrence of the offloading from federal to sub-national levels of government. Is this increased involvement of the sub-national, therefore, simply an expression of modern public administration? This dissertation will attempt to analyze the influence of settler colonialism and the exercise of neo-colonialism in the context of those wider trends in Canada's public administration.

Colonialism is a complex topic about which much has been written and theorized. Colonialism, as discussed earlier, is the outright enforcement of the colonizer nation's governance systems, cultures, languages, and political economies, onto those of a colonized nation. Neo-colonialism can be described in similar terms. It is the continuance of this colonizer presence and activity in the governance, social, and political economic realms of the colonized peoples. Ashcroft, Griffiths, and Tiffin (2000) describe a significant distinction between colonialism and neo-colonialism as the latter having an indirect, coercive manipulation of these realms (146). So, while we can easily see the exercise of control of colonizer over colonized, neo-colonialism can be less overt. It is this less overt nature of neo-colonialism that this thesis is interested in exploring in Canadian federalism. If the Canadian state has historically used colonialism to frame governance relations between itself and Indigenous peoples in favour of the state, has it turned to the use of neo-colonialism in modern Indigenous/state relations? Is modern public administration of devolution an activity of neo-colonialism?

The term "neo-colonialism" was coined by past Ghanaian President Kwame Nkrumah, who argued that neo-colonialism is the last stage of imperialism and is exercised by the continued imperial presence in colonies that have gained independence. As Ashcroft, Griffiths, and Tiffin (2000) write, "In fact, Nkrumah argued that neo-colonialism was more insidious and more difficult to detect and resist than the direct control exercised by classic colonialism" (146). It is these features of neo-colonialism—the nature of difficult detection and resistance—that this study is interested in. Neo-colonial features include those features of settler society that are not typically associated with colonialism (which contributes to the challenge of detection and resistance), but that indeed have the same intent and affects (Ashcroft, Griffiths, and Tiffin 2000). In this way, Canadian federalism could seem to be a such a system for neo-colonial

activity. This thesis will ask if the widespread omission of the sub-national/Indigenous jurisdiction, as an outcome of settler colonial narratives, is a symptom of or contributes to the perpetuation of neo-colonialism in the narrative of Canadian federalism.

Neo-colonialism does not replace settler colonialism; the two can coexist and are not mutually exclusive. For example, the *Indian Act* is colonial legislation that has attempted to formally replace traditional Indigenous governance with colonial band governance on-reserves (though, traditional governance often can co-exist with colonial governance) (Lawrence 2004; Alfred 1995). As Ladner and Orsini (2003) write on the *Indian Act*, it “... provides little more than the tools necessary for self-administration, which is a far cry from First Nations’ aspirations for self-government” (188). These colonialist influences of band governance can operate while neo-colonizing influences, such as sub-national shirking responsibility or increasing activity, are also present on-reserve. An example of both colonial and neo-colonial influences co-existing involves band governments that must both be political leaders working under a system of the *Indian Act* and deliver services devolved under modern public administrative practices. As Papillon (2008) explains, “It is a constant challenge for such organizations to balance their role of service providers accountable to the federal and provincial governments with their status as political structures emanating from their communities” (69).

This thesis will further consider how the constitutional, legislative, and political dynamics of Canadian federalism have shaped the role of the provinces and territories in Indigenous politics. It is those changes in federalism, devolution and jurisdictional ambiguity and the differing political agendas discussed earlier, that make the situations of the governance relations amongst provincial and territorial governments and First Nations peoples so urgent. The existence of neo-colonialism can be evidenced through two specific avenues of governance: the

modern land claims process and social service delivery. These issues will be explored in-depth in this thesis by comparing the historic and contemporary provincial and territorial governance relations with First Nations peoples in Manitoba, British Columbia, and the Northwest Territories.

This thesis will ask if this omission of sub-national activity is an outcome or symptom of neo-colonialism and if so is there a lesson for de-colonialism in this governance dynamic? This query holds a premise that there is a lesson for de-colonization in the determination of this ignored subject matter: to demonstrate colonialism in the framework of Canadian federalism, will uncover possible opportunities for de-colonialism. Even the act of analyzing the governance networks that exist between the sub-nationals and status First Nations peoples can have a decolonizing impact. I typically use the term anti-colonization to distance the goal of undoing colonialism from the theoretical and practical constraints that have come to be associated with the more commonly used terms of de-colonization and post-colonization.

De-colonialism can be defined as the dismantling of colonial order (Ashcroft, Griffiths, and Tiffin 2000, 56). Yet, as practice has shown, the removal of the colonial presence is insufficient to fully disarm colonialism. As Young (2001) writes of Iraq, “So the British left, but only in name.” (40); the very act of physical departure does not dismantle the metaphysical remnants of colonialism. Here, Young writes of imperial states, not necessarily settler colonial states; however, the concept can be and is often consistent in both colonial experiences. For example, when the imperial state leaves the colonized nation, the economies, cultures, and political institutions of the imperial state remain in place in the colonial nations, and also the ideological roots and processes of these systems, the very ones that competed and supplanted those of the Indigenous-centred ideologies. What remains then is an economic, social, and

political system tied to the colonial power. This is because, according to Althusser (1971), the state's ideology is indoctrinated within social institutions, political and economic systems, and more potently in our psyches and so a physical removal of the imperial government is not necessarily the end of it. Thus, colonial experts such as Said (1977), Fanon (1961), and Memmi (1965) describe ways that colonized peoples come to perpetuate the structures and ideologies of colonial systems, even those that may restrict their own freedoms and liberties. Colonial institutions and practices become entrenched or systemic. In some instances, other large-scale organizations, such as monetary or aid funds, come to take the role of the previous colonial power by exercising the decision-making authority (Ashcroft, Griffiths, and Tiffin 2000, 146). In settler societies such as Canada, it seems inevitable that the domestic government continues to perpetuate the colonial order.

It was the realization that the political liberation of colonies in the post-World War II era did not necessarily amount to cultural and economic liberation that led a theoretical shift to post-colonialism. Postcolonial efforts began to be framed as lessons not on how to undo colonialism, as de-colonial efforts had, but on how to move beyond colonialism. Put another way: if we cannot undo colonialism's impact, let's move forward by structuring new and restructuring old relationships and systems of politics, economics, and social spheres in ways that are not colonial, or in ways that do not place the imperial/settler at the core to influence the margins, but instead use an equitable placement between Indigenous and settler nations.

There are various philosophical tensions associated with post-colonialism, but in general two major streams have emerged. The first stream surrounds binary theory which looks at concepts that are related but opposite in meaning in the hope that further understanding will arise from examining the contrasted concepts. Two prominent binaries are LaRocque's (2010) binary

of Civ/Sav (civilization and savagery), and Blaut's (1993) binary of Inside/Outside (those inside and those outside of power/decision-making/prosperity/normalization). These two binary theories place the civilized, the colonizer, at the centre or superordinate and the savage, the colonized, on the periphery as subordinate. While descriptive and useful for understanding the mechanics of colonialism, binaries are value-laden and perpetuate a stasis, where nothing will change, because the very nature of the contrasted concepts are opposite. If the nature of the colonizer and the colonized are opposite, how can these opposites be reconciled? This question leads us to consider what is the very essence of the colonizer, what is the essence of the colonized. If someone is Indigenous can they participate in the colonial order without losing their Indianness? Atleo (2004) writes, "Change is not unusual to any culture or civilization, yet it is assumed that as soon as change is introduced to Indigenous cultures, they can no longer be considered authentic. Authentic Indigenous cultures are thought to be those that have had no contact with the colonizing Westerner" (76). Thus, it has been argued that binaries are unable to capture the real nuances of experience which happen in the social experiences of settler societies. For example, one can subscribe to Indigenous thought while also participating in the colonial society: one does not negate the other.

This tension of binarism leads to the second tension associated with post-colonialism, that being hybridity theory, which asks, "When an Indigenous person or community exists in a wider colonial order, does the impact of this colonialism impact the authenticity of their Indianness?" Hybridity theory argues that authenticity can remain. As Sinclair (2010) explains, "By viewing Indian people as diverse and complex, hybridists counter stereotypes rooted in a fixed, static "authenticity" (240). This acknowledgement of authenticity is important: colonialism is a feature of Canadian history that cannot be ignored, but acknowledging it does

not negate or dismiss Indigenous peoples as authentically Indigenous. As Bhabha (1994) explains, a lack of acknowledging the impact of colonialism only works to support and continue colonial domination, and thus hybridity theory allows for such acknowledgement of colonialism while also maintaining authentic Indigeneity. Bhabha writes, “Hybridity is the sign of productivity of colonial power, its shifting forces and fixities; it is the name for the strategic reversal of the process of domination through disavowal (that is, the production of discriminatory identities that secure ‘pure’ and original identity of authority)” (112).

Hybridity theory—recognizing that colonialism can impact Indigenous peoples but not the authenticity of being Indigenous—liberates the fixtures of positionality held by binaries. Hybridity allows for complex arrangements of culture, identity, and political economies to be present at once. Yet, as Sinclair (2010) further argues on hybridity: “It forces monolithic notions of multiplicity onto all First Nations peoples, many of whom do not necessarily see themselves as fragmented” (248). This is a significant theoretical tension for post-colonialism. In this sense, it reinforces an erosion of authenticity of Indigeneity, instead of demonstrating that fragmented experiences can still be authentically Indigenous. Hubbard (2008) argues this erosion can “reinscribe colonialism” (141). For example, King (1997) argues that according to postcolonial theory, oral narrative is necessarily affected by colonial presence and this impacts its legitimacy by jeopardizing its authenticity as traditional knowledge. Yet, King explains that Indigenous peoples’ actions or ideologies are not only reactions to colonialism; instead, Indigenous knowledge goes back beyond contact held intact by many Indigenous peoples through language and traditional teachings passed through the generations. Therefore Indigenous peoples, knowledge systems, and worldviews are not necessarily impacted by colonial presence or practice: hybridity theory cannot theoretically account for this.

Henderson (1997) is similarly critical of postcolonial theory as a product of colonialism: he argues it is non-Indigenous-centred (because the point of reference of post-colonialism is intrinsically colonial) which is counter-intuitive to Indigenous liberation strategies (23). Fanon (1963:1961) too argues that colonial presence cannot be overcome and therefore liberation strategies will necessarily imitate colonial confines. Thus, Indigenous peoples must develop strategies outside the parameters of colonialism: “This new humanity cannot do otherwise than define a new humanism both for itself and for others” (246). And theorists such as Alfred (1999) argue that traditional Indigenous knowledge is suitable to be used as a liberation strategy because, once again, it has remained outside the reach of colonial influences and pressures.

The challenge with this rejection of post-colonialism and call for new Indigenous-centred strategies or the regeneration of traditional knowledge to serve as a liberation strategy is that it then dismisses some of the experiences of Indigenous peoples since contact and therefore the contemporary expressions of Indigeneity. Both Thrush (2007) and O’Brien (2010) argue that dismissing the actual presence and experiences of Indigenous peoples throughout colonial contact and up to present-day restricts Indigenous peoples to the space of traditional, the opposite of modern and progress, and this dismisses their presence and contributions throughout modern society. Instead of reinforcing a connection to ancestral knowledge and worldviews, post-colonialism can limit Indigenous peoples to only tradition and never modernity, while both can and often do co-exist. Again, Indigenous peoples are reduced to narratives that focus on their essence, circling back to the initial question of “What makes one an Indigenous person?”

Due to these many layers of theoretical tension embedded in the terms de-colonialism and post-colonialism, I have decided to use the term anti-colonialism. I further believe that decolonizing efforts are useful steps to advancing anti-colonial efforts. In a sense, decolonizing

efforts exist on a continuum, not as an endpoint. This thesis is a step along this continuum of decolonizing efforts that attempt to promote activities that are anti-colonial, or that do not inherently promote imperial or settler influences on Indigenous nations. Indigenous nations, therefore, determine the structuring of relationships and systems of politics, economics, and social spheres independent of colonial influences, or anti-colonial and self-determined.

Defining Concepts

There are a number of concepts that are used throughout this project that require defining. These terms are federalism, governance, jurisdiction, and network. These terms create a concept that I have developed, the state/Indigenous governance network. I have chosen this concept in an effort to best address and analyze the query of this thesis: is the enhancement of sub-national jurisdiction neo-colonial?

In Canada, the state is organized through a system of federalism, which is based on a division of powers between the federal and sub-national governments (provincial and territorial) as equal and autonomous (or sovereign) levels of state. While this system encourages interdependency, it also attempts to ensure there are no overlaps (or redundancies) or vacuums of power. The provincial and territorial governments and their relation to First Nations populations, therefore, will be discussed in the wider context of the federal government, as federalism encourages an interdependency.

You might notice that this discussion of federalism does not include a mention of the role of Indigenous nation's jurisdiction. Often when the conversation turns to federalism and jurisdictional debates, the main actors of this conversation are both the federal and provincial governments. These conversations often do not include those peoples that the jurisdictional matter include. You might further notice that First Nations peoples and provincial and territorial governments do not have a place in this dialogue on federalism. Yet, all orders of government in

the Canadian state structure have a place in federalism. This thesis looks at the narrative of federalism that exists in the interplay between the federal and sub-national levels, and that excludes the other levels of jurisdiction, such as municipalities and band governments. This is in part an effort to narrow the scope of this thesis to a manageable project, and also highlight the colonial exclusion that exists in settler Canada where politics, governance, and jurisprudence often are enacted about Indigenous peoples without significant impact from Indigenous peoples themselves. That is the machination of colonialism and it is the goal of this thesis: to unpack this machination by determining how has and how does colonialism continue to shape the narratives of Canadian federalism?

There is a clear difference here between the conceptual terms of government and governance. Government is a state body with delegated or sovereign powers authorized to it, while governance refers to how the government interacts with the people in its jurisdiction and concerns the networks of actors included but not limited to the state.⁴ Rhodes (1996) describes governance as “...self-organizing, interorganizational networks ...these networks complement markets and hierarchies as governing structures for authoritatively allocating resources and exercising control and co-ordination” (652). Networks of governance blur the boundaries between state, market, and citizenry, which creates new networks (Rhodes 1996, 666-667). For the purpose of this research, therefore, governance is used to help conceptualize the complex features of jurisdiction. This term captures the complexities of jurisdiction which arise from a constitutional division of powers, but also are shaped by political and economic tensions.

The next conceptual term I use is jurisdiction, which is understood as an area of regulation that is designated to a body or actor through a constitution, legislation, policy, or a formal agreement of some sort made amongst authoritative decision makers. The discussion at hand,

jurisdiction between the central and sub-national governments in Canadian federalism, is determined by section 91, 92, and 94 of the *Canadian Constitution Act*. Jurisdiction is also the responsibility of the body or actor to ensure a mandate (political, legal) is accounted for. These two terms, jurisdiction and responsibility, are closely related. According to Morse (1989) the distinction rests on the concept of obligation: jurisdiction is the legal power or authority to act or legislate and responsibility is the moral obligation, ministerial responsibility, or the legal obligation of the state (61-62). Jurisdiction involves having the authority to act but says nothing about the morality of any action or inaction. Thus, jurisdiction and responsibility have different approaches to obligation: jurisdiction is the legal embodiment of authority, not the moral embodiment tied to responsibility. Within the political atmosphere of Canadian federalism, these two concepts can be confused, but it is the legal requirements of jurisdiction that is being explored in this project, not a moral imperative. Many would argue, and correctly so, that this is a too narrow reading of s.91(24): this reinforces the settler colonial influence on the narrative of Canadian federalism.

The final concept is network, which is used to define an organizational model. Often governance relations are cast as existing in paradigms, along spectrums, or as networks. Put simply, these models are employed to better articulate the behaviours, activities, and pressures (external and internal) that exist within any subject at hand. This project uses the approach of the network because it conceptually allows for a wider framework of analysis. Whereas a paradigm or spectrum may limit the number of variables or presuppose activity in linear or hierarchical ways, a network allows for infinite variables and does not presuppose an arrangement of behaviour or activity. In Canada, there are many actors and issues that fall under the domain of Indigenous-based politics, and while this one project cannot do justice to each and every

variation of the actors' needs and interests, nor the pressures of each issue that may arise, it does seek to provide the reader with an understanding or framework of analysis to better understand the variety of past and future needs and interests.

These understandings of federalism, governance, and jurisdiction contribute to a wider concept that is used throughout this project: the state/Indigenous governance network. This term is used to capture the many political pressures and interests and the legal frameworks of the actors that are involved in these governance dynamics. The state includes the federal government, the provincial governments, and territorial governments (municipal orders are outside the parameters of this research), unless specified as central or sub-national levels. Indigenous peoples refer to the First Nation communities that exist in Canada. The relationship between the state and Indigenous peoples is in reference to a governance network which is the imprecise organization of these actors as they engage in jurisdiction making and implementation.

Overview of Chapters

This thesis is organized into six chapters. The first chapter discusses the development of federal and sub-national jurisdiction and describes how the *Royal Proclamation of 1763*, the *British North America Act of 1867*, and the *Indian Act* have shaped jurisdictional responsibilities of First Nations peoples and reserve lands for the federal government and includes a definition of who is an Indian, what constitutes Indian reserve lands, and the requirements of this jurisdiction (Canada 1763; Canada 1867; Canada Department of Justice Canada 1985). The chapter moves on to fleshing out provincial jurisdiction for status First Nations peoples living on-reserve which is evident in section 88 of the *Indian Act*, and corresponding judicial interpretations of this jurisdiction. With the jurisdictions of the settler colonial state mapped out, Chapter 1 turns to Indigenous self-government and s.91(24) of the *Constitution Act, 1867* (Canada 1867). The nature of Canadian federalism often pits federal and sub-nationals against one another, leaving

out the people at the heart of the jurisdictional matter at hand. And yet, while s. 91(24) describes state jurisdiction for those First Nations peoples living on-reserve in terms of a colonial paradigm similar to that illustrated by LaRocque (2010) and Blaut (1993), it also provides a framework for Indigenous sovereignty.

Chapter 2 turns to the nuts and bolts of Canadian federalism, the ever-changing governance framework that is the narrative of our governance, and what these changes have meant for the jurisdiction of Indigenous peoples. Today, many federalist governments decentralize or devolve responsibility from the central government to the sub-national governments. This chapter looks at the political interests and needs of the actors involved in the state/Indigenous governance network. It further compares the Canadian federal narrative to that of Australian federalism, a like settler colonial nation, where similar jurisdictional debates have occurred.

Chapters 3 through 5 offer a comparative analysis of sub-national interaction with settler/Indigenous land issues in three sub-nationals: Manitoba, British Columbia, and the Northwest Territories. The benefit of this sample is that it allows for an in-depth look of the practices of sub-national jurisdiction on-reserve. These three sub-nationals allowed for a fruitful discussion of sub-national jurisdiction on-reserve. They provide comparisons of both provinces and a territory. This sample provides an example of a province, Manitoba, where treaties cover much of the land, to a province, British Columbia, where Treaties cover little of the land. The Northwest Territories has a different relationship with the federal government than do provinces due to its territorial status. These three sub-nationals are also at differing stages of reconciling Indigenous self-government and modern land claims. Importantly, this combination of sub-

nationals allows for a rich discussion of settler colonial history and those colonizing and neo-colonizing forces that exist today.

On closer inspection, Chapter 3 focuses on Manitoba, and in many ways this is the target of my thesis. As a Manitoban, my query is driven by the jurisdictional tensions and debates that I have experienced first-hand in this province. In many ways the other chapters act as tools to engage a fuller discussion of jurisdiction in this chapter. This chapter looks at the development of colonialism in Manitoba where much of the lands are Treaty lands and there are many First Nation reserves. The use of land and water resources for the generation of hydroelectric power are integral aspects of provincial and Indigenous jurisdictional dialogues.

Chapter 4 looks at the jurisdictional relationship of the province of British Columbia to First Nations reserves. This province offers an interesting comparative perspective because while it has many reserves, it has few historic Treaties and thus much of the region is unceded lands. The politics of the provincial government meant that British Columbia had little involvement in the governance on First Nations reserves until the 1990s when a political shift, federal court decisions, and public pressures increased provincial presence in these reserve communities. The nature of colonialism, past and present, in matters of economics and politics make this sub-national's involvement in land and economic development invaluable to this discussion of neo-colonialism in the narrative of Canadian federalism.

Chapter 5 turns to the Northwest Territories and provides a territorial comparison to this discussion on sub-national jurisdiction and First Nations peoples. Territories and provinces inherently have different relationships to the federal government and the Northwest Territories offers an important look at this difference. Much of the territory is covered by a single Treaty, Treaty 11, with a small portion covered by Treaty 8, and there are only two First Nations

reserves. This territory's historical colonial relationship with the federal government has framed Indigenous/settler relations concerning land management and resource use, and the territory has recently engaged in a process of territory-wide devolution.

The last chapter before the conclusion, Chapter 6, is a comparative analysis of these three sub-nationals' (Manitoba, British Columbia, and the Northwest Territories) differing bureaucratic approaches to jurisdiction concerning Indigenous peoples. This chapter also maps out the important jurisdictional debates of the social service delivery of healthcare and education. While healthcare and education remain predominantly a responsibility for the federal government, the sub-nationals have taken on increasing responsibilities in the delivery of these services, which offers opportunities for neo-colonial tendencies to emerge.

These six chapters form the thesis query that observes and evidences the jurisdictional role of the sub-nationals in First Nation reserves and asks if the omission of this role in Canadian federalism's narrative is neo-colonial. As Smith (1999) writes, "Indigenous research focuses and situates the broader Indigenous agenda in the research domain" (140). This technique of decolonizing research, that which situates the Indigenous nation (specifically Indigenous sovereignty) in the broader research, is prevalent in this work that looks at how the narrative of Canadian federalism exercises neo-colonialism in its omission of the sub-national relations with Indigenous peoples.

Research Methodology and Methods

This dissertation argues that a relationship or governance network exists between the sub-nationals and status First Nations peoples living on-reserve. I query if this relationship, which has expanded in recent decades, exists due to colonial and neo-colonial tendencies of the settler state or if it is a matter of contemporary public administrative practices of off-loading from central to sub-national governments? I argue that this Indigenous/sub-national governance

network is often overlooked or dismissed—and instead the more straightforward relationship between the federal government and status First Nations peoples as established through the *BNA Act's* s. 91(24) is often understood as the only or primary governance relationship—due to colonial and neocolonial tendencies that shape how Canadian federalism is understood. To demonstrate the existence of these colonial and neocolonial tendencies that influence the functions of Canadian federalism, I have demonstrated colonial and neocolonial intentions and outcomes in the narrative of Canadian federalism to evidence how governance in Canada has evolved in ways that limit Indigenous sovereignty. The narrative of Canadian federalism, that which purports a primary or sole relationship between the central settler state and Indigenous peoples and hence ignores the relationship with the sub-nationals, has evolved according to influences of colonialism and continues to support neo-colonialism in Canadian public administration (or governance structures that benefit the central and sub-national governments at the expense of the Indigenous peoples' sovereignty).

To demonstrate the influence of colonialism and neo-colonialism in the narrative of Canadian federalism, I've drawn from Smith's (1999) decolonizing methodological approach of Indigenous methodologies. Smith (1999) argues that colonialism is embedded in western research practices and these research practices in turn support colonial systems. To illustrate this connection between colonialism and western research practices, Smith argues research methods and methodologies that are western-centric—or informed by the norms and assumptions of western thinking and knowledge bases—inform and support colonial practices (including colonial influences on western knowledge systems). In other words, western research practices are both informed by and reproduce colonial paradigms of power that benefit colonizers and undermine the colonized. Smith is not alone in this argument; others, such as Said (1977),

Memmi (1965), and Fanon (1961), have made similar arguments concerning the nature of western knowledge that is used to support projects of colonialism.

Smith argues further that this inherent connection between western knowledge and colonialism marginalizes Indigenous ways of knowing. Kovach (2009) and Smith (1997) agree that when research is characterized by western knowledge systems that support colonialism, Indigenous knowledge is marginalized. These authors all agree that an approach to overcoming this marginalization and the connection between colonialism and western-based research is to apply Indigenous research methodologies. This is because while western approaches to research continue to serve as functions of colonialism, decolonizing and Indigenous research methodologies provide alternative approaches to colonial, western-based research practices and these can result in critical, de-colonial research practices and outcomes that can be used to empower Indigenous communities.

Smith (1999) inventories several decolonizing and Indigenous research methodologies, including the methodology of “reframing” which I have used throughout this dissertation. I understand the methodology of “reframing” as using decolonial, Indigenous centred, and anti-colonial discourses to analyze documents and occurrences where colonial tendencies might be ignored because they are created by or critiqued by western-based discourses. As Smith (1999) explains, when research ignores colonial influences, it can result in inadequate analyses and thus this methodology—“reframing” research through a lens of colonialism—can result in an adequate analysis of the impact of colonialism on the research at hand (154). As much of my research consists of documents created and distributed by the settler colonial governments in Canada, the application of “reframing” is integral to enabling a critique of the colonial tendencies within these sources. This dissertation has, therefore, used the de-colonizing and

Indigenous research methodology of “reframing” to apply a critical lens of colonialism to the narrative of Canadian federalism to demonstrate the colonial and neo-colonial influences on this narrative, which has evolved to administer settler state responsibility of Indigenous peoples at the level of central and sub-national governments while simultaneously at the expense of Indigenous sovereignty.

Smith describes de-colonizing and Indigenous research methodologies as those that are intended for “the survival of peoples, cultures and languages; the struggle to become self-determining, the need to take back control of acts of defiance” (142). In this dissertation, I have used the Indigenous research methodology of “reframing” in an effort to meet these requirements of a de-colonial research methodology by demonstrating colonial influences in the narrative of Canadian federalism (that which has evolved to enable the settler state to override Indigenous self-determination by dictating jurisdictional delineation to the settler state instead of enabling self-administration to the Indigenous nations themselves) which continues to function as neo-colonial (as the narrative masks the enhanced engagement and responsibility of the sub-nationals by perpetuating a narrative of central authority or jurisdiction for Indigenous peoples in Canada).

This dissertation applies the Indigenous research methodology of “reframing” through various research methods. These methods include a literature survey of three overlapping bodies of theoretical literature: colonial studies (including imperial, settler, and de-colonial studies), Indigenous-centred scholarship, and Canadian public administration, and two main bodies of primary research sources: interviews and sub-national budgetary and annual government reports. To a lesser degree, archival sources were used in this study. The Indigenous research methodology of “reframing” is a useful framework to approach both of these primary research sources, which otherwise may perpetuate the colonial and neo-colonial ideologies of the

Canadian settler state and thus result in an inadequate analysis of the influence of colonialism on the evolution and contemporary practices of sub-national jurisdiction in Canadian federalism. Also, the methodology of “reframing” lends itself to a critique of the colonial influences in the secondary sources used in the literature review, which have the potential to either perpetuate the colonial perspectives or to provide useful de-colonial critiques.

The initial stage of this study was developed through a literature review that includes both primary and secondary literature sources. These sources include a variety of governing documents that dictate the mechanics, or the structures and practices, of the Canadian settler state including jurisdiction. These include constitutional documents, court case rulings, and secondary sources (in particular, those related to colonial studies, Indigenous-centred scholarship, and Canadian public administration) that discuss the wider context, meanings, and outcomes of these governance documents.

This dissertation looks closely at the constitutional documents that delineate jurisdiction in Canada including the *Royal Proclamation of 1763*, the *British North America Act* (1867), the *Indian Act* (1876), and the *Canadian Constitution Act* (1982) (Royal Proclamation, 1763, R.S.C., 1985, App. II, No. 1; Canada 1867, *The Constitution Act, 1867*. 30 & 31 Vict, c 3; Canada 1982, *Constitution Act, 1982*. Schedule B to the Canada Act 1982 (UK), 1982, c 11). Provincial jurisdictions have also been tested through the judicial system and the most integral court cases for the research at-hand include: *Auditor-General for Quebec* (1921) (*Auditor-General for Quebec v. Auditor-General for Canada* [1921], 1 AC 401 (PC)), *Calder* (1973) (*Calder v British Columbia (AG)*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1), *Canadian Western Bank* (2007) (*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22), *Cardinal* (1974) (*Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695), *Delgamuukw* (1997)

(*Delgamuukw v British Columbia*, [1997] 3 SCR 1010), *Dick* (1985) (*Dick v The Queen*, [1985] 2 SCR 309), *Four B Manufacturing* (1980) (*Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031), *Guerin* (1984) (*Guerin v. The Queen*, [1984] 2 S.C.R. 335), *Haida Nation* (2004) (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73), *Johnston v. McIntosh* (*Johnston v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)), *Keewatin* (2014) (*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447), *Kitkatla Band* (2002) (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31), *Kruger and al.* (1978) (*Kruger and al. v. The Queen*, [1978] 1 S.C.R. 104), *Lovelace* (2000) (*Lovelace v Ontario*, [2000] 1 SCR 950), *Re: Eskimos* (1939) (*Re: Eskimos*, [1939] 2 D.L.R. 417; [1939] S.C.R. 104), *Secession of Quebec* (1998) (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217), *Francis* (1988) (*R v. Francis*, [1988] 1 S.C.R. 1025), *Hill* (1907) (*R v Hill*, (1907) 15 OLR 406 (CA)), *Horseman* (1990) (*R. v. Horseman*, [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95), *Simon* (1985) (*R v Simon*, [1985] 2 SCR 387, 23 CCC (3d) 238), *Sioui* (1990) (*R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127), *Sparrow* (1990) (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160), *Van der Peet* (1996) (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146), *St. Catharine's Milling and Lumber Co.* (1888) (*St. Catharine's Milling and Lumber Co. v The Queen*, (1888) 14 App Cas 76), and *Tsilhqot'in* (2014) (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256). The literature review also includes a variety of secondary sources that interpret these constitutional documents and legal cases.

Two primary research methods were used to develop this dissertation: sub-national government documents, including annual reports, strategic plans, budgets, and interviews. The sub-national annual reports, strategic plans, and budgets from each of the three sub-nationals that

make up the comparative element of this study: Manitoba, British Columbia, and the Northwest Territories, were accessed on-line. The dates of these documents range from the 1990s to 2015. These documents were predominantly accessed in the fall of 2012 and winter of 2013; however, as research progressed over subsequent years, annual reports, strategic plans, and budgets from proceeding years were accessed on-line as required. Using these on-line sources, I generated a database to inventory the sub-nationals' policies and programs that concerned Indigenous peoples. These documents provided fair and reliable information on the policies and services that concerned Indigenous peoples in each of the three sub-nationals. This database contributed to a better understanding of the practical or working relationship that frames the Indigenous/sub-national governance model as it articulated the related policies and programs in these sub-national jurisdictions. While this database housed all policies and programs relating to Indigenous peoples that were published in these on-line government documents, this dissertation came to only include those as they relate in each of the sub-nationals to land management, Treaties, land claims, self-government, healthcare, and education. Discussions of these policies and programs can be found in Chapters 3 through 6.

These areas of sub-national jurisdiction were chosen because they are some of the most crucial areas to analyze the influence of colonialism and neo-colonialism in the narrative of Canadian federalism. Land, as this dissertation will illustrate in Chapters 3 through 5, is the cornerstone to any colonial project and thus those policy matters and queries of jurisdictional control over land management, the Treaties, and modern day land claims and self-government agreements are integral to demonstrating that the narrative of Canadian federalism is influenced by colonial and neo-colonial indicators. As well, settler government provision of low-quality or inequitable social services to Indigenous peoples is another marker of colonialism (Frideres and

Gadacz 2012). Any contemporary government provides a vast array of social services that cover any number of features of modern living; however, there is not space in this dissertation to address all of these social services. Healthcare and education were chosen as two policy spheres that demonstrate the vast complexities and intricacies of jurisdiction and Indigenous peoples in Canada, yet they are not the only sectors that provide this demonstration. I have, however, worked in both of these fields in the context of Indigenous-centred politics and service delivery and, therefore, I do have interest and knowledge-base in these sectors. There are additional jurisdictional realms that would have provided just as useful examples to this research query; however, the restraints of time, length of document, and research manageability meant that these lie beyond the scope of this dissertation and yet these realms could certainly lend themselves to valuable and interesting future research endeavors.

As previously discussed, the Indigenous research methodology of “reframing” led to the critique of the narrative of federalism applied in this dissertation. This critique of narrative provides context to the comparative analysis of the sub-national policies in the following chapters. This narrative of federalism demonstrates that policies are politically motivated and that the history of this motivation in Canada has been to support and assist the colonial project or the building of the colonial nation-state, which has perpetually come at the expense of Indigenous peoples’ own sovereignty. While examples of sub-national policies that come from this inventoried database are considered in Chapters 3 through 6, the use of the narrative of Canadian federalism is important because it provides a critical lens to analyze and understand the motives of colonialism and neo-colonialism. This lens enabled this dissertation to differentiate that which is motivated by colonialism and neo-colonialism versus that which might be contemporary public administrative practices.

The second source of primary research used for the purposes of this dissertation was derived from interviews. This research method provided this study with a depth of knowledge, or contextualization, through conversations with various bureaucratic representatives at the sub-national level of government and representatives from Indigenous-centred governance and non-governing organizations. To select interview participants, I wrote letters and emails and, in some cases, telephoned the sub-national ministries and the Indigenous-centred organizations in each of the regions of Manitoba, British Columbia, and the Northwest Territories to request interviews. The selection of interviewees was based on recommendations made by the sub-national government or Indigenous organization: they chose experts within their organizations that they thought could best speak to the research goals of my dissertation topic.

To facilitate the interview process, the interviews were semi-structured and performed according to the interviewee's preferred method: by telephone, email, or in-person if geographically feasible. None of the interviewees chose to respond via email. All interviews with those participants from British Columbia and the Northwest Territories were performed via telephone. All but one interview with the Manitoba-based participants were performed in-person. All interviewees were given the opportunity to maintain their anonymity: only one interviewee chose to keep their anonymity. All interviews were audio recorded with the intention of being destroyed after an allotted period of time. Once the interviews were written into the dissertation, the content was then sent to the interviewee for final approval of the interview's use and application in the dissertation: it was my intent to ensure that I understood and used the interview content according to the intentions of the interviewee and to limit or avoid any misunderstandings. All interviewees signed consent forms that detailed these parameters. The interview questions were provided to participants beforehand, and included:

Interview Questions for Provincial/Territorial government interviewees:

- (i) What policies and/or programs are offered by your province/territory for Status First Nations peoples living on-reserve?
- (ii) Do all/most/few/ or none of the department portfolios within your provincial/territorial administration have an Indigenous aspect/scope to them?
- (iii) How do you understand the current relationship between your jurisdiction and Status First Nations peoples? How has the jurisdiction between your province/territory changed over time?
- (iv) Do you think it is a clearly defined relationship? What improvements to the definition (of jurisdictional delineation) could be made?
- (v) Are there active policies or programs that are outside the scope of constitutionally-mandated scope of jurisdictional responsibility?
- (vi) Do you work with the federal government to define this relationship or to deliver services, and if so, in what capacity is the consultation/collaboration?
- (vii) Do you work with the First Nations to define this relationship or to deliver services, and if so, in what capacity is the consultation/collaboration?
- (viii) In what direction do you see the future relationship between provinces and Status First Nations moving?

Interview Questions for Indigenous government and Indigenous-centred agencies interviewees:

- 1.1. What policies and/or programs are offered to Status First Nations peoples living on-reserve by provincial/territorial governments?
- 1.2. How do you understand the current relationship between your jurisdiction and Status First Nations peoples? How has the jurisdiction between your province/territory changed over time?
- 1.3. Do you think it is a clearly defined relationship? What improvements to the definition (of jurisdictional delineation) could be made?
- 1.4. Are there active policies or programs that are outside the scope of constitutionally-mandated scope of jurisdictional responsibility?
- 1.5. Do you work with the federal government to define this relationship or to deliver services, and if so, in what capacity is the consultation/collaboration?

- 1.6. Do you work with the provinces/territories to define this relationship or to deliver services, and if so, in what capacity is the consultation/collaboration?
- 1.7. In what direction do you see the future relationship between provinces/territories and Status First Nations moving?

The content on Manitoba makes up the bulk of the research in this dissertation and therefore more interviews were undertaken in this region than that of British Columbia and the Northwest Territories. Interviews for the Manitoba content were facilitated with various ministries in the provincial government and two Indigenous-centred agencies, the Assembly of Manitoba Chiefs and the Treaty Relations Commission of Manitoba. From the Assembly of Manitoba Chiefs, I interviewed in-person Grand Chief Derek Nepinak and Dr. Kathi Avery Kinew, Manager of Research and Social Development, and via telephone Kathleen Bluesky, the Coordinator for the Intergovernmental Committee on First Nations Health. From the Treaty Relations Commission of Manitoba, I interviewed in-person both Treaty Commissioner James Wilson and Darren Courchene, Research Coordinator. From the Government of Manitoba, I interviewed three civil servants. These included an in-person interview with Barry Mathers, Executive Director at Aboriginal and Northern Health Office from Manitoba Health. From Manitoba Education, I held an in-person interview with Dr. Sheila Giesbrecht, Student Success Consultant, and from the Manitoba Aboriginal and Northern Affairs, I facilitated an in-person interview with a senior civil servant with over 30 years of experience with the provincial government, who requested that their anonymity be kept.

While I facilitated fewer interviews in the regions of British Columbia and the Northwest Territories, these interviews provide a valuable comparison and contribution to the depth of knowledge, or contextualization, of the sub-national involvement in the settler state/Indigenous

governance network. Regarding the Northwest Territories, I performed telephone interviews with Owen Everts-Lind, the Manager of Policy and Planning with the Department of Aboriginal Affairs and Intergovernmental Relations (now called the Department of Executive and Indigenous Affairs) for the Government of the Northwest Territories, and John B. Zoe, Senior Advisor to the Tlicho Government. Interviews concerning British Columbia were facilitated with civil servants from the provincial government and leadership from Indigenous-centred agencies and government. From the Ministry of Aboriginal Relations and Reconciliation I facilitated a joint telephone interview with Lynn Beak, Executive Director, Cross Government Initiatives, and Jan Gottfred, Director, Intergovernmental and Community Relations Branch. Two telephone interviews with Indigenous governance leadership were performed with Maureen Chapman, Chief of the B.C. Assembly of First Nations and Arthur Manuel, past-Chief of Neskonalith Indian Band, British Columbia. Finally, a telephone interview was facilitated with Dr. Andrew Woolford, author of *Between Justice and Certainty: Treaty-Making in British Columbia (2005)*.

To a lesser extent, archival sources were also used in this dissertation. These documents were accessed from the archives at the Newberry Library, Chicago, Illinois during the summer of 2012 when I held a summer Research Fellowship with the Newberry Consortium of American Indian Studies. These archival documents included: Confederation Debates of 1865 (Lapin 1951), the Royal Commission on Dominion-Provincial Relations Report (Canada, and Joseph Sirois 1940), correspondence between the Secretary of State for the colonies and Great Britain (Public Archives of Canada 1907), several reports during this period from Department of Indian Affairs/Interior Affairs (Canada 1878, Canada 1873, Canada 1880), meeting minutes from the “Friends of Indians” in Britain (Friends of Indians Society 1838), and essays and speeches

written by prominent public officials that discussed the social climate surrounding the Confederation (Great Britain Colonial Office 1839).

A Note on Terminology

There are a number of acceptable and unacceptable terms used to address Indigenous peoples in Canada, depending on the context they are used. For example, two different sources on Canadian colonialism, Brownlie (2003) and Alfred (2005), which were published at approximately the same time, yet base their descriptions of acceptable terminology on fundamentally different contexts. Brownlie states that the *Constitution Act, 1982* defines Aboriginal as consisting of Indian, Inuit, and Metis, and it is the empowering nature of this constitutional entrenchment that forms her preferred terminological use of “Aboriginal” (xxii). Alfred, however, argues that the term Aboriginal is a state-generated term, used to disempower First Nations peoples by obscuring cultural boundaries, muting cultural variation, and depriving cultural authenticity. These two examples illustrate how one term can be used with respect or contempt, depending on the associated context of empowerment or disempowerment. I will use this term, therefore, only when necessary as in the original form of quotes or legislation or if discussing a legal concept, such as Aboriginal rights or Aboriginal title.⁵

Another example of this idea is the manner in which the word “Indian” is used in Canada. The word is generally not appropriate in settler Canada. Brownlie (2003) provides a sound explanation: “Indian” is not typically acceptable unless referring to status under the *Indian Act*, because of the history of racism in Canada which has, in many cases, relegated Indian to a derogatory term in current mainstream Canadian vernacular. For this reason, this term is only used in the form of quotes or to demonstrate legal status through the Treaties or the *Indian Act*. That said, I know many First Nations peoples (status and non-status Indians) who use this very term with pride. And why not? As Monture-Angus (1995) writes, “I want to re-claim that word,

Indian, once forced upon us and make it feel mine” (2). Many grow up with this term being used in their homes and communities and they identify Indian with much cultural pride and knowledge. I know that in my own personal community and those that I work within, this word is commonplace and comfortable to my ears. To assume the racism that settler Canadians might associate with the term “Indian” seems itself a racist limit to those who identify positively with it.⁶

The terms on-reserve and off-reserve also need clarification. I want to distinguish which segment of the Indigenous population is the focus of this study which is the First Nations peoples with status that live on-reserve. This is not a closed group of people; many First Nations peoples live or have families both on and off-reserve and thus there is fluctuation within this social segment of Indigenous peoples. As well, this concept is in itself contentious. For example, as Nepinak (2013) argues, looking only at status First Nations people is prescriptive: it is a concept that allows the federal government to have control over who is or is not in this group and it is premised on a notion that these are the only Indigenous peoples in Canada with rights. Nepinak further points out that this concept is actually built on an identity framework that is drastically changing. However, this scope is used in this project to make it manageable. This is because there are different legal mechanisms within the Canadian state that determine the governance relations between status First Nations peoples and the state and those Indigenous populations that live off-reserve (which can include status and non-status Indians, Metis, and Inuit). There are also peoples living on-reserve that do not have status due to membership regulations in the *Indian Act*. In this project, therefore, I use the term First Nation, not Aboriginal or Indian, because I am specifically interested in the legal and political relationship between status Indians and the federal and provincial/territorial state, and not Metis, Inuit, or non-status Indian, who

might have different legal, political, and historical relationships with the state. In addition to this, the First Nations organizations in British Columbia, the Northwest Territory and Manitoba use this term.

First Nation is a term not without its tensions and I recognize this. I spent the summer of 2012 as a Research Fellow at the Newberry Consortium in American Indian Studies, in Chicago, Illinois. American Indigenous scholars, I learned in this program, most often prefer to use the term “Indian.” In fact, one of my colleagues told me that they felt my use of First Nations peoples was disrespectful. As my colleague explained, this is because the identification of “Indian” is integral to the American Indian sovereignty movement: The Treaties were written with this language and to tamper with this identification and signifier of rights and title may, it is argued, tamper with claims of such rights and title. This favour of the term, also, did not surprise me. Anyone who spends time in a First Nations community, as I have, knows the term well. It is used regularly in Canada by Indigenous peoples for similar reasons of legal importance and so, to return to Monture-Angus, to reclaim the word and the identity.

In Canada, however, the term Indian is not just politically heated but legally complex. The Treaty process, *Indian Act*, and constitution have generated the categories of status and non-status Indians, Inuit, and Metis. So, while Indian is used in these legal documents, it is also used to exclude groups of Indigenous peoples, specifically non-status Indians, Inuit, and Metis. This is because s.91(24) of the *British North America Act 1867* says the federal government is responsible for “Indians and Lands Reserved for Indians” and this has been interpreted in Canada through legislation, policy, and the courts as a “special” relationship between the federal government and Indians (and also Inuit, as determined by the Supreme Court Case *Re: Eskimo 1939*, but this population and set of governance relationships are beyond the scope of this

project). In a constitutional sense, s. 91(24) creates a special relationship between the state and Indians (Boldt and Long 1985, 50). Yet in a public policy sense the status of Indian was created as a colonial tool of assimilation (Tobias 1983, 39) and current government practices demonstrate clear attempts to eliminate this special status (Pratt 1989, 23; Palmater 2011). While membership in Indigenous communities is determined by cultural facets such as collective social kinship agreements and not state-centric mechanisms (Henderson 2002, 420), the state has historically used membership to keep Indigenous peoples “in or out” of Indigenous communities through the use of Indian status (Simpson 2007, 76). Thus, in the Canadian context, the term Indian can be a symbol of the early nation-to-nation relations, but in more recent memory it reflects the attempts by the state to limit Indigenous sovereignty and rights by restricting Indigenous membership.

Finally, I use the term Indigenous throughout this project. I do this, even though my core research focus concerns First Nations that are registered and residing on-reserve, because colonialism is associated with myriad social and political economics that have affected all Indigenous peoples in Canada. In some cases, to discuss only status First Nations living on-reserve would be misleading and exclude the wider impact or effect of the colonial project in Canada. Indigenous is a term with growing acceptance and use both globally and in Canada. But, it does mean different things to different people. For example, Smith (1999) demonstrates that the term has a collectivity that some use to create cohesion for social and political economic movements, while others criticize it for muting cultural and historic differences (6). This mirrors the positive and negative attributes of the term Aboriginal. I have encountered people who define Indigenous as the First Peoples in a region or those who have an ongoing cultural and rights-based connections to land. In the Canadian context these definitions present two tensions: first, it

can be argued that Indigenous peoples excludes the Metis, who are a result of colonial contact, and second, that it excludes urban Aboriginal peoples, who may not have had the opportunity to facilitate a cultural or rights-based connection to land.

Indigenous peoples, therefore, is yet another term that does not meet the needs of defining the many Aboriginal peoples in Canada; however, it can be used in the Canadian context to encompass First Nations (status and non-status Indians), Metis, and Inuit. So Indigenous is much like the constitutional definition of Aboriginal, yet hopefully without its state-generated restrictions. Of course any Indigenous nation around the world has a word to describe themselves, whether it be tied to nation, tribe, or clan affiliation; it is simply an impossible task to honour these individual collectivities in a country of such scale as Canada which has over 600 First Nations reserve communities and numerous Inuit and Metis communities. Generalizing, it seems, is inescapable and I genuinely hope my chosen use of terminology does not confuse or upset anyone.

Chapter 1: The settler colonial narrative of Canadian Federalism and Section 91(24)

Often the existing jurisdictional responsibility of the provincial and territorial governments is ignored in favour of a perceived sole federal duty because of s. 91(24) of the *Constitution Act, 1867*⁷ which states “Indians, and Lands reserved for the Indians” are a jurisdiction of the federal government (Canada 1867). This statement authorizes Parliament to enact laws in relation to Indians and their lands (Hogg 2005, 294). And yet, Jhappan (1995) writes, “in fact, the provinces exercise a wide range of roles with respect to Aboriginal peoples” (163). This authority was originally bestowed on the federal level of the state to achieve uniform policies regarding Indigenous peoples (Hall 2003, 322) and enhance the probability that any such related policy was made in the interest of and not at the expense of the Indigenous peoples (Hogg 2005, 594).

This federal delineation of jurisdiction in the constitution also defines the jurisdictional role for the sub-nationals, as is customary in a federal system, and provides a scope of both responsibility and non-responsibility for the sub-nationals.⁸ Furthermore, while s. 91 (24) has historically been interpreted to delineate federal authority, it is an interpretation that continues to evolve through modern policy making, service delivery, political debates, and court decision-making. In addition, the regulation and management of provincial Crown lands have brought the provinces into Treaty-making procedures and modern land claims, but also these lands often interact with or are the ancestral or traditional lands of Indigenous peoples. Thus, modern interpretations of s. 91(24) have determined changes in how the constitutionally mandated role of the sub-national governments engage with “Indians, and lands reserved for Indians.” And yet, the narrative of Canadian federalism continues to ignore the jurisdictional responsibility of the sub-nationals, which I argue is a symptom of neo-colonialism.

The Federal Jurisdictional Scope

The governance relationship of the federal government and Indigenous peoples is regulated by s. 91(24) of the Constitution, which is a result of the *Royal Proclamation of 1763* (Royal Proclamation 1763). The origin of s.91(24) is an important starting point, because it presents Canadian federalism, and more specifically the division of powers, with a number of questions as to the nature of all jurisdictions (of the central and sub-national powers) in Canadian federalism regarding Indigenous peoples. These questions illustrate how the narrative of Canadian federalism, that which designates Indigenous nations as a federal responsibility, has developed within Canadian constitution-making and interpretation. Hall (2003) writes that the *Royal Proclamation of 1763* left many questions unanswered regarding land ownership and management, which have presented broader questions of government jurisdiction to Canadian federalism (321-322). Hall further demonstrates that the jurisdictional authority (and these unanswered questions) was first set out in the *Royal Proclamation of 1763*, then carried through to the *British North America (BNA) Act, 1867* s. 91 (24), and then further entrenched within the mechanics of present day Canadian federalism (474). The questions that the *Royal Proclamation of 1763* presents to Canadian federalism, and how responsibility for Indigenous peoples is viewed as a jurisdiction for federal or sub-national levels, concern the scope of what defines “Indian” and “Indian lands,” or in modern political debates, the nature of Indigenous rights and title.⁹ These are questions that continue to challenge modern day Canadian politics.

The wording of the *Royal Proclamation of 1763* is ambiguous: “And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and

Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid” (Royal Proclamation 1763). Today, many interpret this wording as evidence that at its inception Indigenous peoples and the Crown dealt with each other as equal and independent, or sovereign, nations. This is in stark contrast to contemporary settler colonial relations where relations are often hierarchical and/or paternalistic, and Indigenous nations struggle to have settler society and settler state recognition of their sovereignty as demonstrated through the various modern land claims, self-government, and Aboriginal rights court cases. There are many examples of such equitable status. Borrows (1997) has argued that when the *Royal Proclamation of 1763* was written it was based on the principles of diplomacy between equal, sovereign nations as was the diplomatic practice between the European settlers and Indigenous peoples at the time (156). According to Kulchyski (2007) “as our constitution developed, as I will discuss later, with the *bnact* of 1867 and the *constitution act, 1982*, aboriginal peoples are discussed in three sections and a few lines, but a close study of our past shows this wasn’t always so. that is why native leaders insisted that the constitution specifically mention the royal proclamation of 1763” (29).

Today, the *Royal Proclamation of 1763* and the notion of original occupancy, are the two foundational sources of Aboriginal rights used in modern legal practice.¹⁰ However, as a source of Aboriginal rights the *Royal Proclamation of 1763* presents a major problem about whether these rights are acknowledged by the Crown or created by the Crown.¹¹ If created by the Crown, then the Crown can extinguish these rights. And, as Kulchyski (1994) writes, these rights tied to the *Royal Proclamation of 1763* have been violated by the Crown (6). If acknowledged in the doctrine, the nation-to-nation sovereign relationship must be maintained or upheld by the Crown. Indigenous peoples have never ceased advocating that their rights exist prior to European

colonial contact and occupation. Today, however, the settler state commonly frames this relationship not on nation-to-nation relations but on those akin to sovereign-subject or state-citizen, as demonstrated by the centuries of colonial history of Canada.¹² This tension surrounding the *Royal Proclamation of 1763* and whether these rights are acknowledged or created presents a question as to the power the federal government has regarding Aboriginal rights and the nature of federal authority over Indigenous peoples.¹³

From the perspective of many Indigenous peoples, the *Royal Proclamation of 1763* upholds the right to sovereignty. For this reason, it is often referred to as the “Indian Magna Carta.”¹⁴ Many point to how the Royal Proclamation came to form Treaty-making practices and cement Indigenous-based land title into Canadian law. It is argued that when the *Royal Proclamation of 1763* did this, it was not making rights but recognizing the existing land rights of Indigenous peoples. In this regard, the *Royal Proclamation of 1763* continues to be important to Indigenous sovereignty movements today. These very aspects of the *Royal Proclamation of 1763* also enabled the Canadian government to develop jurisdiction over Indigenous peoples and subsequent assimilative legislation. This contradiction in Indigenous peoples’ rights remains a key aspect of contemporary rights dialogues concerning the *Royal Proclamation of 1763*. Tidridge describes in his book “The Queen at the Council Fire” (2015), Treaties were made with the Crown, not the government. This relationship was forged by the *Royal Proclamation of 1763* and it still exists between the Crown and First Nations through Treaty. The title of Tidridge’s book reminds us that indeed, the Queen remains at the council fire. Or, put another way, the bilateral relationship of nation-to-nation between Indigenous nations and the Crown remains. We can see how the *Royal Proclamation of 1763* has had many meanings. On the one hand, it is the Indian Magna Carta. It reinforces existing and inherent Indigenous nation’s rights in British

colonial laws. On the other hand, we see how the *Royal Proclamation of 1763* has been used by the Crown and later the federal government to circumvent Indigenous nation's sovereignty. Consider that Justice Murray Sinclair, the Chair of the Truth and Reconciliation Commission, has been quoted as saying "I love the Royal Proclamation, and hate it at the same time." (Tidridge 2015, 53). The title "The Queen at the Council Fire" is a reminder that the relationship between Indigenous peoples is with the Crown, not the executive nor any other branch of the Canadian state: it is a sacred relationship between the Crown and First Nations. This relationship continues to be honoured to this day by a sacred fire at Rideau Hall in Ottawa. Thus, Indigenous rights are recognized in early colonial laws and the Canadian legal structure, which equips this very same legal structure with laws to avoid such rights infringement, as the Indian Magna Carta demonstrates.

After the *Royal Proclamation of 1763* was created, the *Treaty of Niagara* was signed in 1764, bringing 24 First Nations and the Crown into Treaty. Many consider these two agreements to be part of the same Treaty; however, the latter agreement demonstrates the sovereignty and agency of Indigenous peoples which is often overlooked in favour of the diplomacy outlined in the *Royal Proclamation* which does not express Indigenous understandings of this Treaty agreement (Borrows 1997, 155). The Treaty of Niagara of 1764 ratified the provisions—that the Crown can create Treaty with Indigenous nations—set out in the *Royal Proclamation of 1763* (Abele and Prince 2006, 569). Essentially, the Treaty of Niagara was Indigenous peoples' acceptance of the terms of *Royal Proclamation of 1763* (Borrows 2015, 735). The *Royal Proclamation* was created in part to alleviate conflict over lands and assure Indigenous peoples that settlement would not come at the expense of Indigenous peoples' lands, but the proclamation also provided a tool to expand "British sovereignty and dominion over Indian

lands” (Borrows 1997, 159-160). The Treaty of Niagara, in contrast, was both a gathering of the Crown and Indigenous peoples in a spirit of “nation-to-nation” and an expression of Indigenous diplomacy, both of which are captured by the Covenant Chain of Friendship Wampum belt (Borrows 1997, 161). Wampum is an aspect of traditional Indigenous-centred governance that European powers often participated in when negotiating and forming alliances. Wampum Belts were used by Indigenous nations to mark Treaty and milestones of political negotiation between nations (Bol 1998, 67; King 1999, 50). The use of Wampum at the Treaty of Niagara demonstrates that “First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation” (Borrows 1997, 155). The Treaty of Niagara continues to be an important occurrence in Canadian history that marks both Indigenous agency and sovereignty and nation-to-nation diplomacy between the British and Indigenous nations.

Another important feature of modern-day Canadian federalism that is derived from the *Royal Proclamation of 1763* is the property relations between the federal government and First Nation communities. One of the purposes of the *Royal Proclamation of 1763* was to deter conflict regarding land acquisitions and holdings between the settler colonies and Indigenous peoples by ensuring the protection of lands belonging to the Indigenous peoples (Borrows 2007, 159). Due to this, the *Royal Proclamation of 1763* enabled a relationship of “special” status between the federal government and Indigenous peoples by determining that Indigenous lands are inalienable, or cannot be surrendered to any party but the Crown (Kulchyski 1994, 8). Kulchyski (2007) writes “if native people were willing to surrender it, only the crown (or government) could buy it, and the crown had to follow a procedure that involved assembling all the indians, having them choose a leader, and then paying them a fair price” (24). Thus, the

Proclamation also established a legal process of title, or in other words “the procedure whereby such lands could be acquired by the Crown and subsequently made available to non-Native settlers” (Waldram 1988, 27). Consequently, one of the reasons that issues of Indigenous policy have consistently been placed with the federal government is because ownership can only pass between Indigenous peoples and the federal Crown. In fact, it is this responsibility of the state that has fueled Canada’s long history of Indian reserves, residential schools, and Indigenous policy in general.¹⁵

This inalienable land transfer between the Indigenous peoples to the Crown was initially a protectionist measure, but it came to be used by the Crown in ways that benefited their settlement agenda. In this sense, the *Royal Proclamation of 1763* ensured that the state was and is responsible to find ways, in their own pursuit of land as per the colonial project, to “manage the displacement of the Indians” (Shewell 2004, 8). The impact of these property relations, or Indigenous title, being housed under federal authority is that the federal government has used s.91(24) to narrow the nature and scope of Indigenous rights and title by confining Indigenous policy to the will of the federal government. For example, the ministerial portfolio of Indian Affairs has consistently existed under an umbrella of a larger bureaucratic profile that is charged with land appropriation and regulation. The long evolution of Indian Affairs demonstrates just this. The Department of Indian Affairs was initially a part of the Department of Interior in the late nineteenth century. In 1873, Indians and Indian Lands Branch developed under the Department of the Interior and then in 1880 the Department of Indian Affairs was created. The outcome of this co-existence is a set of conflicting mandates for the Department of Interior (Spry and McCardle 1993, 143). In 1936, Indian Affairs was placed under the Department of Mines and Resources, and the present-day department is entitled Indigenous and Northern Affairs

Canada (INAC). As Spry and McCardle (1993) write, “It has been one of the most remarkable features of Indian policy in Canada that the office responsible for administration of Indians has, for much of its existence, been closely attached to the offices responsible for the disposition to non-aboriginals of the same common lands and resources which originally supported the aboriginal peoples” (139). These competing mandates present conflicting policy and legal courses that restrict the likelihood of Indigenous needs being placed ahead of those interests of the colonial government. The present-day union of the two, Indigenous Affairs and Northern Development Canada, is thus a clear extension of this long-standing colonial practice.

The *Royal Proclamation of 1763* was later used as the framework for the *BNA Act, 1867* s. 91 (24), which states “Indians, and lands reserved for the Indians” are a head of power for the federal state. The fundamental responsibilities of protection that the *Royal Proclamation of 1763* placed on the Crown were thus extended and written into the *BNA Act’s* s.91(24). This is significant to the discussion of federal jurisdiction because it is this statement from s.91(24) that has been used since 1867 to frame how the federal government has understood its relationship to Indigenous sovereign nations, or perhaps more accurately how it has interpreted its authority over Indigenous peoples. This relationship is, therefore, not imagined on a scale of nation-to-nation equity: how the federal government has interpreted s. 91(24) was as a provision of wide-sweeping authority over Indigenous peoples. The evolution of Indigenous-related policy in Canada reflects this interpretation of authority. According to Shewell (2004) and Tobias (1983), early state jurisdictional parameters were set with this intention of protection, which evolved into subjugation, and later became a tool of assimilation. This understanding of authority over Indigenous peoples and intent of assimilation has been expressed through two significant avenues of government action: how it defines both Indians and Indian lands.

Up to this point, this discussion of jurisdiction is that defined by that of the settler colonial state. It positions Indigenous nations in terms set by, managed, and controlled once by the Crown and now by the Canadian state. This jurisdiction, however, is not defined as such by Indigenous nations. As Grand Chief of the Assembly of Manitoba Chiefs, Derek Nepinak (2013) says, “Our jurisdiction is one that has never been surrendered. The corner stones have been built on the foundation of Treaty. A relationship of jurisdiction and sovereignty is recognized; this created affirmations that have not happened, but we maintain our jurisdiction. These rights are the Treaty lands, ancestral lands, and rights that are not recognized by settler experience.”

Jurisdiction, to Indigenous peoples, is not defined by this narrative of settler Canadian federalism or, put another way, the Canadian state does not have jurisdiction for or over Indigenous nations. Indigenous nations are sovereign, with rights that pre-date imperial colonialism and Canadian settler colonialism, and these have, as Nepinak maintains, been recognized by the Treaties, ancestral lands, and rights. While not explicitly stating it, I infer that Nepinak is referring to those continued and contemporary rights and responsibilities tied to traditional use and occupancy of ancestral lands that have been recognized and affirmed by section 35 of the *Canadian Constitution Act 1982* (which says, in section 35(1), “The existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (Canada 1982).

The interpretation of s. 91(24) that holds the federal government has jurisdictional authority over “Indians” has allowed the federal government the authority to create and regulate those who are defined as “Indian.” Many would argue that this legal authority is tenuous: Indigenous nations continue to hold traditional or inherent authority to determine membership and identity, and many continue to exercise this right (Lawrence 2004; Palmater 2011). The

definition of Indian in Canada's social and legal history, therefore, is a complex matter. The federal government and Indians are said to have a "special" relationship which is determined by s.91(24); however, the parameters of this relationship are not well defined. In 1857, the *Gradual Civilization Act* was enacted by the early colonial governments of Upper and Lower Canada—and with this the first provision of "special" status as Indian—with the intention of erasing distinctions through enfranchised assimilation¹⁶; instead this status created a legal distinction based on citizenship differentiation between non-Indigenous Canadians and Indians and developed parameters for land ownership and management exclusive to that of First Nations peoples (Carter 1990, 24-25). This distinction of "special" status extends from the *Royal Proclamation of 1763* into the following documents where it has evolved over time: the *BNA Act*, the *Indian Act*, the *Constitution Act of 1982*, the *Citizenship Act*, the *Immigration Act*, as well as fisheries legislation, treaties and land claims, and tax exemptions (Boldt and Long 1985, 50, 250). Initially, the definition of Indian included all with Indian ancestry; however, over time legislation has narrowed this definition (Tobias 1983, 129). In modern Canadian politics, this definition that was narrowed continues to broaden. For example, the recent Federal Court case *Daniels v. Canada* (2013) and Supreme Court Case *Daniels v. Canada (Indian Affairs and Northern Development)* (2016) made the historic decision that the Metis are Indians as per s. 91(24) of the constitution as was previously done for Inuit through the Supreme Court case of *Re: Eskimos (1939)* (*Daniels v Canada*, [2013]; *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016]; *Re: Eskimos*, [1939]).¹⁷

Hogg (2004) argues that in contemporary Canadian law the intention of s.91(24) is for those people with Indian status and living on-reserve and not for non-status Indians or those with status who are living off-reserve (595-596). This, however, is a hotly debated notion and many

would argue otherwise. For example, Pratt (1989) argues that s.91(24) includes all Aboriginal peoples as per the Constitutional definition from 1982, including Indian (Status *and* non-Status), Inuit, and Metis (20). Further to this, Scott and McCabe (1988) have written, “The fact that Parliament, pursuant to its authority, has chosen to legislate only in respect of those aboriginal peoples it has defined as ‘Indians’ does not alter the fact that its authority extends to all aboriginal peoples” (62). Therefore, the notion that s. 91(24) only covers status Indians is tenuous (as is the decision to use this definition in this project; see Introduction, A Note on Terminology). Also, the Indigenous perspective of membership is often more fluid and inclusive than that of the *Indian Act* or s. 91(24) and is not limited to who has status or resides on- or off-reserve, but is based on community affiliation, family ties, or traditional relations such as clan systems (Palmater 2011; Lawrence 2004). Thus, while the state attempts to limit those who are encompassed in its notion of who is included in s.91(24), many scholars have described the narrowness of the state’s definition and that Indigenous peoples themselves have a wider scope of membership and identity.

One of the outcomes of the state determining who is included in the definition of s.91(24)’s term “Indian” is the use of s.91(24) as a tool for assimilation. The Canadian government has used its power in s.91(24) to control who is an Indian in the attempt to reduce this demographic and it has been argued that shifts in the definition of Indian are attempts to eliminate this special status through assimilation in the effort to reduce Indian membership (Boldt and Long 1985; Lawrence 2004; Palmater 2011). As Tobias (1983) writes on s.91(24), “However, the legislation by which the governments of Canada sought to fulfill their responsibility always had as its ultimate purpose the elimination of the Indian’s special status” (127). As Nepinak (2013) says on the state-derived concept of status, “This is premised on a

notion that these are the only people with rights; status is very prescriptive and the feds have used it to control us. Our inherent rights exist for us all, but this is prescriptive... Section 91 (24) creates the *Indian Act* which creates Indians, which is a paper process, which goes through Ottawa, which determines identity. We reject this notion that we live in a prescribed society: there is a more fundamental existence.... But right now, if I am just a section 91 (24) Indian, it is not a good opportunity because this Indian becomes extinct: it is a mathematical certain[ty].” Thus, while s.91(24) creates the responsibility of jurisdiction for the federal government for Indigenous peoples and matters of Indigenous policy, it also provides a tool for the state to control who is an “Indian” in the attempt to assimilate Indigenous peoples. Clearly, put in such a way, the federal definition serves the interests of the state at the expense of the interests of Indigenous peoples and their nations.

Whereas s.91(24) states that the federal government has authority and responsibility for Indian lands, it is not clear what constitutes these lands. For example, are Indian lands those lands used traditionally, or are these lands confined to only reserve lands, or all lands with Indigenous title such as Treaty lands?¹⁸ Both the 1927 and 1951 *Indian Acts* define a reserve as the following: “‘Reserve’ means a tract of land, the legal title to which is vested in His [now Her] Majesty, that has been set apart by His [Her] Majesty for the use and benefit of a band” (McNeil 1997, 148). Reserve lands often exist next to provincial Crown lands, and are often small tracts of land that were, at the time of reserve establishment, usually the least desirable land for access to wood, water, and later agriculture. This fact can be traced to one Indigenous-centred perspective on the reserves, which in Cree is called both *askihkan* and *iskonikan* or fake land and left-overs (McLeod 2009, 57). Other Indigenous-centred perspectives on reserves do exist, and can include, but are not limited to, land holdings or property, a place for cultural

resistance and continuance, and, simply, home. Hogg (2004) writes that the lands in question, or Indian lands, do not just include reserve lands, but all lands set aside by the *Royal Proclamation of 1763* as not ceded to the Crown (597). The *Royal Proclamation of 1763* designated all lands west of the Mississippi as Indian lands. As Miller (2013) writes, “First, the Proclamation effectively recognized some sort of Indigenous rights to possess territories that lay beyond existing colonial boundaries and the height of land to the west of the Thirteen Colonies. These lands, it said, were “reserved to the ... Indians.” This then would include lands that extend well beyond the limitations of reserve lands to all lands of Aboriginal title, and in many cases, include lands that could now be settled or urban areas. Take, for example, the case of the Kapyong Barracks in Winnipeg, which is on Treaty 1 land and is that of the Treaty signatories and the case appellants of Peguis First Nation, Long Plain First Nation, Roseau River Anishinabe First Nation, and Sandy Bay Ojibway First Nation, and now situated near the centre of the City of Winnipeg. This particular case was recently before the Federal Court of Appeal (*Canada v. Long Plain First Nation*, 2015 FCA 177). The implications for the future of this “land reserved for Indians” presents a host of interesting policy decisions and possibilities for the city and these First Nations, as each possibility includes possible tax and sale revenues and, specifically for the First Nations, opportunities to exercise self-determination. Thus, the jurisdictional relationship between the federal government and Indian lands as per s. 91(24) is still a challenging and evolving matter of jurisdictional responsibility.

Deciphering how these lands ought to be used to enable a proper interpretation of the jurisdiction as per s. 91(24) is a difficult task in modern Canadian politics, because contemporary state conceptualizations of Aboriginal title (for better or worse) are based on three tenets: 1) collective holding; 2) inalienability (except to the Crown); and 3) inherent interest protected by

prior occupancy (Macklem 2001, 88). This means that Indigenous peoples must prove use of land in a traditional way that has had little to no interruption by colonial settlement to prove title to land. However, this is difficult for a variety of reasons, most of which have to do with colonial contact which has often disrupted Indigenous peoples' access to their land and practice of their cultures, languages, political systems, and economic structures. As well, historic state definitions of Indigenous title have been determined as existing under Crown authority (Macklem 2001, 87), and have excluded Indigenous-based determinants of title. These determinants are commonly understood to be based on a relationship of reciprocal care and access for use as entrusted by the Creator: not necessarily ownership, but reciprocal guardianship. Thus, these tests of Indigenous title are defined by stipulations developed by the state, such as through Treaties, reserves, and culture tests (so these are colonial measures that seek to test "authentic" Indigeneity in an era shaped by centuries of colonial assimilation). The *Delgamuukw* test, for example, contends that the First Nation must have had exclusive occupation prior to European contact and a continuity of occupation from pre-contact to present day for proof of Aboriginal title (Hanna 2015, 368; Gunn 2014, 27). Such tests are determined by a set of criteria that changes over time, but that excludes Indigenous-centred definitions, and instead uses state-centric definitions that assume that Indian lands must be held in trust by the government. In contemporary management of lands and land claims, therefore, conflicting understandings of what constitutes Indian lands can exist.

Again, while s.91(24) authorizes the federal government to have jurisdictional responsibility for Indians and their lands, it does not indicate the nature or scope of this jurisdiction. In the past, this nature and scope has been interpreted as wide-ranging, and was used initially to protect Indian lands from settler encroachment and later to assimilate First Nations peoples (Milloy 2008). Hogg (2004) contends that "the federal Parliament has taken the broad

view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians” (596). Indigenous policy matters were generally housed solely with the federal government even when it concerned matters traditionally housed with the provinces or those that later came to be devolved to the sub-nationals. As Pratt (1989) has written, “Generally, the federal government argues that it has a power, but not a responsibility, to provide special legal regimes for some Aboriginal peoples” (2). This interpretation is characterized as a permissive, not mandatory, interpretation of the law; jurisdiction does not oblige the government to do something, it makes it allowable if the state chooses to activate its authority (Hawkes 1989, 359). In practice this means there is no legal compulsion of enforcement for any program or service not entrenched in legislation (Pratt 1989, 21). Thus, the federal state has taken on jurisdiction for wide-sweeping responsibility generally outside the scope of the federal government, but also argues that responsibility is permissive and not mandatory.

It is these very interpretations of the scope and nature of s. 91(24) regarding Indigenous peoples and their lands that have shaped how the federal government has perceived and acted upon its responsibility towards Indigenous peoples. The federal government has been able to use s. 91(24) to empower itself to the detriment of Indigenous peoples. Asch (1977) demonstrates the outcomes of this wide-ranging legislation: “A host of problems arise out of the relationship between native people and external agents. All are related to a single theme: that external agents introduce programs over which native people have no control and then force native people to cooperate with them” (55-56). Slattery (1984), however, interestingly demonstrates a different interpretation and argues that s.91(24) “opens the door” for Indigenous self-government as reaffirmed by the right to self-government entrenched in the *Canadian Constitution Act, 1982*. I

argue instead that the settler colonial state has used s. 91(24) to create a narrative that allows for the marginalization of Indigenous nations and enables colonial control over Indigenous peoples. These settler government-based interpretations of s. 91(24) have empowered colonial authority through federal jurisdiction and, in turn, directly shaped the governance network between the sub-nationals and Indigenous peoples.

The Provincial Jurisdictional Scope

The provincial governments have jurisdictional responsibility for Crown lands outside of the reserves, unless designated as federal, such as national parks. In fact, as Jhappan (1995) writes, “s.91(24) is misleading as it provides the federal government with very little authority over lands (just reserve lands) and instead it is the provinces that have authority over traditional lands that are outside of the reserves” (169). This was determined by s. 109 of the *BNA Act, 1867* for many provinces, while others gained this jurisdiction in subsequent legislation. These lands are, however, the ancestral lands or traditional lands of Indigenous peoples. Indigenous peoples have inherent rights to these lands, while the government considers these rights surrendered through Treaty. This represents a clear tension for land management and access in Canadian federalism. Both Indigenous peoples and the provincial Crown lay claim to rights to the same lands, and both governance systems—the Canadian government and Indigenous governance structures—support these claims. Here, provincial government activity and Indigenous peoples clearly overlap in terms of policy, regulation, use, and rights to these lands.

In addition to these non-reserve, traditional lands, there does exist a fundamental role for provincial jurisdictional activity on-reserve, determined by s.88 of the *Indian Act* which outlines the specific role for provincial legislation on-reserve. The federal government’s interpretation of s.91(24), however, has also shaped the interpretation and facilitation of the provincial/territorial governments in the Indigenous policy network by providing the provinces with a jurisdictional

role. According to Pratt (1989), both orders of government are bound to jurisdiction through s.91(24), but it is the federal government that has primary responsibility. No matter how it is interpreted, Canadian federalism (as will be discussed in Chapter 2) has changed dramatically in terms of the division of these powers, and contemporary interpretations of the constitution—shaped by modern governance practice, legislation, and the courts—demonstrate several ways that s.91(24) provides the provinces with jurisdiction regarding those status First Nations peoples that reside on-reserve.

The most basic way that provincial legislation on Indian reserves is enabled is through s.88 of the *Indian Act* which states that, subject to federal law and treaties, “all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province.” According to s. 88 of the *Indian Act*, provincial laws do exist on First Nations’ reserves as long as they are not inconsistent with Treaty terms, federal laws, or the *Indian Act* (Sanders 1989, 169). Therefore, the provincial government has the constitutional authority to legislate for Indians in terms of general application, but it cannot single out Indians, dampen Indianness (or dilute Indigenous cultural identities), trump federal jurisdiction (also called federal paramountcy), or overturn the tenets of Aboriginal rights as protected by s.35 of the *Constitution Act, 1982* (Hogg 2004, 602-605).¹⁹

What do these restrictions on the provinces actually mean? Sanders (1988) fleshes out these points. First, the notion that the province cannot single out Indians means that the provinces cannot dampen Indianness or infringe on the ability to express Indigeneity. Sanders explains that provincial legislation rarely uses the term Indian, and when doing so it is benevolent and not used to discriminate (155). However, provincial hunting laws do have effect thanks to s. 88 as found in *R. v. Dyck* (Sanders 1988, 155-156). Second, the provincial

government cannot ever (in a federation) trump federal paramountcy. As stated, this means they do not trump the Treaties. It also means provincial sales taxes do not apply on-reserve, but it is not clear how the provision of child welfare or employment services or other provincially legislated services are to be delivered (Sanders 1988, 155).

Further, some provincial laws of general application are enforceable (for example, minimum wage and automobile insurance) and other such laws are not (for example, building and zoning requirements), because the latter set is specified in the *Indian Act*, and the former are not. This ability of the provinces to legislate for First Nations peoples was tested in the court case *Delgamuukw* (1997) (*Delgamuukw v British Columbia*, [1997]). This case specifically tested if the provincial states could extinguish Aboriginal title. Chief Justice Lamer argued against such a power due to the limitation of provinces, according to s. 88, to govern or legislate in ways that infringe on “Indianness” (Hogg 2004, 605). Today, the recent *Tsilhqot’in* (2014) decision, which will be discussed in more detail in Chapter 2, held that “provincial laws of general application can apply to lands held under Aboriginal title”, which effectively removed Indigenous peoples’ protection from provincial interference (*Tsilhqot’in Nation v. British Columbia*, 2014; Borrows 2015, 735).

Section 88 was not written into the *Indian Act* until 1951 and at this time it was included as s.87. It is interesting to note that this addition did not result in significant change in policy-making procedure because s.87 captured the state practices that had been followed for almost 40 years as per an instruction pamphlet issued by the Indian department (Milloy 1999, 216-217). Shewell (2004) argues that s. 88 was intended to increase assimilation by decreasing federal constitutional responsibility to Indigenous peoples, initiate a transfer of responsibility to the provinces, and cost-share with the provinces (205). Tobias (1983) also argues that this provincial

and territorial enhanced engagement was a process to decrease federal responsibility for Indigenous peoples. Thus, the creation of s. 88 is evidence of an early desire on behalf of the federal government towards the devolution of responsibilities in the Indigenous/state governance network, and devolution will be discussed more fully in Chapter 2.

While s.88 provides a limited role for provincial activity on-reserve through general application, there is also a role, however limited, that is derived from s.91(24), and connected to s. 88, which restricts provincial involvement due to the “special” relationship between the federal government and First Nations peoples (Pratt 1989, 22). Again, we see that because s.91(24) gives the federal state powers over “Indians, and lands reserved for the Indians,” it is interpreted as the federal state’s authority and responsibility to Indigenous peoples. Therefore, “By contrast, a provincial legislature is not entitled to pass legislation directly in relation to Indians or lands reserved for Indians; legislation to the effect would be in essence legislation in relation to a federal head of power and therefore *ultra vires* a provincial legislature” (Macklem 2001, 116).²⁰ The provinces, thus, are limited in their ability to develop policy in this area, because historically any laws they develop that affect Indigenous peoples must be of general application and cannot negatively affect or impact Indianness (Macklem 2001, 157; Hogg 2004, 602-605). This changed slightly under *Tsilhqot’in* (2014) which stated provincial laws of general application can infringe Aboriginal rights when justified (Isaac, Weberg, & Barretto 2014). However, s. 88 clarifies that Treaties have precedence over provincial laws (Kulchyski 1994, 9) and *Simon v. R* (1985) and *Sioui* (1990) have both found that Aboriginal Treaty and hunting rights are exempt from the jurisdictional regime of s.88 (Macklem 2001, 144-145). Clearly, the courts are still developing interpretations for s.88 and provincial jurisdiction.

These limitations have encouraged the provinces to argue that they are not obligated or responsible for providing for those First Nations that live in First Nations communities (reserves); so, it is argued that Indians and land reserved for Indians are solely federal authority. Again, this special relationship is constitutionally entrenched and the federal government does mostly accept that it is obligated to “pay for most or all programs” for on-reserve Indians (Pratt 1989, 22). In the past this meant that the federal government provided all services on-reserve through the Department of Indian Affairs, including health, education, roads, etc. The shortcoming of this approach to service delivery is that the services provided to Indigenous populations through the central federal ministry are below standards in comparison to those provided by provincial departments specifically tasked with these mandates. This is because the provincial ministries, those regulating, legislating, and servicing one specific field become expert at this. Another possible explanation may be that, according to Frideres and Gadacz (2012), colonial projects result in low-quality social service provision to Indigenous populations (5). Additionally, there are also other tensions such as the practical issue of servicing small isolated rural communities or cultural differences that may make standard issue programs problematic.

Another limitation with this approach to governance is that contemporary service delivery on reserves has evolved in a complicated manner that has split delivery in various arrangements between the federal and sub-national governments. This has resulted in the Department of Indian Affairs providing some services, while others are provided by the provinces (which will act as the deliverer of many of these programs and are then reimbursed for such expenses by the federal government), or the provinces provide the services out of transfer of payment schedules. In this third example, this might be possible because the federal and sub-national governments might have signed Memoranda of Understanding (MOUs), created

legislation or accords that devolve authority to the provinces (and, more recently, to Indigenous governments). This situation has created duplication, overlap, and vacuums in service delivery. It is also interesting to note that in the 1980s, then contemporary sub-national governance practices saw all provincial governments with departments devoted to Indigenous issues and affairs, that were careful not to adopt the federal model of segregated service delivery (Long and Boldt 1988, 12). This has since changed, and many sub-nationals provide services and programming for Indigenous peoples through both integrated and segregated models. Many argue that the limitations attributed to s.91(24) are, however, interpretations and not necessarily fact. For this reason, a number of scholars have demonstrated variances in the interpretations of both s. 91(24) and s. 88, and the jurisdictional role of the sub-nationals in the Indigenous/state governance network. And yet, I argue, these interpretations regularly remain outside of contemporary narratives of Canadian federalism of the Indigenous/state governance network which continue to describe jurisdiction for Indigenous peoples as a federal responsibility.

In addition to these stated limitations on sub-national jurisdiction, there are nine arguments based on alternative interpretations that I would like to explore that relate to the issue of provincial jurisdiction and obligation for Indigenous peoples arising from the *BNA Act, 1867* s. 91(24). These interpretations demonstrate how the constitution enables provincial jurisdiction. First, Ponting and Gibbins (1980) argue that while s.91(24) was drafted according to the long-term concern that Indian policy must be kept a responsibility of the highest level of government, this does not necessarily equate with a limitation on provincial service provision. So, the federal government's responsibility for First Nations on-reserve does not negate provincial involvement, except where the restrictions from s.88 of the *Indian Act* are concerned (i.e. Treaties, federal paramountcy). Ponting and Gibbins (1980) further argue that it is not clear if this provincial

position on jurisdiction is simply an interpretative mishap or if the provinces have been aware of this constitutional ability and chose to ignore it (7). In an interview, past Manitoba Treaty Commissioner James Wilson (2013) states “The province is fearful of involving itself in a jurisdictional situation of feds and AMC [Assembly of Manitoba Chiefs]. It’s easy for the province to use the jurisdictional argument to not provide services: it gives the province an easy out. The standard response is it’s the fed’s responsibility. The people on-reserve in Manitoba are also Manitobans. First Nations peoples are a political football, tossed to whoever wants us.” The province, he argues, is not limited by s.91(24), and this interpretation has likely been used to evade responsibility.

Second, building on this interpretation that while the federal government has primary responsibility for Indians, this does not negate provincial authority, Scott and McCabe (1988) add that while it is the federal government and not the provinces that have a constitutional mandate of responsibility for Indigenous peoples, this does not limit the legislative authority of the provinces to affect Indigenous peoples (62-63). For example, if there is a vacuum of state authority and no services are being provided, the provinces can provide services to Indians both on- and off-reserve without violating constitutional parameters as no federal enclave will exist. The courts have found that the reserves are not federal enclaves, excluded from provincial law (Hogg 2004, 602; Sanders 1988, 154). The courts have also increasingly enforced provincial laws on-reserves (Morse 1989, 71-72). For example, *Hill* (1907), *R v. Cardinal* (1973), *Four B Manufacturing* (1979), *R v. Francis* (1988), and *Tsilhqot’in* (2014) have all argued that provincial laws can apply to Indians on Indian reserves if the legislated mandate at hand is under a head of power of the province, because no federal mandate exists (*R v Hill*, (1907); *Cardinal v. Attorney General of Alberta*, [1974]; *Four B Manufacturing v. United Garment Workers*, [1980];

R v. Francis, [1988]; Tsilhqot'in [2014]). In an interview with Owen Everts-Lind (2013), the Manager of Policy and Planning with the Department of Aboriginal Affairs and Intergovernmental Relations (now called the Department of Executive and Indigenous Affairs) for the Government of the Northwest Territories (G.N.W.T.), it is explained: "The G.N.W.T. has answered this by saying what have the federal government failed to provide? The G.N.W.T. provides for Aboriginal people because the feds do not interpret their obligations broadly, so the G.N.W.T. may see gaps that need to be filled for the welfare and well-being of the people. The danger here is that the province has to cover the gaps left by the federal government that is not living up to the obligations, not just on or off reserve." Here, Everts-Lind illustrates how, when legislative vacuums emerge, the sub-national can provide services to close the gap.

Third, building on the interpretation that federal authority does not limit provincial responsibility, which can be seen when policy vacuums arise as the courts have found that provincial laws are valid, it is argued that the provinces have the ability to engage in spending on-reserve. Sanders (1988) argues that the provinces have valid spending power for status Indians on-reserve. According to this argument, spending is not akin to legislating and it is legislating matters regarding Indians (and their Indianness) that is constitutionally curtailed (169). Thus, provinces and territories are not restricted from spending in regards to status Indians on-reserve. In conjunction, Morse (1989) argues that the federal government cannot transfer the *sui generis*²¹ or fiduciary relationship to the provinces; they can, however, share fiduciary obligations with the provinces (86). Therefore, it is argued that the provinces do have the constitutional ability to provide dollars to Indigenous peoples; however, they cannot constitutionally create legislation specifically pertaining to Indians (Sanders 1989, 169). And there are instances where the sub-national provides finances on-reserve, as B.C. Government

officials, Gottfred and Beak (2013) explain in an interview, “We do not legislate, but sometimes we provide money. The province recognizes First Nations on- or off-reserve as citizens. We will make it available to all people; this is not a challenge to jurisdictional responsibility.” Thus, the sub-national can and does provide funding in ways that are outside of legislation, therefore not impeding constitutional limits on jurisdiction.

A fourth argument also concerns financial duty to Indigenous peoples. Although provincial governments in Canada, like the federal government, must always act honourably²² towards Indigenous peoples, the division of authority and responsibility arising from s.91(24) of the *BNA Act* has led the provinces to interpret their role as non-fiduciary. As McCabe (2008) argues, the provinces have interpreted their jurisdictional responsibility concerning fiduciary duties to be circumscribed and while McCabe argues it is primarily a federal responsibility, provincial duty does exist. McCabe writes, “The fiduciary relationship exists where s.35(1) of the Constitution Act, 1982 is to be interpreted or rights recognized and affirmed in it, and proven in the particular case, are to be given effect equally whether the legislation or government activity in tension with s.35(1) is provincial or federal” (277). Therefore, while the courts have found the federal government has a fiduciary responsibility for Indians, this can extend to the provinces in a manner of honour of the Crown.

The fifth argument concerns s.88 and provincial laws of general application: if provinces can fill legislative vacuums and have fiduciary authority, what are the parameters of exercising laws of generality? As Hogg (2004) writes, “These decisions establish that the provincial Legislatures have the power to make their laws applicable to Indians and on Indian reserves, so long as the law is in relation to a matter coming within a provincial head of power” (601). Thus, as discussed, a province can legislate for Indians if the matter at hand is of provincial purview. A

provincial law that is not of general application, or that does (negatively) impact Indianness, is *ultra vires* or outside the scope of provincial/territorial constitutional authority (McCabe 2008, 240). Again, *Tsilhqot'in* (2014) held that provincial laws of general application can apply to Aboriginal title lands (Borrows 2015, 735). The question becomes: if the provinces cannot legislate in a way that deters Indianness, can they legislate in a way that provides special treatment to ensure Indianness? The answer, according to McCabe, is that they can: “Provincial legislation enacted with the intent, purpose or policy of singling out Indians for special treatment is permissible where the intent is benefit to the Indians” (243). The nature of the legislation being Indigenous-centred does not render the legislative practice out of the jurisdiction of the province, unless it has to do with Indian lands (McCabe 2008, 242-243).²³ And yet, historically the provinces have argued this is not the case: they cannot legislate in ways that promote Indianness. For example, as Papillon (2009) writes, “In Canada too, Indigenous peoples have historically faced hostile provincial governments with little interest in maintaining their unique status and protected land regimes” (4).

This is important because we have now seen that provinces can fill legislative vacuums, have fiduciary authority, and can even legislate in ways that can promote or benefit Indianness. Indigenous nations and Canadian settler politics are at a crucial stage in the self-government movement where courts are determining s. 35 Aboriginal rights and modern land claims, and self-government agreements are being made: what is the role for the sub-nationals in this? Abele and Graham (1989) have written, the “provinces also possess the constitutional mandate, expertise and administrative systems in program and service delivery central to most visions of Aboriginal self-government” (142). This may offer insight into a moral responsibility for provincial involvement on-reserve (which is again not the scope of jurisdiction for this project),

but there also seems to be a legal embodiment of authority to enact legislation or to provide spending in particular to the areas that could support Indigenous self-government.

A sixth consideration concerns provincial jurisdiction of natural resources in Canada as set out in the *BNA Act* s. 109 and the *Natural Resource Transfer Act, 1930 and 1931* (NRTA Act) (Canada 1930). The *BNA Act* s. 109 established provincial jurisdiction of land and natural resources in Ontario, Quebec, Nova Scotia, and New Brunswick. The *NRTA Acts* established this same jurisdictional responsibility for the provinces of Alberta, Saskatchewan, and Manitoba. Recently, devolution agreements across the north have brought lands under the regulatory authority in two of the territorial governments: Yukon (2003) and the Northwest Territories (2013) (Canada Minister of Public Works and Government Services Canada 2001; Canada Indian and Northern Development 2013). Lands have not yet been devolved to the territory of Nunavut (Canada 1993). Thus, it is clear that the sub-nationals are inherently involved in Indigenous politics concerning the regulation of natural resources on those lands outside of the reserves that are the ancestral or traditional lands of Indigenous nations. As proceeding chapters will demonstrate, the question of the regulatory authority over provincial Crown lands is a key feature of modern land claims.

The seventh argument offers insight into sub-national jurisdiction of lands beyond natural resources management. What sub-national jurisdiction exists for lands? The courts have maintained that the provinces cannot legislate outside of the parameters of s.88 on Indian lands which includes reserves and *Delgamuukw* (1997) clarified that this also includes lands where Aboriginal title remains intact (McNeil 2000). The *BNA Act's* s. 109 deals with lands and resources specifically under the jurisdiction of the province, and it reads:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

This aspect of s.109 results in a legal tension when the lands and resources that are under the jurisdiction of the provincial Crown also coincide with Indian lands other than reserves. If provincial Crown lands are next to, overlapping with, or in conjunction with reserve land, the reserves are federal domain. However, if provincial Crown lands are in conjunction with Treaty lands or those of Aboriginal title, a question follows as to the legal application of provincial laws and the nature of ensuring they do not touch “Indianness.” McCabe (2008) illustrates the argument:

It means as well that where the provincial ownership and aboriginal title coexist in the same lands it is inevitable that provincial legislation under s.92(5), and provincial proprietary activity, in respect of those lands must touch aboriginal title, albeit in a manner consonant with the Crown’s fiduciary duty to the holders of the title. (249)

McCabe argues that in a situation where provincial Crown lands and lands reserved for Indians or Aboriginal title are in conjunction, the province must act in a manner akin to the federal duties towards Aboriginal peoples. Thus, the province must account for and fulfill the fiduciary obligations that the federal government would be accountable for. In essence, the province could promote, in such a situation, Indianness. Today, the *Keewatin* (2014) decision has clarified that

provincial laws of general application are not effective on lands of Aboriginal title unless consultation has been undergone (duty to consult) and, if appropriate, Indigenous interests are accommodated (*Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014; Isaac, Weberg, & Barretto 2014, 3).

The ninth and final consideration concerns the extent to which the founders of the constitution intended provincial involvement in Indigenous policy which was initially deemed a federal mandate to ensure both uniform policy and set and regulate standards that advocated for the interests of Indigenous peoples; however, a question arises about whether that constitutional responsibility was always intended to remain at the central state level, or perhaps shift when the time was appropriate to sub-national or Indigenous governments? There were discussions prior to the Confederation debates which suggest the possibility of an intention for jurisdictional responsibility to be transferred to the provincial government. A letter from Archibald Acheson, the Earl of Gosford and the governor-in-chief to British North America, to Lord Glenelg (Charles Grant) the Colonial Secretary, written July 13, 1837, reads: “Until Circumstances make it expedient that they should be turned over by the Crown to the Provincial legislature and receive Legislative Provision and Care....”(Great Britain Colonial Office, 34). This same sentiment is stated in a letter from Lord Glenelg later the next year on August 22, 1838 to the Earl of Durham (John George Lambton Durham), governor general and high commissioner to British North America.²⁴ Under a pretense of the wider context of nation-building, it is perhaps unlikely that shifting responsibility to a lower state level was considered realistic in either the pre- or post-confederation era. Attention would have been focused on immediate nation-building; however, these letters suggest that there was an assumption that the provincial-level governments would absorb responsibility for Indigenous policy at a later date. Present-day practices of federal

offloading suggest that day has arrived. This fits with the desire for assimilation: once assimilated, Indigenous peoples can become a responsibility of the provinces and by entrusting this responsibility to the provinces, they will become assimilated.

These alternative interpretations of the role of the sub-national in the Indigenous/state governance network are derived from various court cases and legislative and political practices. However, these interpretation, those outside of s.88, that off-set limitations that are derived from s.91(24), all suggest the potential for the very real involvement of the sub-national in the Indigenous/state governance network, examples of which will be demonstrated in proceeding chapters. To summarize, the federal government's responsibility for First Nations on-reserve does not negate provincial involvement, except where the restrictions from s.88 of the *Indian Act* are concerned. When a vacuum of state authority arises and no services are being provided, the provinces can provide services to status Indians both on- and off-reserve without violating constitutional parameters if the legislated mandate at hand is under a head of power of the province. The provinces also have valid spending power for status Indians on-reserve and a fiduciary responsibility for Indians can exist in a manner of honour of the Crown. While the provinces cannot legislate in a way that deters "Indianness", they can legislate to ensure "Indianness" (unless it has to do with Indian lands). Due to provincial jurisdiction of natural resources in Canada, the sub-nationals are inherently involved in Indigenous politics concerning the regulation of natural resources on those lands outside of the reserves that are the ancestral or traditional lands of Indigenous nations and where these lands are in conjunction, the province must act in a manner akin to the federal duties towards Indigenous peoples; this has included the modern Treaty-making process. Furthermore, during early nation-building, there was an assumption that the provincial-level governments would absorb responsibility for Indigenous

policy at a later date; this assumption is built on a premise of assimilation. And yet, the narrative of Canadian federalism holds that the sub-national does not have a role in the Indigenous/state governance network. This omission is clearly inaccurate.

S.91(24) and Indigenous Self-government

One cannot discuss the Indigenous/state governance network as defined by s. 91(24) without discussing the ramifications of s. 91(24) on Indigenous self-government. This topic is conceptually heavy and complex. Up to this point, the discussion has involved the federal authority of Indigenous peoples as interpreted in s. 91(24) and the resulting role of the provinces. Yet, this has not fully dealt with the inherent right of sovereignty that these First Nations hold. While s. 91(24) has circumvented aspects of sovereignty through settler federalism, as Slattery (1984) argues, s. 91(24) also provides a legal authority for settler Canada to recognize Aboriginal self-government in the Canadian state.

Slattery (1984) demonstrates this by illustrating the existing sovereign status of Indigenous peoples as recorded by various Treaties and the *Royal Proclamation of 1763*. Such a state of sovereignty, or the right to self-determination, that these documents entrench (but do not create as they are inherent rights that existed long before these documents and European contact was made in North America) does not petrify and is carried forward (Slattery 1984, 367). The *Constitution Act, 1982*, section 35 “recognizes and affirms existing Aboriginal rights.” These “existing” rights, thus, exist elsewhere in Canadian law beyond s. 35 (Slattery 1984, 379). For Slattery, this section, therefore, arguably reaffirms the existing right to self-determination (sovereignty) that was codified in various Treaties (such as, but not limited to, the *Royal Proclamation of 1763*), and any legislation that derogates this state of sovereignty is nullified by s. 35 (Slattery 1984, 386). Thus, s.91(24) carries with it the legal bearing for Indigenous self-government that was recorded (and so entrenched) in settler law by the *Royal Proclamation of*

1763. Because this is entrenched in the founding document used to develop the *BNA Act* s.91(24) it stands to reason that this entrenched sovereignty is also built into s.91(24). Thus, Slattery argues that this element of our constitution can be used as an existing legal doorway for Indigenous self-government. In this way, while s.91(24) has been used by central and sub-national governments to circumvent Indigenous sovereignty it also provides a legal mechanism in settler Canadian law to implement the existing right of Indigenous sovereignty.

Conclusion

While s.91(24) is seemingly clear in its intent to define a jurisdictional relationship between the federal government and “Indians, and lands reserved for Indians,” Canadian politics and legal mechanisms have faced many challenges in constituting the parameters of this jurisdiction. In modern Canadian society, it seems that s.91(24) has generated multiple possible interpretations. That said, by limiting the scope of discussion to Canadian federalism and the division of powers between the federal and provincial governments (and, thus, excluding for the sake of this project the various arguments that surround Indigenous autonomy and sovereignty), it is clear that the historical interpretations of s.91(24) that have framed this jurisdictional debate and have in the past limited provincial involvement in Indigenous politics, are shifting to include the idea that provinces should be involved, and when they are not involved they are avoiding their responsibilities to status First Nations living on-reserve. Each day that provinces are not actively involved in bettering First Nations peoples’ lives and promoting “Indianness” is another day that the provinces are not fulfilling the mandate that is evolving to meet the needs of contemporary federalism. I argue that the dismissal of the provincial jurisdiction in the narrative of Canadian federalism is akin to neo-colonialism: it is a practice that is based in colonial intentions—to benefit the settler government while marginalizing Indigenous nations sovereignty—and applied through modern governance activities such as jurisdictional ambiguity.

Chapter 2: Evolving Canadian Federalism and the Indigenous/sub-national Governance Network

The federal government and the sub-nationals have varying degrees of constitutionalized and legislative jurisdictional responsibilities for those First Nations peoples that live on-reserve, and yet responsibility for Indigenous peoples is viewed as solely a federal domain. On this Sanders (1988) has written, “Canadian Indian policy had an appearance of uniformity... (which) disguised some notable regional differences... The older view that there is little provincial activity in this area still survives.... But Indian issues have become an inescapable part of provincial life...” (173-174). This “inescapable” participation of the sub-nationals is due to those provincial jurisdictional responsibilities outlined in the *Indian Act* section 88 and the *British North America Act* (BNA Act) section 91(24), and also due to the wider changes in Canadian federalism, including public administrative practices and the political motives of the actors in the Indigenous/state governance network (Canada Department of Justice Canada 1985; Canada 1867). These changes have increased the presence of the sub-nationals on-reserve. This chapter maps the impacts of the changing nature of Canadian federalism and Canadian politics in the area of jurisdiction for Indigenous-related matters.

Federalism is a system of governance where a division of powers is determined by a constitution and the levels of government are sovereign or equal. Canadian federalism is not a static approach to governance, but instead a process that continues to evolve (Simeon 2002). For instance, Canadian nationhood was established in 1867 and at that time colonial federalism was the on-going, entrenched governing model and was based on the strong central authority of the federal government, but by the end of the 19th century, Canada was maturing into its nationhood and the model of classic federalism was adopted, which engaged a more balanced division of

powers among the central and sub-nationals. Later, as the nation endured the rapid social, economic, and political changes that resulted from the Great Depression and the post-World War II era, collaborative federalism was developed to enhance co-operation between the federal and provincial states to meet the changing needs of Canadian society. Later still, more political and economic upheavals shaped the 1960s and '70s, which were counterbalanced by the regulatory framework of competitive federalism which remains a dominant approach in Canadian politics with the exception of constitutional federalism which punctuated the late 1970s and the '80s during the patriation process of the *Canadian Constitution Act, 1982* (Canada 1982). Today, competitive federalism is the lasting mode of governance. It is often characterized by neo-liberal practices²⁵ such as devolution, or the shifting of responsibilities from a higher to lower level of the state, and privatization, or the contracting out of public services to the private sector.

These wider shifts in Canadian federalism have fundamentally altered the Indigenous/state governance network. In contrast to these wider trends in Canadian federalism, Abele and Prince (2002) describe the contemporary Indigenous/state governance network as an assortment of these ranges of federalism, at times exhibiting features of colonial, classical, collaborative, and competitive federalism in any variety of combinations. Federalism, therefore, can be understood as flexible and, as will be demonstrated, this nature extends to the mechanics that guide the Indigenous/state governance network. Papillon (2013) argues that a resurgence of federalism has occurred “as a mechanism for managing coexistence of multiple national groups over a shared territory in recent decades” (38). Yet, as Murphy (2003) explains, the change for Aboriginal-state relations in the federation has been slow and incremental, and this will likely continue to be such (23).

Colonial Federalism

An early, colonial form of federalism arranged the division of powers (or jurisdictional breakdown) so that the central, or federal, government was provided with stronger powers than the sub-national, or provincial and territorial, governments. In Canada, a strong and uniform central government was sought to avoid the perceived problematic power struggles experienced by the American republic model of governance, which at the time was a model with a weaker central government and stronger sub-nationals (Tilby 1912). It is this early arrangement of powers that is partly responsible for the arrangement of Indigenous-related policy as a federal mandate. Another determinant was that the federal government was the main authority over land appropriation during early nationhood development. While the intention of federal authority over land was to facilitate settler homesteading and township settlement, the unintended result has been a federal monopoly on managing Indigenous policy. Furthermore, the federal government has traditionally held jurisdiction over any matters not specifically laid out as a responsibility of the provinces and so, since originally there was no designated role in these matters for the provinces, federal powers would naturally have assumed any such responsibility required by the state (Morse 1989, 64-65). Thus, without constitutional imperative, the provinces did not have a clear role in Indigenous-related policy. One of the outcomes of the sub-national not having an explicit constitutional directive in Indigenous-related policy meant that the federal government interpreted its role to encompass an unrestricted authority within this scope of policy-making (Morse 1989, 65). This position suited the provinces well: they were only required to participate in the Indigenous/state governance network when Treaty negotiations required it (usually at the request of the federal authorities) and this lack of necessary involvement contented the provinces (Morse 1989, 66). The provinces further interpreted this responsibility to extend to all

Indigenous peoples, even those who are not traditionally thought to pertain to s.91(24) of the constitution, or those other than status Indians (Morse 1989, 66).

Another contribution to the jurisdictional placement of Indigenous-related matters was the wider political environment of nation-building in the mid to late nineteenth century. This era was one of immense change with the construction of the modern political map and the establishment of the nation-state. Also, the expectation in these early stages of the Canadian colonial project was to achieve assimilation of Indigenous peoples. Canadian government and society were impatient to build a country and not interested in building a framework of equal co-habitation that would require centuries of diplomacy. As Carter (1990) explains, Indigenous-related policy was hasty and not given extensive or comprehensive attention. Therefore, given that the jurisdictional delineation of Indigenous -related matters was set forth at a time of nation-building, or immense political change, little thought was given to the notion of sustainable longevity. In fact, Indigenous peoples really consumed little attention during this era of nation-building. As Russell (2005) writes, “Canada’s constitution-makers saw Aboriginal peoples not as ‘partners in Confederation’ but simply as a subject matter of the new federation’s central legislature” (101). This can be seen in the constitutional debates pre-dating the drafting of the *BNA Act, 1867*, which do not include a discussion of Indigenous peoples and the Index to the Confederation Debates of 1865, which include only two insubstantial references to Indigenous peoples, the first concerning general government and the second in regard to jurisdiction (these two references can be found in Lapin 1951, 3 and 1029). The significance of this lack of thorough debate on Indigenous peoples’ role in the Confederation certainly seems to imply that Indigenous peoples would be governed, and not govern themselves.

An important contributor to the jurisdictional placement of Indigenous-related matters under the settler government and not as co-equal, concerns the racism that shaped the era of nation-building period. Racism, according to Frideres and Gadacz (2012), is a foundation to any colonial project (8-10). Memmi also argues this and writes, “It appears not as an incidental detail but as a consubstantial part of colonialism” (As quoted in LaRocque 2010, 9). Canada is not exempt from the role of racism in its colonial foundations. Satzewich and Liodakis (2010) explain that racism is embedded in Canadian state formation, in addition to colonial expansion: “Furthermore, racism was pervasive in early Canada and took a variety of individual and institutional forms” (42). And as Dua, Razack, and Warner (2005) explain, Canadian nation-building is tied to conceptualizations of race and racism. Specifically, they argue that Canadian identity was founded on a discourse of whiteness and this discourse continues to influence how Canadians perceive past and on-going state formation and function. They write, “National mythologies operate to make Canada a white nation. We are constantly led to believe that Europeans built the nation, and in telling this history, the conquest, genocide, slavery, and continued exploitation of the labor of aboriginal and people of color is suppressed and/or erased.” (4). This discourse of race omits the exploitation of several groups in Canada’s history, including Indigenous peoples. The impact of racism on Canadian ‘nation building’ contributed simultaneously constraints and pressures on Indigenous sovereignty, as Indigenous peoples were written into the constitutional foundation as a jurisdictional responsibility for the settler colonial state.

Classic Federalism

While the impetus of power being held by the central government contributed to Indigenous-related issues being placed under the responsibility of the federal government, this power was transferred over time. The shift to classic federalism meant the division of powers;

the central and sub-national governments began to work more closely with one another to more likely achieve the ends of responsive and responsible governance. Yet, the notion that the federal government was tasked with the paramount authority of Indigenous peoples remained.

An illustration of how jurisdictional responsibility shifted under classic federalism can be seen in the *St. Catharine's Milling* (1888) case, which greatly contributed to the modern determination of the division of powers among the provincial and federal governments (*St. Catharine's Milling and Lumber Co. v The Queen*, (1888)). In this case concerning the regulation of natural resources, the Dominion of Canada argued its authority to license the lands in question was derived from s.91(24) of the *BNA Act*, and the Treaty process meant the land was ceded from the First Nations peoples and thus held under federal Crown title (Kulchyski 2007, 49). The province argued that s.91(24) referred only to territories that were actually stipulated as "Indian reserves" and not lands of Treaty or Aboriginal title. The court ruled that Aboriginal title to land was recognized by the *Royal Proclamation of 1763*, surrendered through the Treaty to the Crown, and then passed to the province under the *BNA Act* (Canada 1763; Kulchyski 1994). Thus, the lands reserved for Indians did not transfer to the federal Crown under the *BNA Act*; instead, they remained in full authority of the provincial Crown (Hogg 2004, 598). The court also ruled that Aboriginal title was a 'burden' on Crown title (Crown title was underlying). Therefore, those First Nations peoples who surrender title can only do so to the federal Crown (a principle of the *Royal Proclamation of 1763*), not the province, but the province has come to ultimately maintain responsibility for the lands (this happened at varying times for each province during Confederation and afterwards). Thus, the federal government maintains authority of Indian lands under s. 91(24) of the *BNA Act*, but s.109 of the *BNA Act* also enables the provincial ownership and management of such lands. The federal government must, therefore, consult with the

provinces on matters concerning these lands even though the federal government maintains ultimate decision-making power over the sale of these lands. In this way *St. Catharine's Milling* demonstrates the shift in colonial federalism to classical federalism and the beginnings of a shift in the balance of powers among the provinces and federal government within the Indigenous/state governance network.

Classic federalism can further be traced in proceeding court rulings such as *A.-G. for Quebec v. A.-G. for Canada* (1921) and *Re: Eskimos* (1939) as this era of federalism continued (*Auditor-General for Quebec v. Auditor-General for Canada* [1921], 1 AC 401 (PC); *Re: Eskimos*, [1939]). Here, these rulings both demonstrate a growing balance of powers shared with the provinces regarding Indigenous-related matters. *A.-G. for Quebec v. A.-G. for Canada* (1921) ruled that unoccupied reserve lands in Quebec set aside pre-Confederation did not belong to the province as per s. 109 of the *BNA Act*, but instead were a jurisdiction of the federal government under s. 91(24), which the federal government could use to release these lands to the province (McNeil 1997, 150). *Re: Eskimos* (1939) concerned the constitutional status of Inuit and the jurisdictional responsibility for welfare payments to Inuit during the Depression Era. The courts queried the nature of Inuit and the federal or provincial responsibility according to the constitution: is there a special relationship between Inuit and the federal government (Indian status)? If Inuit were found not to be Indian, or to not have this “special relationship,” then fiduciary responsibility would belong to the province (Kulchyski 1994). The resulting federal interpretation of this ruling is that “in one law, the bna act, where its says ‘indian’, it means indian and inuit. In another law, the indian act, where it says ‘indian’ it means indian and not inuit” (Kulchyski 2007, 67).²⁶ This case frames the legal status of Inuit under the prerogative of both federal and provincial jurisdiction.

Collaborative Federalism

Canadian federalism continued to respond to the changing social needs of Canadians during the Great Depression and beyond the post-WWII era by employing collaborative federalism to meet the rapidly changing socio-economic needs of Canadians. During this era, what citizens demanded of the state began to change: citizens wanted a more proactive government that provided more services and which increased the overall size of the bureaucratic government and shifted the function of the state. At the time, collaborative federalism brought greater pressure from the federal government onto the provincial states to increase their responsibilities for Indigenous peoples. In general, the post-WWII period was marked by heightened welfare state policy-making, which included an integration of Keynesian economic strategy into public service delivery to stimulate the economy. One of the distinguishing features of collaborative federalism at the time was the increased federal transfer payments to the provinces to increase their role in the provision of social services for the general population throughout the 1950s to '70s. It is important to note that during this era it has been demonstrated by Rocher and Smith (2003) that federal devolution was also met with federal intervention in provincial matters of jurisdiction (9). That said, many others demonstrate the increased capacity of the provincial governments at this time to provide social services delivery in a variety of public service matters across their regions (Sanders 1989), and a significant increase in the role of provincial governments in Indigenous-centred politics (Morse 1989, 63; Little Bear 1988, 175; Jhappan 1995, 167). Prior to this, the province had acted as an agent of the federal government in regard to First Nations people, but there was a clear shift at this time to the provision of service delivery by the provincial government to First Nations peoples in many areas of social services as those services were expanded for the general population and intended to be universal (i.e. family allowances, pensions, and so on) (Long and Boldt 1988, 3).

In fact, the federal government had for some time demonstrated clear intentions to increase provincial involvement in the state/Indigenous governance network. This is illustrated by a wide variety of political actions undertaken by the federal government which predominantly occurred in the early post-WWII period and continue to the present-day. An earlier example is the *Natural Resource Transfer Act* of 1930, which shifted authority for natural resources from the federal government to the provincial governments of Alberta, Saskatchewan, and Manitoba (this put natural resource management in-line with that of the eastern provinces as per s.109 of the *Constitution Act, 1867*). Later, during the years 1946-8, a number of hearings held by the Joint Committee of the Senate and House of Commons reveal numerous accounts of federal advocacy for an increased provincial role (Shewell 2004, 260-321). In 1951, at a federal-provincial conference, the provinces did give way to federal pressures and agreed to cover old-age assistance and blind person's allowance for Aboriginal peoples (Shewell 2004). As the provinces became more involved in Indigenous-centred governance, the framework for service delivery on-reserve began to change. By the 1960s, joint service delivery activities had grown to require its own federal-provincial division in the federal department of Indian Affairs (Long and Boldt 1988, 4). During this same decade, in conjunction with service delivery growth, the provinces also began to exercise increased activity in the natural resource legislation and gaming laws, which was a "significant departure from past practice" (Morse 1989, 72).

In the post-WWII era, the sub-nationals were increasing their role in all service provision. As well, in this era of collaborative federalism, ultra-constitutional practices, which are non-legal or "ad hoc" political arrangements, grew. Canadian federalism is not only derived from the constitutional parameters, but also from the ad hoc rules of Canadian government, or the Westminster conventions which are the unwritten constitutional conventions. These conventions

are “crucial components of the constitution, they are not set out in written form. They are of enduring importance but they are subject over time to gradual change in their interpretation and application” (Kernaghan 2002, 104). In fact, there is a growing gap between the written constitution and the contemporary practices of federal-provincial relations or constitutional conventions which are increasingly used and intrinsically shaping federalism (Smith 2003). Clearly, conventions and governance practices, either defined by or originated within the constitution, have significant bearing on Canadian federalism. Thus, increased provincial enhancement in the Indigenous/state governance network has not necessarily been due to explicit acceptance on behalf of the provincial governments expansion in their role, but due to tacit expansion through policy and program development (Pratt 1989, 21).

This lack of outright written constitutional entrenchment is a contributor to the continued perception that First Nations peoples are a federal jurisdictional matter that informs the narrative of Canadian federalism. This is because federal pressures and provincial acceptance of increased engagement in the Indigenous/state governance network often took form outside of the constitutional scope, in the realm of policy development. The impact of *ad hoc* policy secession and politically-motivated involvement on the Indigenous/state governance network has meant that the federal government is sure to involve the provinces in all land claim negotiations, regardless of s.91(24) of the *BNA Act*. As Russell (2005) writes, “The need for provincial participation in comprehensive land settlements was more of a political than a legal imperative” (177).²⁷ Provincial control of provincial Crown lands is of course crucial from a sub-national perspective. Thus, the flexible nature of federalism as a governance approach allows for shifts to accommodate the political needs of the confederation, and these are often outside of those legal structures that determine federalism such as the written constitution: these shifts to address

political need, as will be demonstrated, have been characteristic of the Indigenous/state governance network.

There were a number of fiscal, and thus political, restraints that developed during this era of collaborative federalism, which have had an effect on the political motivation of the provinces and their involvement in the Indigenous/state governance network. While the federal government placed pressure on the provinces to increase their services to Indigenous peoples, both on- and off-reserve, the federal government did not increase funding dollars to accommodate increased costs (Pratt 1989, 50; Sanders 1988, 159-160). The federal government then is in a position of financial benefit if the provinces accrue responsibility for Indigenous peoples through constitutional devolution (Scott and McCabe 1988, 65). For the provinces, this is a significant fiscal restraint, as status Indians residing on-reserve are exempt from provincial taxation mechanisms (Pratt 1989, 50). As well, there has been an increasing and consistent movement of Indigenous populations off-reserve since the post-World War II era due in part to population growth, lack of opportunities and services on reserve, and changes in the *Indian Act* in 1951. Additionally, the number of First Nations people with status living off-reserve has increased, as has their use of provincially funded services. Finally, the services most needed by First Nations are those constitutionally mandated by the provinces (Long and Boldt 1988, 11). So, the provinces have the constitutional authority and expertise in these areas, yet they argue they are restrained by s.91(24) in providing these services. However, as discussed in Chapter 1, are the provinces constrained by s.91(24) or do they choose to interpret the constitution as a restraint to evade the associated responsibilities and costs?

Competitive Federalism

During the era of competitive federalism, the pressure of the federal government on the provinces to enhance their role by taking on federal responsibilities towards Indigenous peoples

mounted. In fact, an Indian Affairs internal document entitled “Directional Plan for the 1980s” was publicly leaked—it indicated a federal advocacy for the provinces to take on a larger role of responsibility for Indigenous peoples (Calder 1988, 75). This advocacy can be further illustrated by the series of federal government policy proposals and government reports from this era, including *A Survey of the Contemporary Indians of Canada* (1966) (known as the Hawthorn Report), *Statement of the Government of Canada on Indian Policy* (1969) (the White Paper), *Indian Self-Government in Canada: Report of the Special Committee* (1983) (the Penner Report), and *New Management Initiatives: Initial Results from the Ministerial Task Force on Program* (1985) (the Nielsen Report) (Canada Indian Affairs Branch 1966; Canada Indian Affairs and Northern Development 1969; Canada Parliament. House of Commons 1983; Canada Task Force on Program Review 1985). Each of these reports recommended a reorganizing of relations amongst the federal, provincial, and Indigenous nations that in some way increased provincial activity.

Two reports, the Hawthorn Report (1966) and the Penner Report (1983), were comparatively moderate in their recommendations to enhance provincial activity in Indigenous-related policy and programming. The Hawthorn Report, Weaver (1980) notes, expressed the opinion that provincial governments ought to increase their presence in the governance network. She writes: “As well, the team refuted the usual constitutional argument that Indians were the exclusive responsibility of the federal government, thereby leaving the way open for the provinces to deliver programs to Indians” (6). The Penner Report recommended that a new relationship be struck on the grounds that social conditions Indigenous peoples are commonly faced with were an outcome of dependency based on the historic system of colonial state relations. Rawson (1988) writes that the result of the Penner Report’s proposed new relationship

is a form of Indigenous peoples' self-determination wherein Indigenous governments will "also increase their direct contact with provincial governments and others will be a requirement" (28). While this might recognize Indigenous agency, this increased direct contact is simply a shift from a colonial premise of federal to provincial jurisdiction.

The White Paper (1969) and Neilson Task Force (1985) made stronger recommendations for the enhancement of provincial activity. The White Paper (1969) proposed the termination of s.91(24) on the basis that this section limited the participation of Indians in the wider, non-Indigenous Canadian society and the White Paper argued that the services provided to First Nations ought to be delivered by those government agencies that served all Canadians (Pratt 1989, 43). First Nations leaders, while opposed to many aspects of the White Paper, were most strongly opposed to this controversial recommendation because, while s. 91(24) entrenches federal jurisdiction (which enables and maintains the colonial relations), it also maintains in Canadian law a distinction between Indigenous peoples and mainstream, assimilated settler society. Put another way, s. 91(24) can be used by Indigenous peoples to resist assimilation. Indigenous peoples' rejection of the White Paper—the resistance to provincial activity—resulted in caution of the provinces and the federal government towards devolution in the area. Later, the Nielsen Task Force (1985) recommended curbing costs by limiting federal spending and provision of services for First Nations on-reserve by transferring these responsibilities to provinces (Long and Boldt 1988, 9). Thus, numerous federal documents during this era of competitive federalism demonstrate the federal policy intent to increase provincial jurisdiction for Indigenous peoples. It is interesting that during this era no government solution looked to Indigenous peoples' sovereignty—only devolution (although Penner did call for a constitutional right to self-government). This solution is flawed: the state is attempting to address the outcomes

and responsibilities of systemic colonialism by devolving matters to the sub-national. This cannot address the systemic issue of colonialism; it will not shift the colonizer-colonized model, keeping the system of colonialism intact. As critics of such accommodationist models argue, these approaches do not acknowledge or deal with the fundamental challenge that Indigenous peoples face when their sovereignty has been minimized by colonialism or when their sovereignty challenges the very legitimacy of the colonial state (Papillon 2008, 33). For example, as Ladner and Orsini (2003) explain this “this transition is not from colonialism to post-colonialism; it is from one form of colonial rule to another “kinder, gentler” form of colonial management” (196). These authors further explain that a serious approach to reshaping Aboriginal-state relations would consist of dismantling the colonial bureaucracy that maintains colonial inequity.

The pressures for an increased provincial presence in Indigenous-related matters can further be seen in the court decisions during this era of competitive federalism. Banks (1998) writes that *Cardinal* (1973) was the first SCC case to rule on inter-jurisdictional immunity in relation to s. 91(24) of the *BNA Act* (338; *Cardinal v. Attorney General of Alberta*, [1974]). Inter-jurisdictional immunity refers to a situation where two levels of governments’ legislation covers one matter. If a conflict emerges, the federal authority is paramount, but if no conflict emerges, the sub-national legislation remains in force: it has inter-jurisdictional immunity. In *Cardinal*, the ruling rejected the “enclave doctrine” (a concept that holds First Nations reserves are only federal domain) and concluded that provincial laws can exist on-reserve (Banks, 1998, 339). Peeling (1998) quotes Justice Marland who, in the 1974 court case *Cardinal v. Attorney General for Alberta* (*Cardinal v. Attorney General for Alberta* [1974] S.C.R. 695), ruled:

A province cannot legislate to a subject matter exclusively assigned to the Federal parliament by s.91. But it is also well established that provincial legislation does not necessarily become invalid because it affects something which is subject to Federal legislation....Provincial legislation may incidentally affect matters assigned exclusively to the federal government, including aboriginal title and rights. (2)

Thus, the ruling held that provincial laws can be in force on-reserve, signalling the shift of competitive federalism for the federal government to devolve responsibilities to the sub-nationals through the flexibility of Canadian federalism.

In the recent court decision *Tsilhqot'in* (2014), the courts rejected the application of inter-jurisdictional immunity (Borrows 2015, 734). Inter-jurisdictional immunity prevents provincial laws from applying to federal laws, and if this concept was applied to Aboriginal title, it could prevent provincial laws from applying to Aboriginal title (in that s.92 is precluded from being applied to s. 91(24)) (Borrows 2015, 734-5). However, the courts have argued that if inter-jurisdictional immunity were applied, a legislative vacuum could arise. However, as Borrows (2015) explains, such a legislative vacuum would not arise if pre-existing and continued Indigenous jurisdiction of Aboriginal lands was recognized by the courts (738). In this sense, inter-jurisdictional immunity offers a clear opportunity for Indigenous sovereignty to be recognized and applied with the Canadian federation.

Within this era of competitive federalism, constitutional federalism emerged surrounding the patriation of the constitution in 1982. The process of constitutional patriation contributed to the enhancement of the role of sub-nationals in the state/Indigenous governance network. This enhancement is both entrenched in the constitution and policy shifts at the time. The sub-

nationals increased their constitutional presence in Indigenous-centred matters in many ways, including the amendment process, the *Constitution Act, 1982* s. 35, and the *BNA Act, 1867* s. 91(24) (which is reaffirmed in the Proclamation of the Constitution, 1982). For example, one of the Constitution's amendment process requires that amendments are made with the vote of 7 out of 10 provinces with a majority of people, or the 7+50 formula, and this provides the provinces with a major role in shaping future Indigenous-related policies at the constitutional level (Long and Boldt 1988, 45). And yet, while these Aboriginal rights can now be amended or extinguished through this process of constitutional amendment, Indigenous peoples themselves are not entitled to participate in this process (Bhandar 2004, 833). As well, with the inclusion of s.35 to the Constitution, the provinces' engagement and active participation in the defining of Aboriginal rights became constitutionally mandated: this increased provincial involvement in developing these rights in the constitution (Scott and McCabe 1988, 65). Morse (1989) argues that s.35(1) increases Aboriginal and Treaty rights as a limit, which reduces Parliament's authority over Treaty and Aboriginal rights which will reduce federal action (75), which can enhance the provincial role in these matters. For example, Morse (1989) argues that with repatriation came a shift in how the federal government interpreted s.91(24). Morse writes that federal scope became "narrow" and "provincial co-operation is deemed to be required" (75) and "that active provincial participation was essential" (76). As Murphy (2003) explains, it is clear that this era of constitutional patriation increased Indigenous presence in many matters of intergovernmentalism (21). Taken together, these are significant changes to the constitutionalized roles for the sub-nationals in Indigenous-related matters.

In addition to these constitutional mandates, the era of constitutional federalism also saw an enhancement to the policy-making role of the sub-nationals in Indigenous-related matters. For

example, during the first ministers' meetings surrounding patriation, a number of premiers' speeches described their provincial policies and confirmed a growing sense that provincial policies regarding Indigenous peoples did indeed exist (Sanders 1988, 170). On these speeches, Calder (1988) writes "Although it may be difficult to demonstrate in quantifiable terms, few observers doubt that the aboriginal constitutional discussion process had contributed to a growing provincial involvement in native issues, including Indian self-government issues" (81). This era of constitutional federalism increased the decision-making authority that the sub-nationals have in Indigenous-centred politics, which is often in contention with Indigenous peoples' position on the sub-nationals.

During the era of constitutional federalism several changes were made to the approaches and understandings of Canadian federalism. As Rocher and Smith (2003) explain, those long-standing understandings of a national dualism were tested by evolutions in Canadian society and constitutional changes such as the *Charter of Rights and Freedoms (1982)* as well as wider changes in Constitutional conventions arising from institutions and intergovernmentalism (*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*). The *Charter of Rights and Freedoms* is a bill of rights that makes up the first part of the *Canadian Constitution Act, 1982* (with the remainder including the *BNA Act*, equalization payments, and an amending formula). Rocher and Smith (2003) argue that Indigenous nationalism (as well as multiculturalism) has undermined the dualistic approach to Canadian federalism, resulting in an emphasis on multinationalism (28). During this era, what began to emerge were more networks for Indigenous peoples to be involved in the Aboriginal-state relations. As Otis and Papillon (2013) write "Moreover, the insistence on basing discussions on concepts and institutions established in the 1867 constitution

ignores the fact that self-government may require autonomous indigenous polities to straddle categories defined by the constitutional division of powers” (16). This includes those divisions of powers beyond the central state and sub-nationals, and can include municipal governments.

In this era, it has been argued that there are great possibilities for Indigenous governance through government’s negotiation process which can result in the development of new models of governance (Coyle 2013). One such model is multilevel governance, which it is argued can offer an alternative to Canadian federalism’s dualistic governance (Papillon 2008, 31). Multi-level governance, that which takes place outside of the constitutional and legal realms and in the policy realm, is an emerging approach to governance. Papillon (2008) writes, “While they do not alter the formal nature of state authority as defined in the constitution, multilevel policy exercises are characterized by growing interdependencies between Aboriginal and non-Aboriginal governing actors, leading to a partial displacement of formal rules of authoritative decision-making in favour of joint decision-making processes and negotiated solutions to policy disputes” (ii).

How does this work in practice? Take an example of band governance. Ladner and Orsini (2003) explain that traditional Indigenous governance models and approaches have, under settler colonialism, been replaced with band governance which is a form created through the *Indian Act*. They write, “The imposed regime change altered indigenous structures and processes of governance by replacing consensual and inclusive democracy with elected majority rule” and placed authority and responsibility with the federal government, not the band council (Ladner and Orsini 2003, 197). For Papillon (2008) multilevel governance can replace colonial models reproduced by the *Indian Act* which has replaced traditional government with band councils which, as an extension of the state, have minimal authority for many Indigenous peoples. This is

because multilevel governance is based on self-rule and shared-rule, which enhances autonomous decision-making at the community level. Since the 1980s new partnerships between federal governments and Indigenous communities have been struck to reduce the cost of programming and services which increases the responsibilities of local communities (Papillon 2008, 8 & 14). With the enhanced autonomy at the community level and reduced influence of federal authority, Papillon argues that Indigenous governance is benefited. In a similar vein, Murphy (2003) writes, “Much of this change has been achieved in what might be called a post-constitutionalist phase of Aboriginal-state relations, wherein the goal of securing a more explicitly entrenched Aboriginal third order of government in the Canadian constitution has given way to a more piecemeal and pragmatic strategy of negotiating institutional and policy arrangements within existing orders” (5-6). To Murphy (2003), there is opportunity within federalism for self-determined groups to be autonomous self-governing bodies that are interdependent or cooperative (10).

Others, however, are critical of the change afforded through such approaches to governance. Jhappan (1995) explains that changes in Canadian federalism resulted in no changes to the constitution (with the exception of the *Canadian Charter of Rights and Freedoms, 1982*), and thus the formal structure of power that divides the provincial and federal governments remains intact (155); instead, change in Indigenous-state relations is happening at local levels and through bilateral and multi-lateral agreements (156). Walker (2010) argues that “colonial notions of sovereignty” have both excluded Indigenous peoples from Canadian federalism while maintaining “only two constitutionally recognized levels of government” (that of the central and sub-nationals), which continues today under the growing presence of intergovernmentalism (11). Similarly, Ladner and Orsini (2003) have demonstrated that changes under the federal

government concerning the *First Nations Governance Act (FNGA)*—a bill intended to reform the *Indian Act*, which was before the House of Commons in 2002-2003—resulted not in advancements but “paradigm paralysis”. They demonstrate this by analysing how the colonial intentions of the *Indian Act* directly impacted the development of the *FNGA* and write “the *FNGA* constitutes a new form of colonial rule in which the federal government is dictating, once again, the terms and conditions of Aboriginal governance” (193).

One alternative to multilevel governance is Treaty federalism, which is an approach to governance that is premised on the Treaties and federalism. The Treaties are foundational to Canadian constitutionalism (and thus federalism) and are also governance practices utilized in both Indigenous nations and Euro-Canadian systems, which makes this approach to Indigenous/state governance relations appropriate. As Ladner (2003) states, the Treaties are the “foundational law” in Canada or the foundation of Canadian federalism (173). Treaty federalism is based on Indigenous peoples’ concept of both federalism and constitutionalism, and it predates European occupation as can be illustrated by the Haudenosaunee, or the Iroquois Confederation, which had a developed federal system of governance that came to contribute to the development of the American federation (Ladner 2003, 168-169). Henderson (2002) explains that Treaty rights are independent of common law as they are based on Indigenous customary laws and traditions but vested in the Canadian constitution (428). Therefore, Treaty federalism is built on Indigenous legal tradition and, as Treaties are recognized by the Crown, so too can Treaty federalism work with Canadian constitutionalism and common law. Abele and Prince (2006) further demonstrate that the constitutional underpinnings of Canadian federalism support Treaty federalism: conceptually, both European and Indigenous concepts of governance support this and the Treaty of Niagara of 1764 is an example of Treaty federalism in practice. As these authors

explain, the Wampum Belt of the *Treaty of Niagara, 1764* illustrates in what can be described in contemporary terms as the concept of Treaty federalism, in that it clearly depicts both the European powers and Indigenous nations as existing side-by-side, but on distinct paths.²⁸

In addition to Treaty federalism being built on Indigenous legal traditions that are recognized by settler Canadian governance, Treaty federalism is an approach to Indigenous/state governance relations based on renewing the nation-to-nation relationship. According to Ladner (2003), “To summarize, treaty federalism is an agreed on framework for the mutual coexistence of two sovereign entities within the same territory” (178). Treaty federalism is built on a premise of “nation-to-nation” and presupposes that Indigenous nations are sovereign nations that exercised self-government prior to the Canadian state (as captured by the *Royal Proclamation of 1763*) and through this model of federalism, Indigenous nations maintain their sovereignty: “A First Nation does not “join” federalism, instead it is a sovereign nation that has relations with the Crown in Canada, and this relationship is defined by a treaty” (Walker 2010, 13-14). Adding to this, Abele and Prince (2006) explain that under Treaty federalism Indigenous nations do not join Canadian federalism; instead, Treaty federalism recognizes the historical nature of Indigenous nations’ sovereignty and distinct approaches to culture and governance (579-580).

Competitive Federalism and New Public Management

While Canadian federalism is clearly multifaceted, the contemporary model of Canadian federalism remains competitive and one expression significant to this thesis is New Public Management (NPM). The era of NPM in Canada has impacted the Indigenous/state governance networks because it necessarily enhances the role of the sub-nationals in Canadian federalism. This model of governance has two main features: 1) the retrenchment of the state and contracting out service delivery to private enterprise or downloading to lower levels of the state and 2) entering into new, unprecedented areas of governance (Dunn 2002, ix-xi). This approach to

governance in Canada is comparable to that of other capitalist democracies: it is common for modern state policy development to be concurrent with the changing levers of regulation in capitalist markets (Roberts 2002). This approach, thus, is a wider feature of public administration that is a trend. On the first feature, Sancton (2002) writes, “By any measure, Canada is a remarkably decentralized federation. Since the 1960s at least, so much of our political activity has been directed at elevating our provincial governments to a status that is fully equal to that of the government of Ottawa” (249). Thus, the provincial role is enhanced in many aspects of governance. On the second feature, Sossin (2002) argues that the new areas of NPM’s governance practices include tying the success to the market, or equating economic empowerment to political empowerment (86). NPM has, thus, increased the role of the sub-nationals due to federal activities such as spending cut backs and devolution and also the increased exposure of both provincial and territorial governments to global markets (Wiseman 1996, 58).

This thesis is interested in the first feature, that of devolution by way of the downloading of central government mandates to the sub-nationals. This devolution occurs for two general reasons: sub-national interest in expansion and federal pressure to do so. First, the sub-nationals want an increase in control over land and natural resources (Boldt and Long 1988, 5): this is called encroachment, when the provinces actively seek to increase their presence. Boldt and Long (1988) have written that “they (provinces) are unwilling to assume a significant increase in responsibility for Indians without a satisfactory measure of jurisdiction and management control over Indian peoples and lands” (46). The provinces have an interest in increasing their role in land management and where jurisdiction increases have happened, they will do so with increased jurisdiction over Indigenous peoples as these lands interact and overlap. Morse (1989) writes that

“Protecting provincial jurisdiction came to be seen as political imperative, while longstanding assimilative impulses were recast as positive efforts to promote fairness for all” (72). As will be a cornerstone to Chapters 3, 4, and 5, the motive of jurisdictional encroachment concerning land and resource management cannot be separated from assimilative tendencies of settler colonialism.

Second, federal political pressures of devolution, or when the federal government retrenches from governance activity, and shifts in Canadian federalism, such as NPM, have created vacuums that the province must fill. This second aspect of NPM is different from the first: it is not encroachment but devolution. As Alcantara (2003) explains,

The Constitution does not allow provincial statutes to apply to Indians and their reserve lands when such statutes clash with provisions in the *Indian Act* or other federal statutes. Thus, when a problem that is not covered by the *Indian Act* arises, such as the division of a matrimonial home during a divorce proceeding, Indians are unable to rely on other federal or provincial statutes for redress. (142)

This means that a legislative or policy vacuum can arise—the outcome of which is that there is no clear mechanism to deal with an issue. This can lead to the sub-national government filling this gap. In an interview with B.C. Government officials, Jan Gottfred and Lynn Beak (2013), they help to explain that while s.91 (24) entrenches federal jurisdiction in ways that limit the province from legislating over Indians outside of laws of general application, legislative ambiguity can be used to fill vacuums or make progress that otherwise might not have been made. They say, “It’s not always clear. In some ways we are actually... We welcome the ambiguity. It allows us to move forward in partnership and achieve better outcomes in communities” (Gottfred and Beak, 2013). The provinces, as illustrated here, can use

jurisdictional ambiguity to fill legislative vacuums that arise when the state retrenches or a gap emerges.

One of the effects of devolution is that jurisdiction becomes “unclear” or indeterminate. Such indeterminacy arises when jurisdiction is overlapping, which results in the duplication of the mandates of each level of the state, or when gaps appear because a legislative vacuum arises. Gagnon and Erk (2002) have argued that within federalist states such as Canada, jurisdictional ambiguity is often used to reduce political divisiveness and to prompt effective decision-making in political atmospheres that are inherently divisive and where achieving common ground is impractical on all political matters (324). While this perspective may be accurate, there are also instances in federalism that have allowed the provinces to use the indeterminacy of federalist jurisdiction to their advantage. This is because in such situations, as Simeon (2002) explains, attempts to clarify proper jurisdictions are often not successful (214). Pratt (1989) writes “The inevitable result is of course either the denial of essential social programs or a dramatic increase in the provincial burden for them” (23). Thus, the sub-national often fills the gap in jurisdictional responsibility. Also, however, Scott (1989) writes that “the provinces...tend historically to read the constitutional provision both literally when it suits them and broadly when it suits them” (353). Thus, indeterminacy of jurisdiction has increased sub-nationals’ responsibility as the sub-nationals fill gaps, but the sub-nationals also use this indeterminacy to suit its own agenda.

These complications concerning jurisdictional indeterminacy arise in the Indigenous/state governance network. Abele and Graham (1989) write, “Federal inaction both prompts pragmatic responses from provincial and territorial governments concerned with meeting their statutory obligations and constrains provincial actions by heightening uncertainty, particularly about the all-important legal and fiscal relationship between the Government of Canada and Aboriginal

peoples” (144). Therefore, while the provinces maintain that there is a federal duty of responsibility for Indigenous peoples, when the federal government does not make provision, the flexible nature of federalism allows for the provincial and territorial governments to compensate for the gap in service delivery or to avoid doing so. Therefore, as Canadian federalism evolves, and these gaps and overlaps continue to emerge, there is subsequently more involvement of the sub-nationals in the Indigenous/state governance network.

This jurisdictional ambiguity can further lead to a denial of responsibility. In an interview with Kathleen Bluesky, the Coordinator for the Intergovernmental Committee on First Nations Health at the Assembly of Manitoba Chiefs, jurisdictional indeterminacy is often misconceived as ambiguity when it actually is a denial of responsibility. Bluesky (2014) says, “It’s not an ambiguity of jurisdiction, but a denial of responsibility and so people get left in limbo because they cannot get either the provincial or federal governments to take responsibility.” Thus, for First Nations peoples on-reserve, jurisdictional indeterminacy is often not an issue of jurisdictional ambiguity, but a clear denial of responsibility on behalf of either level of government.

Devolution of the federal government’s activities to the sub-nationals in the Indigenous/state governance network is generally marked by hesitancy and unwillingness of the sub-nationals to become more fully involved. The sub-nationals typically attempt to decrease and not increase their role in the state/Indigenous governance network: they are, in general, reluctant to provide resources or services that may threaten their interest bases, and so any increase has occurred with hesitance and reluctance (Long and Boldt 1988, 57, 127). Long and Boldt (1988) further argue that the provinces have argued that s.91(24) ought to encompass all Aboriginal peoples (78). This would relieve provincial governments from their legal, constitutional, or

conventional obligations towards Aboriginal peoples such as Metis, non-status Indians, and status Indians living off-reserve. The provinces, in their desire to not increase activity in Indigenous-related matters, have been said to want to deal with First Nations reserves as municipalities, which would be a financial benefit to the provinces in taxes (Boldt and Long 1988, 5). This is because municipalities are a jurisdiction of provinces and thus provinces can grant municipal powers and tax municipalities (see Hogg 2004, chapter 30), while the provinces cannot tax First Nations as a jurisdiction of the federal government. Yet, Indigenous groups are politically averse to this because municipalities do not have ownership rights to their lands, while through the Crown reserves do (Sanders 1988, 153). Municipal status would diminish existing title and also limit future self-determination struggles. In general, provincial and territorial governments are against bands having nation-like or province-like status, as they are concerned that such a status may challenge their authority or sovereignty, especially over resource management (Boldt and Long 1988, 51, 58).

Devolution and the Courts

The federal government's agenda of downloading responsibility for Indigenous peoples to the provincial government provides the provincial government with some political leverage. The federal government is in a position of financial benefit if the provinces accrue responsibility of Aboriginal peoples through constitutional devolution (Scott and McCabe 1988, 65). Indigenous and provincial/territorial bodies all have political and economic interest in maintaining the traditional parameters and also establishing or expanding new sub-national/Indigenous governance networks. The federal Crown has been pressured to concede to the provinces that their laws of general application (as per s.88) are in effect on First Nations reserves as long as they are not inconsistent with Treaty terms, federal laws, or the *Indian Act*. Without this concession, it has been argued, the provinces might withdraw provision of social

services (Long and Boldt 1988, 47). In this way, the provinces both help the federal government fulfil its constitutional and Treaty duties towards Indigenous peoples and lever some power against the wide sweeping authority of the federal government in the state/Indigenous governance network (Scott and McCabe 1988, 61).

The devolution of the Indigenous/state governance network, both sub-national encroachment and federal devolution, can be further evidenced through the courts, which have greatly impacted the way that the provinces interpret their activity in the Indigenous governance network in this competitive era of federalism. As Graham, et al (1996) illustrate, “Over the period of our analysis, successive court decisions related to lands and title and to Aboriginal rights more generally made it evident to provincial governments that they could not ignore fundamental issues of lands, resources and governance” (xi). In court cases regarding lands, title and Aboriginal rights the courts have found that the provinces cannot ignore or must engage in issues of lands, resources, and governance (Wilkins 2011, 533). This encourages provincial encroachment in Indigenous politics through such mechanisms of Canadian law.

Additional examples of provincial encroachment within this era of competitive federalism abound in Canadian jurisprudence. Looking back to *St Catharine’s Milling* (1888), this case makes a clear division of powers regarding Indian lands as a head of powers for the federal government. The role of the province and s.88 application for “Indians and Indian lands” has continued to be tested by the courts in this era of competitive federalism and NPM through a series of rulings that explored the parameters of s. 88 and provincial jurisdiction, Treaty lands and rights, and Aboriginal rights and title. For example, *Dick* (1985) concerned hunting out of season and asked if the provincial hunting laws at hand are of general application or if they impair Indianness (*Dick v The Queen*, [1985]). While *Dick* found that s. 88 cannot trump

Indianness, the ruling also found the provincial laws at hand were outside of s.88 (not general application) and thus did not infringe Indianness (Bankes 1998, 334). Bankes and Koshan (2014) argue this ruling is a clear encroachment of provincial power and an absence of accountability to the standards that s.88 is meant to protect Indians from (2). The next major change from the courts arose in *Delgamuukw* (1997), a case put forward by the Gitskan and Wetsuwit'en Nations which sought recognition of title to their unceded, ancestral lands (*Delgamuukw v British Columbia*, [1997]; Mills 1994). The court ruled that provincial laws can exist on First Nations' reserves as long as they are not inconsistent with Treaty terms, federal laws, or the *Indian Act*. Provincial laws of general application cannot extinguish Aboriginal title (Elliot 2005, 70; Bankes 1998; Peeling 1998). One of the outcomes of *Delgamuukw* was a test of evidentiary burden for title, which means that the First Nation must prove Aboriginal title to lands. The criteria for proof set out in *Delgamuukw* contends that the First Nation must have had exclusive occupation prior to European contact and a continuity of occupation from pre-contact to present day (Hanna 2015, 368; Gunn 2014, 27). Later, the *Haida* (2004) case, which dealt with the Haida nation's ancestral lands and provincial regulations of the forestry sector on these lands, ruled that the provinces can infringe on s. 35 Aboriginal rights, but must consult with the Indigenous nation if these actions adversely affect Aboriginal rights (*Haida Nation v. British Columbia (Minister of Forests)*, [2004]; Wilkins 2011, 530). The *Canadian Western Bank* (2007) decision on federal devolution on banking suggested that inter-jurisdictional immunity caused uncertainty and legal vacuums that could be bridged by the flexibility of federalism, and thus any legislative vacuum that arises could be bridged by provincial governments (Wilkins 2011, 538-539). Thus, under the era of competitive federalism these cases evidence that the courts have

interpreted s. 91(24) of the constitution and s.88 of the *Indian Act* in ways that have increased the sub-national presence in the Indigenous/state governance network.

The next major shifts in the interpretation of provincial involvement in “Indians and lands reserved for Indians” come from the recent court rulings of *Tsilhqot’in* (2014) and *Keewatin* (2014) (*Tsilhqot’in Nation v. British Columbia*, 2014; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014). Briefly returning to *Delgamuukw*, the ruling clarified that Aboriginal title lands are as much a federal enclave as reserve lands, and thus the *Indian Act* s.88 cannot breach its limitations which maintain that sub-nationals cannot single out Indians, dampen Indianness, trump federal jurisdiction (also called federal paramountcy), or overturn the tenets of Aboriginal rights (see Chapter 1). The *Keewatin* (*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014) decision concerns provincial resource use on Treaty 3 lands, and the courts found that the province has the authority through s.88 to infringe on the Treaty for resource use, but this infringement bears the obligations associated with the duty to uphold the Treaty. The *Tsilhqot’in* decision concerns Aboriginal title in the interior of British Columbia, where Treaties do not exist and ancestral lands were not formally ceded and thus title remains unextinguished. The ruling states that Aboriginal title for these Indigenous nations that do not hold Treaty consists of swaths of lands, not parcels or “dots” of land.

Both of these cases, *Keewatin* and *Tsilhqot’in*, have changed the landscape for provincial activity on Indigenous lands. Bankes and Koshan (2014) argue that the *Tsilhqot’in* decision has “eviscerated the lands reserved head of s.91(24)” and dismisses the *Delgamuukw* decision on division of powers over land, which limits the constitutional protection of Aboriginal lands afforded by s.91(24) and the jurisdictional immunity provided by *Delgamuukw* (1). The *Tsilhqot’in* decision does, however, importantly constrain the provinces’ control of natural

resource development by affirming the strength of Aboriginal title (Bankes and Koshan 2014, 2). It can be argued that by strengthening Aboriginal title, the case ruling diminishes both federal and provincial dominion. However, it has been further argued that this case, in some ways, continues to reproduce legal settler colonial narratives that serve settler interests at the expense of Indigenous peoples' sovereignty.

Looking closely at this ruling Bankes and Koshan (2014) ask several probing questions: does this limit protection enabled by s.91(24) for the Aboriginal title or "lands reserved" from provincial encroachment through s. 88? Or does *Tsilhqot'in* make s. 88 obsolete? While these rulings are very recent and it will take time to test the decisions' legal weight concerning the division of powers, these authors argue that *Tsilhqot'in* provide the sub-nationals with new legal parameters in which to work. They write, "By focusing on the judicially created justifiable infringement test rather than inapplicability, *Tsilhqot'in* will allow a province to argue the justifiability of the application of its provincial resource laws (e.g. forest, mining, and oil and gas legislation) to title lands in each and every case rather than dealing with applicability at a more principled level" (Bankes and Koshan 2014, 2). This, they argue, provides the province with the capability to argue for provincial activity on Aboriginal lands through the wider subjective and discretionary justification for infringement, instead of a narrower proof of justified applicability of such provincial activities.

Borrows (2015) and McCrossan and Ladner (2016) similarly argue that *Tsilhqot'in* diminishes the protection First Nations held from provincial interference (Borrows 2015, 737; McCrossan and Ladner 2016, 416-417). For example, McCrossan and Ladner (2016) have argued that while *Tsilhqot'in* recognizes Aboriginal title under s. 35 of the *Constitution Act, 1982* and provides Indigenous peoples with greater decision-making control over their lands, the case

in fact does little to shift power from the federal and provincial governments to empower Indigenous nations to exercise their own legal orders (s.35 Aboriginal rights) on their lands (416-417). The authors argue that this is because the courts have limited ability to see beyond federal and provincial laws which “fundamentally undercuts” Indigenous legal orders, including traditional legal systems and those written into s. 35 (McCrossan and Ladner 2016, 412). They argue that the underlying logic of the courts is framed by a settler-colonial discourse that “excludes” and “undercuts” Indigenous legal orders. The courts are unable to fully acknowledge Indigenous legal orders because this would expose the illegitimacy of the Crown sovereignty and the courts’ legitimacy. Due to this, the *Tsilhqot’in* decision continues to favour the powers of the federal and provincial governments at the expense of Indigenous peoples’ inherent rights.

This era of NPM continues to be influenced by the narrative of Canadian federalism, reinforcing the predominant position of the sub-nationals that Indigenous-related matters are federal domain even though the sub-nationals are evidentially increasing their presence in these matters. This is, again, because of the initial federal monopoly in Indigenous-related policy-making (Morse 1989, 64-67). This narrative, however, ignores this process of devolution that is a part of contemporary federalism and that of constitutional and legislative imperatives outlined in Chapter 1. Exell (1988) writes during this era that the sub-nationals “continue to cling to the notion of federal constitutional responsibility” regardless of which government level provides the services (96). Why is this? Is this devolution a result of wider trends in public administration? Or is it a neo-colonial indicator that is masked by devolution in the narrative of Canadian federalism?

Devolution: Opportunity or threat to Indigenous sovereignty?

These contemporary expressions of federalism that shift and increase the presence of the sub-national activity in the realm of First Nations reserves bring various possible opportunities

and outcomes for the Indigenous communities and nations. The sub-nationals use colonial narratives of betterment²⁹ to present their involvement in the Indigenous/state network as one of benevolence, and while this may be a motivator that leads to activity, as evidenced constitutional, legislative, judicially recognized jurisdictional duties do also exist. Furthermore, political and economic interests encourage sub-national encroachment, as do federal pressures of devolution. These many interests at hand present Indigenous peoples with a host of factors to consider when weighing the changing nature of Canadian federalism as it pertains to the colonial relationship that exists between themselves and the structures of Canadian governance. Thus, there are many perspectives amongst Indigenous nations as to relationship with the sub-nationals. Some Indigenous peoples might argue that the enhancement or encroachment of the provincial government can jeopardize Indigenous peoples' sovereignty and rights, while others view the provincial government as an important and needed source of funding support.

These multiple perspectives on the jurisdictional relationship between Indigenous nations and the sub-nationals have led to arguments both for and against devolution. To begin, arguments against devolution and sub-national enhancement are based in general on sub-national relations that might dampen federal relations including fiduciary responsibility, increased assimilation through s. 88, or impede sovereignty movements. Long and Boldt (1988) make the comparison that if the relationship between First Nations and the federal government is characterized as "special"³⁰, then between the provinces it is "tenuous" (3). As Kinew (2014) explains, many Indigenous leaders are reluctant to endorse recent increases in provincial involvement; "There is an understanding of political reality: not a willingness. While these Nations may not seek these relations, they do accept that changes in the structures of Canadian government make them sometimes necessary."

Many Indigenous groups take the view that interactions with the sub-national governments can erode or diminish Indigenous nations' relations with the federal government, including nation-to-nation relations and those legal protections found in s.91(24) and the Treaties. Some Indigenous nations "fear that any move to transfer responsibility to the provinces will jeopardize or even nullify their Aboriginal, Treaty, and corporate land and resources rights" (Long and Boldt 1988, 5). As Calder (1988) writes, "A central consideration for Indians was the reduced Indian control implicit in moving from the normal pattern of bilateral relations with the federal government to a tripartite process in which the other two parties (federal government and provinces) had the decisive say on amendments" (76). The Treaties were signed nation-to-nation, and engaging in provincial relations aligns the Indigenous nation with the sub-national, not the federal nation-state: this does not uphold nation-to-nation status, which is foundational to Aboriginal self-government and sovereignty movements.

It could be argued that such sub-national interference would then dilute the First Nations' negotiating power or further diminish the federal government's jurisdictional obligations to First Nations living on-reserve by eroding federal fiscal obligations or reducing Indigenous nations' authority over the reserve's management and band governance (Calder 1988, 76; Long and Boldt 1988, 58). For example, some argue that s.88 erodes status under s.91(24) because it allows provincial governments to expand their legislative jurisdiction over First Nations peoples in ways that the Canadian government would not allow in other areas of federally-authorized governance (Long and Boldt 1988, 6-7). Tied to both of these arguments surrounding erosion of status under Treaties and s. 91(24) is a threat to culture through state assimilation. Indigenous peoples have expressed their concern that enhancement of provincial engagement would threaten their cultural survival, as was reported by Indigenous peoples to the Penner Committee. It was this concern

that encouraged the Penner Committee to recommend in its report that the federal government use its power under s.91(24) to exempt Indian reserves completely from provincial laws (Long and Boldt 1988, 8).

These concerns are warranted: the constitutionalization of Aboriginal rights demands the increased role of the provinces through the constitutional amendment process. With the constitutionalization of Aboriginal rights in s. 35 of the Constitution Act, 1982, Calder (1988) and Rawson (1988) have argued that should there be a requirement of constitutional amendment to these rights, the sub-national will participate in this amendment (as one of the constitution's amending processes is through the required support of a majority of the provinces, or the 7+50 formula) (Calder 1988, 76; Rawson 1988, 23). Essentially, this inclusion or presence of the sub-national governments ushers in the very diverse and numerous sets of interests and needs of the sub-nationals to the decision-making table in addition to those already diverse and numerous interests and needs that belong to the federal government and Indigenous peoples. This can include the political diversity of the sub-nationals which have differing Indigenous populations, differing types of and numbers of lands claims, and different political philosophies and leadership (Calder 1988, 73-74). Indigenous peoples have criticized this immediate or tacit inclusion of the provincial influence in Indigenous-related issues arguing that the provinces should only be able to participate in this process if they are invited by Indigenous nations (Cardinal 1988, 88).

Due to these political arrangements, the various expressions of support for sub-national involvement that can be found to range from naught to little support. In some instances, there are Indigenous groups that wish to have no contact at all with the sub-nationals and take a position that such laws can and should be challenged by Treaty rights. For example, this scenario could

mean that provincial laws, including the s. 88 mandated laws of general application, would not apply to Indigenous peoples and the Treaties would facilitate legal and diplomatic nation-to-nation relations between First Nations and the federal Crown as they were originally intended (Hawkes 1989, 360). As Murphy (2003) explains, “Aboriginal leaders must also contend with the fact that their communities continue to harbour significant levels of mistrust of Canadian governments, and the motivations underlying federal Aboriginal policy” (Murphy 2003, 5). There can be considerable distrust towards the sub-nationals, because often these governments have not historically honoured Treaty rights and Aboriginal rights and title in disputes over hunting, fishing and gathering (Long and Boldt 1988, 6): one example is the decades-long *Tsilhqot’in* trials which demonstrated the province did not honour Indigenous ancestral lands by enforcing provincial laws in these areas. Kinew (2014) critiques such enhanced provincial activity and says, “There is continuing reluctance even though section 88 exists. Why would you want another layer of Crown interlopers?”

There are Indigenous groups that do have political relationships with provincial governments that can be characterized as co-operative. Kinew (2014) explains that many of these First Nations governments would not have wanted the provinces at the table, but now things are changing; there is a reluctant compromise that the provinces be there. For example, some Indigenous groups do enter into tripartite arrangements or double bilateral arrangements with provinces where First Nations have separate and direct relationships with the province and federal government (Morse 1989, 79). Other First Nations groups are willing to deal with the Crown as a body that includes both the federal and provincial governments (Hawkes 1989, 361). Also, some Indigenous groups seek out tripartite agreements amongst Indigenous, provincial, and federal governments to increase otherwise inadequate fiscal supports for projects or other

publicly funded initiatives.³¹ As well, because provincial governments provide many services to reserve communities and, through the *British North America Act, 1867* (BNA Act) in s. 109 and the *Natural Resource Transfer Act, 1930* (NRTA Act), provincial governments have jurisdiction for vast amounts of land throughout Canada, self-government agreements will require provincial involvement to sort out jurisdictional conflicts.

The outcomes of the enhanced role of the sub-nationals has been varied. In some ways, these various perspectives of the sub-nationals and Indigenous nations reflect the wider changes in the governance environment of Canadian federalism, where the network is naturally flexible and so as it changes, so too do the actors, interests, and needs at work. The process of devolution in Canadian federalism has impacted the network, thus broadening the variables at work.

According to Graham, et al. (1996) the political discourse between the state and Indigenous peoples has become more institutionalized and formalized over time, and has increased the inclusion of Indigenous-centred directives in government documents (xii). Abele and Prince (2002) argue that the relationship between the federal government and Indigenous peoples is no longer one of “control” but one of “government-to-government” as Indigenous governments and communities assume an increasing role in service delivery (223). As well, Slowey (2008) argues that devolution has provided benefits to Indigenous peoples by strengthening community decision-making power. In this era of shifting federalism, therefore, some argue that there are Indigenous nations that have been able to enhance their decision-making authority in the Indigenous/state governance network.

As Canadian federalism changes, however, the challenges of indeterminacy that arise from devolution have also contributed to pressures on Indigenous-centred activity in the Indigenous/state governance network. The expansion of the role of provinces on behalf of the

interpretations from the courts and legislation can lead to an overlap of laws, creating double-aspect laws which limit Indigenous-based jurisdiction (Long and Boldt 1988, 7). Cardinal (1969) argues that s.91(24) was meant to protect Aboriginal rights from provincial encroachment, but its enforcement has been weak; the provinces have increasingly applied their statutes to Indians and Indian reserves through provincial game and conservation laws and in some cases this has come to trump the Treaty rights (46). Additionally, funding and service delivery vacuums have arisen which leave First Nations communities challenged in funding these services (Lavoie 2008, 192). Thus, the enhancement of sub-national involvement has also led to policy overlap and policy vacuums, which are a real challenge that First Nations communities are left to mitigate.

Returning to the nature of federalism, this is a governance model that is inherently flexible: within its parameters many other possibilities exist. Instead of sub-national involvement at the Indigenous self-government decision-making table, Indigenous peoples advocate for a third order of government. The basis of this third order of government would be to create a platform for self-government—both an inherent right of Aboriginal peoples and a right that Indigenous peoples have never given up—that functions beside federal and sub-national governments (or nation-to-nation). In Chapter 1 it was noted that Slattery (1984) has argued, “existing rights” and s.91(24) offer a doorway to self-government. Further to this, the Royal Commission on Aboriginal Peoples (RCAP) (1996) states, “We have come to the conclusion that the inherent right of self-government is one of the ‘existing Aboriginal and Treaty rights’ recognized and affirmed by section 35 of the Constitution Act, 1982” (Canada Royal Commission on Aboriginal Peoples Volume 1 1996, 647). In RCAP (1996) it is explained that in federalist systems of governance the provincial and federal levels of government are autonomous and the federal government does not have the ability to derogate provincial laws. For RCAP, this model

provides an existing framework for Indigenous self-government, where autonomous levels of government can exist side-by-side or nation-to-nation, as they did in the early years of imperial colonialism. As RCAP (1996) further states, “So the federal/provincial relationship provides a model for many of the features that would characterise a sound relationship between Aboriginal governments and federal and provincial governments” (Canada Royal Commission on Aboriginal Peoples 1996, 647). Ladner (2003), however, is critical of RCAP’s position which she argues perpetuates self-administration instead of entrenching self-government (183-184).

The evolution of Canadian federalism, from early nation-building to the entrenchment of the welfare state (including the provision of social services and management of natural resources) and modern-day devolution (the transfer of classic responsibilities of the federal government to the provincial/territorial state level and more recently Indigenous agencies) has had a number of impacts for both the sub-nationals and Indigenous peoples. Canadian federalism has evolved, and will likely continue to do so. Smith (2004) writes, “The provinces are much stronger players in the system than those who framed the Constitution ever anticipated” (101). Sancton (2002) notes that a review of both sections 91 and 93 of the *Constitution Act, 1867* (which outline the province’s general constitutional responsibilities) reveals a set of responsibilities with little resemblance to those practiced today (250). While earlier manifestations of federalism organized the central and provincial governments to function independently, since 1945 there have been increased interactions within shared policy regions (Dyck 1996, 1). This has impacted the Indigenous/state network as, “...Ottawa has consistently tried to unload its responsibility for Indians onto provincial governments” (Kulchyski 2007, 60-61). In the past, the federal government has attempted to arrange tripartite dialogues, but this is often hindered by the historical precedence of relations between First Nations and the federal

government (Long and Boldt 1988, 12). As federalism continues to evolve, the role of the sub-nationals in the contemporary state/Indigenous governance network continues to be enhanced concerning many matters of social service delivery and thus decision-making authority.

Conclusion

The impact of settler colonial jurisdictional evolution on Indigenous sovereignty is not unique to Canada, but can also be found in like-settler colonial nations such as Australia. As Russell (2005) has written on this very comparison, while these English-settler societies “tackled the native people problem with different laws and policies, the results . . . were basically the same; massive dispossession and political oppression of the Indigenous peoples” (49-50). These comparisons arise because Britain made colonial contact with what became Canada and Australia at relatively similar times, implemented capitalist markets, and, based on a colonial premise of the doctrine of discovery, introduced common law and Westminster-style governments. These colonially enforced changes were implemented at the expense of Indigenous peoples’ own economic, cultural, and governance practices, including their sovereignty in the eyes of the colonial state and their relationships to land. There are, however, also important differences in the character of these settler societies and nations, including jurisdictional delineation.

In Australia, the jurisdictional delineation of Indigenous peoples was a responsibility given to the sub-national level and not the central government. The jurisdictional placement of Indigenous-related matters with the sub-national government was based on logic that was quite opposite to that of Canada’s jurisdictional placement. Papillon and Cosentino (2004) describe the Australian colonial states’ early debates surrounding jurisdictional responsibility for Indigenous peoples and demonstrate how it centred on which level should not have authority, whereas in Canada the debate was on which level should have authority. This was because neither level of the Australian government wanted such responsibility which became mandated to the sub-

national level, and not the central authority. This jurisdictional placement was based on the logic that the closer the government was to the people, the better served they would be. In Canada, as discussed in Chapters 1 and 2, jurisdiction was placed with the federal government to ensure uniformity and reduce unethical and biased government activities towards the Indigenous populations.

In Australia, one of the outcomes of the jurisdiction resting with the sub-national level of government has resulted in Indigenous peoples viewing the central government as an ally against the sub-nationals (Morse 1988, 219). Since Australia's national referendum in 1967, there have been further changes in how the state views its responsibility for Indigenous peoples. The referendum provided the federal government with authority to legislate in matters concerning Indigenous peoples and in 1972 the federal Department of Aboriginal Affairs was established (Young 1992, 150). Since the referendum, jurisdictional responsibility is now shared between the central and state levels of government (Papillon and Cosentino 2004, 14). There are some benefits to the federal government assuming more responsibility for the Indigenous populations, such as more resources for social services and rights recognition. This jurisdictional sharing, however, has also led to significant issues of inconsistency and stagnancy across the nation in terms of Indigenous-related policy. Like those political practices of Canadian federalism, the different levels of government use this indeterminacy to evade responsibility or for "buck-passing" (Papillon and Cosentino 2004, 14).

Examples of inconsistency arise around Aboriginal land rights which are not written into the Australian constitution as they are in Canada, but instead are written into both federal and state-level specific legislation (Papillon and Cosentino 2004, 14). Currently, legislation exists at both federal and state levels that deal with resource management, and this can provide various

degrees of rights and land title for Indigenous peoples to their ancestral lands (Papillion and Cosentino 2004, 14). Those rights recognized by Australian federal and state legislation are the result of Indigenous peoples' activism and demands for recognition, which arose in the 1950s-70s (Lake 2001) and due to the landmark court case *Mabo* (1992), which rejected the doctrine of discovery and acknowledged the dispossession of Indigenous peoples' lands in Australia (Dominello 2009; *Mabo and Others v Queensland (No. 2)* (1992)). In the ruling, Justice Brennan refuted that Indigenous peoples of Australia had no legal bearing to their lands and called this view "unjust and discriminatory" (Patton 2001, 31). This case led to significant legislative changes such as the federal *Native Title Act 1993* which recognises Indigenous peoples' rights to land based on continued cultural connections (Creative Spirit 2016a). At the state level, legislative processes are quite disparate; these approaches offer differing levels of Indigenous-centred determination and control of ancestral lands, while some states have no formal mechanism to process the recognition of Indigenous peoples' lands. The Northern Territory, Queensland, and New South Wales all have formal claims processes, which include the *Aboriginal Land Rights Act 1976*, *Aboriginal Land Act* (1991), and the *Aboriginal Lands Rights Act* (1983) (Creative Spirit 2016a; Young 1992).

The different approaches to jurisdiction delineation is a curious manifestation of distinct colonial enterprises. Australia had a different approach to delineating jurisdiction than Canada with responsibility being assigned to the sub-national, not central level of government, but over time there has been a process of shifting responsibility to the central government. This is a shift supported by the Indigenous nations of Australia. In Canada, the process of devolution has allowed for provincial encroachment into the area traditionally thought to be of federal responsibility, but this is a shift that is not supported by the Indigenous nations. Indigenous

peoples want the central government to continue to take the lead role as the Treaty relationships were made with and continue to be held with the federal Crown. Continued nation-to-nation government interactions also reinforce Indigenous sovereignty movements. The evolution of jurisdiction in these two countries in the Indigenous/state governance networks has, then, been opposite: however, Indigenous leaders in both societies want the central government to take the lead over that of the sub-national government. Often policy-makers look to like-jurisdictions for cues on effective policy-making: perhaps the Australian experience with jurisdiction for Indigenous affairs could be instructive for Canada's Indigenous/state governance network?

The question remains unanswered, however, as to whether the increase of provincial involvement in Canadian federalism is due to the wider trends of public administration, such as devolution, that are shaping federalism or if it is a manifestation of neo-colonialism. Another question arises: when, if at all, does sovereignty fit into this query? Does this query raise critical consciousness, one of the steps in affirming sovereignty according to Freire (2011;1970)? This is a question that I have struggled with over the course of this project: how is this discourse a contribution to anti-colonialism?

Consider for a moment Smith (1999) who discusses the outcomes of centuries of colonial research premised on fixing the "Indigenous problem"; "The natives were, according to this view, to blame for not accepting the terms of their colonization" (91). Smith argues that the dominant society and decision-makers have always viewed the "Indigenous problem" as a problem with Indigenous peoples or communities, not problems with the structures of settler colonial societies, economies, or politics. And, for this reason, the response of many social policy researchers has been to look to the social service provision (such as healthcare and education) for a remedy, not the actual structures that make neo-colonialism systemic. My hope

is that the proceeding chapters demonstrate that what is being discussed at-hand is a structural issue. On this topic of service delivery, Wilson (2008) writes, “These programs proceed with the assumption that if economic and environmental conditions were the same for Indigenous and non-Indigenous people, Indigenous people could “pull themselves up” to the standards of dominant society” (20). Wilson continues to argue that it is this very way of thinking, a form of settler thinking, that has created the Indigenous-related policies in Canada such as the residential schools. He also points out that under such thinking these already inequitable conditions (such as poor socio-economic indicators) continue to deteriorate. So, why do we not look to the structural issues for remedy? This is how this project seeks to contribute to the wider sovereignty movement—by looking at one of the structural elements of settler colonialism (governance through federalism) that, regardless of its intention or perhaps due to its intention, encourage neo-colonialism.

Chapter 3: Manitoba and the politics of hydroelectricity

Manitoba's Indigenous/state governance network offers unique perspectives on provincial encroachment through both social service delivery and the politics of water and hydroelectricity. Whereas Indigenous rights and title throughout much of Canada are argued for on the competing uses of land, minerals, and other natural resources, in Manitoba a significant issue is that of water. Manitoba is a region densely covered by lakes and rivers, and the development of large, hydroelectric projects has figured significantly in the struggle for Indigenous peoples to determine recognition of their rights and title by the settler state. For many First Nations communities these waterways support their traditional practices of culture, politics, and economics. The politics of hydroelectricity present both limitations to contemporary cultural practices and an advocacy platform for Indigenous rights and title recognition. In addition to looking at the role of water in Manitoba's Indigenous/state policy network, this thesis will also look at the jurisdictional delineation of modern-day social service delivery in Manitoba in the sectors of health and education, and jurisdictional development of sustainable land use practices.

In Manitoba, there are approximately 64 reserves³², which are commonly referred to as First Nations communities in the attempt to distance the community from the negative connotations of reserve systems.³³ Many are fly-in communities spread out across the relatively uninhabited north with only limited road access during the winter. The communities in the south that are closer to urban development tend to be better off in terms of infrastructure and access to markets for goods. But this is a modern-day improvement. I worked in a First Nation community a mere two hours northeast of Winnipeg, and people of my parent's generation (so, not that old!) have living memory of a gravel road being built to the community. More isolated communities

are still faced with significant geographical challenges due to their distance from major urban centres and limited access to services. According to the federal department in charge of Indigenous-related issues, Indigenous and Northern Affairs Canada (INAC), 23 of Manitoba's 63 communities do not have road access, and this accounts for a significant portion of Manitoba's First Nations reserve population (Canada Aboriginal Affairs and Northern Development 2012).

These isolated communities face a number of barriers due to their remote locations. For example, the cost of travel, food, housing, and other amenities are significantly higher in these regions, whereas access to some resources and services are harder to access or even absent compared to an urban area. With over half of the First Nation populations living in communities that experience such restrictions, the pressures placed on such communities are immense. In my own work in this field I have met federal representatives who were surprised to see how isolated these communities truly are. One even commented that Manitoba's First Nations communities are more isolated, due to limitations in information and communications technologies (ICT) infrastructure (including internet connectivity, as well as telephone, cellular, and satellite services), than even those of Canada's most northerly regions. This modern-day isolation stems from past colonial policies and is a significant issue for the province's Indigenous/state governance network.

Manitoba's Prairie Political Culture

An interesting aspect of the political environment in Manitoba is the longevity of Indigenous politics commingling with the politics of the non-Indigenous mainstream. The Indigenous peoples and the colonialist state and settler populations relationships have been shaped at times by mutuality and at times by friction and animosity. As well, Manitoba, like other sub-nationals in the Canadian confederation, employs a Westminster parliamentary system. Thus, many of the features of the state and political tensions that shape the Indigenous/state

governance network are similar: the Manitoba provincial government, like that of B.C. and the N.W.T., is a colonial institution, but what is unusual about the Legislative Assembly of Manitoba and its history of provincial statehood is that it has, from its Metis inception, long been mired in the Indigenous/state policy network, whereas, in the N.W.T. the central state shaped the territorial politics, and Indigenous involvement in the sub-national politics occurred with the shift to devolution in the 1970s. In B.C. the colonial sub-national was determined to develop outside of the Indigenous/state governance network. In fact, the creation of the Manitoba provincial government and the original organization of the Legislative Assembly were direct results of Indigenous political resistance to the Canadian confederation, which came to shape the original and some of the lasting structures and mechanics of the assembly.

Looking back on Manitoba's political environment at the time of confederation one sees some crucial political changes for the Indigenous/state governance network that continue to shape the network. These political changes include the province joining the federation, Treaty-making, and the implementation of the reserve system. As the British Empire pushed westward, Indigenous resistance culminated in diplomatic tensions that resulted in negotiations between the Federal Government and the Metis nation that shaped the actual making of the province. The Metis³⁴ population was dominant in the province at the time of confederation: 10,000 of its 12,000 inhabitants were Metis (Wiseman 1996, 50) and in an attempt to preserve the Metis way of life and political economic control over the area that became Manitoba (then called Rupertsland), the Metis engaged in both military action, leading to the Red River Resistance of 1869, and diplomatic negotiations with the Federal Government over the creation and stipulations of the province of Manitoba. Louis Riel was the leader of the Metis, and the first formal European style government set up in the area was in fact Riel's provisional government.³⁵

While the Metis resistance in Manitoba was subsequently overpowered by Canada, the impact of Metis politics lived on. For example, the Legislative Assembly was originally organized on the principles of the Metis provisional government, which distributed its 24 seats equally between the French speaking and English speaking members of the Legislative Assembly. Also, a stipulation of the Metis was to make French an official language in Manitoba (this provision was written into section 23 of the *Manitoba Act* until it was abolished by the legislature in 1890, and then subsequently reinstated) (Francis, Jones, and Smith 1992, 93). This inclusion of the French language in the *Manitoba Act* demonstrates the French Metis' influence on Manitoba entering the Confederation: the original outline for confederation as written into the provisional *Temporary Act of Rupert's Land* (1869) made no concessions to support French language (Francis, Jones, and Smith 1992, 35). This tradition of equal bilingual representation remained in practice by the provincial assembly until the language base of the provincial population changed with increased immigration. As well, some First Nation peoples voted in the 1870 provincial election (Friesen 1992, 45). The right to vote was soon after stripped from them, but it demonstrates the desire to participate of some Indigenous peoples at the time of Confederation. As immigration grew, the social atmosphere began to change and there was an increase in tensions between the new immigrants to Manitoba and the established Metis population (Spry 1985, 96-97). In particular, the influx of Protestant, English-speaking Ontarians to the area caused religious and language tensions with the Catholic, French-speaking Metis. Whereas the impact of the Metis on the Legislative Assembly may have waned, the impact on provincial politics has remained. The Red River Valley is still considered the homeland of the Metis nation³⁶ and though the Metis are beyond the scope of this project, the role that the Metis

Nation played in province-making is significant as they continue to work for rights acknowledgment by settler Canada.

First Nation resistance has also been strong in Manitoba. The reserve system, however, was developed alongside confederation-building, and impacted the role of many First Nation peoples by restricting involvement in and resistance to confederation. One of the many noteworthy contributions to such resistance is the creation of the Manitoba Indian Brotherhood (MIB), established in the 1960s. The MIB has played a key role in various forms of activism and political organizing, and one of these accomplishments was the publication of *Wahbung: Our Tomorrows* in 1971 which is a manifesto that discusses the history of Indigenous/Crown relations, documenting socio-economic failures of Canada's Indigenous policies (Manitoba Indian Brotherhood 1971). It was one of the first of its kind and two interesting aspects of *Wahbung* are that it came to form the foundational document of the Assembly of Manitoba Chiefs in 1988 and remains a highly respected directional manifesto for the assembly. Another interesting fact about the MIB is that one of its members, Eric Robinson, went on to have a successful political career in the Legislative Assembly of Manitoba and recently served as both a cabinet minister and also the first Indigenous deputy premier. In fact, a number of Indigenous members have sat in the legislature, including John Norquay, an English Metis Premier from 1878 to 1887; Elijah Harper, who famously held an Eagle feather in the legislature in opposition to the Meech Lake Accord in June 1990; Oscar Lathlin, the first former Band Chief (of Opaskwayak Cree Nation) to serve as Cabinet Minister; George Hickes, the first Inuit Member of the Legislative Assembly and the first Indigenous Speaker of the House, and many others. These many individuals demonstrate the influence and activity of Indigenous peoples in the legislative Assembly of Manitoba.

This Indigenous-based activity in Manitoba politics extends past the legislature to the vast and complex network of Indigenous political organizations that exist in Manitoba. Arnason (2008) attributes this to the efforts of the Department of Indian and Northern Affairs Canada, which set up tribal councils in the 1970s to both represent Indigenous peoples and lobby the government (48). These tribal councils include Island Lake Tribal Council (northeast), Keewatin Tribal Council (north central), Swampy Cree Tribal Council (northwest), West Region Tribal Council (west), Interlake Tribal Council (Interlake), Dakota-Ojibway Tribal Council (south), and Southeast Resource Development Council (east side of Lake Winnipeg). In the early 1980s the MIB collapsed into two groups that became the Manitoba Keewatin Okimakinaak (MKO) providing representation to the north, and the Southern Chiefs Organization (SCO) to the south (Manitoba Keewatinowi Okimakinaak 2013). In the late 1980s the Assembly of Manitoba Chiefs (AMC) arose as a pan-Manitoba, umbrella political organization. It has served as the provincial-level organization associated with the Assembly of First Nations (AFN). Understanding the mechanics and activities of this contemporary network of political organizations can be a challenge. I have heard the AMC described in comparison to the organization and proceedings of the Legislative Assembly of Manitoba. For example, at AMC the elected chiefs meet to discuss policy and vote on resolutions, they work on behalf of their communities (constituents), and there is a set of departments and policy analysts that mirror those at the legislature. It has been said that the structure of AMC allows the organization and the provincial and federal governments to “talk to each other”; the likeness of organizational structure and procedure affords AMC the institutional capacity for state-to-state negotiations. Understanding the role of these organizations is difficult because, for instance, AMC’s activities are solely political advocacy, while the tribal councils, MKO, and SCO, engage in both political advocacy and

service delivery. Arnason (2008) describes this complexity well by writing, “It really becomes tricky to find the right words to describe organizations on different levels. The choice seems to be mainly between political and governmental” (48).

Today, Sioux Valley Dakota Nation has the only self-government agreement in Manitoba and it is called the Sioux Valley Dakota Nation Governance Agreement which is a tripartite agreement signed in 2013, and given royal assent (became law) in March 2014 (Canada Parliament of Canada 2014a). In the early 1990s, Indian Affairs announced the Manitoba Framework Agreement, which was a pilot agreement to abolish the *Indian Act*. It was signed by 60 First Nations, AMC, and the Minister of Indian Affairs and Northern Development. The agreement began from an AMC resolution and was discontinued in 2004 (Canada Aboriginal Affairs and Northern Development Canada 2013b). In an anonymous interview with a senior bureaucrat with over 30 years of public service experience with the Manitoba government, it was explained that the Sioux Valley Dakota Nation Governance Agreement effectively removes them from the *Indian Act*, so they no longer report to the Department of Indigenous and Northern Affairs Canada (INAC), and instead have a government-to-government relationship with Canada. One of the hardest things to negotiate was the financial part of this agreement, because the federal government did not want to establish a sustainable funding model. For example, if the First Nation established a revenue-making business, INAC would drop funding by 50% for every dollar made. The First Nation protested this, and so the federal government backed off. This protest was because many First Nations earn their own source revenues. One example is the Brokenhead Ojibway Nation, where only 15% of the nation’s revenue comes from INAC. Anonymous (2014) explains that the Brokenhead Ojibway Nation is in practice a self-governing entity, but not formally. They could easily transfer to self-government, yet are hesitant to transfer

to self-governed agreements. Their hesitancy goes further than financial reasons. The form of government that is described in the *Indian Act* and self-government agreements give the First Nation Band's Chief and Council a great deal of power over the First Nation's population, and many First Nation peoples did not want this degree of power enshrined in such law (Anonymous 2014). These financial and political reasons underscore why more First Nations have not arrived at self-government agreements in Manitoba.

The wider provincial political culture has undoubtedly shaped the environment that houses these political organizations. Looking back to confederation, the political culture has inextricably been shaped by the immigration patterns that closely followed Manitoba joining the Confederation. While the Metis had resisted the Crown in an attempt to formalize a foothold of political power and cement their rights in the region, the Crown, in the end, was able to overpower the Indigenous opposition. Political powers in the region shifted for two major reasons. First, the central government increased its political power in the provincial government by putting in place a federally-appointed Lieutenant Governor who propagated the central state's mandate (Grafton 2011). Second, the increased immigration from Europe and Ontario drastically changed the population demographic and shifted Manitoba's political culture (Wiseman 1996, 28). These immigration waves brought new political pressures that in essence dampened the Indigenous roots of the initial provincial statehood. These migration patterns in particular shaped the capital city of Winnipeg, with the socialist and union politics of the United Kingdom and Eastern Europe, and the rural areas with the conservative politics of the Ontarians (Wiseman 1996, 51).³⁷ Interestingly the New Democratic Party held an unprecedented four term majority government in Manitoba, that only recently ended, in part through the support of many First

Nation communities that make up the majority of the northern electorate (support which itself diminished in the NDP's recent loss).

Unlike B.C., which had relatively few Treaties, and the N.W.T., which fell mostly under Treaty 11, there are many signed Treaties in Manitoba. There are seven Treaties³⁸ and adhesions that were signed in Manitoba (though some were only partly in Manitoba) from 1871 to 1906 spanning much of the province. There are only five of the province's 64 First Nations that are not signatory to Treaty, including Birdtail Sioux, Sioux Valley, Canupawakpa, Dakota Tipi, and Dakota Plains which are all Dakota Nation communities in the southwestern region of the province (Canada Aboriginal Affairs and Northern Development 2012). According to the Treaty Relations Commission of Manitoba (2013), "The Dakota people were not a part of the Numbered Treaties; however, they are recognized as having use and occupation of territories within Manitoba and have secured alliances and arrangements with the Crown and First Nations." This is because First Nations in Manitoba have Treaty with the Dakota Nations (Courchene 2014). In an interview with a senior bureaucrat for the Manitoba Government, it was explained that a significant motivator for the Sioux Valley Dakota Nation Governance Agreement was this lack of Dakota Nations Treaties with the Crown. It was hoped this self-government agreement would become a template for other self-government agreements in Manitoba; however, First Nations' concerns regarding the impact of self-government on their Treaty rights has cast self-government agreements, in general, in an unfavourable light because it remains unclear at this time how such agreements will impact Treaty rights, as the Dakota Nations do not themselves have Treaties with the federal government.

Many of the Treaties signed elsewhere in Canada were signed at various times from the 17th to 20th centuries; in Manitoba, these Treaties were signed in the early years of

confederation. The intent of the Treaties from the point of view of the state was to extinguish Indigenous title to the lands so they could be made available to settlers and the state. When Canada purchased and absorbed what was then considered the Hudson's Bay Company's (H.B.C.) territory of what became Manitoba (then called Rupertsland), it needed title for authority to govern. The federal government had the constitutionalized jurisdiction (and thus decision-making authority) of Indigenous-related policy matters and this enabled the federal government to initiate the extinguishment process through Treaty-making (Ray et al. 2000, 210). This extinguishment of Indigenous title was used to legitimize Crown title (Asch and Zlotkin 1997, 209). The intent of the state in this process was to confirm state legitimacy, not to confirm Indigenous title. In fact, the federal government negotiates land claims by recognizing rights to in turn extinguish those rights (Green 1995, 97). Therefore, the Treaties in Manitoba—as can Treaties elsewhere in Canada—can be understood, from the perspective of the state, as mechanisms to establish Crown title and in turn extinguish Indigenous title.

This state-oriented understanding of the Treaties, however, is not how the Treaties are understood by the Indigenous nations. Indigenous understandings of these Treaties were not as agreements of extinguishment but as diplomatic agreements affirming rights and title. For example, in an interview with Assembly of Manitoba's Grand Chief Derek Nepinak (2013), he explained that Indigenous self-determination has never been surrendered: the cornerstones have been built on the foundation of Treaty even though these inherent and sovereign rights are not recognized by the settler population. What Nepinak was describing is that these Treaty rights are a colonial recognition of the pre-existing and ongoing rights of Indigenous people—even if these rights are ignored by settler society, they are enshrined in both settler state law and Indigenous law. In an interview with James Wilson (2013), the then Treaty Commissioner in Manitoba, he

also described these Treaties not from a view of extinguishment, but from that of an ongoing relationship. Wilson uses a social metaphor, that of marriage, to explain Manitoba's Treaties. The Treaty is the vow or the marriage ceremony that sets priorities, but the relationship comes afterwards and takes work. Wilson says that one of the issues is that the *Indian Act* has contributed to dysfunction in this relationship. Specifically, the *Indian Act* shifted the relationship created in the Treaty between equals to a relationship of hierarchy and dependency. It is clear in these discussions of Treaty that Manitoba shares the political discrepancies in the perspectives on Treaties that exist elsewhere in Canada, but these discussions also demonstrate unique facets of the Treaty-making process. This is because Manitoba is marked by numerous Treaties that cover most Indigenous nations and the Treaties, like its reserves, were created around the time of Canada's confederation.

Given that the establishment and number of the Treaties in Manitoba is distinct from those of B.C. and the N.W.T., it is not surprising that the reserve system is also distinctive. Manitoba, like B.C. has many reserves, whereas the N.W.T. has only the one. A purpose of the reserve system was to provide land to settlers by restricting the First Nation peoples to particular sections of Treaty lands, and the expression of reserve-making in Manitoba clearly illustrates this. The settlement of the prairies occurred rapidly around the turn of the century (Francis, Jones, and Smith 1992, 170). "Manitoba Fever" gripped the province as European and eastern Canadian immigration waves came to settle, farm, or participate in the thriving industry of Winnipeg's import and export sector (Carter 1990, 155). The first significant efforts to encourage immigration to Manitoba were undertaken by the federal government in the years from 1870 to 1881. Keep in mind that these were also significant years for Treaty-making. The federal Department of Agriculture, which was also responsible for immigration from the period

of 1869 to 1892, was aggressive in its attempts at prairie settlement. Through immigration campaigns and immigration agents, the government encouraged settlers to come to Manitoba from eastern Canada, the United States, and Europe (Jahn 1968). This federal department was also tasked with the responsibility of Indigenous policy (Spry and McCardle 1993, 139). Today, this would be seen as a clear conflict of interest—though not from a settlement-colonial perspective.

The reserve system in Manitoba has influenced the Indigenous/sub-national governance network and has been significant in reinforcing settler interests over those of the Indigenous nations. As stated, the First Nations communities, or reserves, in Manitoba are often isolated and though this isolation is not so severe in southern communities, it is significant for those isolated northern communities which have limited access to goods and services from wider markets outside of the reserve (Carter 1990, 155). As well, by 1891 there were state restrictions implemented to deter settler trading or bartering with Indigenous peoples living on-reserve. The pass system was introduced in 1885 requiring First Nation people to receive written permission from the Department of Indian Affairs to leave the reserve (Carter 1990, 150, 157). The reserve system in Manitoba was created to benefit immigrant settlement and the result has meant geographic, service, and economic isolation for many of these First Nation communities.

This isolation has greatly restricted the economies of Manitoba's First Nation communities. Often, settler society holds misconceptions of Indigenous populations not being able to cope with the changes that the colonialists brought. Usually, perspectives on this topic are cast through a lens of European diffusion,³⁹ which can hold viewpoints of false limitations of Indigenous society. A number of historical accounts, however, reveal a different story. For example, accounts exist as to how Indigenous peoples were pushed by settlers onto unfavourable

land for resource subsistence and development (Harris and Warkentin 1974, 25).⁴⁰ Some have argued that the reserve system was created to shield Indigenous peoples from the influence of immigrants (Martin 2008, 22) whereas others argue that Canadian policy measures, not Indigenous peoples' economic or political practices, created restrictions for Indigenous participation in settler economies (Shewell 2004; Brownlie 2003). Still others have argued that the reserve system was created to assimilate Indigenous peoples into non-Indigenous society (Tobias 1983, 52). Thus, the reserve system demonstrates how such state policies have affected Indigenous participation in mainstream settler society and the provincial economies. Though some reserves were created on traditional lands, the main settler-based reason for their creation was to isolate First Nations, and in Manitoba these communities and economies often remain as such.

The economy of Manitoba was for a long period shaped by external actors, specifically the Hudson's Bay Company (H.B.C.) and the federal government. B.C. has long had a strong economy based on staples and the N.W.T. is resource rich, though this economy is also strongly shaped by external corporate and state players. Like B.C., Manitoba was intensely shaped by the initial colonizing economic driver of the fur trade. The H.B.C., the main corporate power of the fur trade, administered the lands in this region until their sale in 1864 and the Crown took over in 1870 when Manitoba was incorporated (Harris and Warkentin 1974, 232). The impact of the fur trade and its subsequent economic decline on the province was significant for the Indigenous populations (Tough 1996). For example, "The fur traders imposed a robber economy on the region, with both animal and human resources relentlessly exploited by the Northwest Company and the Hudson's Bay Company men for their own ends" (Harris and Warkentin 1974, 245). This is not to say that the economy lived or died by the actions of European powers, just that the

effect of the European economic system was pervasive. For example, as Milloy (1990) writes on the influence of colonialism and the Plains Cree: “The Plains Cree lived for themselves, not as European-organized appendages of an alien trade system” (120). Euro-settler trade, therefore, impacted the lives of Indigenous peoples, but these peoples maintained varied degrees of agency while participating in this economy.

A number of externally-imposed economic challenges arose for Indigenous peoples during the post Treaty era, suggesting that the economies of Indigenous peoples in Manitoba have been largely influenced by external colonial economic practices. When the fur trade began to decline due to declining resources in the 19th century, the federal government looked to agriculture as an economic solution to the poverty that resulted for those dependent on the fur trade and as a means to “civilization.” Carter (1990) explains that early settlers considered Indigenous peoples inferior to westerners and that the purpose of the administration of Indian Affairs was to “guide Indians during the difficult period of transition from “savagery to civilization”” (4). It is somewhat ironic that the fur trade had reduced agricultural practices amongst Indigenous peoples, but now was to serve as an economic solution to those left jobless by the collapse of the fur trade. Yet, as Carter (1990) carefully describes, Indigenous peoples across the entire Plains, including Manitoba, practiced agriculture and, prior to European contact, agriculture made up to 75% of some Indigenous nations’ food sources (37). Ray (1996) further gives evidence of farming practices across the Plains nations, throughout the United States, Great Lakes region, and Red River Valley, much of which continued to be practiced in parallel with the fur trade (244-245). By the mid-nineteenth century, the state did intervene and created Indigenous agricultural policies; these, however, were insufficient for a variety of reasons and many historians point to the state’s policies and practices that did not provide the necessary

assistance for success (Hull 1987, 5; Carter 1990; Ray 1996). These policies were put in place as early as the 1830s, but more aggressively throughout the 1870s and 1880s; it was at the end of this decade that Indian Affairs created policy to divide settler and Indigenous agricultural groups and this not only hurt reserve agriculture, but also “paved the way for alienation of much reserve land in the years after 1896” (Carter 1990, 193).

During the fur trade era, Fort Garry (which Winnipeg later came to encompass) was established as a major economic hub. It was the fur trade and later settlement gateway to the west and north and this position of economic importance was stable until the early 20th century; in fact, Winnipeg had the largest rail yards in the world by 1904 (Francis, Jones, and Smith 1992, 170). After confederation, the province was built on a foundation of “British, agricultural, modern and industrial” (Friesen 1992, 37). When global changes in transportation were introduced, such as the Panama Canal, these greatly reduced the province’s foothold on manufacturing and distribution. Winnipeg, the “Hub City” as it was colloquially referred to, was one of the largest manufacturing centres in Canada until World War I; it was this manufacturing capacity, interestingly, that provided the necessary materials to build the colonial settlements of the west (Francis, Jones, and Smith 1992, 170).

The modern economies of Indigenous peoples in Manitoba continue to be influenced by external colonial economic practices. In the 1950s, Manitoba’s natural resource industry also became a major economic driver for the province, specifically in the sectors of mining and hydroelectric power (Francis, Jones, and Smith 1992, 438). This is significant to First Nation communities, whose Treaty and reserve lands once again became targeted by settler economic encroachment. A significant challenge to building sustainable economic measures in First Nation communities is that government policies restrict First Nations’ access to the natural resources on

their lands which limits possible economic benefit (Simpson, Storm, Sullivan 2007, 54). Yet, more modern government policies to strengthen the contemporary First Nation economies are developing and often these are based on service and knowledge-based sectors. This is in part due to Manitoba's waning natural resource sector of forestry, mining, and hydro that is creating fewer jobs than it did 30 years ago (Simpson, Storm, Sullivan 2007, 54).

Starting in the 1960s and '70s, co-ops were promoted in northern Manitoban Aboriginal communities both to create economic development but also because Indigenous culture places more stress on social collectivity (Loxley and Simpson 2007, 27). And Milloy (2008) states, "Not until the 1980s were there any concerted attempts to inject economic life into the reserves" (6). However, even with these concerted efforts the development of modern economies can still be restricted due to limited access to technology: "There are still First Nations in northern Manitoba that do not have Internet access. Unreliable Internet connections, a lack of Broadband Internet and inadequate technology are all ongoing problems for northern First Nations" (Duboff 2004, ii). In my own work at AMC, this was a significant challenge that the organization was working on, and one that many other provinces have been able to overcome. Simpson, Storm, and Sullivan (2007) have argued that today, northern Manitoba First Nations communities and economies continue to be marginalized (Simpson, Storm, and Sullivan 2007, 54). Nepinak (2013) argues this is because the relationship between the Manitoba government and First Nations peoples is not based on a partnership and there are no real opportunities to partner: this reality goes back 140 years and must be changed. The chasm between settlers and Indigenous nations in the matters of economy and politics has not been closed.

The mechanics of the Indigenous/state governance network in Manitoba are unique, as they are in each of Canada's sub-nationals. Past immigration waves and their political influences,

Treaty-making and reserve establishment, and the province's economic development are all influences of the era of confederation and are still evident in the contemporary Indigenous/state governance network and continue to contribute to the systemic isolation of many of Manitoba's First Nation communities.

Modern Politics of Land and Water

Manitoba's modern land claims process is not exempt from Canadian federalism's influences of devolution. This influence can be seen in the key pieces of legislation concerning land and water in the province's Indigenous/state governance network, which include the *Natural Resource Transfer Act, 1930 (NRTA)* and the Northern Flood Agreement, 1974 (NFA) (Canada 1930; Manitoba Northern Flood Committee 1977). These documents are tangible examples of devolution in that they establish provincial presence in Indigenous matters of land and water regulation, and demonstrate an extension of colonial activity in the modern-day Indigenous/state governance network. As Martin and Hoffman (2008) explain, "Colonization is helpful in explaining the historical continuities underlying hydroelectric development in Manitoba. While colonialism provided a basic foundation necessary for the historical expansion of the Canadian state, perhaps its most important contribution for hydro development was a mindset as an opportunity and relocation as a means to move Aboriginal communities" (8). Here these authors explain that in Manitoba, hydroelectricity and Indigenous and state interactions demonstrate a continuance of colonial activity, or neo-colonialism. This section will explore this neo-colonialism as it is evident in Manitoba's sub-national/Indigenous governance network.

In Canada, jurisdiction of Crown land management was entrusted to four provinces through the *BNA Act of 1867*, section 109 and included Ontario, Quebec, Nova Scotia, and New Brunswick (Canada 1867). This section did not, however, apply to the western provinces (Clark 1990, 115). Thus, the federal government maintained jurisdiction over natural resources in

Manitoba. Therefore, provincial involvement in First Nation land issues was directly prevented by the constitution, keeping the province uninvolved in these matters unless required otherwise. In Manitoba the provincial Lieutenant Governor, Alexander Morris, attended and participated in the signing of Treaty 3 and onward (Courchene 2014). The *Natural Resource Transfer Act (NRTA)* of 1930 and 1931 gave the Prairie Provinces the authority to manage natural resources (Feehan 2009, 354-356; Dyck, 1996, 380). Clark (1990) explains that due to this legislation Crown title “was now uniformly vested in the provincial governments” (120). The *NRTA*, therefore, is significant to the Indigenous/state governance network because it shifted the role of the provincial government from a position of relative noninvolvement in Treaty negotiations to that of a dominant participant.

The *NRTA* is an example of the federal government’s offloading of responsibility to the Prairie Provinces, as it provided the Prairie Provinces with regulatory control of non-reserve or Crown lands except those needed to satisfy federal Treaty obligations. The outcome of the law has muddied the exclusive authority of the federal government in the *BNA Act’s* s.91(24) by imposing upon the province the Crown’s duty to fulfill Treaty (Mitchell 1988, 132). An example of muddied authority, and thus ambiguous jurisdiction, can be found in the act which states:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force on the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. (*Natural Resource Transfer Act*, s.13)

This excerpt implies that provincial laws, like game regulations or species conservation, trump Treaty rights on both Crown and Treaty lands. Hogg (2005) argues that this law can be interpreted as a benefit for Indigenous peoples because it enhances Treaty rights (609). Another interpretation, however, might argue that this excerpt clearly imposes restriction on Treaty rights as it states certain provincial restrictions on hunting and fishing “from time to time shall apply to the Indians.” As Mitchell (1988) argues, the *NRTA* has been used in practice to narrowly interpret and define Treaty rights (Mitchell 1988, 133-134).⁴¹ Thus, the wording is ambiguous at best, but has been interpreted by provinces for their self-interest.

The impact of devolution from the *NRTA* has meant that the provinces are inextricably involved in land claims procedures. The act binds the province to a process that is intended to ensure the federal government honours land-based obligations: “Indeed, the intent of section 11 of the NRT Agreements was to impose on each province the duty to enable Canada to fulfill its obligations under the treaties” (Mitchell 1988, 132-133). The *NRTA* guaranteed that the province must have a role in this process of future federal activity addressing concerns and errors with surveyed reserve lands, such as Treaty Land Entitlements (TLE) (Anonymous, 2014). The *NRTA*, thus, obligates the Manitoba provincial government to participate in the land claims process. In Manitoba, this is a matter tasked to the Treaty Land Entitlement Committee (TLEC). As the TLEC explains, “Through the MNRTA [Manitoba Natural Resource Transfer Act], Canada transferred the control and administration of all unallocated Crown lands to Manitoba. The MNRTA also required that Manitoba set aside sufficient unoccupied Crown land so Canada can satisfy its outstanding Treaty obligations. ***This is a constitutional obligation***” (Manitoba Aboriginal and Northern Affairs 1997, sic). Thus, the *NRTA* constitutionally bound the province to fulfill the federal Crown’s Treaty obligation. And yet in an interview with Dr. Kathi Avery

Kinew, the Manager of Research and Social Development at the Assembly of Manitoba Chiefs she said, “The province knowingly said they would look after Treaty rights, but weren't serious about it” (2014). And Wilson (2013) argues that while this devolution of natural resources has been constitutional, it is outside the realm of the Treaties because Treaties are based on a nation-to-nation framework, not an Indigenous nation-to- sub-national arrangement of governance. Therefore, the devolved involvement of the province in land regulation is constitutional but requirements have not been upheld to address the underpinnings of Canada such as the Treaties.

In Manitoba many of the Treaty land promises remain unfulfilled, even with those *NRTA* requirements for unsettled lands to be made available for outstanding Treaty obligations. Because of this TLEC was formed in 1977 to address these outstanding claims and issues, and an agreement-in-principal was created in 1984 between the TLEC, Canada, and Manitoba (Treaty and Aboriginal Rights Research Centre 1994, 20). The TLEC is a trilateral organization, so the provincial government is a part of the process along with the federal government and the Indigenous nations. Sawchuk (1983) writes of the TLEC mandate: “The task of the Commission was to receive representations from interested parties and formulate a set of principles to guide the development of a policy under which Manitoba could meet its obligation to provide land to Canada for the satisfaction of these claims” (215). The origins of the TLE reach as far back as the signing of the numbered Treaties which “were negotiated under circumstances advantageous to the government” (Treaty and Aboriginal Rights Research Centre 1994, 11). The courts have found that Treaty promises recorded in both the written text and oral record of the Treaty negotiations and First Nations understandings and interpretations of Treaty promises must be fulfilled (Treaty and Aboriginal Rights Research Centre 1994, 11).

The TLE framework was established in 1997; however, individual First Nation community TLE agreements had been reached as early as 1994 (Canada Indian and Northern Affairs Canada Manitoba Region 1997). There are two avenues of Treaty fulfillment: the TLE Framework Agreement and individual TLE settlements, which were settled prior to the 1997 TLE Framework Agreement. The TLE framework put aside 1,100,626 acres of Crown land for TLE reserve creation. This allotment of acreage for Treaties was determined by a formula of population estimates; because this Treaty allotment was not fulfilled in the past, today's formula for TLE acreage is determined by the outstanding acreage (Manitoba Aboriginal and Northern Affairs 2014). Of this, 985,949 acres is provincial Crown land and 114,677 acres is to be purchased from willing sellers (Canada Aboriginal Affairs and Northern Development Canada 2014b).

To date, there are 29 Manitoba First Nation communities that have validated land claims with the federal government: 21 through the TLE Framework Agreement and 8 under individual TLE settlements (Canada Aboriginal Affairs and Northern Development Canada 2014b). Of the 21 communities that processed claims through the TLE Framework Agreement, 15 agreements have been executed. An interesting fact is that "Currently, approximately 90 per cent of Treaty Land Entitlement transactions take place in Manitoba and Saskatchewan." (Canada Aboriginal Affairs and Northern Development Canada 2014b). This is interesting because the numbered Treaties are predominantly found in the Prairie Provinces, and Kinew (2014) says the sub-nationals have not been serious about fulfilling Treaty obligation: "It's a Treaty 1 through 11 issue." As an outside observer, the fact that there are so many contemporary outstanding Treaty obligations as well as long standing federal abandonment, seems to be clear evidence of a lack of sub-national interest in Treaty fulfillment. The numbered Treaties did also cover Alberta and the

N.W.T., but as will be discussed in Chapter 4, the Paulette Case (1973) is the reason the N.W.T. is implementing comprehensive and not specific land claims. Perhaps one reason Alberta has fewer TLE's is due to the smaller number of outstanding Treaty commitments as compared to Saskatchewan. According to Bill C-37, the Claim Settlements (Alberta and Saskatchewan) Implementation Act (2001), which received royal assent in March 2002, outlines the outstanding commitments in Alberta as approximately \$132.5 million and 22,500 acres, whereas in Saskatchewan, commitments total \$539 million and just over 2 million acres (Canada Law and Government Division 2001, 4-5). Other variances in Alberta's TLE process exist: "Most TLE settlements in Alberta, unlike those in Saskatchewan, do provide for the transfer of provincial Crown lands, rather than "willing seller-willing buyer" land purchases" (Canada Law and Government Division 2001, 5).

In Manitoba, TLE agreements vary in scope. To provide some sense of the scale of the agreements that have been settled consider the largest and smallest agreements: The Barren Lands agreement included 66,420 acres and \$1,616,313 and the York Factory agreement included 29,173 acres and \$790,919 (Canada Aboriginal Affairs and Northern Development Canada 2013b). Other agreements have provided financial settlement to purchase land for the reserve. As explained by Anonymous (2014), the 1997 TLE negotiations provided a generous land acreage or cash settlement if land was not available. As well, the bureaucrat stated "there is lots of Crown land, and the province is not holding back on providing this land." Though, perhaps there is much less support for land settlement if the land is in Winnipeg, such as that of the Kapyong Barracks, which was a parcel of land that several Treaty 1 First Nations argued the federal government did not properly consult them over its future development according to their TLE agreement (Canada v. Long Plain First Nation, 2015 FCA 177).

Closely tied to this process of land claims are the politics of water. The waterways in Manitoba, its rivers and lakes, are sometimes colloquially referred to as the land claims of Manitoba due to the immense amount of water, the importance of the waterways to economic development, and the ways that settler colonialism has applied itself through hydroelectric development. In fact, Waldram (1988) argues that the modern politics of water in the Indigenous/state governance network parallels colonial power struggles. As Waldram writes, “Rather, I would argue that the parallels that do exist between the Treaty and scrip era on the one hand, and the hydroelectric era on the other, demonstrate a continuity in the manner in which the government has handled Native issues for over 100 years” (182). This comparison includes colonial ideology, colonial economic activities, colonially-fueled outcomes, and even neo-colonial activity.

The modern politics of water mirror the past colonial relations between the state and Indigenous nations as water continues to be important to Indigenous nations across all of Canada, not just in Manitoba. Past and present, these waterways have shaped Indigenous economic development, as the waterways have served as a means for transportation: “In the forested uplands, rivers and lakes were the avenues of movement, to be traversed by canoe in summer and by foot in winter” (Harris and Warkentin 1974, 233). These waterways connected people and served as links for economic activity and political diplomacy. As Waldram (1988) writes, “In fact, it could easily be argued that the true backbone of the northern Native economy was not, and is not, the land, but rather the lakes, rivers and streams” (5). These trade routes remained the main platform of economic mobility during European contact and throughout the fur trade. The contemporary economic utility of these waterways is no longer principally based on trade or transportation, but for the purpose of generating hydroelectricity. As Wera and

Martin (2008) explain, “Throughout the twentieth century, water was a key ingredient in the fabric of North American society” (56). Thus, while the use of waterways changed, their importance did not. While these politics of water exist consistently across Canada, the distinction in Manitoba is how grave the effect of these politics of water have been for Manitoba’s First Nation peoples. Consider any map of Manitoba, and the sheer scale of the geographic region’s waterways is perhaps the most unmistakable aspect of the area.

To demonstrate this parallel between colonial activity and water use, consider the role that Manitoba Hydro, the provincial Crown Corporation tasked with developing hydroelectric power in Manitoba, has played in the Indigenous/state governance network. The politics of water are influenced by the colonial motivation similar to that of land accretion. For example, “Once the land had been secured, the Native people became a non-issue, at least for a time. But, eventually with changes in technology, a new source of wealth was targeted” (Waldram 1988, 5). So these uses of water for modern hydroelectricity mirror previous colonial activity in Canada which has consistently been facilitated through a number of avenues of resource extraction (Orkin 1999, 116). According to Kinew (2014) this colonial paradigm is supported by the federal and provincial governments that continue to not live up to the Treaties: “This is important because living on the land provides a healthy lifestyle and jobs; it’s important not to lose these rights. To quote Leroy Little Bear, “I am the land and the land is me.”” This is regarding the spiritual, emotional, and health connections First Nations peoples have with their land and waters, the territory where, as Mawedopenais said in 1873 in negotiating Treaty 3, “The Creator planted us here.”⁴² Additionally, Slowey (2008) argues that in this economic paradigm, Indigenous people in Manitoba went from being politically irrelevant to being important due to the demand for natural resources, in particular hydro (46). Therefore, as land was targeted in the

past for settlement purposes, now water has been a target for colonial expansion and resource acquisition. In Manitoba, Manitoba Hydro generates all of the province's hydro power. The corporation began operation in the early 20th century and currently runs 15 dams throughout the province and supplies power to the province as well as exports south to the United States and west to Saskatchewan.

The politics of water in Manitoba parallels past colonial relations because the state has used its position of power to suppress Indigenous peoples' political will and rights. As Wera and Martin (2008) argue, Manitoba Hydro has had great economic success due to unfettered access to Indigenous lands, because the federal government has not upheld its Treaty responsibilities to protect these lands (72). Again, the federal government passed responsibility for natural resources to the provincial government through the *NRTA*. Manitoba Hydro is a provincial Crown corporation which means that the province is both the regulator of land protection and a beneficiary of its development. This is the very reason that s. 91(24) was created—to deter such conflicts of interest at the sub-national level, and yet the provincial government has been able to set hydro policy as it chooses, because with the exception of the *NFA*, it does not have a Treaty relationship and responsibility for the protection of Indigenous rights and title.

The Department of Indigenous and Municipal Affairs is always present when Manitoba Hydro works with a First Nation community, and the role of the department is to advocate within the system for the First Nations peoples, and the department is “pleased” to see when First Nations communities become decision makers and equity owners (Anonymous 2014). The department encourages community level decision-making and equity ownership because, “There is no law in Canada to establish this. Quebec has signed some generous agreements including the James Bay and Paix des Braves, but such agreements are generous with funding but not equity

ownership. In Manitoba, there are examples of both.” (Anonymous 2014). For example, Nisichawayasihk Cree Nation (Nelson House) signed as an equity partner to the Wuskwatim Dam in 2006 (Wuskwatim Power Limited Partnership 2016), and so too are the four First Nation partners, Tataskweyak Cree Nation (Split Lake), War Lake First Nation, York Factory First Nation, and Fox Lake Cree Nation that signed on as equity partners in 2009 to the Keeyask Dam (Manitoba Hydro NDb). It should be noted that equity ownership involves risks that can sometimes outweigh the benefits: if the project is unsuccessful, the Nisichawayasihk Cree Nation could incur significant debt due to this ‘equity’ agreement (Kulchyski 2004, 6).

This comparison to colonialism in the politics of water stems from the recognition of the similarity in colonial attitude of the state. As will be discussed in Chapter 5, colonial projects are often cast as necessary for wider social betterment through what is known as narratives of “common good”. Such a narrative is a justification based on needs of distant markets, not local impact: “Like the rhetoric of localism, a rhetoric of profitability is more easily understood by provincial residents than the historical imperatives of continental modernization and expansion” (Hoffman and Bradley 2008, 160). The use of this argument of “benefit to all” distances projects from the real or potential negative outcomes. This narrative distorts the positive and negative potential by enhancing the positives and diminishing the negatives. This goal is clear, as Hoffman (2008) demonstrates and writes, “The exploitation of Manitoba’s vast waterways was long a goal of southern policy-makers” (108). And yet, as Lane (2013) argues, hydro is not the economic stimulator it was earlier for the province: exports are falling, prices of processing and construction are increasing, and intra-provincial demands for power are falling due to closures in mega-industry such as mining and pulp facilities. According to Manitoba Hydro-Electric Board Annual Reports, exports are falling: in 2005, Hydro generated a total of 31.5 billion kilowatts,

with 19.8 billion kilowatt hours used within Manitoba and the remainder, approximately 11.7, were exported (Manitoba Hydro 2005). In 2014, this dropped to 10.5 billion kilowatt hours, though revenue increased by \$82 million to \$439 million in export sales (Manitoba Hydro 2014).⁴³ Returning to the neo-colonial narrative of betterment for wider society, this narrative persists, because these hydro projects have been a sign of progress and modernity in northern Manitoba since the 1960s (Kulchyski et al. 2006, 1). Hydro is championed as the environmentally friendly and sustainable energy resource; however, this ignores the ramifications of environmental and social impact (Wera and Martin 2008, 57). These ramifications frequently include flooding, relocation of communities, and increased hydro costs.⁴⁴

Additionally, hydro projects are touted as motivators for jobs and economic stimuli. The results of these projects, however, tell a different story. As Hoffman and Bradley (2008) write, “One of the significant costs of doing business is the continued undermining of the prospects for the economic and cultural viability of northern Aboriginal communities” (164). One example is the experience of the community of South Indian Lake (SIL) or O-Pipon-Na-Piwin Cree Nation in dealing with the impact of the Churchill River Diversion (CRD), which became operational in 1977 and is a diversion on the Churchill River that reroutes its waters to the Burntwood and Nelson River systems which have hydroelectric generating stations (Manitoba Hydro NDa). The impact of the CRD was deeply negative and created problems in the community in place of the many good things that were promised and expected to come from this development. As Hoffman (2009) says, “Rather than leading to a reconciliation of community differences, Aboriginal-Hydro agreements have often deepened rather than narrowed divisions within and among northern communities” (122). This demonstrates the deepened community divisions in SIL by

describing the community before and after the impacts of CRD. Beforehand, the community was well-off economically, with a robust economy based on fishing and trapping which enabled a social structure based on traditional Cree cultural practices. After the CRD project, the fishing industry collapsed and trap lines were flooded. The resources provided to families by Manitoba Hydro barely cover the “extremely high average monthly energy bill” due to the housing stock provided by Manitoba Hydro (Hoffman 2009, 128). The Community Association of South Indian Lake’s *CASIL Agreement* is a complex set of negotiations under *NFA* that concluded SIL is an independent First Nation community (thus apart from Nelson House) (Manitoba Department of Northern Affairs 1999): prior to this agreement the government had been hesitant to accommodate the community’s grievances. This community was not adequately consulted on hydro projects nor were its grievances sufficiently mitigated, and these grievances have been long-standing and have had deep negative impact on the community, including environmental damage and community member displacement from the flooding brought on by CRD. In this brief exploration of colonial attitude, the parallels of past settler colonialism with contemporary practices are clear. It is, also, reminiscent of Fanon (2004) who argues colonial economic doctrines advocate themselves as positive change, when in fact they are unsustainable and do not deliver on the positive economic promises (207-208).

The economic premise of resource development, when cast through a colonial lens, shows that economic outcomes are mixed. For example, the outcomes of these projects will benefit some and not others, and like most colonial projects, the disadvantages sit with the Indigenous nations, whereas the economic benefits mostly serve the south (Wiebe 1999, 61). In contrast, one of the impacts of globalization on public policy-making, or modern-day neo-liberal market trends being implemented by the state, is that, while the effect can increase economic

self-sufficiency of an Indigenous nation, it can also lead to enhanced stratification between the state and the Indigenous nation or amongst Indigenous nations themselves (Slowey 2008, 39). For example, while some economic benefits do materialize for some, they often do not “trickle down” to those living in the community (Kulchyski, et al 2006, 2, 11). Thus, modern economic conditions can result in stratified or uneven benefits and disadvantages for communities.

An example of such stratification in Manitoba due to hydro development includes one nation whose activism consistently remains in the media spotlight, Nisichawayasihk Cree Nation and the Wuskwatim Dam. Kulchyski (2008) describes the project as having two possible outcomes. If the project is successful, there may be jobs and finances for the community, if it is unsuccessful, there will be “crippling debt” for the community. In 2004, Kulchyski travelled there and writes, “I saw the erosion along the banks created by rapidly rising and falling water levels. I saw burial areas that had been exposed by flooding. I saw uprooted trees posing an insurmountable barrier all along the banks of the river” (131). Thus, regardless of the economic benefits, the impact on the environment was being made. As Mathers (2014) says on these economic development projects that take place on ancestral lands, these projects, “should develop the capacity of the community. There is a connection to land that First Nations want. Not looking at land is to the detriment of the people. This is cultural competency: it must reflect the spiritual connections to the land. Such a history with the land has been taken away.” Looking closer at the outcomes of the project, Kulchyski argues that the agreement provides few jobs for the community, most of which are menial.⁴⁵

Martin (2008) argues that colonial motivations for modern land deals can be most clearly seen when considering the outcome. Some deals provide more land and money to the Indigenous nation which results in socio-economic betterment, because, in these communities, the

government's motivation for the land claims is not rights based, but resource based (28-29). This means that the government is seeking a deal to conclude negotiations to access the natural resources, not to restore the Indigenous rights of the community to its traditional territory. Indigenous nations, on the other hand, embark on land deals to affirm in settler society their inherent rights. Business deals, therefore, do not equate economic viability with cultural viability, or Indigenous rights.

In the past, there has been limited involvement of First Nation people in many such projects. Even in projects that require years of planning, the Indigenous communities at stake are often only notified upon commencement of construction (Waldram 1988, 174). Many communities were not consulted on the hydro projects of the 1970s, and backlash to this resulted in Indigenous resistance to these projects (Slowey 2008, 48; Dubrovlny 2008, 172). Today there are plenty of examples of Indigenous groups entering these negotiations and agreements as business partners; yet, they can find that their hands become bound in support of practices they are opposed to, such as environmental damages (Hoffman and Bradley 2008, 155). For example, many of these hydro projects result in damages to lakes and rivers, as well as land due to flooding, which has vast cultural and economic ramifications for the people (Waldram 1999, 69).

To further illustrate provincial involvement in neo-colonial relations in hydro development in the Indigenous/state governance network, consider the example of the Nelson-Churchill Dam in northern Manitoba. This project began in the 1950s, is situated in northern Manitoba, and includes six of the provinces' 15 generating stations (Manitoba Hydro 2013a).⁴⁶ It was built in an era steeped in these very colonial propositions, and these colonial relations deeply affect these Indigenous nations. One of the outcomes of this hydro project was the *Northern Flood Agreement* (NFA), struck in 1974 to deal with the impacts of the dam, and mainly

provided compensations and set the direction for the project in the future. It is an agreement between the Canadian government, the Manitoba government, Manitoba Hydro, and the chiefs of Nelson House, Norway House, Cross Lake, Split Lake, York Landing, which together make up the Northern Flood Committee (McKay 1999, 36). On the Northern Flood Committee Hoffman (2009) writes, “The best that the Northern Flood Committee could hope for was to negotiate a price for the damages and suffering. Aboriginal people had no choice but to accept” (118). The *NFA* outlines an exchange of reserve lands—those required to complete the Nelson-Churchill project—as well as compensation and community development strategies (Wera and Martin 2008, 68). South Indian Lake (O-Pipon-Na-Piwan Cree Nation) was not part of the original process, because it is a non-Treaty community, and not under the purview of the federal government but the provincial government, and was eliminated from the original process (Tataskweyak Cree Nation 2001; Wera and Martin 2008, 68). Yet, some of its band members were also members of Nelson House Cree Nation, and thus they received compensation from the *NFA*. In 1989 South Indian Lake was deemed a lawful claimant to the agreement and restitution under the *NFA* followed (Hoffman 2008, 120).

The First Nation communities involved with the *NFA* were unsatisfied with the process because they allege the province did not uphold the agreement. By 1984, 130 complaints had been lodged by the NFC against the *NFA* (Keeper 1999, 101). While criticisms vary, one example is that the *NFA* was criticized “for continuing a colonial tradition characterized by inherently exploitive relationships” (Hoffman 2008, 4). One member of Cross Lake First Nation, John Miswagon (1999), describes the widespread and far-reaching social and environmental impacts felt in his community from the dams along the Churchill/Nelson River, as including impoverishment, fluctuating shorelines, environmental damage, flooding of burial grounds,

erosion of sand and soil, and disruption of band finances, the fisheries, and game (78-82). Due to this dissatisfaction, the provincial government entered into negotiations with each community to reconcile the issues in the 1980s (Wera and Martin 2008, 69). In the 1990s, the affected communities continued to be frustrated with these negotiations and alleged that the province continued to lack substantial commitment to the *NFA*. They therefore initiated further negotiations with the province, and this resulted in a Master Implementation Agreement (MIA) (Hoffman 2008, 118). These negotiations were then finalized with Tataskweyak Cree Nation (1992), York Factory (1995), Nelson House (1996), and Norway House (1997); Pimicikamak has not yet finalized, but in November of 2014 they did sign an agreement with the province and Hydro to start the process of finalizing (Wera and Martin 2008, 69; Canadian Broadcast Corporation 2015). In general, these agreements have been criticized for costing the First Nation communities cessation of their rights under the *NFA*, and the federal government has been criticized as shirking its Treaty obligations (Hoffman 2008, 119). For example, Sandy Beardy (1999) a member of the Cross Lake First Nation, argues that the federal government's behavior demonstrates that it is trying to get out of the Treaty relationship (149). Similarly, community member Miswagon (1999) describes the flooding as an ongoing violation of rights, and that the provincially made promises have not been met: "In expectations of the benefits provided through *NFA* entitlements, the federal government illegally cut spending on regular programs and services to less than half provided to those native communities in Manitoba which did not sign the *NFA*" (78-79).

The *NFA* was later referred to as a Treaty by Minister Eric Robinson in the Manitoba Legislature in 2000. The reference as such marks the significance of the document and perhaps the commitment of the province to the agreement. As a longstanding civil servant described this

reference as a Treaty, that “gives it more status as entitlement under law” (Anonymous 2014); in fact, as a Treaty, it is constitutionally protected. Still, many Indigenous peoples remain unsatisfied with the *NFA*.

The politics of hydroelectricity in Manitoba have been referred to as colonial because communities were relocated for settler acquisition and resource exploitation, and for the power dynamics that made this possible. This is akin to the criticisms of the *NFA*: while other sub-nationals have entered into modern-day Treaties with Indigenous nations that are “groundbreaking” and form “new social contracts,” (such as those in Quebec, in particular the *Paix de Braves*), the *NFA* and *MIA* remains dated in its approach to land claims or, put another way, relations are mitigated by a colonial mindset of resource use (Martin and Hoffman 2008, 3-4).⁴⁷ The *NFA* has been interpreted narrowly by the Manitoba government and it has resulted in many legal battles (Kulchyski 2004, 4; Kulchyski 2008, 134). It has been argued that the *NFA* is not a departure from past colonial-enforced negotiations: it uses “conditional” and “ambiguous” language (Hoffman 2008, 123), a set of promises, and no concrete securities (127). Hoffman provides various examples such as a promise to consult, survey, and assess, but does provide requirements for measurable action. Hoffman (2008) writes, “Despite the fact that no, or at best few, concrete actions were required and no absolute promises of employment were in the agreement, Hydro retained the right to ‘adopt, amend or terminate its on-the-job employment and business opportunities policies’ (article 6.1.3)” (125).

The province of Manitoba has had clear jurisdiction concerning Indigenous lands since the *NRTA 1930*, which reinforced a provincial-Indigenous relationship with some northern First Nations communities concerning water and hydro. This is clear throughout this discussion of legislation, including the *Northern Flood Agreement* (*NFA*), and hydroelectric projects such as

the Wuskwatim Dam, Nelson-Churchill Dam, and the Churchill River Diversion. The issue of land has been heavily tied to hydro development and land negotiations between the province and Indigenous nations parallel colonial negotiations demonstrating neo-colonialism at work in the Indigenous/sub-national governance network.

A more recent example of provincial legislation that demonstrates a clear provincial encroachment into the Indigenous/state governance network in the jurisdictional area of policies for sustainable land use and harvesting is the *East Side Traditional Lands Planning and Special Protected Areas Act (ESTL Act)* (Manitoba 2010). It concerns territory along the east side of Lake Winnipeg to the Manitoba/Ontario border. Introduced by the Manitoba Government in 2008, this act is a state response to the resistances of Indigenous peoples to neo-colonial activity in the region and their demand for self-determination. As Simpson, Storm, and Sullivan (2007) write, “First Nation communities living in this planning region are demanding that the Government of Manitoba give them more control to manage, plan and participate in development activities in their traditional territory” (Simpson, Storm, and Sullivan 2007, 52). The region that this legislation pertains to includes those communities in the area east of Lake Winnipeg.

The *ESTL Act* says that First Nations communities on the east side of Lake Winnipeg can apply for special protection of Crown lands outside of reserve or Treaty lands if they are currently used for traditional land use and management practices. This is a different process than the TLE process. Currently, four management boards created in accordance with the *ESTL Act* exist in Poplar River, Bloodvein, Little Grand Rapids and Pauingassi First Nations (Manitoba Conservation 2012). For a First Nations community to claim eligibility from this protection, it must present the Manitoba government with a management plan that meets three objectives. First, the nation must outline the geographical territory of the area (or traditional ancestral lands)

and include a map and traditional knowledge or oral history detailing land use. Second, the nation must prove current land use in these traditional areas. Third, the nation must demonstrate that the area will be used in an environmentally sustainable way, and in a way that contributes to community development.

There are, however, two clear problems with the *ESTL Act*. The first is economic: the legislation is not rights-based but economically-motivated legislation. The second is that the legislation continues to restrict sovereignty in a couple of ways. It restricts self-determination by demanding that the community fulfill an economic mandate; the Nation does not, therefore, have sovereign use of the land, which may change and grow organically. As well, many Indigenous nations decide on land-use activities through broad communal considerations and not on financial considerations alone. Finally, the legislation maintains decision-making power with the state.

The first problem that the *ESTL Act* creates for the Manitoba Indigenous/state governance network is that it confers economic influence, not rights-based authority. Importantly, this economic activity is based on traditional economic practices. However, when any state/Indigenous nation partnerships are economically-based, and are not rights-based, these partnerships can be problematic for the Indigenous peoples at the heart of the matter. As Kulchyski (2008) explains of the *NFA*, “In effect, by becoming financial partners, a conflict of goals and interests will have to be borne by the First Nation. On the one hand, if the project is not financially successful, the First Nation will be left with a legacy of crippling debt; on the other hand, if the project has a greater negative impact on the environment, part of the sustainable future of the First Nation is jeopardized” (138). What lessons does such a criticism of the *NFA* hold for *ESTL Act*? The concept of rights-based can be defined as follows: “a human rights

approach to development recognizes primarily the legal obligation of members of human rights treaties to development cooperation and development efforts” (Hamm 2001, 1005). Thus, a rights-based initiative recognizes the inherent rights of the Indigenous people ahead of economic or development indicators. The *ESTL Act* does not do so. Instead, agreements are based on economic motive and economic incentive, instead of fulfillment of Treaty requirement or the establishment and recognition of Aboriginal rights and title.

The value and importance of rights-based legislation in settler colonial societies is that it empowers Indigenous nations through the recognition of their rights. Indigenous nations desire such recognition of their right to sovereignty as exercised before European contact and that which was upheld by the *Royal Proclamation of 1763* and subsequent Treaties. Economically-based legislation and policies can be neo-liberal, and if they are they will place market values ahead of rights recognition. Martin (2008) argues that colonial motivations of modern land deals can be most clearly seen when considering the outcomes: some deals provide more land and money to the Indigenous nation which results in socio-economic betterment. This is because, in these communities, the government’s motivation for the land claims is not rights-based, but resource-based (28-29). This means that the government is seeking a deal to conclude negotiations to better access the natural resources and not to empower and to restore the Indigenous rights of the community to its traditional territory. As AMC Grand Chief Nepinak (2013) explains, today’s policies and programs are missing the mark: “This is clear when you see the differences in livelihood. There is something wrong with the current relationship. Despite the history of collaboration, there needs to be a shift to a rights-based approach.” Nepinak (2013) further argues that the future resource agreements ought to be formulated on a rights-based approach, which would lead to the creation of equitable resource access—or Indigenous nations’

autonomy over the resources on their ancestral lands—and this would allow for Indigenous nations to truly have self-determination.

The *ESTL Act* is not rights-based, and not just because the requirements are economically-based, but because the legislation asks for a plan of sustainable economy. Therefore, it does not provide to the Indigenous nation a sovereign-based use of the area or its resources. For example, s.8(3) of the *ESTL Act* states, “A planning council must consider the following when developing a management plan: (f) the economic development needs of (i) First Nations and Aboriginal communities that have traditionally used land in the planning area, (ii) residents of the surrounding region, and (iii) the province as a whole.” Thus, a plan that is acceptable to the *ESTL Act* has requirements that meet predetermined economic needs: it is not rights-based. It also has requirements concerning those needs of members outside the community. Yet, as the United Nations Declaration on the Rights of Indigenous peoples states in article 20(1), “Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in their enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities” (United Nations 2007, 8). The *ESTL Act* clearly determines the economic model and activities that are acceptable by a standard of social betterment of neo-liberal economic models, not a standard of cultural preservation or rights acknowledgement. This act, therefore, perpetuates the merits of economic use, and this use is not sovereign-based but is prescribed by the state. However, the form of economic use contemplated by the *ESTL Act* is not neo-liberal (as it is for the *NFA* partnership agreement), but very traditional economy oriented. In fact, the *ESTL Act* is specifically set up to support the Poplar River World Heritage site proposal, and thus

ought to be distinguished from west and north side hydro development models, which are deeply neoliberal.

The *ESTL Act* is further not rights-based because the legislation ensures that the provincial cabinet minister responsible for this legislation has final directional authority. According to the legislative act, s.8(2) states, “If the planning council is authorized to develop a management plan, the minister may direct the planning council to do one or more of the following: (a) seek input from any parties specified by the minister; (b) hold public meetings about the plan as specified by the minister; (c) comply with any directions from the minister about the form or content of the plan; (d) provide the minister with drafts of the plan when requested; (e) comply with any time frames specified by the minister for preparing the plan and submitting it for approval.” Therefore, the minister is entrusted with great authority by the *ESTL Act* and can give direction to a planning council and is authorized to direct the draft and planning process. This clearly ensures that the directional authority and decision-making power will not reside with the community but with the settler state. Though, it could fairly be argued that if the *ESTL Act* gives First Nations the authority to plan traditional uses, then how that authority is arrived at is less important than having the overall authority.

Finally, the *ESTL Act* is not rights-based because the provincial government is not required to gain First Nation community approval for amendment. For example, section 14(2) states “despite clause (1)(a), the Lieutenant Governor in Council may approve a proposed amendment to a management plan without obtaining the written approval of a First Nation or Aboriginal community” (Manitoba 2010). This section is an example of state overkill. The minister already has the authority to make amendments as seen in section 23(2), which states: “The minister must incorporate an approved amendment to a management plan into the

management plan” (Manitoba 2010). It seems, therefore, that s.14(2) explicitly allows state amendments without Indigenous approval on Indigenous ancestral lands for Indigenous economic-development programs. This a clear restriction of Indigenous-based sovereignty. As the UN writes in the Declaration on the Rights of Indigenous peoples, Indigenous peoples have this right: “Indigenous peoples have the right to participate in the decision-making in matters which would affect their rights” (United Nations 2007, 8). Indigenous peoples have the right to make decisions on their lands; however, because it is not rights-based legislation, the state maintains dominance over the sovereignty of these Indigenous nations.

When legislation is not rights-based, and is instead economically motivated, challenges can emerge in the Indigenous/state governance network. Lithman (1992) argues that very little is known about the long-term effects of the changes that these types of development models will bring to Indigenous residents of northern Manitoba (1).⁴⁸ He writes, “So far, northern developments have largely served to marginalize them, instead of including them in the economic well-being of the country” (Lithman 1992, 3). Loxley (1992) argues that the north was viewed as key to industrial development for the whole province (56); however, the main purpose of this development was resource extraction, not to ensure the well-being of the Indigenous peoples that lived in these regions (Loxley 1992, 57). Loxley describes how the approach to industrialization in the north limits the local economies because this production is based on the principles of an open economy. This means that methods for production are imported and the outputs and profits of this production are exported; therefore, the potential benefits of these economic activities do not remain in the north (58). Chuchman (1992) writes, “This economic reality seems to dictate that large-scale mega-project developments are the only feasible way to

capture the potential economic rents accruing from these natural resources” (158). Thus, it is not clear if the *ESTL Act* will perpetuate or overcome these economic challenges.

While I have argued the *ESTL Act* has neo-colonial indicators, it is not so black and white: it might also hold real potential for anti-colonialism. The *ESTL Act*, for example, does allow for and encourage more local control, sustainable development models, and traditional economies. Essentially, the rights established in this act are aligned to what Alfred (1999) argues enlists the Indigenous nations to cede sovereignty to the settler colonial state, and over time rights become defined and dictated to the Indigenous nations but by the colonial state (140). This perpetuates a neo-colonial paradigm. A rights-based approach would provide self-determined authority with the Indigenous nation and would enable a path towards anti-colonialism. Yet, the *ESTL Act* seems to go further than most provinces have. For example, Lithman (1992) says of the development of natural resources in northern Manitoba that “such a discussion should include to what extent the North can be allowed to be something else than a wealth creator for the South” (2). In many ways it seems that the *ESTL Act* could be just this. It is based on sustainable community economic development, traditional food procurement, and traditional cultural knowledge and knowledge-sharing—not resource use for the south. Loxley (1992) is critical of the Manitoba government for “putting millions” into industrial development projects that are unsustainable and not thinking creatively of seeking alternative forms of such consumption (62). And Penikett (2006) argues that co-management agreements do not instill co-jurisdiction between Indigenous nation and settler state, but they do limit government power (115-116). In many ways this is a creative piece of legislation that does not seek only to aid natural resource mega-projects. Could it be that *ESTL Act* is attempting to generate sustainable resource use and creative means of consumption? According to the UN, rights recognition is

“Recognizing that respect for Indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment” (United Nations 2007, 2). And this very recognition can be found in the 2011-12 Annual Report from the Department of Conservation’s Community Traditional Area Land Use Plan (TALUP) whose coordinators are trained to document and map First Nation traditional knowledge (Manitoba Conservation and Water Stewardship 2012, 6). The *ESTL Act* might just be a clear step in the direction of rights recognition in the Indigenous/state governance network.

Conclusion

The Indigenous/state governance network in Manitoba is a prime illustration of devolution and provincial encroachment. The history of Indigenous inclusion in the province’s political environment is interesting. Colonial efforts successfully quelled past Indigenous struggles for rights and title recognition, and set patterns for relations that exist today. Present efforts—land claims and management of resources/land—demonstrate possible neo-colonial motivations of the recent provincial government’s encroachment. Both of these areas demonstrates provincial activity in Manitoba’s First Nation communities, refuting the possibility that the mechanics of a governance network behave purely on a federal government-Indigenous nation spectrum of activity.

What is so interesting about the prevalence of provincial encroachment in Manitoba is that even if the motivation is not neo-colonial, the very use of colonial tools often will bring about such a result. As Nepinak (2013) perceptively states, for every policy created there is a blindside to it, or for every action there is a reaction that often cannot be anticipated. Even the best intentions result in significant and perhaps even terrible consequences. For example, the provinces are not responsible for the *Constitution Act* s.91(24) and this section has created consequences for Indigenous peoples. One example of consequence concerns funding: s.91(24)

allows the federal government to restrict funding for those people living off-reserve and the sub-nationals to restrict funding for those First Nations peoples living on-reserve. Nepinak (2013) states, “The government has created a policy to divide the Indigenous people and this is contributing to a population drain from reserve communities to urban settings. Over time the federal government has picked up on the blindside (or the unintended consequence) and are manipulating it effectively; they now fund off-reserve Indigenous organizations better than those on-reserve.” Nepinak argues that this is a consistent effort to draw people into Canadian liberalism (or settler society). This again demonstrates neo-colonial motivation of the devolution process in Manitoba's Indigenous/state governance network.

Chapter 4: From the *Royal Proclamation of 1763* to the modern Treaties: Enhanced Provincial Jurisdiction in British Columbia

The governance relationship between the British Columbian (B.C.) provincial government and Indigenous peoples differs significantly from that of the other Canadian provinces. Westward colonial expansion to the region took place later than that of its eastern counterparts, and this has been significant to the development of B.C.'s Indigenous/state governance network. The B.C. government functioned for a long time on a premise that the *Royal Proclamation of 1763* did not apply to the territory as it had not yet been “discovered”⁴⁹ by European colonialists. Their interpretation set a pattern for the provincial state/Indigenous relations wherein the province did not typically acknowledge or participate in the politics of Indigenous title-making and this has led to unfinished land issues. Due to this and a variety of historical issues, B.C. has many reserves (318), but the province established few Treaties⁵⁰, which has provided an interesting and unique, but often challenging, set of circumstances for the modern land claims process.⁵¹ Also, due to its historical interpretations, the B.C. provincial government remained relatively uninvolved in the Indigenous/state governance network until the modern land claims process necessitated provincial involvement. At this point, a steady increase of provincial involvement in all matters of the network has occurred at a relatively rapid pace compared to the rest of Canada. In particular, this chapter is concerned with how the Indigenous/sub-national governance network relates to land claims, natural resource management, and political economy, and it offers a critical analysis of neo-colonialism for each of these areas.

The Royal Proclamation of 1763 and the role of the province in Settler/Indigenous Relations

The historic nature of B.C.'s provincial lack of involvement in First Nations issues has shaped modern lands claims and contemporary jurisdictional responsibilities. This can

be clearly illustrated by the B.C. provincial government's interpretation of the *Royal Proclamation of 1763*, which prefaced the province's general lack of involvement in Indigenous-related matters surrounding land. Today, the provincial government has enhanced its role in policies and programs that are Indigenous-related, however this is a recent development. In the past, the provincial government remained uninvolved in most Indigenous-related matters because when the *Royal Proclamation of 1763* was signed, the European settlers had not yet reached B.C., and, therefore, one interpretation of the document is that it only extends to the Rocky Mountains and, thus, does not recognize Indigenous title in B.C.⁵²

B.C.'s interpretation of the *Royal Proclamation of 1763* has meant that the B.C. government has refused to acknowledge title or reconcile such land claims. The B.C. government used to assume that land title was extinguished through an implicit process of British sovereign assertion. An explicit assertion of title means that land was explicitly attained through war, Treaty, or another means of land rights transfer. The implicit relinquishment—because land was not taken through the means of war, Treaty, or land rights transfer, as in the larger land mass of B.C. that is not under Treaty—was deemed sufficient by the provincial government of B.C. which did not pursue further legal settlement of land (Tennant 1990, 216-217). Whereas different rules of property, such as those commonly practiced elsewhere in Canada or, for example, according to the nature of common law, would have resulted in a Treaty that in European legal terms legally transfers ownership or responsibility from one party to another. However, lands in B.C., unlike much of central and eastern Canada, were not acquired through military conflict or Treaty cessation, but through assertion of British sovereignty (McKee 2000, 14).⁵³

After contact, the assumption that the Crown held title to land, and Aboriginal title was merely a burden on this land, allowed the B.C. government to ignore Aboriginal title (Woolford

2005, 6). In fact, this lack of recognized Aboriginal title is one of the factors that has contributed to the more recent court cases concerning Indigenous title and modern land claims in B.C. (Berger 1991, 142). The assumption that the Crown held title to land and Aboriginal title is a burden on the Crown was determined in *Calder* (1974) and confirmed under *Delgamuukw*'s (1997) ruling that Aboriginal title does not come from Crown, but original occupancy as a basis for rights (Woolford 2005, 6). This historic position on land, however, has further directly encouraged the persistence of contemporary arguments that the provincial government has no role in present-day modern land claims in the province (McKee 2000, 23).

Indigenous peoples hold their own relations to land, which often include notions of stewardship and title that do not arise from settler laws but from Indigenous legal traditions and worldviews. These notions are firmly rooted in the belief of Indigenous people's sovereign title or ancestral and inherent connections to land. In an interview with Arthur Manuel (2015), past-Chief of Neskonalith Indian Band, it was explained to me that "Once the Crown asserts sovereignty they assume they have title to the land and Aboriginal title is considered a burden to the Crown. But this is not so: Aboriginal title is the underlying title and Crown title is the burden on Aboriginal title." And, as Chief of the B.C. Assembly of First Nations, Maureen Chapman (2015), stated in an interview, "My view is that we have ultimate jurisdiction over land. We were the first people here and through many occurrences that jurisdiction was taken away from us. We are not of the mindset that we have never given up." Clearly, for Indigenous peoples the relationship to land persists, regardless of the claim of sovereignty and title projected by the Crown.

The disparity between the province's interpretation of land title and the First Nations' worldview of ancestral ties to land has framed much of the struggle, both historic and modern,

over resolving land issues, as can be illustrated in Treaty-making, reserve-making, and modern land claims. In B.C., only Vancouver Island and the Northeastern region are Treaty lands. There are 14 Douglas Treaties signed on Vancouver Island between 1850 and 1854, named after the then-colonial governor, James Douglas. Douglas was governor from the years 1851 to 1864 and he approached Indigenous title on the premise that it should be acknowledged and compensation provided to Indigenous peoples; yet, this policy was not continued by successive governors of the colony (Berger 1991, 143). Later, the Lieutenant Governor of British Columbia, Joseph Trutch, who held the position from 1871–1876, refused to acknowledge Indigenous title, and this led to the cessation of historic Treaty-making in B.C. As Penikett writes, “Of all British colonies in North America, only British Columbia refused to extinguish Aboriginal title through Treaties” (Penikett 2006, 6).⁵⁴ This lack of Treaties sets those Indigenous nations’ interests in B.C. apart from other First Nations in Canada (Chapman, 2015). Later in the century, Treaty 8 was signed in 1899 in northeastern B.C., as well as Alberta, Saskatchewan, and the Northwest Territories. Treaty 8 was developed for economic reasons surrounding resource use or access (mainly the 1890s Klondike gold rush)—it was not negotiated to determine or uphold Indigenous rights to lands (McKee 2000, 22). Here the premise of the *Royal Proclamation of 1763* not bearing impact on land regulation—as in recognizing and confirming Indigenous title—repeats in the premise of the Treaty, which is economic. Furthermore, due to the province’s approach to land title (the assumption of implicit British sovereignty), the provincial government was not involved in the process of Treaty 8 (McKee 2000).

The interpretation of the *Royal Proclamation of 1763* and implicit Crown sovereignty extends from Treaty to reserve lands. While B.C. has few Treaty lands, there are 318 First Nations reserves in the province. As Smith (1995) writes, “The practice of establishing Indian

reserves without entering into Treaties, set B.C. apart from the rest of Canada in dealing with the Indian interest” (78). This particular assumption of extinguished title is significantly different from how other provinces have approached Aboriginal title, and it is based on the unique set of B.C.’s circumstances at confederation. For example, the province has argued that these reserve lands satisfy Indigenous land claims (Penikett 2006, 78-79), because when B.C. joined the confederation in 1871, unextinguished policy was not written into the provincial founding agreement. This argument is based on the premise of B.C.’s entry into confederation as a Crown colony. As well, B.C.’s Terms of Union (Article 13) (1871) with Canada states, “The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government, shall be continued by the Dominion Government after the Union” (Canada 1871, 76). Thus, the province held that from then on Indigenous peoples were under federal authority.

Since joining Confederation, land management in B.C. has always been held under provincial jurisdiction, and until the 1990s the province has chosen not to engage with the First Nations on land management; instead, these issues defaulted to the federal government. There is an exception to this that can be found in the McKenna-McBride Royal Commission, 1912-16, where the province was actively involved in reducing Indian reserve lands. The commission was struck after years of Indigenous nations sending delegates from B.C. to the capital and petitioning the government on land and reserve issues. Both the federal and provincial governments entered into hearing grievances, but not negotiations. These hearings led to little outcome, save for a few additional acres of reserve lands for the Nisga’a and Tsimshian nations, and efforts were suspended in 1908 by then-premier Richard McBride due to arguments between

the federal and provincial government over reserve lands allocations. In 1912 the commission was struck and led by McBride and federal appointee A.J. McKenna. The final report did expand some reserve lands, but also decreased large amounts of reserve lands in particular in areas sought by settlers (Ray 1996, 319-325; Tennant 1990, 88-103). The 1924 federal Order in Council stated that B.C. had fulfilled any obligations of Terms of the Union, Article 13 of Indian land and title, further enforcing the position that B.C. held no land-related obligations to First Nations (Penikett 2006, 77; Smith 1995, 80). The province, therefore, originally contributed little to the reconciliation of Indigenous land and instead relied on the federal government to do so.⁵⁵

The relationship between the BC government and Indigenous peoples concerning land and settler occupation of Indigenous peoples' lands is steeped in the doctrine of discovery. As discussed in the Introduction, the doctrine of discovery is European internal law developed to justify colonial land cession. It stipulates that if land is uninhabited by human beings it can be taken. However, many of the lands "found" during imperial colonialism were inhabited, so the theory further justifies land cession if the inhabited lands are not being used by European standards of economic development. Therefore, if a land was inhabited by Indigenous peoples and desired for conquest it could be taken through military conquest, Treaty-making, or colonization (Culhane 1998, 47-48). It is this British imperial thinking that the Canadian Crown is based on (Culhane 1998). This colonial myth is used to legitimize the colonial settler society by perpetuating the idea of the vacancy of the land and the motive of the "encouragement" of "progress" or "civilization" to provide benefit to the Indigenous populations. This can be seen in this overview of the province's position on land management concerning Indigenous peoples' rights to their ancestral lands.

The general lack of recognition of Indigenous title by the B.C. government continued from confederation until the 1990s, with the exception of the McKenna-McBride Royal Commission, 1912-16. In 1991, the Social Credit government, that had been in power since the 1950s (except for the years 1972-1975), fell and the New Democratic Party took power. This new government introduced a significant policy shift and became actively involved in the land claims process. In August of 1991, the B.C. government announced it would join the federal government in land negotiations. The B.C. government wrote of this policy shift,

For the first time in British Columbia's history, the Province and First Nations are developing government-to-government relationships to achieve agreements that share resources and facilitate decisions the Province is building government-to-government relations with First Nations and honouring commitments to close the socio-economic gaps separating Aboriginal people from other citizens. (Ministry of Aboriginal Affairs British Columbia 1995, 2)

This involvement, however, was limited to a role of assistance and not as an equal negotiating partner; the province continued to maintain that the primary responsibility and authority lay with the federal government (Smith 1995, 82-83). For example, in 1991, when the province announced it would start negotiations, it still did not acknowledge Indigenous title (Mckee 2000, 30).

Subsequent provincial governments continued to develop this policy strategy and in 2005 the government developed the "New Relationship Trust" with Indigenous political leaders. Later that year, the tripartite "Transformative Change Accord" was signed by the province, federal government, and the Leadership Council which includes the First Nations Leadership Council, the First Nations Summit, the Union of B.C. Indian Chiefs, and the B.C. Assembly of First

Nations (New Relationship Trust 2014). In 2006, the New Relationship Trust was committed to legislation with a budget of \$100 million, and has held two rounds of regional meetings, and several initiatives surrounding economic development, education, governance, and languages (New Relationship Trust 2014). Clearly, and as explained in an interview with B.C. government civil servants Jan Gottfred and Lynn Beak (2013), this initiative takes a broad view to commit to improve the socio-economic status of First Nations peoples in B.C. Importantly, this initiative is evidence of the continued encroachment of the provincial government in the Indigenous/state governance network.

The Indigenous nations of B.C. have different perspectives on the New Relationship Trust and enhanced provincial involvement in land negotiations. Chapman (2015) explains that New Relationship Trust was initially based on the intention of mutual trust and respect. However, she states, "...but we are finding that as we continue to solidify this trust, it diminishes because there's such a turnover of staff in the province that no corporate memory holds and we have to keep educating." For First Nations groups, Chapman (2015) says the New Relationship Trust has allowed the provincial government to "...put barriers up or stall, especially if they see we are making progress. It's frustrating." The enhancement of the province—and a shift from those past politics of detachment to Indigenous-related policy—in the politics of title has been relatively recent, and in many ways is still evolving.

The impetus for this political shift at the provincial level is due to various historical reasons including, as will be discussed later in this chapter, public and court pressures. An additional significant motivator for change in land claims procedure in B.C. has been the long history of Indigenous resistance to settler colonialism. Much of this resistance is based on a clash of worldviews between settler populations and Indigenous peoples. According to Tennant

(1990), although the legacy of the schools remains fundamentally harmful, the residential schools did facilitate a shared social consciousness, a shared space, and a common language, as Indigenous peoples were taught English. Without a common language their communication using their Indigenous languages may have been limited; but the use of the common language, English, built a strong network of Indigenous political action connecting B.C.'s diverse nations.⁵⁶ This political activity was highly influential, resulting in various politically strong Indigenous organizations. For example, the Allied Indian Tribes of B.C., established in 1916, represented many Aboriginal groups across the province and led to the formation of a Special Committee of the Senate and House of Commons in 1927 mandated to investigate Indigenous title (Hall 2003, 250). This further resulted in the Canadian Government making changes to the *Indian Act* in 1927, which made it illegal for anyone to raise or provide funds (including legal fees, postage, travel, or court costs) to Indians for the purpose of land claims (Tennant 1990, 111-112; Berger 1991, 148).⁵⁷

While these are clearly negative actions by the Canadian government, their severity demonstrates the significant influence of these political organizations. As well, whereas these state sanctions limited much of this Indigenous resistance and organizing, new forms of political activity emerged that were connected to labour-based activities such as unions and labour associations (Hall 2003, 251). It is in fact this Indigenous resistance that, according to Gottfred and Beak (2013), encouraged the recent B.C. provincial governments to actively negotiate land claims with Indigenous nations. For example, in an interview with Gottfred and Beak (2013) they explained to me that it is the Indigenous peoples' determination for justice through political activity—including blockading roads, barricading resource development projects, and the active pursuit of the courts process—that demonstrated to the B.C. government that they needed to

generate certainty and goodwill on land issues, beyond that which the Treaty process and courts deliver, which can be uncertain, lengthy, and costly. As Chapman (2015) explains, the use of the courts is a drastic measure: most communities do not have access to the resources the court system requires. The influence of these Indigenous-led political organizations and resistance has encouraged the provincial government to participate in reconciling outstanding land claims, which has enhanced the provincial government's activity in the Indigenous/state governance network.

Recent changes at the provincial level in B.C.—from detachment to enhanced sub-national involvement—set this region apart from its counterparts in Canada. This has been due to the colonial interpretation of the *Royal Proclamation of 1763* and assumption of implicit Crown sovereignty, the history of Treaty-making, and the environment of continued land negotiations. These changes to enhanced involvement can be further found in the modern land claim process and general service delivery which have also undergone those wider effects of devolution as are exhibited across Canada. Today, a scan of provincial documents⁵⁸ indicates the province has moved into social service delivery for Indigenous peoples in many areas including land claims, natural resource management, and economic development.

Indigenous Land Claims and Provincial Land Management

This section will look at the modern land claims process and provincial land management in B.C. The province has increased its role in land claims due to Indigenous peoples' activism and resistance and pressures from the courts and public. Land claims are complex as is evidenced in B.C. where the process has been criticized as lengthy and has suffered from challenges due to jurisdiction, policy, administration, and conflicting political interest-bases. As will be discussed in this section, changes in organizational design contribute to questions around the efficacy of land negotiations and the intent of the provincial government in these negotiations: are these

changes a result of public administrative practices or neo-colonial? I argue that neo-colonial tendencies on behalf of the B.C. government can be evidenced by the enhanced provincial involvement on land management and political economies concerning Indigenous peoples.

British Columbia's current modern land claims process is intrinsically shaped by the wider and historical provincial interpretations of the *Royal Proclamation of 1763* and the pressures of devolution, Indigenous resistance, and political change. Due to the absence of federal Treaties entered into in B.C., Indigenous land claims have largely remained unresolved and this has prompted the development of the modern land claims process in the province (Pacific Business and Law Institute 2009, 1). The lands in question make up less than 5% of lands in B.C. (McKee 2000, 52), or less than 0.2% of land in Canada, statistics that Manuel (2015) argues is reflective of the settler colonial government's intention to marginalize Indigenous peoples. There is much to say about land claims in B.C., however a good deal is beyond the scope of this thesis.⁵⁹ This project is most concerned with jurisdiction and determining whether the provincial expansion provides some insight into the neo-colonial tendencies of modern Canadian governance.

Historically speaking, s.91(24) was interpreted in Canada as confirmation of sole federal/Indigenous relations; hence, the province assumed no responsibility towards Indigenous peoples, and this position was supported by the province's Terms of the Union which indicated that the Dominion would accept all such responsibility (Exell 1988, 94). As discussed, this understanding of jurisdiction has changed for the B.C. government as recently as the 1990s. In particular, this understanding has changed concerning the jurisdiction between the B.C. and federal governments regarding land claims (Gottfred and Beak 2013).

Much of what has pushed the province into Indigenous-related jurisdiction have been court rulings that redefine settler-colonial perspectives of land title and changes in public opinion. The courts have been critical of the modern land claims process throughout all of Canada, however the highest number of court cases dealing with land issues have emerged from B.C. The *R v. Calder* (1973) decision was one of the crucial turning points that led to the B.C. provincial government involvement in the process (Berger 1991, 154). This Supreme Court case was led by Frank Calder, chief of the Nisga'a First Nation, and while this case was lost at the Supreme Court, the courts did find that Aboriginal title was still indeed in effect, as First Nations had continued to assert (McKee 2000, 26). Prior to this ruling, the provincial government had argued that Indigenous nations in B.C. did not have title protected by the *Royal Proclamation of 1763* because it did not extend past the Rocky Mountains to the British Columbian region and it was argued that such title had been extinguished by colonial settlement (McKee 2000, 17). Ray (1996) argues that Calder was the impetus for the federal government to change course on Aboriginal title and "began to lay the ground work for claims negotiations" (337). This case shifted the role sub-nationals play in Indigenous governance networks, but it also, along with *R.v. Guerin* (1984), determined in Canadian case law that Aboriginal title pre-exists the *Royal Proclamation of 1763* and is not determined by colonial laws (McKee 2000, 28).

Given the earlier interpretation that the *Royal Proclamation of 1763* did not extend to B.C., the courts have clearly had a large impact on the land claims process. Yet, this has not resolved the conflict of title between Indigenous and settler governments. As Chapman (2015) argues, while these court cases and a number of others have legitimated the inherent rights of Indigenous peoples, the provincial government continues to resist acknowledgement of these inherent rights: "If they do in one community, they must do so in other communities." And

Manuel (2015) argues that the courts are not an adequate method of reconciliation because decisions based on the sovereignty of the Crown represent a conflict of interest for the courts. Furthermore, court procedures are mired in colonial thinking: Manuel states “The courts endorse racist notions.” Racism, as discussed in Chapter 2, is connected to colonial projects. Due to this conflict of interest and colonial-mindset, while the courts have changed the politics of title in B.C. in a way that has encouraged the contemporary land claims process and this brought the provincial government into these politics, for many Indigenous peoples the courts do continue to prevent the recognition of Indigenous title to their ancestral lands.

In addition to court proceedings, some have argued that public opinion has contributed to the provincial land claims policy shift. This public support for the provincial engagement in the modern land claims process was well-captured even before the provincial governments 2002 referendum on Treaties. As McKee (2000) writes, “By 1989 public support for Treaties hit approximately 80 percent, as public knowledge about land claims increased” (30). Thus, as public knowledge increased, so too did public support for land claims. In the 2002 referendum, with two million referendum ballots mailed to the British Columbian populace, approximately 760, 000 were returned with 80% of respondents answering favorably to the eight-question referendum (McKee 2000, 121-122). This partially contributed to a shift in political support for provincial involvement in negotiations. This public support contributed to the B.C. government altering their policy position of not entering Indigenous matters of politics and contributing to the province’s New Trust Relationship. This public support continued, as seen in the 2002 Treaty referendum where 80 percent of voters supported modern Treaty negotiations (McKee 2000, 147). This 2002 referendum has been criticized by the public and media as biased, racist,⁶⁰ and with a clear intent to have the province step out of land negotiations with Indigenous nations;

however, the B.C. populace's support for continued land reconciliation served to recommit the provincial government to modern-day Treaty-making, yet the land claims and Aboriginal self-government procedures were not made any "easier" (McKee 2000, 121-122). This public pressure was a significant contributor to effecting provincial government action on land claims.

While the courts, and to a lesser degree public opinion, have proven themselves an important tool for land reconciliation in B.C., they have also had significant influence on provincial involvement in the Indigenous network. This can be seen by the 1991 B.C. Claims Task Force that created the British Columbia Treaty Commission (B.C.T.C.) and negotiations began in 1994. The purpose was to create an independent body to facilitate the Treaty-making process. In fact, as B.C.T.C. became more established another organizational shift reflected provincial state evolution on jurisdiction for Indigenous matters. In the early days of the B.C.T.C., the organization recommended that the federal and provincial governments represent non-Indigenous views for Treaty-making (McKee 2000, 57). Soon after, the Treaty Advisory Committee (T.A.C.) was established in 1992 as an independent body to represent various labour and industry groups to the provincial government (McKee 2000, 39-40); the establishment of this organization to represent these non-Indigenous views reflected a growing understanding on behalf of the province that it cannot act solely on behalf of the interests of settler society.

Modern land claims demonstrate a high degree of provincial involvement in the land claims process. At the time of writing, there are two finalized self-government agreements in B.C.: The Sechelt Indian Band Self-Government Act (1986) and the Nisga'a Treaty (1999). There are three complete land claims: the Tsawwassen First Nation Final Agreement (2009), Maa-nulth First Nations Final Agreement (2009), and the Yale First Nations Final Agreement (2013).⁶¹ As well, there are 49 land claims (modern Treaties) currently being negotiated by the

B.C. government and 61 First Nations (British Columbia Treaty Commission 2009a). In spite of this high degree of contemporary reconciliatory activity, the past continues to slow the process: Penikett (2006) argues, “In the country’s northern region, Canada has signed modern Treaties that deal honourably with Aboriginal claims to land and demands for self-government. Yet in British Columbia, settler resistance, Aboriginal anxieties, and political indifference have for too long hobbled Treaty negotiations” (5). It is debatable whether these modern northern Treaties are as honourable as Penikett suggests; however, Penikett’s main point that B.C. lags behind Canada is noteworthy.

The historical lack of provincial involvement in the Indigenous/state governance network has also shaped the current organizational structure of land claims in B.C. For example, according to Gottfred and Beak (2013), the actions required in both determining existing Indigenous title and the process of modern land claims is highly complex in B.C. Once again, this is due to the various approaches to land title that have resulted in both the creation of many reserves and minimal number of Treaties. These approaches to title have resulted in three complex mechanics of Indigenous land administration: those First Nations peoples that are involved in the Treaty process, those not involved in the Treaty process, and thirdly the historic nature of the provincial lack of involvement in First Nations issues (Gottfred & Beak 2013). These various and complex mechanics have historically led to a lack of agreement over the issues and the process of Indigenous land title, and demonstrate that past colonialism affects present-day land politics.

All land claims in general are complex and lengthy process, comprised of many components. Penikett (2006) has written that modern Treaties are far more complicated than historic Treaties (87). The process has six stages, and each process begins with a Memorandum

of Understanding (MOU) to determine costs and responsibilities and Interim Measures Agreements (IMAS) to protect both the interests of the First Nation and the government while the Treaty is being negotiated, and so government approved resource harvesting can happen on First Nation lands or service provisions can be made in the interim (Penikett 2006, Chapter 2 & 148). The 49 land claims agreements that are currently being negotiated are all at some stage of this 6-tiered process. The stages are: 1) the statement of intent to negotiate a claim with the B.C. provincial and federal governments; 2) assessing the readiness to negotiate which requires the Indigenous nation, governments, and the Treaty Commission to sit down and have an initial discussion of the parameters of the claim at hand; 3) a framework for the negotiation is then developed amongst these parties; 4) this results in the development of an agreement in principle; 5) which leads to the negotiation to finalize the Treaty; and this is further followed by 6) the implementation of the Treaty (British Columbia Treaty Commission 2009b). These stages illustrate the complexity of the land claims process and each stage often requires a great deal of time for completion.

A number of challenges have developed in the land claims process in B.C. concerning spheres of jurisdiction, policy, administration, and political interest-bases. The regions of B.C. without Treaty form much of today's robust but challenging land claims process in B.C. Those lands that were transferred through the Douglas Treaties, however, also present a separate host of issues for the modern land claims process. These Treaties were based on the idea of Indigenous peoples' individual or family-based property, a concept Douglas had assumed was practiced, not the practices of shared land that existed, and on artificially created boundaries, and not the original 'boundaries' practiced by Indigenous nations in land use and political diplomacy. These incongruences have created challenges in current modern land claims processes (McKee 2000).

In fact, in an interview with B.C. Government civil servants, Jan Gottfred and Lynn Beak (2013), they discussed this government-based assumption for regulation and described it as a continued and significant challenge to the modern land claims process.

The B.C. government has become more involved in the modern land claims process, and a number of jurisdictional issues have arisen from this involvement. The government attempts to negotiate consistent Treaty agreements instead of individual Treaty mandates and to deal with issues of fairness (B.C. Assembly of First Nations 2006, 11; Ministry of Aboriginal Relations and Reconciliation 2014). This is because most governments generally prefer to set uniform policies to reduce the costs associated with implementation and regulation. This lack of individuality or specificity has been an obstacle in B.C. 's modern Treaty negotiations: "It transforms a tripartite "government-to-government" negotiation process into what is viewed as a "Government program" (B.C. Assembly of First Nations 2006, 12). In an interview with Andrew Woolford (2015), author of *Between Justice and Certainty: Treaty-Making in British Columbia* (2005), he stated on provincial involvement, "That was controversial in and of itself. Certain, primarily interior, Indigenous nations preferred not to be involved in Treaty process, in part because of the involvement of the British Columbian government. They did not feel they should negotiate with the junior governments because their relationship should be with the federal government." And Chapman (2015) further explains, it is not common practice for leaders to meet with non-leaders. As Chief, she meets with other chiefs, whether elected or hereditary. This principle applies to the settler government as well: the chiefs expect to meet with those decision-makers of the state, whether it be the premier or cabinet ministers, and not the state's bureaucrats. Chapman states, "Yet, the current provincial administration is not committed to meeting with the Indigenous leadership: these meetings are near impossible to arrange and the

issues of contemporary Indigenous peoples, such as pipelines and child welfare practices, do not align those on the agenda of the provincial government.” Therefore, the involvement of the provincial jurisdiction in the modern land claims process present a jurisdictional challenge in that the nation-to-nation relationship is disturbed.

Additionally, interest-based jurisdictional issues arose due to the participation of the provincial government. As Woolford (2015) describes, the Canadian and British Columbian governments did share a similar interest-base: both were heavily invested in certainty language and shared similar interest-bases concerning fee simple ownership to title. Yet, as Woolford says, “speaking on governments in general and having one coherent view oversimplifies things a little bit because there were deeper divergences within the governments.” Woolford expands this argument by noting that, at times, the B.C. government felt the federal government was particularly stuck on issues of federal jurisdiction that were of less interest or priority to the provincial government. As well, within both of the provincial or federal negotiation cohorts, restrictions were placed on negotiators as mandated by their departments, impeding progress: “What they saw as positive courses of action, they were unable to pursue because they were restricted by the department of justice or whoever up the line that was blocking them” (Woolford 2015). For some negotiators, therefore, differing jurisdiction-specific interest-bases and priorities impeded the progress of land claims negotiations.

Challenges have also developed in the land claims process in B.C. concerning the policy approach of the provincial government. McKee (2000) argues that the B.C. government’s approach to modern Treaties has been hesitant. The province is hesitant to detail how it will achieve its goals, likely for two reasons: 1) to limit criticism of the process and 2) to limit criticism and analysis of its outcomes (McKee, 2000, 84). As McKee (2000) writes, “Victoria’s

paramount concern at this point in the Treaty talks is less than thorough or scientific: rather than indicating the general goals of the Treaties and then moving to a more specific set of standards by which these general goals can be met, the provincial government's objective is simply to reach an agreement with an aboriginal group, or be seen as making some progress in the talks" (84). A uniform policy mandate, therefore, is not conducive to land claims in B.C. given that the three types of state organizations of land title (Treaty, non- Treaty, and provincial inactivity) require very different forms of land claims procedures—a uniform mandate cannot accommodate this. Nor can it respond to the specific circumstances and cultural needs of the many different First Nations in B.C. Whereas Indigenous nations across Canada demonstrate degrees of diversity, it is interesting to note the high degree of cultural variability in B.C. One example of this diversity is that there are at least nine distinct linguistics groupings spoken there alone, as opposed to 12 in all of Canada.⁶² That one uniform policy mandate can meet the varied cultural and political needs of these diverse nations is certainly a difficult goal to achieve.

Aside from these jurisdictional and policy issues, a number of administrative challenges also exist in the B.C. land claims process. This is unsurprising, given the high number of land claims in the province. An outcome of these administrative challenges is the complexity and slow pace of the land claims negotiations (Penikett 2006, 8). The B.C. Land Claims Commission has itself publicly divulged that the modern Treaty-making process is more complicated than initially expected (Penikett 2006, 157) and this has generated many administrative challenges: different mandates and expectations on behalf of the province and the First Nations groups, communication problems, difficult or overly-complicated language of Treaties, lack of public knowledge and available information, deeper political and personal commitment needed on behalf of both federal and provincial governments, lengthy conflict resolution, conflicting views

of self-government amongst First Nations groups, and conflicts that emerge at negotiation and implementation stages (Penikett 2006, 257). Woolford (2015) says “In some cases the provincial roles added bureaucracy. The province had particular investments in certain issues at the table that they wanted dug into which were different than those being dug into by the federal government. So, at the negotiating table occasionally the Indigenous nations could play the two governments off each other to try to get them to spur each other onward, but in most cases, my feeling was that the province delayed things and were not a tactical advantage for the Indigenous nations.” These challenges slow the process and with such a variety of requirements for consideration, the administrative challenges that result are in a sense not surprising.

In addition to these issues surrounding jurisdiction, policy, and administration, exists a set of issues concerning the interest bases of the negotiating participants, including the settler governments and First Nations governments. Woolford (2005) argues that one challenge that the settler government’s interests has presented to this process of modern land claims is that the B.C.T.C. chose not to politicize the land claims process in a bid to avoid alienating the federal and provincial governments. This meant that the B.C.T.C. based the premise of the land claims around looking to the future and bettering the mechanics amongst Indigenous and non-Indigenous relations. Thus, reconciling this past colonial relationship and the injustices incurred during this history was, then, not a part of this process (Woolford 2005, 92-93). Woolford (2015) explains the distinction in interest bases along the lines of desired outcomes and intention for negotiations. First Nations enter negotiations with the desire for compensation and acknowledgement of both the lands and resources lost. Yet, non-Indigenous governments (the federal and B.C. governments) do not want to venture into compensation for fear of the precedents it might incur for the future: they want certainty, as well as having an overriding

interest in having resource development continue to take place. Due to this, the negotiations undertaken in the B.C. Treaty process did not implement the interim measures that the First Nations sought for the protection of traditional lands for future use (Woolford 2015).

The differences of interest bases between the B.C. and federal governments at the negotiating table meant that the settler colonial government itself did not have a unified front. Due to this, some groups were able to use these differences to their advantage and First Nations were sometimes able to strategically play these off against one another (Woolford 2015). In this sense, the provincial government's presence did serve as a tactical advantage in some instances. At times, the provincial government's presence at negotiations allowed for intermediary agreements to be made that may not have been achieved between the Canadian government and Indigenous nations. In other instances, however, the provincial government delayed negotiations, and provided little tactical advantage for First Nations governments. Some have argued that the presence of the BC government allowed the Treaty process to be co-opted into a neo-liberal political and economic mandate. One result is explained by Woolford (2015) who says "My sense was that the provincial governments were an obstacle, but we can't pretend that the federal government was in any way facilitative in this process." Woolford lists these issues of facilitation as the structure of the loans to process and negotiate a claim, getting people to the negotiating table, and providing capacity to the First Nations. The result of the provincial government's role in the land claims process has been mixed. The positive outcomes include the province's ability to facilitate intermediary agreements, which allowed some access to resources. However, others might see such involvement in these agreements as cooptation that might cement the First Nations into a neo-liberal agenda and the settlement of Treaty (Woolford 2015).

Of course tensions, whether based on historical political limitations or present-day public administrative short-sightedness will occur, but so too will positive changes. One improvement in the land claims process has been the *First Nations Leadership Accord*, signed in 2005 by the three main Indigenous B.C. organizations: The First Nations Summit, the Union of B.C. Indian Chiefs, and the B.C. Assembly of First Nations. This led to the facilitation of stronger provincial-Indigenous agreements and better decision making. According to Gottfred and Beak (2013), because the First Nations Leadership Accord requires Indigenous representatives to relay information and decision-making matters to its own members for approval and community input, consultation and direction has increased the level of cohesive agreement amongst the Indigenous leadership. Gottfred and Beak (2013) argue that this has also allowed for unprecedented success in negotiations between the province and Indigenous groups. For example, First Nations leaders now come together, establish a common set of issues, goals, and needs, and then collectively meet with the province to negotiate.

A review of recent B.C. provincial documents, published throughout the early 2000s, reveals two interesting shifts in the organizational design of the B.C. government regarding land claims. The first change emerged in the B.C. Annual Reports from the fiscal year 2001-02 that saw a shift in the organizational design of provincial authority concerning Indigenous matters (British Columbia 2002). Here the allocation of the recognition and reconciliation of land issues became split amongst the Ministries of Aboriginal Relations, Finance, and the Attorney General. The second interesting shift concerns the ministry responsible for Indigenous matters. Until 2005-06, provincial documents concerning Indigenous matters were mandated under the Ministry of Community, Aboriginal and Women's Services. In 2005 the Ministry of Aboriginal Relations and Reconciliation was established (British Columbia 2006). It seems plausible that a

department focused on various, and perhaps competing, aspects of society—such as community, women, and Indigenous matters—would split, fracture, or even dilute the attention given to Indigenous matters, and thus being housed in a ministry specific to Indigenous issues would be of benefit. The questions emerge, in light of this review of these budgets, whether this strengthens efficacy by having a number of ministries pay attention to and facilitate these pursuits? Or does it weaken efficacy by dispersing these efforts across various department silos generating the necessity of duplicated efforts, attention, time, and money and thus slowing the process? Have provincial jurisdictions been slow to recognize the strategic importance of Indigenous issues? One is left to wonder why Indigenous issues are rehoused so often.

Another question revolves around not the efficacy of land negotiations, but the intent of the provincial enhancement in these procedures. Consider an item from the 2007 budget that states provincial intention to “accelerate Treaty negotiations” (British Columbia. Ministry of Finance 2007, 33). What is the purpose of this acceleration on behalf of the government—is it an extension of settler nation-building or the establishment of Indigenous sovereignty? In an attempt to answer this query, I will turn to Penikett (2006) who has argued that B.C.’s current modern land claims demonstrate Canada’s commitment to settling the historic “land question.” He writes, “Negotiating Treaties in B.C. is unfinished business in the process of nation-building in Canada” (3). This is an interesting framework of analysis for land claims in B.C. Is it about finishing the project of building the Canadian nation-state or reconciling an aspect of colonial injustice for the region’s Indigenous peoples? Often in settler colonial societies, Indigenous matters are not dealt with on their own or for the sake of reconciliation. Instead, these matters are dealt with in an intention to justify or legitimize the state and to gain access to natural resources for capital development purposes. Therefore, is Treaty-making about reconciling past colonial

mistakes or is it about furthering the settler colonial agenda? These two different approaches can lead to challenges in achieving successful reconciliation.

Consider for a moment Monture-Angus's (1999) argument that while the court case *Delgamuukw* (1996) asserts Aboriginal title is *sui generis* (unique)—which many interpret as a boon for the Indigenous sovereignty movement—this ruling only partially clarifies the content of this title or confirmation that this extends to self-government (129). Thus, while the court case may be a positive development for the future ascertainment of Indigenous rights and title, it is not an end point of reconciliation for Indigenous rights and title. Ladner and McCrossan (2009) have added to Monture-Angus's argument by attributing the incompleteness of reconciliation to the court's intention to confirm Crown sovereignty, and not to reconcile Indigenous title (272). Therefore, it seems that the Canadian state's approach to settling Indigenous title is about continuing the Canadian settler nation-building project, in its search for justification and legitimation, rather than affirming Indigenous rights and title.

Now consider B.C. land claims where similar issues have arisen surrounding state intent of state sovereignty, not the intent to reconcile colonial injustice or the determination of Indigenous title. The B.C. Ministry of Aboriginal Affairs (1996) has written that a number of outcomes from modern Treaties may result: there may be an increase in land and resource use availability and opportunity of use (19); improved business in First Nations' communities (23); improved income and employment in communities (28); opportunity for building new skills in management and other areas and establishing cultural education programs (31); and possible enhancement of social development programs and reduction in social services (34).

Here it is evident that the B.C. Ministry of Aboriginal Affairs views modern Treaties as a means to socio-economic vitality, according to western ideals, and not a means to Indigenous

title and rights reconciliation in and of itself. What is the result of the state pursuing land claims with a mandate of western-centred socio-economic measures? Blaut (1993) argues that in a neo-colonial context, diffusionist theory is hidden in the language of economic development, and so settler states are able to continue to exercise colonial pressure through economic development models that limit non-western communities (27). While diffusionist theory is better known for its historic use of western concepts of private property (individual, capitalist) to overpower non-western concepts of property (communal), Blaut also describes how modern diffusionism continues to espouse these western concepts through economic development. One of the outcomes of such policies is that the motivations for Indigenous peoples—title and rights that support the well-being of traditional cultures and worldviews—are often not ensured because it is actually a motive of economic development that is sought. Thus, neo-colonial policies are generated that perpetuate western economic development models, and this does not lead to self-determination, a specific goal of Indigenous nations sought in part from land claims.

The B.C. Assembly of First Nations has described just this situation in a 2006 set of public hearings on recent modern Treaty negotiations. The assembly writes that the Treaty process raised the expectations of the B.C. fisheries sector that recognition of rights would be made at the community level. As is often the case, these expectations have not been met. The assembly goes on to write that the outcomes have instead resulted in disappointment as “many have found that the government mandates have limited flexibility and hindered progress in fisheries negotiations” (B.C. Assembly of First Nations 2006, 21). Thus, the community expectations concerning Treaty rights and the fisheries were not met. Is the disappointment a result of two different sets of mandates for one process: one party wants to justify and legitimize itself and the other wants justice through reconciliation? The phrase “just reconciliation” can

mean merely reconciliation or reconciliation as a means of achieving justice; here I've used the latter approach.

Misaligned mandates will result in unfulfilled expectation, but so will misaligned values. How reconciliation is defined and understood has a high degree of bearing on the land claims process and on the values that shape this process. According to western approaches to law, and thus western values of land ownership, reconciliation occurs when damages result from an infringement of an acknowledged right. Penikett (2006) argues that without the acknowledged right, which for our purposes of land title in B.C. takes us back to the *Royal Proclamation of 1763* and Indigenous title through prior occupancy, compensation (or reconciliation) will not be made (168). The western notion of reconciliation thus limits the ability of land claims to fulfill the Indigenous expectations of a restoration of rights, title, and self-determination because rights remain relatively unacknowledged or what has been acknowledged by the settler state is only done so to legitimize the state itself.⁶³ This limitation is due to this western understanding of Indigenous land claims (Blaut's diffusionism)—Indigenous understandings of land claims often get overlooked.

These understandings, according to Tennant (1990), have two parts. First, governments must acknowledge the claimant group, the Indigenous nation, held title to its land before contact and this title is not extinguished; second, governments must negotiate with the group to reach a settlement or agreement similar to that in other parts of Canada. Thus, in terms of Indigenous land where Treaty was made, a process (regardless of the process's success or ability to justly determine Indigenous lands) does exist, yet the more typical experience of B.C. Indigenous peoples does not have such a process to rely on during government negotiations. While there has been a significant policy shift for areas without Treaty, the modern land claims process is often

still bound to those interpretations of *Royal Proclamation of 1763* in these non-Treaty areas.⁶⁴ And so the land question many Indigenous peoples in B.C. are faced with follows: “The questions may be put succinctly: Did British Columbia Indians have pre-existing land title? If they did have such title, is implicit action sufficient to extinguish it, or does it continue until explicit extinguishment occurs?” (Tennant 1990, 213).

R. v. Delgamuukw (1996) answered these questions when the court decided in this case that the Gitksan and the Wet’suwet’en Nations do have Aboriginal title, and laws of general application cannot extinguish it (such as implicit action). In this case, the appellants argued that Indigenous nations have always argued that title was never ceded: in most parts of B.C. Treaty was not made with the Crown (Mills 1994) and, as Penikett (2006) writes, “Government had secured no land surrender from Indians in B.C.” (76). As discussed earlier, the province has argued, however, that Aboriginal title in B.C. was extinguished by the Crown before B.C. joined the Confederation. We see here how the two sets of values on land reconciliation processes are different which leads to challenges in achieving successful reconciliation when dealing with the provincial government. The recent *Tsilhqot’in* (2014) ruling reiterates pre-existing land title and pushes this reconciliation further by determining Indigenous title is not denoted as small parcels of land, but large swaths of land. The implications this ruling holds for the provincial government is not yet clear, but the definition of title will surely demand provincial acknowledgement of Indigenous title that aligns more closely to an Indigenous-centred perspective of ancestral and inherent land connections.

Turning from the modern land claims to provincial involvement in land management and the political economy in B.C., neo-colonial tendencies on behalf of the B.C. government emerge. The B.C. government has expanded jurisdiction through land management. The topic of land in

any colonial project is one that carries a long history of tenuous recognition of Indigenous title and thus embitterment. Land is important to the understanding of jurisdiction in colonial projects for two reasons: first, land is appropriated for settler homesteading and urban settlement, and, second, it is appropriated for capitalist resource exploitation. Historically, land was sought after by settler colonial regimes to displace Indigenous populations with settler populations and to extract the economic value of the land in the capitalist marketplace. In contemporary political economies, the importance of land, or natural resource management, continues.

In Canada, land has not been uniformly regulated, resulting in a patchwork of jurisdictional responsibility. As we know, in B.C., land management has always been held under provincial jurisdiction since joining Confederation in 1871, and the province has chosen to not engage with the First Nations on land management, with the exception of the McKenna-McBride Royal Commission, 1912-16, which resulted in reducing reserve lands. In B.C., therefore, the area of natural resources, or land, is particularly contentious in the state/Indigenous governance network. For example, “The defence of land and resources is almost always a primary impetus in Indian politics, but it has unfolded with particular force in British Columbia” (Hall 2003, 251). As discussed, this is due to the province’s interpretation of the *Royal Proclamation of 1763*, the formation of early Treaty negotiations and abandoning of Treaty-making, and the resistant role of the province in Indigenous matters. These aspects of settler state-making limited the ability of the Indigenous nations to maintain title ownership in the eyes of the settler government.

Looking closely at the role of land or natural resources management in B.C.’s Indigenous/state governance network, an interesting question emerges surrounding the contemporary relations concerning decision making and how the province and Indigenous nations partner with one another. According to Chapman (2015) the role of the provincial

government has increased “... in terms of natural resource management, because they want our resources.” Gottfred and Beak (2013) argue the provincial approaches to natural resource management provide opportunities for good partnerships. In fact, they argue it is these partnerships that have allowed jurisdictional ambiguity to be circumvented. The Ministry of Forests’ 2004/05 Annual Report, echoes the sentiment and states

The objective of increasing First Nation participation in the forest sector acknowledges that First Nation communities are largely rural or forest based, that First Nations often have an interest in increasing their participation in the forest sector, and that government has a legal obligation to consult and seek to accommodate potential infringements of asserted aboriginal interests regarding forestry decisions and actions on Crown forest land. (British Columbia Ministry of Forests 2005, 57)

This passage from the B.C. government document publicly suggests a partnership that acknowledges Indigenous interest in land and is based on Indigenous participation in the decision-making process. However, a question emerges: according to whose standards or values will this participation in decision making be determined, the province or the Indigenous nation? This question emerges because, as already discussed, the First Nations and the provincial government have differing sets of worldviews and interests in the matters of land. Again, settler states have consistently appropriated land from Indigenous peoples to aid settler colonialism, and here is an example of negotiation to stimulate the logging industry and Indigenous participation in that industry as seen in the Ministry of Forests Annual Report 2004-2005 (British Columbia Ministry of Forests 2005).

Feit (2001) has critically inquired into the outcomes of state/Indigenous land management partnerships in the Quebec context which are similar to B.C.'s partnerships. Feit argues that Indigenous public participation in policy-making actually provides little contributing or decision-making roles for Indigenous peoples. Instead, it is the government and industry that define the parameters and conditions of Indigenous participation; thus, they control the negotiating discussion (119). Feit says this process gives the appearance of government efforts to elicit Indigenous participation. The approach then ties Indigenous peoples to processes that are only slightly changed, so they are mostly intact from previous state-Indigenous relations that were exclusionary of Indigenous-based input/decision-making. The intention of the partnership agreement is to diffuse and diminish both Indigenous and wider settler society distrust and opposition, so that the state and private industry can generally maintain their activities unchanged (Feit 2001, 143).

Similarly, this conditioning can be seen in the B.C. context where Manuel (2015) says “people are tied up in funding arrangements and are stuck in these because of their poverty.” These funding arrangements tie the hands of these Indigenous nations: the needs that the conditions of poverty place on these nations both encourages entering these types of relationships and keeps them in these relations. According to Manuel, in order to alleviate the circumstances that tie Indigenous nations to these types of funding arrangements, jurisdiction should formally be transferred to the Indigenous nation. Manuel explains jurisdiction as a circle that historically has been distributed in equal parts, with two thirds governed by the federal government and one third governed by the provincial government. Yet, Manuel argues that one third of this governance pie should be Indigenous jurisdiction, as guaranteed and regulated by section 35 of the *Canadian Constitution Act, 1982* which says “The existing aboriginal and treaty

rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (Canada 1982). This one third would include all aspects of governance such as service delivery, membership, state operations, and finances. Specifically, Manuel says that all money should be governed by the mechanics of s. 35 and not the system of contribution payments and *Transparency Act* that currently regulate finances for First Nations. Manuel says “these are human rights, like membership, and this shouldn't even be a debate.” The *First Nations Financial Transparency Act* (2013) made several financial demands of First Nations bands, including the requirement that all First Nation Bands provide their audited, financial statements to the federal government to be made public on the Aboriginal Affairs and Northern Development Canada website (Canada Indigenous and Northern Affairs Canada 2015). This controversial legislation was repealed by Parliament in 2015.

An additional point of interest that emerges from this excerpt of the Ministry of Forests' 2004/05 Annual Report is that it does not acknowledge a point of view or approach that will shape these partnerships (British Columbia Ministry of Forests 2005). More specifically, will these partnerships be shaped by a state lens of neo-liberalism or anti-colonialism, or an Indigenous lens of traditional land stewardship and knowledge? Feit (2001) has argued that state/Indigenous partnerships in land management result in negative impacts on the feasibility of retaining traditional knowledge and also diminishes the feasibility of living off the lands in traditional ways (132). These wider issues of cultural and economic livelihood are often cast by settler states as relics of colonial engagement, but they continue to plague modern Indigenous/state governance networks. There is no evidence of any recognition of the intergenerational knowledge transfer or a continuance of traditional livelihoods within this Annual Report (British Columbia Ministry of Forests 2005). Instead, the annual report seems to

frame the decision-making process through a neo-liberal approach to political economy, which ignores the Indigenous worldview that can involve a model of sustainability or an approach of mixed economy (of traditional Indigenous and modern western) to promote the economic self-sufficiency of a community.

It is this questioning of the B.C. government's attempts to impress neo-liberal approaches upon modern-day Indigenous economies that comprises the next area of jurisdictional expansionism—that of political economies—in the Indigenous/state governance network. The Finance Department demonstrates significant financial investment in promoting Indigenous participation in the provincial natural resource economy. In its 2003 Budget, it states

Additional funding of \$36 million in 2003/04 and \$60 million in 2004/05 is available to expand activities in the B.C. Timber Sales program and revenue sharing with First Nations to increase their participation in the forest sector economy. In 2005/06, the ministry budget will rise a further \$47 million to increase forest investments and expand revenue sharing with First Nations. A \$275 million provision will be recognized in 2002/03 to assist with the transition to a sustainable forestry sector. (British Columbia Ministry of Finance 2003)

Given the history of colonial erosion of Indigenous economies in B.C., the question that arises is whose values are driving this service delivery mechanism? Are they those of the settler state, which uses a neo-liberal strategy, or those of the Indigenous group, which may assert a mix of traditional and modern features to create a mixed or diversified market or for whom cultural well-being may be of equal value to economic well-being.

One of the defining features of colonialism is exploitation of peoples (labour) and natural resources (lands/goods) through external (imperial or settler) political economies

(Ashcroft, Griffiths, Tiffin 2000, 40). For this reason, contemporary economic systems allow us to gauge possible markers of continuations of colonial activity or neo-colonialism. To illustrate this point in B.C., consider the pre-colonial, traditional economic markets of Indigenous peoples in the region. Penikett (2006) describes these as “advanced systems of property rights” (75-76) and Edmonds writes, “In short, Northwest Coast Aboriginal peoples were very experienced in the business of trade” (Edmonds 2010, 31-32). These statements demonstrate the knowledge and experience of economic trade amongst Indigenous peoples in the region. These economic practices were changed by colonial contact and trade regimes, followed by the implantation of modern capitalism.

European and Indigenous trade alliances began as somewhat peaceful or at-least mutually beneficial, and yet over time these relations often turned acrimonious. The fur trade provides evidence of agency for Indigenous peoples that participated in the trade: “The HBC operated as the colonial government in this area under the authority of the British Crown, but in the early days of fulfilling this role it did little to affect the political autonomy of the First Nations in British Columbia” (Woolford 2005, 43). Because the fur trade was the main purpose for European presence in early colonial B.C., not settlement, displacing Indigenous peoples from their lands was not a priority (Woolford 2005, 43-44). It was not until later that the settler colonial presence shifted from trade to settlement (Harris 2008, 421; Ray 1996). Many have demonstrated that colonial projects, which are based on Eurocentric views of Indigenous people as peripheral, extend this colonial notion to subsistent trade economies. Barr (2011) explains that traditional Indigenous economic procedures were elaborate modes of exchange based on intricate networks of trade partners.

In B.C., a colonial disruption to Indigenous economies occurred. Harris (2008) explains that colonial presence brought new trade alliances that upset social hierarchies (422). Some people did well from trade, while others did not: “Responses were exceedingly uneven” (422). Both Knight (1978) and Ray (1996) describe how Indigenous peoples’ labour transitioned from traditional procurement practices to the wage economy as colonial settlement and industry were established. Industrial fishing began in 1871 and expanded quickly along the west coast of B.C. employing large numbers of Indigenous peoples (Ray 1996, 292-312). In addition to Indigenous peoples working in this industry, by 1888 the industry had immense impact on the regulation of Indigenous fishing tools and implements as well as the uses of resources harvested (302). Knight (1978) chronicles the involvement of Indigenous peoples in resource industries in B.C., where beginning in 1890 a boom in resource extraction led to the proliferation of B.C.’s resource industry based around fishing, farming, forestry which required unskilled labour and relied on contract work (123-125). The seasonal nature of these industries impacted Indigenous peoples’ abilities to continue their traditional procurement practices as it took them off the land and placed them in factories, and the regulation requirements of these industries placed limits on Indigenous peoples’ abilities to use their ancestral traditional lands.

To better illustrate the shift that the political economy of settler societies imprints on Indigenous economies consider the cultural economics of staples economies, such as that of the settler society in B.C. First, Marx has demonstrated that when modes of production shift under capitalism (the economic substructure), so too do the politics (or the superstructure): economics affect politics. Under capitalism, the mode of production alienates workers from both outcome (product) and process (labour). This process of alienation is further facilitated by an expropriation of land from those who labour on the land (peasants or hunters) to the new owners

of land (the state or landlords). This shift in land use from the collective to the individualistic generates private property and profits. This is distinct from Indigenous conceptions of land use in which people view themselves as responsible to land, as guardians or caretakers, and the land is used to serve the collective needs of the wider community. When market economic activities are repurposed through capitalist ideology of imperial and settler societies, because politics and economics are connected, there is a wider effect in the settler society and Indigenous peoples' economies.

In fact, a staples economy—or an economy based on natural resources—is based upon very specific economic and political structures, and B.C. has a staples-based economy. For example, Wiseman (1996) has demonstrated that Canadian provincial political culture is premised on a staples economy: “From a political economic perspective, culture may be said to reflect the forces of production surrounding a staples economy. From this vantage point, the inputs of production—capital and labour—and the staples to which they are applied, shape power relations and political consciousness or culture” (22). Therefore, the staples economic-base affects the political culture, a relation that reflects Marx’s perspective. So, how does this economic culture inform the provincial government of B.C.? As Harris (2008) writes “Marx’s imposing analysis of early industrial capitalism, for example, catches some elements of early Canada while missing many others altogether” (xvii). When working from a position of capitalism, as Marx demonstrated, it is clear that this initiates a shift in modes of accumulation and the shift in land use (from collective to individual) commences, resulting in what has become the western constant of modern economic activity (profit, individualism, and private property), which is in opposition to Indigenous concepts of economic activity (guardianship and

collectivity). Harris (2008) writes, “All these developments were superimposed on Native people and their land” (427).

Returning to the budgetary items that discuss measures to engage Indigenous nations in modern economic markets, a question emerges: do these policy mechanisms undermine the Indigenous economies by reinforcing settler economies? We already know that settler society has impacted the traditional market economies of the Indigenous peoples, imposing external imperial systems. We also know that neo-colonialism is perpetuated through economic development policies. According to Simpson, Storm, and Sullivan (2007), true community economic development that benefits Indigenous communities cannot occur under existing funding models. And Indigenous nations in B.C. see this type of community economic sustainability as can be demonstrated in the General Protocol Agreement, a protocol signed in 2001 between the provincial government and Turning Point, an Indigenous-based coalition, to protect areas of land and negotiate sustainable economic development: “Previously these groups had suffered from government politics and economic constraints that limited their access to business opportunities in the forestry sector” (Penikett 2006, 154). This is because these models were both based on historic colonial premises that result in service delivery duplication and they severely limit community decision-making ability (76). The result is less money in the community, less economic sustainability, and less community decision-making capacity. It is policies such as these that have created contemporary economic situations that are unsustainable in many Indigenous communities (Loxley 2002, 29). Chataway (2002) explains this is because economic development is then encouraged according to the principles of modern liberal economies which have two distinct outcomes for traditional economies: to undermine or to enhance within the liberal economy (77). When traditional markets are undermined, problems emerge such as

factionalism and distrust. Two things are needed for the success of Indigenous economies in modern liberal economies: flexibility (Newhouse 1999) and enhanced trust (Chataway 2002). When neo-liberal economies undermine or are too rigid, Indigenous economies are not successful. For example, Chataway (2002) argues that these current economic policies cannot provide the structural change needed to provide long-term economic success (76). As well, Hammond and MacPherson (2002) demonstrate that the goal of successful integration of Indigenous nations with neo-liberal markets will not result from “quick fixes.” Instead, integration must be facilitated by long-term policies interwoven with traditional and modern values that address the full assortment of economic activity, not just those aligned with neo-liberal market values (Newhouse 1999, 168). The question remains: what is the B.C. government’s motive in the economic well-being of First Nations people? Will it continue to perpetuate neo-colonialism through economic levers? Will it be flexible and allow for traditional or mixed economies to emerge?

While economic development initiatives specific to Indigenous peoples occurs frequently in B.C.’s budgets and reports, the B.C. Department of Finance’s Economic and Resource Development program provides insight into the increased activity of the sub-national in the Indigenous/state governance network. This program consistently discussed economic development for Indigenous nations and provided provincial dollars to economic development programs between the years 2007 and 2010. Examples can be found in the 2007 Budget where the province set aside \$30M for First Nations economic development, and the 2008 budget set aside an additional annual \$10M for this program (British Columbia Ministry of Finance 2007; British Columbia Ministry of Finance 2008). In addition to this, various other dollars were invested through this fund. This is interesting because the provincial documents describe this

fund as available for various activities, including costs accumulated in the Treaty process. Here the province has connected land, specifically the Treaty process, with economic development. Yet, the courts have determined that the Treaties cannot be interpreted in this way: instead, the interpretation stops short of economic development. Examples of this can be found in *Marshall (1999)* or *Sioui (1990)*, both of which found that Treaties are legitimate legal documents that continue to provide rights for cultural harvesting, but not for economic earnings (though *Marshall* does discuss a ‘moderate livelihood’). In this context, it seems the provincial government has created policy that is perhaps disingenuous in that it has no teeth to effect change. Perhaps, instead, while not rights-based, it does go beyond judicially-imposed limitations by connecting land rights and economic development, which is a significant contributor for Indigenous self-determination, in that economic independence is required for sovereignty.

The Indigenous/sub-national governance network in B.C. has undergone significant changes in its interpretation of jurisdiction. This might be due to general devolution, or the state and public desire to reconcile land issues, or further the pressure from Indigenous peoples for land reconciliation and to de-colonize social service provision. Whether the provincial encroachment results in neo-colonialism or anti-colonialism is perhaps less due to the state’s intent of this devolution (neo-colonialism or anti-colonialism) and more to do with how these outcomes are understood (as neo-colonial or anti-colonial) by the communities themselves.

Conclusion

B.C.’s Indigenous/state governance network is interesting given how the provincial government has interpreted its role through the *Royal Proclamation of 1763*, its general lack of Treaties, the development of the reserves, and province’s reluctance to participate in the state/Indigenous governance network. It is further interesting to trace the presence of the early

colonial motivations to modern policy-making, noting how these motivations still heavily influence the network. As the pan-Canadian federalist pressures of devolution infiltrate the B.C. network, the role of the provincial government has become increasingly prevalent in the network. Does this increased prevalence have the B.C. government providing social service deliveries and policy outside the realms of its responsibility as per s.91(24) of the constitution? Gottfred and Beak (2013) argue that in some ways they are. However, they further argue that the province does not legislate outside of its jurisdiction, but sometimes does provide funding outside of its jurisdictional responsibility which, as explored in Chapter 2, the province has the jurisdiction to do (Morse 1989; McCabe 2008; Sanders 1988). Gottfred and Beak (2013) describe some areas of governance as unclear and say that in some ways the province welcomes this jurisdictional ambiguity; it allows the state and Indigenous nations to move forward in partnership and achieve better outcomes in the communities. I argue, however, that this ambiguity allows the province to continue to behave according to past and present colonial patterns as well as neo-colonialism.

Chapter 5: The Northwest Territories, Devolution, and Land and Resource Management

The Northwest Territories (N.W.T.) provides a territorial comparison to the Indigenous^{65/} state governance network. Like the other territories in the Canadian confederation, the N.W.T. differs from the southern provinces. Some key distinguishing characteristics of N.W.T. are that much of the territory is covered under Treaties 8 and 11. In general, however, the region lacks reserves, it has many modern land claims or Treaties, and holds expansive natural resources (without, often, having jurisdiction over natural resources). Also, provincial governments have more autonomy, and so the territories have long advocated for stronger, province-like powers and contemporary devolution contributes to this status. Territorial sub-nationals have historically been governed under a regime of heightened central authority as compared to the provinces and this has shaped how the development of the government in the N.W.T. relates to the Indigenous/state governance network. This also has shaped the territory-wide process of devolution, which has greatly influenced this governance network.

Of significant importance to the governance network in the N.W.T. are the vast natural resources in the region, which have always been at the centre of the southern colonial interest in the area. As Stewart Hodgson, Commissioner of the Northwest Territories, said in 1970

The emergence of the Northwest Territories as a political and economic force promises to be the twentieth century's greatest saga . . . It will include industrial developments on a scale suited to the size of the land, giving employment to thousands of modern pioneers. It will be a modern re-enactment of old frontier days—accelerated and magnified by world pressures of population, increased commercial demands and heightened by competition for mineral resources. It will be rocketed ahead by computer-oriented technology. (Brody 1975, 212).

These words could just as easily have come from the pioneering days of the whale expeditions of past centuries, the gold rush days at the turn of the 20th century, or even from today's federal government whose recent arctic policy report states, "New opportunities and challenges are emerging across the Arctic and North, in part as a result of climate change and the search for new resources . . . Northern resources development will grow ever more critical to Northern economies" (Canadian Government 2009, 4). These resources are those same resources located on the ancestral lands and Treaty lands of Indigenous peoples. The arctic, and subarctic in this case, truly remains a frontier for the settler state and as such it continues to be discussed by state actors in terms of neo-colonial use and development.

Colonialism, Political Development, and Devolution in the North

Colonial contact, both imperial and settler, was made later in the north than the rest of Canada (Abele 2009, 21). This is due to two reasons. The first is that the politics of colonial economics in Canada that began with the fur trade did not extend to the north with significance until the last few decades of the fur trade era. As Father Rene Fumoleau (1973) explains, it was the new transportation routes opened through the northwest between 1868 and 1885 that led to new economies in the region between 1885 and 1895 (27-30). While earlier fur trading did bring whaling expeditions to the region, scholars generally point to this later era of the trade as that which made significant settler colonial impact on the region. Second, the modern economic possibilities of the vast natural resources in the region were discovered later and this attracted the more recent colonial presence.

Asch (1977) writes that "during the period of H.B.C. [Hudson's Bay Company] monopoly, the region was apparently considered too remote to command much attention" (51). Thus, the north existed on the fringes of the colonial economies of the south. As Coates and Powell (1989) argue, the changes due to colonial settlement in the N.W.T. did not leave the

Indigenous population agency-less: federal policy often reflected regional realities and interests. Later, when the national fur trade collapsed, industrial production became more reliant on oil and minerals, which the north has in abundance, and this resulted in an increase in colonial contact as external interest in mineral extraction grew (Abele 2009, 21). Today, while the national economy of fur trading has diminished, hunting and trapping in the north are still practiced and provide a living for some. These economic discoveries such as the Klondike Gold Rush of the 1890s and the Norman Wells oil discovery in the early 20th century brought settler and southern proprietary interest to the north, and mineral excavation in the 1920s and 30s encouraged more recent colonial interest, evidenced by the signing of Treaty 11 from 1921-22, which corresponded with both the gold rush and increased settler migration to the region (Abele 2009, 22; Kulchyski 2005, 55).

Later, political pressures arose, specifically due to World War II and the Cold War, leading to what is referred to as the arctic sovereignty approach, which is the Canadian government's policy of establishing and maintaining defense of the arctic coastlines to assert and maintain both ownership and control of the resources in the north and which has brought about a stronger colonial presence through the military (Abele 2009, 25). In fact, the military needs of World War II have largely been responsible for binding the territorial region more closely to the wider Canadian nation-state (Dawson 1947, 30; Brody 1975). For example, the United States' Alaska Highway built during World War II and the Canada-United States Dew line (Distant Early Warning line) brought increased colonial settlement to the region. And as Abele (2011) demonstrates, this political interest and presence of the post-World War II era are mirrored in contemporary northern politics: "To a degree not seen since the 1950s, the Conservative government claims the North as a territory to be developed almost entirely in terms of defense

and economic development” (219). Thus, colonial contact was entrenched later in the north than the rest of Canada and the colonial paradigm remains a feature of contemporary northern, settler politics.

As discussed previously, colonial powers asserted their legitimacy of rights to the lands throughout North America, including what has become the N.W.T., through settlement at the expense of Indigenous peoples’ rights to land through the doctrine of discovery and *terra nullius*. These concepts were used to undermine Indigenous peoples’ worldviews, or their social organization, governance and legal systems, and political practices, and superimpose European worldviews. The result of these practices has been damaging to Indigenous peoples’ connection to their land and their rights to their lands; however, many of these connections do remain as exercised through traditional knowledge systems and practices. These measures, doctrine of discovery and *terra nullius*, enabled colonial powers to assume control over lands that belong to the Indigenous nations and this impacted Indigenous peoples’ rights to their lands. Reasserting traditional and continued rights to land is the cornerstone of contemporary Indigenous rights movements and Indigenous/state relations. This settler colonial approach to land appropriation can be illustrated by the imprint of colonial settlement of the N.W.T.

For example, the N.W.T. has a long history of geo-political shifting with its borders changing as the Canadian federation expanded westward, adding new provincial and territorial bodies; the geographical history of the Northwest Territories in Canada is one of continual cessation of land to other provinces and territories. While the N.W.T. was added to the Union by the Quebec Resolutions in 1864 (Thomas 1978, 3), the territory did not become part of the new Confederation until 1870 when the region was purchased by the Crown from the H.B.C.. At the time, the place name of North-Western Territory was used as reference to any British territory

not yet a part of another province or colony (McNeil 1982, 5). This region covered the range from Manitoba's Red River, west to the Rocky Mountains, and north to the Arctic Ocean (Thomas 1956, 3, 6). Over time, new regions have been carved from the political borders of the North-Western Territory: in 1870, Manitoba joined the confederation, in 1871 B.C. joined, in 1880 the Arctic Islands were transferred to Canada, in 1898 the Yukon was established (Thomas 1978, 15), and in 1905 Saskatchewan and Alberta were formed (Dawson 1947, 5). The provincial boundaries of Manitoba, Ontario, and Quebec were extended in 1912. The next change was not until 1999, with the creation of Nunavut.

This is a political history of the settler colonial government, which intimately shapes Indigenous nations and governments in the N.W.T., past and present. In an interview with John B. Zoe, Senior Advisor to the Tlicho Government, Zoe explains the wider history of the territory's geo-politics, that which is broader than settler colonialism and includes those Indigenous-centred perspectives that are often marginalized through settler colonialism. He says, "We have a history that predates confederation. So in the world we had, we had a system and way of life in place. It was based on the environment, coexistence, but at the same time that world became unraveled especially after the Europeans discovered the Americas" (2014). Zoe goes on to explain the changes that resulted from the presence of and interactions with explorers, missionaries, and trade. This change came in both the forms of competition and making alliances, including the Treaties—the historic Treaties, numbered Treaties, and now comprehensive claims. Today is a period of recognition of rights and Treaties. Zoe concludes by stating, "These are the evolution of Canada and common law onto this continent, and in the N.W.T." (2014). This perspective is important because, as this chapter will demonstrate, it builds on a foundation of Indigenous worldviews that delegitimizes the doctrine of discovery.

The federal government has traditionally held a heavy but evolving presence in the N.W.T. regional politics and governance.⁶⁶ From the territory's inception it was clear that the population would not support the Government of the N.W.T. (G.N.W.T.) to become a province, so it was split into provisional districts under the notion that these would transfer to provincial status in time (Thomas 1978, 18). Due to the limited population numbers (a 1941 census reported a population of 12,028) that were scattered over vast distances, the territorial government was originally administered by the Royal North-West Mounted Police until 1921, at which time a N.W.T. council—the first modern N.W.T. council—was appointed by the federal government (Dawson 1947, 20-22). This administration continued to be run by a Commissioner, a position held by appointed federal bureaucrats from the south (Tester and Kulchyski 1994, 16). Northern appointees to council started post-WWII, with elected members beginning in the 1960s, and finally a fully elected council (a representative government) was implemented in the 1970s (Abele 2009, 28; Tester and Kulchyski 1994, 16). Since then, the government of the N.W.T. operates as a government that represents the entire territory; however, a number of regional Indigenous groups have emerged and are creating a complex network of self-governance and jurisdictions of shared resources (Abele 2009, 36). These progressions of Indigenous groups that are both interest-based and land claims-centred are continuing this evolution of the N.W.T.'s political landscape.⁶⁷

One of the major distinctions of territorial governments is this heightened involvement of the federal government.⁶⁸ Two significant outcomes of this central state presence have affected the N.W.T.'s Indigenous/state governance network. First, the imperial nature of the government initially weakened the local community involvement in settler governance. Second, the role of

devolution in the territory has been different from the southern provinces, because the G.N.W.T. was always expected to absorb many of the governance activities of the central government.

The first significant consequence of the extensive federal control in the N.W.T. concerns weakened community involvement in governance in the twentieth century, which impacted the local political structures. Initially, federal control limited local population participation in formal politics, including the participation of Indigenous peoples. Bean (1977) has argued this limit was the intent for the federally-propped territorial government and writes, “Rather than welcoming this as the success of the Local Government Program, the territorial administration has attempted to diffuse and limit that development by channeling it into administrative complexities and bureaucratic lethargy” (140). Thus, the G.N.W.T. became a colonial state with rigidities that kept local influences outside of the central scope of governance operations. The northern settler state was therefore marked with southern influence of the central government (A. Henderson 2007, 2). The local population was made up of a small settler population, which had the result of an “uneasy grafting of one’s institutions onto another’s” (A. Henderson 2007, 3), and thus the settler colonial society and state imposed itself onto the Indigenous peoples in the N.W.T.

As well, Thomas (1956) has argued that the constitutional status of the G.N.W.T. cemented the federal mentality of heightened colonial exertions in the region. Thomas writes, “The imperial-colonial relationship and the process of gradual, unsystematic evolution in that relationship were so familiar, and in many of their aspects so acceptable, as to be one of the unconscious assumptions of Canadian political thought. It is not surprising therefore to find the federal government embracing, without hesitation, the prerogatives of “imperial” authority in the North-West” (4). When the N.W.T. joined the federation,⁶⁹ the territory was not described by the federal government as a province or a colony and thus had a distinct administrative and

parliamentary relationship characterized by “unilateral action” (Thomas 1956, 7). This allowed, or perhaps necessitated, the federal government to hold “unrestricted authority” in the formation and function of the local government (Thomas 1956, 12).

The heavy-handedness of the central government restricted local involvement in the settler state for both settler and Indigenous populations. The outcome of this governance approach and formation has been significant for increasing Indigenous involvement in territorial politics. Once the central heavy-handedness was lifted in the 1970s by the transfer of government to the region, local influence in politics and governance abounded. Again, it was only in the 1970s that the N.W.T. acquired its first modern and representative council respectively. In 1967, the institutions of the G.N.W.T. were relocated from Ottawa to Yellowknife which coincided with the shift from central political appointment to local political representation. As Feehan (2009) writes, “Prior to that, the territories were managed by federally appointed commissioners, who operated with limited input from elected representatives of local residents” (346). The intent behind this shift was to form a bridge between the distant government and the local level and to generate a more responsive government. However, initial challenges emerged that limited the intended outcomes: “A more responsible government also added up to more government: more government meant more outside interference” (Kulchyski 2005, 55). Thus, the influence of the localized government initially carried forward the trend of heavy-handedness. This is because much of the political power remained in Ottawa. Interestingly, the result was two types of government and politicking that occurred simultaneously: that of the politics of the people—on the ground, face to face—operating through dialogue, and that of the government which was removed from these people’s daily lives

and effectively limited their participation in the region's formal politics (Kulchyski 2005, 55-61).⁷⁰

During the early years of this newly localized government, 1965-1975, it was mostly non-Indigenous people elected to government and they did not typically represent or advocate for Indigenous issues. In 1965, Abe Okpik of Frobisher Bay (Iqaluit) became the first Indigenous member appointed to the Council (Couturier 2014, 7). Around this time, Indigenous grassroots organizations began to perforate these institutional politics, bringing with them advocacy for Indigenous issues. In 1975, only two Indigenous people were elected to government, James Wahshee and George Barnaby, but the build up to the 1979 election was highlighted by a strong effort to establish a significant Indigenous presence and an Indigenous majority, including Inuit, Dene, and Metis, was indeed elected (Dacks 1990, 225; Kulchyski 2005, 61-63). Prior to the 1979 election, many Indigenous groups—who were concerned with the decision-making powers of settler colonialism—boycotted the legislature as an illegitimate institution of the settler state (Dacks 1988, 224). Some argue that this 1979 election brought Indigenous issues to the forefront of the territories and legislative matters (Dacks 1988, 225). Others, however, argue it did not necessarily mean more Indigenous issues were recognized by the government, due to the internal mechanics of the Canadian government which slowed or stymied the efforts of the Indigenous representatives (Kulchyski 2005, 61-63). Dacks (1988) says the 1979 administration did support some Indigenous aspirations, including concepts of Aboriginal self-definition and the formation of a committee to consider the territories' constitutional future and the Inuit goal for a division of the territory for self-determination; however, the administration did not move quickly on many of the Indigenous issues because internal, territorial politics assumed such activity might alienate the non-Indigenous population (225). An important distinguishing feature of the G.N.W.T. is that

it is a consensus-based government. Dacks (1990) has written that the consensus style of politics “displeases” the settler population who view this as a misstep in parliamentary representation (340). This feature sets it apart from other sub-nationals in the Canadian confederation, except for Nunavut.

One result of this shift in political efforts to increase Indigenous presence within the colonial Canadian government was a reinvigoration of the politics of devolution and Indigenous self-government: “Devolution became a rallying cry, and a series of efforts to decentralize were initiated” (Kulchyski 2005, 73). Between the historic 1979 election and the creation of Nunavut, most political leaders (with the exception of two) in the N.W.T. have been Indigenous (Kulchyski 2005, 11), and in 1991, Nellie Cournoyea became the first Indigenous female Premier in Canada (Couturier 2014, 7-8). Since the creation of Nunavut, however, non-Indigenous leaders in the N.W.T. have begun to be elected in greater numbers which is shifting this pattern of Indigenous leadership (Kulchyski 2005, 11). Throughout this period and today, devolution has remained a political goal in the N.W.T.

Turning to the second significant consequence of the extensive federal presence in the territory, the role that devolution has played in the N.W.T. politics is different than that of the provinces. The N.W.T. public has long been dissatisfied with the heavy-handed nature of the central government in the region, and there has been immense pressure on the territorial government to pursue devolution long before today’s extensive plan for management of devolved functions was made. This has, in the long run, slowed the process of constitutional development and attainment of “province-like” political formation (Abele 1990, 63). However, the process of devolution was then “accelerated” in the mid-1980s (Weller 1990, 317, 319), partly due to the overall movement towards devolution in Canada, but also in response to

Indigenous self-government movements and the state's desire to use land for economic purposes of oil and mineral development. This process had waned by 1990 (Dacks 1990, 4-5), but resumed with the Arctic sovereignty debates in the 2000s. On March 11, 2013, the federal government announced that it had finalized the devolution agreement between itself and the G.N.W.T. (Canada Indian and Northern Development 2013). This agreement was ratified into law on April 1, 2014 as the N.W.T. Lands and Resources Devolution Agreement.

The experience of devolution in the N.W.T. has greatly differed from that in the rest of Canada for two reasons. The first concerns those interests of the G.N.W.T. and the second concerns those interests of Indigenous nations. To begin, the N.W.T., like the other northern sub-nationals, always expected to take on those governance activities that a province would normally practice but that the central government had originally undertaken. The southern provinces view increased powers differently. When provinces joined confederation, for historical reasons they did not have uniform powers. These powers differ, as the provinces argue they can better reflect the regional needs and interests of their local citizenry (Franks 1967, 14). Due to territorial status, the territorial governments have less fiscal autonomy than the provinces. The result of this, as an example, is that while territories can collect some provincial-type taxes, they cannot collect to the same extent as provinces, and this naturally limits their public purse and their spending powers. As well, they do not have control over the management of Crown lands, and non-renewable resources are under authority of the federal government in the N.W.T. Due to this federal ownership of the land and resources, politically the territory can be said to not be a "full partner in Canadian federalism" (Dacks 1988, 223). The territories have long lobbied for devolution to gain more province-like powers, thus, enhancing their decision-making role,

spending powers, ability to vote on constitutional amendments, and economies (Abele 2011, 230-231).

Political devolution in the N.W.T. further differs from that of the provinces because the territories see it as a way of gaining province-like powers, or those powers the provinces already have. The territories are still on an evolutionary path to provincehood and devolution enables this path. As Weller (1990) writes, “The G.N.W.T. has also been motivated to support devolution because it is likely to extend the legitimacy, power and influence of established political structures and better equip politicians to resist what some see as the destructive calls for the division and the uncertain and disruptive process of land claims” (321). Here, Weller describes a colonial viewpoint of land claims and motivation for devolution. Additionally, for the territories, devolution is not just a transfer of authority to a lower level of government (or jurisdictional transfer); it concerns a constitutional adjustment (Dacks 1990, 6). Until the N.W.T. Lands and Resources Devolution Agreement (2013) was ratified, the only natural resource that was devolved to the G.N.W.T was forestry (again, natural resources in the territories are under federal jurisdiction) (Feehan 2009, 350). Also, the service delivery of healthcare is provided by the G.N.W.T (Dacks, 1990, 4; McArthur 2009, 217). The N.W.T. Lands and Resources Devolution Agreement (2013) will expand management of many more such resource-based sectors to the G.N.W.T. (Canada Indian and Northern Development 2013).

Today, devolution in the N.W.T. has taken an unprecedented (or historic) step forward by the federal announcement of Canada’s Northern Strategy, which announced the final devolution agreement, the N.W.T. Lands and Resources Devolution Agreement (Canada Indian and Northern Development 2013), between the federal government and the G.N.W.T. This devolution strategy follows that of the Yukon (2003) (Canada Minister of Public Works and

Government Services Canada 2001). A review of G.N.W.T.'s Budget Plans from the years 2000 to 2010 demonstrates the territorial-level commitment and long-term planning that has gone into readying the government for this devolution strategy. The discussion of devolution is present in each of these documents. In consideration of both of these factors—that the Yukon has a devolution agreement and that the N.W.T. is so committed to this process—it was clearly a matter of time for this governance evolution.

The N.W.T. Lands and Resources Devolution Agreement (2013), as its title aptly states, will have the impact of devolving the authority for lands and resources from the federal government to the G.N.W.T. In the words of Zoe, Senior Advisor to the Tlicho Government (2014), “In the last 40 years, most things transferred to G.N.W.T. The last piece is land and water, this is the last piece that’s just gone through parliament.” As Prime Minister Harper relayed the federal government’s perspective on the recent final devolution document in a media release; “Once finalized, this historic agreement will provide the Northwest Territories (N.W.T.) with greater decision-making powers over a range of new responsibilities which will lead to jobs, growth and long-term prosperity across the Territory” (Canada 2013). On Aboriginal rights, the act states that it cannot derogate s.35 of the Constitution Act, 1982, impinge on Crown fiduciary duty, or impede Indigenous land claims negotiations or agreements (19-20). The act also deals with sub-national/federal jurisdiction for status First Nations peoples. It reads, “The Legislature will not have the authority to make laws in relation to matters within class 24 of section 91 of the Constitutional Act, 1867, except to the extent that such authority is: (a) provided to the Legislature by federal Legislation for the purposes of implementing land claims or self-government agreements; or (b) already given to the Legislature on the date this Agreement is signed” (19). This means that this act will not impede on restrictions set out in s.91(24).

Therefore, s.88 still prevails, and the G.N.W.T. cannot legislate for status First Nations outside of s.88's parameters.

The motive of the G.N.W.T. for devolution—to increase province-like powers—is also quite a different motive than that of the Indigenous nations. Instead, Indigenous nations view devolution as an opportunity to seek rights entrenchment or promote Aboriginal self-government. In a sense, both sets of parties, the G.N.W.T. and Indigenous nations, want more rights and responsibilities from the federal government. However, while the sub-nationals want devolution to gain authority, this does not necessitate a dialogue on Indigenous rights. In an interview with G.N.W.T. employee Owen Everts-Lind (2013) devolution in the G.N.W.T. was discussed solely as a territorial development and explicitly not about Indigenous rights; he says “these two are separate.” For the G.N.W.T., the motivation for devolution has little to do with Indigenous rights and it more strongly concerns the roles and responsibilities of the territory in the Canadian federation. However, devolution for Indigenous peoples is sought to achieve self-determination; to this end, many N.W.T First Nations see the G.N.W.T as a competitor and obstacle. While opinions on this topic vary, some peoples support devolution for the aim of self-government, while others do not support it. This is because it could be argued that G.N.W.T.'s devolution will provide a shift in bureaucratic decision-making from Ottawa to Yellowknife: this will not shift the paradigm of colonizer/colonized, just shift the colonial power centre. Therefore, regardless of location, settler-colonial decision-making is still at work and not Indigenous self-governance. It can also be argued that devolution can support Indigenous self-government by giving the local government the authority to govern important issues such as land, health, or education, or to bring this level of government into the land claims and self-government process which might help to facilitate (though, it could also hinder) this process.

These conflicting mandates result in criticism of territorial devolution. Indigenous nations are concerned with how devolution will strengthen the territorial government in ways that will impact Indigenous governance. Many Indigenous peoples view self-determination as inherently tied to this process of devolution (Dickerson 1992, xiii). Dacks (1990) explains that by the mid-1980s devolution was an entrenched process that had delivered much of the jurisdictional and corresponding status of the provinces to the northern territories. This process, however, was developing without contribution and inclusion of Indigenous nations. They further felt that this process would violate their own agreements with the government (Dacks 1990, 4). Many Indigenous peoples have a Treaty relationship with the federal government and this is a relationship built on a nation-to-nation status. For example, Zoe (2014) explains that the relationship between the Tlicho Nation and the federal government will always exist because of the Treaty relationship to the Crown. Yet, at the same time the management of what is acquired through the Treaty is devolved to the territorial government. The Nation must both maintain a federal relationship for funding, while also a relationship of sharing with the G.N.W.T. concerning lands and waters in the north. The Federal Government, however, does not see the Treaties this way; treaties are often described by the state as ‘cede, release, or surrender’ rights to land. Many Indigenous nations exist, such as the Metis, that do not have Treaty. As territories gain more powers, this could affect how these Indigenous nations negotiate. For example, these negotiations will necessarily become tri-lateral, which increases the bargaining interest-bases, bureaucracy and administration, and the time and costs of negotiation.

Some Indigenous nations have concerns regarding devolution because it will shift which level of government controls aspects of governance, but it is the settler state that will still maintain control. There is, thus, no disturbance to settler state control, which maintains its

colonial imposition on Indigenous nations and their governance systems. Zoe (2014) asks, “how do we participate in that management of those things because now we have recognition of those lands, management authority?” He answers: “Well, the way that it impacts us is that we are not used to working with the federal government: we always dealt with them through Indian affairs, the old DIAND [Department of Indian Affairs and Northern Development], and while they took care of you, they were exploiting your lands. They are devolving this part to G.N.W.T. and leaving Indian Affairs with Canada. Now there is another party holding the bag. So the difference now is working with the G.N.W.T.” For the Tlicho Nation, which has a self-government agreement in place, the impact of devolution shifts the political relationship with the federal settler state to the territorial settler state. The settler colonial government remains intact, however the relationship with the settler colonial state shifts from one that both holds a Treaty relationship, and a fiduciary obligation (*R. v. Guerin*, 1984), to a settler colonial state that does not have these important legal fixtures of duty and obligation in place. The sub-nationals do, however, hold an obligation to uphold the honour of the Crown.

Abele (1990) demonstrates how the devolution process concerning the forestry sector brought the authority for management under control of the territory, but funding remained at the federal level. Thus, devolution of this sector was a shift from central to territorial state governance and this does not provide full decision-making authority to the Indigenous nations concerning their ancestral lands. For example, the aspects of decision-making that are most important to Indigenous nations that coincide with the forestry sector such as hunting and trapping remain insufficiently supported by federal practices which do not coincide with traditional land-use practices (Abele 1990, 47). Therefore, the devolution of management of

lands does not enable Indigenous self-determination of an area of service delivery, such as land management, which could be considered an integral aspect of Aboriginal rights.

A challenge for Indigenous self-government can be found in devolution. As John B. Zoe from the Tlicho Government explains, devolution can transfer land and governance to the sub-national instead of the Indigenous nation. Zoe poses the question: because Canada has direct relationship for delivery of programs and recognition of land through the *Indian Act*, how do you shift the *Indian Act* into something that gives recognition? His response is that devolution is evolving into a process where Canada provide responsibilities to the sub-national, that should have been devolved to the Indian governments that are newly developed. The Treaties and self-government agreements arrange for the formal transfer of these powers. However, the *Indian Act*, while providing a framework for governance and service delivery from the federal government to Indigenous governments, does not provide recognition of Indigenous nations as governments. The *Indian Act* is, of course, a colonial legislative tool that maintains a hierarchical relationship between the federal government and Indigenous governments, unlike the Treaties that are arranged among bilateral nation states.

Alternatively, degrees of support amongst Indigenous peoples for state devolution can be found. For example, Zoe (2014) explains that the Tlicho Nation is not opposed to territorial devolution, but new governments must respect the co-management provisions. As Graham (1990) points out, some have argued that devolution could result in the local territorial government holding responsibility for those delivery activities that many Indigenous peoples use, thus perhaps providing a more responsive or supportive governance approach to Indigenous organizational and programming needs. As Everts-Lind (2013) argues, the state is beholden to the citizens of the N.W.T., and many are Indigenous: for this reason, devolution should not be

viewed as occurring contrary to Indigenous citizens' interests. Yet, this may not necessarily translate to support of Indigenous land claims: Weller (1990) shares concerns of Indigenous groups that devolution procedures might be political strategies on behalf of the G.N.W.T. to "distract" Indigenous peoples from land claims processes and devolution does little to protect collective rights such as language (322). Today, however, with the creation of Nunavut, four comprehensive and one specific land claims complete (Tlicho, Gwich'in, Inuvialuit, Sahtu Dene and Metis, and Salt River First Nation, respectively), this argument could be made superfluous.

Others have argued that devolution has indeed had a significant supportive impact for Aboriginal self-government in the N.W.T. In practice, McArthur (2009) argues that devolution is not so much a lessening of the imperial presence of the central government in the territory, but a response to a changing political environment marked by self-government and land claims (188). While outside of the devolution discussion, Kulchyski (2005) has written of the G.N.W.T., "Government has consciously attempted to adopt Aboriginal values into its mechanisms" (101). According to the G.N.W.T.'s *Official Languages Act* (1988), as an example, there are nine official languages in the territory, seven of which are Indigenous (Inuktitut, Inuinnaqtun, Inuvialuktun, North Slavey, South Slavey, Tlicho, Chipewyan, Gwich'in, and Cree, as well as English and French) (Northwest Territories 1988b). The presence of Indigenous-specific issues and self-government in the territorial approach to devolution, is therefore, unmistakable to some. For example, then-Minister of Indian and Northern Affairs Robert Nault said in 2000: "When the discussion started, devolution meant transfer of responsibilities from the federal government to the territorial government. Today, when I say devolution I envision a relationship that recognizes linkages to the lands and resources in land claim and self-government negotiations" (McArthur 2009, 217). It will be interesting to see if the recent N.W.T. Lands and Resources Devolution

Agreement (2013) furthers or restrains this support for Aboriginal self-government through the process of general central/territory state devolution.

The N.W.T. offers a unique outlook on the Indigenous/sub-national governance network, because it demonstrates many of the experiences of a territorial sub-national in this network. The Indigenous nations of this region have made a significant impact on shaping the new directions of territorial politics, as is demonstrated by the participation in settler politics, the significant number of land claims, and the survival and entrenchment of the seven official Indigenous languages. The territorial state offers a set of interests in devolution predicated on the territory gaining province-like powers and, as will be discussed in the following sections, the Indigenous nations' efforts to formulate land claims and struggles to achieve self-determination.

Treaties, Modern Land Claims, and Natural Resource Management

Modern land claims have emerged as an important feature in contemporary Canadian politics. They have emerged because of the efforts of Indigenous peoples to push these claims onto the agendas of the settler colonial state. Ever since Europeans made contact with Turtle Island, or North America, Indigenous peoples have advocated for the continued recognition of their rights and title to land. In the North, this advocacy is robust. The occurrences of modern land claims are plentiful in the N.W.T. for a variety of reasons including the presence of a significantly large Indigenous population, in comparison to the settler population in the region,⁷¹ few Treaties and reserves, and a vast amount of natural resources. The federal imperative for land claims reconciliation in the region has not been to recognize Indigenous title to land but to ensure that Indigenous title is extinguished (Russell 2005, 176). Of course, this differs from the Indigenous peoples' attempts to have their title and rights to their ancestral lands acknowledged. The process of agreeing to the tenets of a land claims agreement is not a simple task. Kulchyski (2005) discusses how the political pressures that Indigenous groups face include unmet

expectations and the length of time taken for negotiations. This reality has led to some groups settling for agreements that are below their expectations and others not yet having signed accords after years and decades of negotiating.

Modern land claims are preceded by the Treaty process. One significant criticism of settler Canada by Indigenous peoples has been that of the Treaty-making process and its outcomes, many of which have not yet been reconciled. The issues that have arisen from the colonial procedures regarding Treaty-making is a disconnect between what was expected from a Treaty and what it came to be. This is due largely to the *Indian Act*, which came to be superimposed onto the Treaty relationship.

The history of settler colonialism surrounding the appropriation of land is evident in past Treaty-making processes and this frames modern land claims processes. This is because many of the issues that arose in the treaty-making process, such as misaligned interpretations of the spirit and intent of the Treaties, contributes to tensions in the modern Treaty process. The N.W.T. region is partially covered by two Treaties, Treaties 8 (1899) and 11 (1921). The settler state has been critical on Indigenous oral tradition, including how oral tradition relates to the Treaties, and has criticized and rebuked oral tradition as being less legitimate, and the result is that the oral Treaties of the Indigenous nations have not been reflected in modern Treaty alliances. Instead, the written government versions of the Treaties are reflected in these alliances and negotiations. The result is unmet promises and expectations.⁷² And yet, we know there is a difference between the government's written and Indigenous oral accounts of the Treaties. While these differences are well documented by historians, we need look no further than the key appointed Treaty-maker of the "numbered" Treaties, Alexander Morris who wrote explicitly on revisions to prairie-based Treaties 1 and 2, that were made orally and not captured in the written documents:

When treaties, Numbers One and Two, were made, certain verbal promises were unfortunately made to the Indians, which were not included in the written text of the treaties, nor recognized or referred to, when these treaties were ratified by Privy Council. This, naturally, led to misunderstanding with the Indians, and to widespread dissatisfaction among them. (Morris 1880:1991, 126).

The challenge that the external techniques have created is that they cast a perception of illegitimacy on traditions of orality and these oral accounts of the Treaties. Thus, the promises made between the state and Indigenous nations have not been upheld. Chamberlin (1997) argues, when only the written texts are relied upon, they provide a one-sided perspective of the Treaties and the Treaty processes, and can lead to misrepresentations (16). Indigenous peoples' understandings of the Treaties demonstrate a recognition of Indigenous rights to land, the continuing use of this land, and a continuation of their self-determination, not a cessation of Indigenous title (Ray 2000, 195 -202). The lack of availability and recognition of oral accounts and one-sided direction of Treaty relations has limited Indigenous nations' benefit from the Treaties and greatly enhanced that of the state. Note the efforts of Treaty organizations from across all of Canada to capture existing oral accounts from Elders to remedy this one-sided interpretation by providing a fuller account as understood by the Indigenous negotiating parties and, similarly, the Supreme Court of Canada has emphasized valuing the oral understandings of the Treaties in cases such as *Sioui (R. v. Sioui, 1990)*.

This one-sided understanding of the Treaties is a limitation premised on settler or Eurocentric perceptions of Indigenous nations that view oral tradition as less worthy than that of the written record. And yet Helm (2000) demonstrates how the N.W.T.-based Dogrib Nation's oral tradition can be used to enhance written records and archival sources on various aspects of

colonialism in the N.W.T., such as trade, missionaries, and the government. Helm writes, “in pulling together strands of documentary and oral historical evidence—with much needed evidence missing—in order to arrive at the best, that is, most justifiable, conclusions about the course of events, actions, and circumstances throughout the contact era” (269). Also on treaty negotiations in the N.W.T., Asch (2013) has written, “hereby indicating clearly that oral understandings better reflect the terms of this Canadian treaty (and by implication others of the times) than written accounts do” (451). Thus, oral accounts of Treaties, in the N.W.T. and elsewhere, are tantamount to the fullest, most accurate description of Treaty obligation, and this is not always acknowledged or recognized by settler states.

This is problematic because oral traditions often provide very robust and accurate accounts of colonial interactions between settler and Indigenous populations, and in fact written documents have demonstrated inherent and severe limitations. For example, Eurocentric assumptions about orality surface when oral tradition is viewed by colonial settlers as illiterate, non-literate, or preliterate (Chamberlin 1997, 8). And yet, oral tradition is none of these things. As Derrida (1992) argues, there is no such thing as a society without writing—all societies, therefore, have procedures to catalogue or document their histories and knowledge systems. Take for example Hulan and Eigenbrod’s (2008) description of how oral tradition is a process of accurate record keeping in Indigenous cultures. They write, “Oral traditions are distinct ways of knowing and the means by which knowledge is reproduced, preserved and conveyed from generation to generation” (7). Wilson (2005) argues that oral narratives are living entities that connect past to present, “Consequently, ours are not merely interesting stories or simple dissemination of historical facts. They are, more important, transmissions of culture upon which our survival as a people depends” (36). Here Wilson demonstrates the benefit of oral record

keeping when compared to that of the written document; oral records provide a more nuanced record of events. Further drawbacks of written versions include issues of translation. Benjamin (2007) writes, “A real translation is transparent; it does not cover the original, does not block its light, but allows the pure language, as though reinforced by its own medium, to shine upon the original all the more fully” (79). Therefore, it is never enough to know two languages to provide an adequate translation. One must know the culture at the time of writing, the political inclinations of the writer, and so on. The written translation is never created in a vacuum free of the impact of the original—all who have contributed to analysis of the original have an impact upon the translator’s job. One must understand the philosophy of the original to properly work with any written document. In a sense, it is an art to produce a written translation, and this can be misunderstood or misconstrued by these documents.⁷³

The question arises as to how the G.N.W.T.’s approach to modern policy-making regarding Indigenous land relates to the historic colonial Treaty-making practices that have both relied on external techniques of legitimacy and ignored Indigenous nations’ input due to Eurocentric bias against oral traditions. As has been discussed, there are few Treaties in the north, and thus, a robust land claims process is underway. Specifically, these existing Treaties (8 and 11) were created in haste, with several adhesions instead of several treaties, and they are not comprehensive (Fumoleau 1973, 100, 211). Furthermore, Treaty 8 did not establish reserves but land in severalty (or a small containment of land, much like a reserve, for each family), because the Indigenous nations in this territory had different social organization than those Indigenous nations in the south (Fumoleau 1973, 61-2). As well, it is notable that Treaty 11, which provides more expansive attention to the Métis than the various First Nations groups, was approached by

Indigenous signatories with “suspicion, apprehension, and reluctance”: this Treaty was imposed on these Nations—the people had no choice but to take it (Fumoleau 1973, 211).

Zoe explains that Treaty 11 establishes a relationship between Indigenous governments and the federal government for lands and service delivery provision. Zoe (2014) says, “The only relationship with the federal government was through the *Indian Act*, which recognized us as an entity; now with self-government the *Indian Act* is not bound to us. What still applies is the term being First Nations, because we have education and health benefits. Treaty 11 still applies in terms of annual payments and provisions for supplying teachers. Treaty 11 is a bundle of rights transferred over to the territorial government.” Thus, this “bundle of rights” for education and healthcare is transferred in Zoe’s view from the federal to territorial government. The relationship between the Indigenous nations and territorial government continues a colonizer/colonized model, but the Treaty foundation does enable Treaty rights to the Tlicho nation.

These shortcomings in the settler state Treaty interpretation have contributed to the modern land claims process and yet the one-sided interpretations of the Treaties remain as there has been no reconciliation of oral tradition in the state’s approach to land issues. There is a sense that modern thinking is different and improved than past ways of thinking. As Derrida (1992), states: “Current economic and juridical history is largely mistaken in this matter. Imbued with modern ideas, it forms *a priori* ideas of development, and follows a so-called necessary logic. All in all, it remains in old traditions” (44). Thus, it is assumed that modern economic and political activity is not connected to the past, but it is actually inherently steeped in it. The G.N.W.T.’s budgetary discussion of settling land negotiations demonstrates a practice that parallels the past Treaty-making processes of imperial and settler society, and this suggests these

practices “remain in old traditions” which could reproduce these externalized techniques of legitimacy which can result in neo-colonialism.

A snapshot of the current state of land claims in the N.W.T. demonstrates two key factors. The first factor is that land claims are predominantly a federal/Indigenous nation process. As Abele (1990) explains, the territorial government has not in the past been a full participant in land claims negotiations (46). The land claim process is based on a number of federal policy documents that assist in defining the procedure of the claim, evidencing federal-Indigenous relations. These documents include the Inherent Right Policy (1995), Comprehensive Land Claims Policy (1986), and Gathering Strength (1997) (Ilbacher-Fox and Mills 2009, 237, see Canada Indian and Northern Affairs Canada 1995, Canada Indian and Northern Affairs Canada 1986, Canada Indian and Northern Affairs Canada 1997). During the negotiations of various land claims, the G.N.W.T was often involved in the discussion and in coordination with the federal government, but the territorial government did not behave as a negotiator (Northwest Territories. Aboriginal Affairs and Intergovernmental Relations 2012b). The role of the G.N.W.T. differed with the Nunavut Land Claims Agreement, which was a trilaterally negotiated agreement.

The second factor is that each major Indigenous nation is involved in a significant land claims negotiation. The Nunavut Land Claims Agreement of 1999 is likely the most well-known land claims agreement as it resulted in the formation of the new territory of Nunavut. Other land claim agreements, however, have also been reached with the Inuvialuit (1984), Gwich'in (1992), and Sahtu (1993), whereas the Tlicho (2003) have reached both a land claim and self-government agreement (Ilbacher-Fox and Mills 2009, 240). There is also one Treaty Land Entitlement (TLE) completed with the Salt River First Nations Treaty Settlement (2002) (Canada Minister of Indian Affairs and Northern Development 2001). This is important because of how

the recent devolution process in the N.W.T. impacts these agreements. These modern land claims are influenced by the Paulette (1973) case which determined that while Treaties 8 and 11 purportedly surrendered lands to the government, it was not understood by Dene at the time as an agreement of extinguishment of title (Dickerson 1992, 148). The Indigenous nations that are signatory to these Treaties, therefore, are in an unusual position that they are negotiating comprehensive land claims and not specific land claims as is usual for a Treaty holding nation (Kulchyski 2005, 82). How will devolution bring the territorial government into these agreements in the N.W.T.?

While the federal government has taken the lead on these negotiations, the G.N.W.T. does have a territorial land claim policy entitled “Aboriginal Land Claims,” released in 1998, and this policy states that it will “represent the N.W.T.’s public interest in Aboriginal land claim negotiations” (Northwest Territories 1988a, 1). In addition to stating principles in line with this mandate, the policy also states that land claims must be finalized for the territory to achieve province-hood. It reads “The resolution of Aboriginal land claims should enhance the ability of the Government of the Northwest Territories to attain further province-like jurisdiction from the federal government” (Northwest Territories 1988a, 1). It is clear that the interests of the G.N.W.T. are to increase power through devolution and finalizing land claims is part of this process. Here the territorial government is encroaching in Indigenous governance networks to ensure its own interests are protected and not eroded in Aboriginal self-government and modern land claim procedures.

There are a greater number of comprehensive land claims in the N.W.T. than most of the other Canadian sub-nationals. Much of this is due to the fact that Treaties in much of the country were settled (but not in the N.W.T.) and the relatively large size of the Indigenous population in

the region and their relentless advocacy for self-determination and reclaiming ancestral lands. These negotiations have been predominantly federal government and Indigenous nation negotiations, with the exception of the creation of Nunavut. The G.N.W.T. has had a territorial-level document outlining policy for land claims since 1998 and the *N.W.T. Lands and Resources Devolution Agreement* (2013) will certainly increase or significantly change the role of the G.N.W.T. in these negotiations as the federal government devolves land and resources to the territorial government. *N.W.T. Lands and Resources Devolution Agreement* (2013) states, for example, in section 2.4 “From and after the Transfer date, the GNWT shall be responsible for those responsibilities under Settlement Agreements set out in Schedule 2” making post-agreement jurisdiction over specified areas a clear responsibility for the G.N.W.T. (Canada Indian and Northern Development 2013).

The G.N.W.T. publications reveal an interesting discussion of Indigenous lands. As discussed, there are a number of land claims in N.W.T.. In the 2005 G.N.W.T. Strategic Plan, it states the territorial government’s intent to deliver “successful negotiation and implementation of Aboriginal land” (Northwest Territories 2005a, 21). What is interesting about this statement is that it does not disclose how success is defined or by whose standards. Historically, the interpretations of the Treaties have been misaligned between the leaders of Indigenous nations and the Canadian state. The question arises as to how this modern policy-making regarding Indigenous land relates to the historic colonial Treaty-making practices. Of further interest is that the same declaration of “successful negotiation” occurs in the Business Plans from the years 2006-09, 2005-08, 2002-05, but not in those plans from the years of 2007-10, 2003-06, 2001-04 or 2000-03 (Northwest Territories 2007; Northwest Territories 2006; Northwest Territories 2005b; Northwest Territories 2003; Northwest Territories 2002; Northwest Territories 2001a;

Northwest Territories 2000). Does this demonstrate an inconsistent practice in modern policy and territorial state activity surrounding Indigenous lands?

This state-level interpretation further exemplifies a purpose-based use of land, which does not include the concept of the Indigenous peoples' inherent right to the land. For an Indigenous nation, however, the inherent right to land stems not from purpose of use, but from the responsibility to the land entrusted by the Creator that in-turn assumes a right to the land based on continued care and guardianship of the land. This has been ignored by the colonial settler state, and this shift maintains the state's dismissal of this inherent right to occupancy. As John B. Zoe (2014) states "The mentality of the territorial government did not change in terms of process and development and consultation. They still do what they were doing before recognition, even though new agreements might be put in place, but the policy of shifting had not happened, so the mentality is to continue to exist with the same consultation as before." Zoe argues that this shift is called recognition but real recognition has not surfaced. It is business as usual. Zoe goes on to say, "The only way to affect change is through legislation and updating laws. If you look at the land claim coalition website, there are 10 agreements but no method of implementation, so the coalition must prompt government to implement. The only way for recognition is through the courts; this is why there are so many cases. The challenge is to shift this. Courts and litigation are unavoidable to give voice to a new way." Thus, there is an official state recognition of self-government, but this has not translated into changes in Indigenous-state recognition of lands which still rely on past techniques for recognition and implementation.

The significant, contributing factors for land claims in the N.W.T. are based on three features: the presence of a large Indigenous population, the absence of First Nation reserves, and the economic significance of the natural resources. The first feature is due to the Indigenous

populations forming a majority in many areas of the North. Land claims and self-governance are connected, and thus land claims are integral to Indigenous sovereignty movements. As Alfred (2005) writes, “the return of unceded lands, reforms to state constitutions to reflect the principle of Indigenous nationhood and to bring into effect a nation-to-nation relationship between Indigenous peoples and Settler society, and restitution” (268). These lands are, of course, those of Indigenous peoples that colonial settlement has attempted to control. As Zoe (2014) states, “What we are looking to now is jurisdiction over lands that we are entitled to.” The Indigenous populations of the territories are relatively larger than those of the provinces and unlike the southern provinces, the Indigenous populations of the territory are often the majority, and this high-population demographic has made the demand for land claims recognition a reality in the territory (Smith 2004, 79- 80).

A second feature for land claims reconciliation in the N.W.T. concerns the reserves. There are only two reserves in the N.W.T. in Salt River and Hay River, and while Treaty 11 does stipulate reserve-making, Indigenous peoples were not then interested in developing reserves given their lack of success in other parts of Canada (Kulchyski 2005). Everts-Lind (2013) has echoed this sentiment that reserves are not common in the N.W.T. because the Indigenous nations have largely chosen not to pursue this form of settlement. This general lack of reserves is a significant reason for the land claims negotiations that began in the 1970s (Kulchyski 2005, 30-31). According to Everts-Lind (2013), the lack of reserves in the N.W.T. has allowed Indigenous leadership to enjoy more independence than they would have under a reserve-model. Everts-Lind further argues that this system has done a better job of protecting Indigenous rights due to restrictions that reserves bring, such as geographical and economic isolation. As well, the Indigenous nations are free of the jurisdictional conflict of on-reserve versus off-reserve that

exists in the southern provinces when the province and Band Council struggle with effective delivery of programs such as education and healthcare to Indigenous citizens (Everts-Lind 2013). Therefore, the fact that the Territory does not socially organize along the lines of reserve communities could be argued as a benefit to the Indigenous populations in the N.W.T and has also been a factor for modern land reconciliation.

A third feature for the land claims process in the N.W.T. concerns the plentiful natural resources of the region. Natural resources are sought by the public, governments, and industry of southern Canada, but Indigenous peoples have both ancestral and cultural ties and Indigenous title to the lands on which these resources are found. This has caused problems as these parties naturally have differing interests in ownership and use of these same lands.

The N.W.T. is abundant in natural resources and has an economy that is heavily based on natural resource extraction and resource use. The impact of this economic mode on the northern Indigenous/state governance network is significant: “Indigenous communities throughout Northern Canada view the impacts by large-scale resource development projects to be so significant that they largely outweigh the economic benefits” (Simpson, Storm, and Sullivan 2007, 53). This is similar to B.C.’s economy, however, as a territorial government the G.N.W.T. does not have the explicit jurisdiction (or tax capability) that B.C. has had since it entered confederation and that Manitoba has had since the assent of the *Natural Resource Transfer Act* in 1930.

The Mackenzie Pipeline is likely the most well-known mega-project of the north and it serves as a good example of the politics of natural resources in the north. Plans for the Mackenzie Valley Pipeline project began as early as the 1960s, and today it remains a politically divisive mega-project proposal (Abele 2009, 28). The opinion of government and industry has

been that Canadian economy needs the oil and gas and that the north needs the jobs that the pipeline construction and maintenance can provide (Berger 1977). Indigenous groups which live in the regions of the Mackenzie River and Beaufort Sea, including the Dene, Métis, and Inuvialuit nations, have long protested the Mackenzie Valley Pipeline because the proposed economic interests have been advanced at the cost of subsistence hunting and fishing, which are activities that promote and protect Indigenous rights (Berger 1977, 5). This debate is based on a divide that sets the southern desire for resource use and a promise of northern jobs against the Indigenous nations' perspective of protecting and honouring their ancestral lands, or from a settler perspective, their Indigenous title (Watkins 1977). Today, the debate is as strong as ever.

The debate has, however, changed. Clearly, there is still a consumer need for these resources as well as jobs, but the dialogue has expanded to include needs and expectations beyond these two platforms. Historically, as Ginsberg (1980) has written, Indigenous peoples in northern economies define development as “more jobs, new roads, good houses, and other aspects of infrastructure” (6). Yet, this definition ignores many Indigenous peoples' perspectives of development that might define it as destruction of lands, traditional knowledge systems, Indigenous rights, and self-determination. Today, the mainstream debates surrounding mega-projects tend to include development as well as a dialogue on empowerment for Indigenous populations that live on these lands. In the past, the resource industry and welfare state have had negative impacts on northern economies; as non-renewable resources make for unsustainable economies. The economic benefits of the resource industry have in the past served outside interests, but today local communities' demands for change are seeing a real shift in corporate response to meet these demands (Southcott and Irlbacher-Fox 2009, 11-12). Dacks, Coates, and O'Neil (1988) have discussed a similar shift in these projects and argue that more control over

decision-making is occurring; however, they caution that “empowerment which does occur at the local level will remain fragile in the sense that it will always be vulnerable to forces and events determined outside the community over which the community exercises very little or no power” (7-8). And Kulchyski and Berneur (2014) argue that in Canada’s north, modern land claims encourage Indigenous peoples to rely on capitalist resource development practices instead of traditional food harvesting practices to be successful. Thus, for these two sets of authors, the same colonial interest is at play, only now a few Indigenous leaders and institutions have bought into the dialogue. Still, in a survey facilitated by Southcott and Irlbacher-Fox (2009) amongst corporations involved in the northern resource industry, Indigenous populations and organizations were listed as a driver for future change (19).

Land claims are important to the Indigenous peoples in the N.W.T. because they enable these nations to pursue economic and political self-determination. Braden (2009) argues that these modern land claims have “fundamentally changed the economic and political dynamics” of the N.W.T. (250). Thus, land claims provide Indigenous nations with tools for economic activity and political pursuit, which affect the wider territory. As well, they restore (in part) and provide state recognition to Indigenous nations’ inherent rights to their ancestral lands. Yet, the settler state rarely recognizes this as a point for legislation or law-making. As Abele (2011) writes, “Modern treaties (comprehensive claims agreements) affirm their land and other rights and provide for transfer of capital to beneficiary organizations, providing them with powerful collectively managed economic leverage” (224). While this title has historically been ignored, undermined, and restricted in Canadian politics, these land claims in part restore it. A difficulty is that there are two sets of competing interests. The federal government and the G.N.W.T. wish

to extinguish title, whereas Indigenous nations wish to preserve and restore title of ancestral lands. One is economically focused, the other is culturally- and rights-based.

In Canada, there exists a settler discourse—a place-story, to once again use Buss's concept—that stipulates that economic success hinges on natural resource extraction and that this benefits all Canadians equally; however, the impact is actually quite inequitable. For example, the government and industry generate narratives claiming that without oil and gas mega-projects there will be economic setbacks (Berger 1977, 5). This is described as a narrative of the “common good”; however, the problem with this contemporary narrative is that it mimics past narratives of colonialism that circulated in western Canada during the late 19th century and described the exploitation of some for the benefit of many (Abele 2011, 228). As Simpson, Storm, and Sullivan (2007) explain, “Thus, governments, policy makers and the general public for that matter, see the modern resources sector of Canada's Northern economy as being somehow superior to the subsistence/traditional economy still being practiced by Indigenous communities in the North” (53). We see here that the economy in the north is described by settler colonial narrative as benefiting all, when in fact it does not benefit everyone and causes clear harm to many Indigenous communities.

A criticism of this narrative of the “common good” is that it enables the state and industry to override Indigenous interest in their ancestral lands. For example, as Borrows (2010) has described, “Couched in the language of agency, the liberty and security of the majority has been held out as a reason to override minority rights. Dominance through such force was often a means and excuse to end or stifle a weaker nation's development, under the cloak of principle and legitimacy” (46). And so this concept of the “common good” is more valued or trumps Indigenous rights (Waldram 1988, 6). Adams (1975) further discusses how this narrative impacts

Indigenous peoples: “An effective method of distorting the social relationships between white and native people is through the myth that Indians need to be protected. By persuading whites to believe this illusion, colonizing governments are able to get away with suppressive and abusive controls of natives” (171). This is not to say that natural resource extraction economics has not provided any economic benefit to Indigenous peoples. Slowey (2008) and others have demonstrated real benefit to many northern communities through contemporary state/Indigenous impact and benefit agreements stating, “Similarly, federal policy that once aimed at assimilation is now directed at removing restrictions and developing First Nations economic independence and political freedom” (18). Instead, this is a criticism of the narrative of the “common good” of these economics that overrides Indigenous rights and use of their ancestral lands. This narrative is often based on a premise of common good that does truly benefit all Canadians. As Puxley (1977) writes on this Canadian narrative, “At the level of the individual, the essence of the colonial relationship may be understood in those situations where one individual is forced to relate to another on terms unilaterally defined by the other” (108). This narrative can be seen as an extension of colonialism, based on taking advantage of and sustaining inequity, and results in neo-colonial inequities.

This view of the narrative of the “common good” can be traced through an examination of G.N.W.T. annual publications which reveal some points of interest concerning the economy of natural resource extraction and use, and industrial mega-projects. For example, the Socio-Economic Impact Fund is a program established by the federal government and implemented with sponsorship by the G.N.W.T. in 2006 that builds liaisons between Indigenous organizations and the federal government. The 2005 G.N.W.T. Strategic Plan describes the objectives of this fund: “(to) Expand partnerships and optimize federal contributions to economic and social

development” (Northwest Territories 2005a, 25). This specifically concerns mining, oil and gas, and the Aboriginal Skills and Employment Program, which provides training for northern industrial projects. The 2005 Strategic Plan goes on to discuss how this program will both provide northerners with educational opportunities and work with the federal government to secure investments for and create partnerships with Indigenous organizations and industry (Northwest Territories 2005a). While this is specific to the 2005 Strategic Plan, these same economic strategies can be traced throughout most of the Business Plans from the year 2000 to 2010 (Northwest Territories 2007; Northwest Territories 2006; Northwest Territories 2005a; Northwest Territories 2005b; Northwest Territories 2003; Northwest Territories 2002; Northwest Territories 2001a; Northwest Territories 2000). It is therefore a pervasive policy and planning mandate.

How do these policies impact the N.W.T.’s Indigenous/state governance network? Consider the economic impact of other industrial mega-projects in the N.W.T. As discussed, colonialism’s impact on the northern economy does not have the longevity of experience as it does elsewhere in North America, because the influences of colonialism reached the north later. Trade goods, however, reached the north long before other colonial political and economic presences. These goods impacted the northern economy by shifting it from a traditional subsistence economy to a trade-based economy, and since the 1920s it has been a blend of subsistence and trade (Brody 1975, 131). The impact has been the impoverishment of the traditional economy and people (Brody 1975, 22). In fact, according to Kulchyski (2005), “In the north it is possible to see, to visually apprehend, the imposition of one way of life on another” (4-5). The colonial presence in the north is clear. As well, the issues that arise from western methods of economic activity have forced a transition from traditional Indigenous approaches to

western market activity (Asch 1997). This can be traced throughout the economic practices of Indigenous peoples in the N.W.T. As explained by Ray (1996), initial trade schedules among European newcomers and Indigenous peoples matched Indigenous traditional seasonal activities, and thus were not disruptive (118). This changed over time as market conditions brought cycles of boom and bust to the fur trade. For example, from the 1890s to WWII fur trapping experienced an economic rise and this trade became more significant than that of earlier whaling expeditions along coastal arctic (Ray 1996, 268). Thus, while traditional economies were still being practiced, there was a change in how they were implemented.

One of the reasons this shift to a market economy is so vivid is because the modern economy of Canada is heavily dominated by industrial mega-projects (Simpson, Storm, and Sullivan 2007, 53) and the N.W.T. is no exception. The modern economy in the territory, as a result of such projects, is as Falvo (2011) describes, one of “extremes.” For example, the Gross Domestic Product (GDP) is higher in N.W.T. than anywhere else in Canada (Feehan 2009, 350). This economy is predominantly based on minerals, oil and gas, and diamond mining (Abele, 2009; Feehan, 2009). Yet, despite this high GDP, the territory spends 25% more than average on housing and still has some of the highest rates of overcrowding in the nation (Falvo 2011, 247). This illustrates that the wealth of natural resources that is experienced at the territorial level does not translate into individual or community-level wealth. This is because natural resource corporations offer limited, unsustainable economic opportunities (Asch 1977, 60). Rees (1988) has described these outside corporate activities in northern economies as producing unskilled/unspecialized local jobs, resulting in finances leaking out of the community, weakened sustainable diversification, and a significant informal economy, which can make up as much as 50% of the economy (64-65). The benefit of the external resource industry to the local

communities is limited. Keith and Neufeld (1988) argue that what is fundamental to successful local economies is land, access to resources, and “self-organizing and self-regulating systems for resources planning and management” (98), such as the ‘significant informal economy’ referred to above. These are the very features for success that the federal government’s recent McCrank Report (2008) recommends doing away with.

The *McCrank Report* (2008) is a report to the federal government concerning the many criticisms facing northern land claim regulatory bodies that makes several recommendations based around the recentralization of land claims procedures (Canada Public Works and Government Services Canada 2008). The *McCrank Report* is a result of INAC’s *Northern Regulatory Improvement Initiative*, which was struck in 2007. The *McCrank Report* was released the following year with recommendations on restructuring certain decentralized regulatory bodies through an amalgamation into a single board. The report states that this work was undertaken in consultation with communities and the need to reduce workload burden on behalf of the communities was identified as a principle requirement for betterment. While these plans for amalgamation have not been implemented, the concern amongst communities is that this amalgamation would result in less flexible and responsive regulatory bodies with uniform and static policies which will present new obstacles and exasperate existing obstacles in the land claims process (Zoe 2014).

The 1970’s saw renewed southern interest in northern resources (McArthur 2009, 193), but as resources are expensive to harvest, the federal government provided subsidies by way of tax incentive and infrastructure support (Abele 2009, 41). These public expenditures and subsidies have been important to northern economic development (Abele 2009, 47). For some, the southern colonial presence in the north raised the standard of living, but others were forced

into dependency as livelihood was now based on external economic conditions. Asch writes, “In short, in today's circumstances wage labour is often less of a solution than it is a problem—despite what the industry-sponsored studies say” (Asch 1977, 57). It could, therefore, be argued that this shift changes traditional social values and concentrates wealth in the hands of those not willing or interested in using it in socially responsible ways.

Today, however, there is evidence that attitudes towards northern development are changing, albeit the long-range outcomes these attitude changes are yet to be seen. Returning to the example of the Mackenzie Pipeline, this mega-project demonstrates the inclusion of various roles Indigenous nations are assuming. The Aboriginal Pipeline Group (APG), established in 2001, has a role as six key producer groups for the Pipeline (also including Imperial Oil Resources Ventures Limited, ConocoPhillips Canada (North) Limited, Shell Canada Limited, ExxonMobil Canada Properties, and contractors in general). There also exists a Mackenzie Valley Aboriginal Pipeline Limited Partnership (MVAPLP) and Mackenzie Valley Aboriginal Pipeline Corporation (MVAPC), which represent the financial interests of Indigenous nations in the region. Today, there is evidence of newer types of contracts between corporations and Aboriginal peoples, because, as Southcott and Irlbacher-Fox (2009) point out: around the world, northerly communities are gaining more control over their local economies (6). The north might still be reliant on the resource industry, but for these authors the future drivers of development are changing. In addition to those global market drivers that have long shaped the industry, Indigenous governments are now listed as a major driver of future industrial development (19). I would argue that any attitude change requires time to evaluate outcome as the settler colonial “common good” narrative forms a common thread through the reviewed G.N.W.T. publications, as made clear by the 2005 G.N.W.T. Strategic Plan’s goal for “economic and social

development” (Northwest Territories 2005a, 25) and these publications and websites of these bodies. And yet, Kulchyski and Berneur (2014) argue that modern land claim settlements in Denedeh (N.W.T.) and Nunavut, by extinguishing Aboriginal title, can turn Indigenous political organizations into capital holding corporations which are structurally dependent on resource development projects to be successful.

There are a number of challenges that have arisen in the land claim process in the N.W.T. These claims must navigate both the complex networks of institutional organizations and federal policies and legislation. The institutional organization of land claims is complex due to the number of independent land claims organizations that work in the domain of land claims. In addition, the matter of jurisdiction has not been made clear (Abele 2011, 231) and the process is slowed by this bureaucracy. According to the Auditor General of Canada’s 2003 Report the government is more committed to fulfilling procedural objectives than pursuing outcomes and this slows the process. This report reads: “relational friction and specific disputes over implementation arise from government efforts to meet legal obligations rather than taking a results-oriented approach in assessing implementation efforts” (Office of the Auditor General of Canada 2004, 234). Braden (2009) has written that a weakness is the lack of a federal plan for modern land claims and that the process of land claims is in need of reorganization (259). The federal government sought to address this with the *McCrank Report* (2008); however, this has since been abandoned, but it is worth pointing out that Indigenous nations were concerned that the report’s recommendations to amalgamate land and water regulators into one body would possibly limit their agency.

The policy direction set by the federal government is another challenge for the land claim process in the N.W.T. Abele (2009) explains that “In contrast to the new constitutional principles

that shape northern governing arrangements, the principles that underlie the federal approach to the development of northern resources are little changed from the National Policy days” (33). This means that as the G.N.W.T. strives for and gains devolution, many changes occur for the sub-national, including constitutional shifts; yet, the overriding policy has not changed. Abele continues to explain that the federal government’s policy is driven by a desire for economic development. Further to this, the *Indian Act* framework shapes relations between the federal government and Indigenous nations, which inherently perpetuates a dominant-subordinate position (Ilbacher-Fox and Mills 2009, 252-253). So, while the G.N.W.T. may express commitment, it continues to work within this federally-imposed set of policies. As well, the Indigenous nation also continues to work from the confines of a colonial policy perspective.

This chapter began with a discussion that framed the politics of the North as meeting colonialism much later than the southern regions of Canada. This is significant because those actions of early settler colonial contact, as opposed to contemporary settler colonialism and neo-colonialism, can be traced through settler state actions in many residents’ living memory. The role of the territorial government in the Indigenous/sub-national governance network is also a more recent phenomenon, and one that Indigenous nations struggled to evade through the establishment of self-governance. While the dynamics of social service delivery have undergone a shift of devolution across Canada, the development of this shift in the N.W.T. demonstrates the particular tensions of the territory’s political culture. The most basic distinguishing features of the territory, beyond its status as a territorial government, is its large land mass and small population which makes government relatively expensive. While the territory is undoubtedly resource rich, this has not equated into wealth for the general population. Feehan (2009) attributes this in part to the existing federal/territorial fiscal arrangement, which does not allow

the territory to generate as much revenue as the provinces, and thus the territories are limited in their public spending (361). Of course, the recent finalization of the devolution accord with the federal government, which transferred land authority and decision making to the territory, will have considerable impact on the G.N.W.T.'s public purse. While this particular discussion of jurisdiction will focus on land negotiations and decision making, the territorial negotiations of Indigenous self-determination, of Aboriginal self-government, will be considered next.

Aboriginal Self-government and the G.N.W.T

In many ways, self-government is well on its way to entrenchment in the N.W.T. Consider the rate of self-government agreements since 1975, when the N.W.T.'s Dene Nation first demanded Aboriginal self-government: at the time the demand was radical, yet by the 1980s it was standard language and negotiation in Canada (Kulchyski 2005, 86). As Zoe describes of Indigenous self-government in the N.W.T., "It is about the recognition of jurisdictions that did not exist before. Before it was just provincial and federal. Now we are creating a recognition through the Constitution of 1982 for claims and rights. This means working out agreements for programs available for all Canadian on these lands" (2014). There currently exist a vast number and variety of self-government agreements being negotiated in the N.W.T. There are four settled land claim agreements (Gwich'in, Inuvialuit, Sahtu and Tli'cho) that include water, resources, (mineral, oil, and gas), and some devolution of responsibilities from the central to Indigenous government.

There are also a number of self-government agreements that are currently in the works with two that are complete, that of the *Tli'cho Land Claims and Self Government Agreement* (2003) and *Déline Final Self-Government Agreement Act* (2015). Inuvialuit and Gwich'in began self-government negotiations in 1996, and these negotiations include the communities of Paulatuk, Aklavik, Sachs Harbour, Ulukhaktok, Inuvik, and Tuktoyaktuk (Inuvik and Aklavik

are both Inuvialuit and Gwich'in home communities) (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2012b, 3). In 2003, the two nations signed a self-government Agreement-In-Principle (AIP). The Gwich'in broke off from these negotiations in 2005, yet the Inuvialuit continued to proceed with negotiations with the G.N.W.T. and Canadian government. As well, the Gwich'in and Métis Gwich'in continue their self-government negotiations with the G.N.W.T. and Canadian government. The communities involved include Inuvik, Aklavik, Fort McPherson, and Tsiigehtchic. They are currently negotiating self-government that was included as a future initiative in the 1992 Gwich'in Comprehensive Land Claim Agreement and they are working towards an A-I-P (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2012b, 4).

In contrast to these wider regional agreement negotiations, each of the Sahtu communities are negotiating self-government agreements as a community-based agreement. These First Nation communities include Colville Lake, Fort Good Hope, Norman Wells, and Tulit'a (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2012b, 5). These negotiations are based on the commitment to negotiate self-government rights set out in the *Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993)*.

The following negotiations are not based on a commitment in a land claim agreement and negotiations are being made tri-laterally amongst the Indigenous nations, the G.N.W.T., and the federal government. The Dehcho First Nations are negotiating an agreement amongst the G.N.W.T., Canadian Government, and the following communities: Deh Gah Got'ie Dene Council, Fort Providence Métis Nation, Ká á gee Tu First Nation, Sambaa K'e Dene Band, Liidlii Kue First Nation, Jean Marie River First Nation, Nahanni Butte Dene Band, West Point First Nation, Pehdzeh Ki First Nation, and the Dehcho Métis Nation. The Acho Dene Koe First

Nation is negotiating a self-government agreement in conjunction with the Fort Liard Métis Nation. The Akaitcho Dene First Nations includes the communities of Dettah Yellowknives Dene First Nations, N'dilo Yellowknives Dene First Nations, Tutselk'e Dene First Nation, and Deninu Kue First Nation. Finally, the Northwest Territory Métis Nation is negotiating a land and resources agreement (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2012b, 5).

This list of self-government negotiations is long and the variety of agreements and negotiations reflects community-specificity; however, they are not final, with the exception of *Tlicho Land Claims and Self-government Agreement* (2003) and *Déline Final Self-Government Agreement Act* (2015), and one wonders what obstacles the recent *N.W.T. Lands and Resources Devolution Agreement* (2014) may create for these Indigenous nations that continue to negotiate with the federal government as nation-to-nation bodies. If land, the cornerstone to Indigenous self-determination, is transferred to the control of the territorial government, how will the federal government and Indigenous nations continue to develop Aboriginal self-governance? Will the territorial government be brought in, possibly altering the nation-to-nation negotiations?

The federal government's media release on the *N.W.T. Lands and Resources Devolution Agreement* (2014) does state that devolution will not impede Aboriginal rights. It reads "The Devolution Agreement contains specific provisions designed to ensure that devolution does not negatively affect Aboriginal rights or ongoing land claim negotiations in the Northwest Territories" (Canada 2013). Here, the federal government states its assurance that Aboriginal rights will not be negatively impacted by devolution, yet there is no mention of continued or eroded nation-to-nation negotiations. The document *Canada's Northern Strategy* (2009), however, does offer some insight as to whether the role of land as the cornerstone of self-

governance could be diminished. The strategy describes Inuit Nations as occupying the north. This perhaps demonstrates how the settler state understands the Indigenous peoples connections to their ancestral lands: instead of an inherent right and responsibility, it is viewed as an occupation (Canada 2009, 3). While prior occupancy is one of the bases for Aboriginal rights in Canadian law, many Indigenous peoples discuss their rights as an inherent right to self-determination that is not derived from the Canadian state, but that which has always and will always exist outside of the Canadian state.

Contributing to the complexity of Aboriginal self-government in the N.W.T. is the non-Indigenous settler society which holds varied perspectives on Aboriginal self-government. Sabin (2014) demonstrates the complexity of settler society in the north by describing features of the non-Indigenous settler population in the Yukon that have both brought elements of the colonial order to the territory, while also contesting this same colonial order. A. Henderson (2007) notes that the non-Indigenous settler population in the N.W.T. did not experience the same growth as that in the Yukon; I would argue that it is likely that a parallel of this tug-of-war between colonial state entrenchment and resistance would apply in the N.W.T. settler society as well. Dacks (1990) has written on distinctions between settler and Indigenous society in the north, and argues that modern settler society views itself as individualistic which is markedly different than the collective nature of the Indigenous nations in the region (338) As White (2011) writes, “The exclusionary provisions of Aboriginal governments can raise difficult problems as to the status and rights of non-Aboriginal people living where Aboriginal governments hold sway” (755). This exclusion can be witnessed by A. Henderson’s (2007) writing, which states “References to the Aboriginal populations living in the north are made only in passing, as though they were the trees surrounding white settlers” (90), and Fumoleau (1973), through various archival records,

has carefully tracked the clash between Indigenous and settler society as the settler society presence grew in the N.W.T. There is a chasm between the settler and Indigenous populations; however, through the transition from colony to northern province, the struggle and experience allows for common ground that connects these two populations (Coates and Powell 1989, 155). The chasm, however, does exist and can be described through a lens of devolution of the territory: provincial status could be said to be a goal of settlers, while self-government a goal of Indigenous people, who might see provincial status as potentially slowing self-government. There exist fundamental differences between these two groups based on colonial histories and its resulting inequities and the distinction between Indigenous peoples' ancestral rights and Aboriginal rights and those of settler Canadians.

The concept of Indigenous self-government is extensively discussed in territorial state documents, including G.N.W.T. Annual Budgets and Reports. For example, in the government-wide 2005 Strategic Plan an implementation of a government-wide policy called "Towards a Better Tomorrow" states the intent of the plan is the "successful negotiation and implementation of Aboriginal land, resource, and self-government agreements in all regions" (Northwest Territories 2005a, 21). In the G.N.W.T.'s Business Plan 2000-03, 2001-04, and 2003-06 the goal is, "Strong and effective Aboriginal and public governments operating co-operatively with no reduction in program and service levels as a result of implementing self-government agreements" (Northwest Territories 2000; Northwest Territories 2001a; Northwest Territories 2003). And additionally, the G.N.W.T.'s Business Plan 2000-03 states that, "Use a zero-based approach to cost proposed self-government models and identify the one-time and on-going incremental costs to implement the model" (Northwest Territories 2000). These statements demonstrate a widespread similarity in approach to Indigenous self-government throughout the G.N.W.T.'s

administrative documents. And yet, the Canadian government has been criticized for its inability to move towards Indigenous self-government (see Boldt 1993; Ponting and Gibbins, 1980, Chapter 7). The question arises as to the ability of the G.N.W.T. to facilitate Indigenous self-governance within its existing framework, or whether it will continue to perpetuate a neo-colonial status quo.

The political concept of Indigenous self-governance is based on a premise that the colonial political economy dismantled the traditional Indigenous governance systems and that these pre-colonial autonomous sovereignties ought to be restored. It is, therefore, an anti-colonial movement meant to balance the unequal power dimension of colonial/colonialist relations, but also, and perhaps more importantly, reassert inherent sovereignty in and of itself, so it is not in response to or contingent on the colonial order. In Canada, self-governance is arguably an Aboriginal right guaranteed by s.35 of the *Constitution Act, 1982*; it remains, however, a somewhat undefined and mostly unrealized concept as the struggle to achieve Indigenous self-government has been stymied by the settler political environment in Canada, in particular those western notions of federalism, liberalism, and democracy.

LaSelva (1996) explains how this political environment has stymied Indigenous self-government by arguing that both federalism and liberalism, the common starting points of the Canadian nation-state's Indigenous self-government dialogues to date, have failed at delivering Aboriginal self-government due to inherent theoretical tensions and limitations within these political philosophies. The inherent limitations of federalism concern its assumption of allegiance. According to LaSelva (1996), federalism performs well when balancing Canadian nationalisms such as the French-English tension, but has rejected First Nation history (140). Federalism does a good job protecting or maintaining "Canadianism" by allowing for cultural

expressions of diversity (132-133); however, this diversity is secondary to that of the allegiance to Canada which is based on the English/French founding of the nation and excludes the Indigenous sovereignty and influences on subsequent colonial history. LaSelva argues this cultural space for diversity means federalism could be an ideal provider of autonomy for First Nations, yet it does not do so because of its inherent assumption of common allegiance. This limitation can perhaps be best demonstrated by an explanation of Indigenous self-determination that is based not on a Crown granting of status and authority but on the notions of prior occupancy and those rights and responsibilities espoused by the Creator.

The inherent limitations of liberalism concern its ability to offer protection to cultural difference against assimilation and its inability to accommodate Indigenous diversity or appease “incommensurable” cultures or those at which commonality does not exist (LaSelva 1996, 138-141). Liberalism uses jargon to dismiss difference and uses this technique to perpetuate “fictitious human rights” (139) which skews the need for Aboriginal self-government and the interests of Indigenous rights movements. In fact, many scholars have documented how liberalism has developed a dialogue that has co-opted the language of the Indigenous movement to advance a liberally-minded agenda to the detriment of the Indigenous-centred agenda. Liberalism in Canada has excluded Indigenous philosophy and has co-opted the Indigenous movement by placing liberal assumptions at its core and these assumptions are powerful mechanisms which shape the outputs of the decision-making process (for further reading see Corntassel 2008).

Democracy, argues LaSelva, remains an untested and ideal political theory within the Indigenous self-government movement, because democracy is a political ideology which can successfully mitigate diversity and was also practiced traditionally in First Nations societies

(LaSelva 1996, 144). Democracy can promote itself in smaller social organizations or communities (LaSelva 1996, 145) and can support Indigenous self-governance by returning to the initial moral underpinnings of Canadian federalism. These are the original tenets of democracy—recognizing cultural diversity and rejecting cultural assimilation—but they have been eroded in contemporary Canadian governance (LaSelva 1996, 143). Others describe Indigenous traditional political philosophies as democratic, which seemingly fits with LaSelva’s argument (MacPherson 1965; Kulchyski 2005; Turner 2006). And yet, I disagree with LaSelva that the Canadian government can use existing political philosophies to provide Indigenous self-governance. This is because, as many critics point out, many of the Canadian state-made approaches to self-governance are limited because they are built on a foundation of how Indigenous self-governance can fit into the Canadian state and so these approaches are not principally Indigenous-centred.

Indigenous self-governance, therefore, must arise on its own, not as a response or addendum to the current settler state model of government. Ladner (1995) argues that the inclusion of history provides a broader approach to Indigenous self-government in what is now Canada by including the customary practices of Indigenous nationhood or sovereignty. Ladner explains Indigenous self-governance as a continuum of existing and traditional decision-making. When Indigenous self-governance is conceptualized as a response to the settler state it is restricted to a conceptual model that is positioned within and not alongside, or independent of, the contemporary political order. Thus, Indigenous self-governance arises as a response and a threat to the existing order, not as an inherent right of Indigenous peoples or a continued practice of traditional decision-making. Such a competing model does not garner support from the citizens of Canada or the state. Without a commitment to Indigenous-centredness, democracy

too will develop a model of Aboriginal self-governance where the model is simply placed within the existing Canadian model of political tensions, resulting in failure because it would be developed in accordance with a colonial paradigm (or a model of unequal power relations between the colonizer and colonized, the settler and Indigenous peoples) and not in accord with equitable Indigenous/non-Indigenous or Indigenous nation/settler state relations. It would, therefore, perpetuate colonialism and not consummate the anti-colonial order, or deliver a model based on the inherent right to sovereignty that is intended and sought after by Indigenous self-governance movements.

In the N.W.T., Indigenous nations continue to advocate for their inherent right to self-government, a right that is not predicated on models created by the settler colonial state. As discussed, there are numerous self-government negotiations taking place in the territory and these sovereignty movements are premised on what Zoe (2014) describes as the pre-contact right to be self-determining. Zoe states,

You have precontact self-determination. What you had for each new generation is what you inherited. Your interests were based on recognition, your outside relationship to other people. Your self-determination that you had was broken or beaten up over the years by Canada's policies, and transfer of powers to new entities without consultation. We are looking for harmonization of authority that every Canadian is entitled to, without further break down of a system that we've had no control over before. We are gathering strength through our own histories, finding a system that not only provides truthfulness for yourself but a relationship built on trust with other jurisdictions that

includes the feds, provinces, and territorial governments that share resources that are in your background.

Zoe is clear that Indigenous nation's right to self-government is based on an Indigenous system or understanding of inherent right to self-determination and this right does not come from inside the Canadian state, it has always and will always exist outside of the Canadian state. This is why liberal policies and philosophies cannot accommodate this inherent right to self-determination. Indigenous self-determination must come from this authentic source of generational transferred ancestral rights, recognition of Indigenous nations, and relationship-building.

Can the territorial government, therefore, truly achieve a model of Indigenous self-governance that enables self-determination or will self-government be relegated to just being an addendum to the state? What is interesting is the way the G.N.W.T. views self-government. When Everts-Lind (2013) discusses the relationship between the G.N.W.T. and Indigenous organizations during the negotiations of self-government, he says a change in the relationship between Indigenous nations and the state has occurred. This is because self-government requires a new and lasting relationship due to the new concurrent jurisdiction between the Indigenous self-government and the G.N.W.T. This new relationship is often understood as a partnership; self-government should not be viewed as a divorce but as a marriage (or, put another way, it is not the end but a new beginning) (Everts-Lind, 2013). As more self-government agreements are completed and implemented, new sets of relations may develop. In some cases, the G.N.W.T. will share jurisdiction with the federal and Indigenous governments, and in other cases the G.N.W.T. will have no role. Everts-Lind (2013) argues that self-government is the biggest shift the G.N.W.T. will undergo, and it has immense public support. In the past, it may not have been clear what the role for the sub-national in Indigenous self-government was, but now it is viewed

as inherently important to achieving successful self-governance. This idea has become entrenched into the organizational culture of the G.N.W.T. just as its current reports and budgets demonstrate. It will be interesting to see, as devolution progresses, if this view conforms to the G.N.W.T. bureaucracy's definition of self-government or if the bureaucracy can understand, appreciate, and implement an Indigenous perspective of sovereignty.

Conclusion

The Indigenous/state governance network in the N.W.T. is strongly shaped by the politics specific to territorial governments in the federation, which have traditionally been heavily influenced by the central government. While devolution has long been a territorial goal to achieve province-like powers, it has also developed alongside the rise of Indigenous people's involvement in local sub-national politics. The process of both localized, representational government and devolution has encouraged the Indigenous presence in territorial politics to steadily increase since the 1970s. This presence in the territorial political arena offers a unique element of the Indigenous/state governance network, as Indigenous peoples have strongly influenced the representational politics of the territory. This took place alongside a large number of significant land claims being settled in the area, including the establishment of the territory of Nunavut. The G.N.W.T. has increased its presence in the Indigenous/state governance network through changes in local representational politics, and the wider process of devolution. It also remains to be seen if the more recent process of devolution that is attached to Canada's Northern Strategy will impact Indigenous involvement in territorial politics as it did in past devolutionary shifts. It remains to be seen what the impacts of this devolution are for both the territorial government and for Indigenous rights.

Chapter 6: Enhanced sub-national presence in the Indigenous/State Governance Network

Through settler colonial narratives of Canadian federalism, the evolution of jurisdiction for Indigenous peoples has evolved as a responsibility of the central or federal government—to the detriment of Indigenous sovereignty—and this jurisdiction is entrenched in government through the *BNA Act* s. 91(24). The sub-national governments, however, have a role in the Indigenous/state governance network as evidenced through the *Indian Act* s. 88, land management legislation and policies, case law, and increasingly through the evolution of public administrative activities such as devolution. This combination of legislation, policies, law, and governance activities demonstrate an increasing or enhanced role of the sub-nationals in exercising jurisdiction concerning the livelihoods of Indigenous peoples. The role of the sub-nationals, however, is often dismissed by narratives of Canadian federalism: this is a hallmark of settler colonialism, a system that often silences or marginalizes Indigenous peoples, their histories, and their sovereign rights. Chapters 1 and 2 demonstrate that the evolving interpretations of sub-national activity on-reserve—from spending, legislating to support Indianness, and filling legislative or policy vacuums—and the inherently flexible nature of Canadian federalism has contributed to much of the changing nature of sub-national involvement in the Indigenous/state governance network. The increased role of the sub-nationals in this network, I argue, is not simply an evolution in public administration, but neo-colonial as it comes at the expense of Indigenous self-determination in that it can limit nation-to-nation relations Indigenous-centred approaches to service delivery. This next chapter will look at the enhancement of the sub-nationals through the lens of the organizational evolution of the sub-national ministries responsible for Indigenous peoples, the delivery of social services in

healthcare and education, and provide critical analyses through a theoretical understanding of neo-colonialism.

Enhanced sub-national Bureaucratic Responses

The organizational evolution of provincial ministries responsible for Indigenous peoples in each of the sub-nationals of Manitoba, B.C., and the N.W.T. has expanded from a position of non-participation to well-established ministries. These ministries are clear evidence of the sub-nationals' encroachment onto Indigenous-centred matters. This encroachment can lead to a muddying of jurisdiction, which requires inter-governmental dialogue with the federal and First Nations governments. This encroachment of the sub-nationals in the Indigenous/state governance network, also, limits Indigenous self-determination.

According to Nepinak (2013), provincial governance activity in Manitoba's First Nation communities is marked by a long history of non-participation. Historically, the provinces did not venture onto the reserve, and it has only been in the last generation that provincial encroachment has occurred. The provincial approach of non-participation in the First Nation communities is based on the Treaty relationship with the Crown that set a framework for Nation-to-Nation relations, and the province remained generally external to these relations. Nepinak (2013) continues that recent provincial involvement on reserves is the result of the federal government's measures to increase the role of the province on-reserve in Manitoba.

This can best be seen in the development of the provincial bureaucracy earmarked specifically for Indigenous matters. In 1966, the first Manitoba office responsible for Indigenous matters was created and since the 1970s, the federal and provincial governments have entered cost sharing agreements for development in the north (Manitoba Aboriginal and Northern Affairs 2013). In 1974, the activities and responsibilities of the Northern Affairs Commission, most notably those of providing municipal services and infrastructure and self-government, were

transferred to the Minister of Northern Affairs. In 1982, the department expanded to include a Native Affairs Secretariat (now called the Aboriginal Affairs Secretariat), which is mandated to meet the service delivery needs of Manitoba's increasing urban Aboriginal population and to aid in facilitating land-related agreements (including hydro development and TLEs) and self-government negotiations. These were the duties of a cabinet secretariat under the Pawley administration (1981-1988) until 1988 when, under the Filmon Government, the secretary continued many of its duties but not as a cabinet secretariat (Anonymous, 2014). In 1999, with another change of government, the Doer administration made the secretariat into a full department under the title Aboriginal and Northern Affairs (Anonymous 2014). Today, it is called Indigenous and Municipal Affairs. Clearly, this provincial department is increasingly involved in the Indigenous/state governance network, including "Indians, and Lands reserved for the Indians."

The Department of Aboriginal and Northern Affairs (ANA) described itself as the lead negotiator for northern land development (Manitoba Aboriginal and Northern Affairs 2013). A senior civil servant in the department attributed the origin of the department to the increased political organizing on behalf of Indigenous peoples surrounding the patriation of the Canadian Constitution (Anonymous 2014). At the time the provincial government recognized the need to centralize special attention on Indigenous issues into one unit, and so the Native Affairs Secretariat was created. Its function is to be an advocate for Aboriginal peoples both on and off-reserve, and Metis and Inuit peoples (Anonymous, 2014). The department works, as well, in a consultant capacity for other departments that have a mandate for Aboriginal peoples. This can mean the department takes the lead on interdepartmental programs, advises on service delivery, and works with other departments to resolve conflicts that might arise. The department is

organized horizontally, and within government is seen as having good cooperative, collaborative, and networking relationships with other departments (Anonymous 2014).

As stated, the Department of Indigenous and Municipal Affairs works on behalf of all Indigenous peoples in Manitoba, First Nations, Metis, and Inuit, and those living on and off reserve. I asked a senior civil servant how s. 91 (24) of the *Canadian Constitution Act* is interpreted by the department. The response was “The section is a difficulty, but in practice we’re not vigilant about the section. We see Aboriginal peoples as Manitobans first. We have battles for what we see as off-loading by the feds to the province” (Anonymous 2014). This response is similar to that of bureaucrats working in B.C. and the N.W.T.

Like the other sub-nationals in Canada’s federation, the B.C. government has expanded its range in the realm of social service delivery for Indigenous peoples living on-reserve (or those traditionally thought of by the state as s.91(24) Indians). Social service delivery can be thought of as a service that is regulated or provided by the state. Chapters 1 and 2 have outlined the process by which the settler Canadian governments, both the central and sub-nationals, developed jurisdiction over Indigenous peoples. It has been a process determined by colonialism, and colonialism continues to impact the features of Canadian federalism and jurisdictional debates surrounding Indigenous peoples and s. 91(24). As Maureen Chapman, Chief of the B.C. Assembly of First Nations, states: “We are doing everything we can to take the jurisdiction back, and we are not of the mindset that we have ever given it up. It’s not recurring, it’s not the government giving this back to us: jurisdiction is an inherent right never given up by First Nations peoples” (2015). And yet, Chapman continues to explain that dealings with the government are strained due to lack of political will and the legacy of racism that is a feature of

any colonial project: “Systemic racism is still alive in every level of government and with many people generally.”

While many attribute the increase of the B.C. government in the governance network to the 1990’s New Trust Relationship and provincial involvement in land claims, the shift in provincial involvement in service delivery had begun prior to this political shift of the 90s. The B.C. government increased its involvement in service delivery for on-reserve First Nations as early as the 1960s and by the late 80s provincial participation in the funding and delivery of programs for First Nations existed in “almost the whole range of provincial activity” (Exell 1988, 94-95). The most fundamental change in the role of the sub-national involvement was the development of the Ministry of Native Affairs in 1988 (Gottfred & Beak 2013). This department was created in-part due to the B.C. Supreme Court case *Martin* (1985) (McKee, 2009, p. 29). In this case, Justice MacFarlane ruled that “The judicial proceeding is but a small part of the whole process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations.” The B.C. Supreme court was clear that it expected the provincial government to contribute to the land claims process, and the Social Credit government responded with the development of the new department in 1988 devoted to Indigenous issues; the government, however, continued to refuse to acknowledge Indigenous title (McKee 2000, 30). As social service delivery pressures change in the province of B.C., the state maintains that it consults with Indigenous peoples to determine how these changes should develop. Gottfred and Beak (2013) say that the province has created a mandate of new relationships that can be described by the tag line “nothing about us without us.” While the province does consult regularly with Indigenous nations, Gottfred and Beak (2013) further argue that they could do better and have a long way to go.

The process of devolution of social services has affected the organizational design or how government ministries adjudicate responsibility of the B.C. ministries. Social service delivery agreements between the B.C. government and First Nations peoples living on-reserve is a complex, integrated field based on various partnerships, and these partnerships shape the responsive changes in the organizational design of each of the public ministries (Gottfred and Beak 2013). An example of a responsive change in the ministerial organization design is that all of the provincial ministries have a mandate of an Indigenous-centred scope. The intention of this is to ensure First Nations peoples have equal opportunity with those B.C. citizens who are non-Indigenous (Gottfred and Beak 2013). This process of Indigenous focus within the ministries initially began with a provincial Aboriginal Branch, then developed into Aboriginal Centres of Excellence, and further evolved into the current model where Aboriginal affairs are incorporated systemically into each of the ministries, which liaise cross-ministry to connect on the broader issues.⁷⁴ There are also interim committees that meet regularly to focus on cross-ministry Indigenous issues. In addition to this cross-ministry representation, there is also a ministry of Aboriginal Relations and Reconciliation, which evolved from the Department of Native Affairs and later the Ministry of Community, Aboriginal and Women's Services. The role of this department is intended to embody the notion that "A key component of reconciliation involves creating relationships that are mutually beneficial through collaboration and commitment" (B.C. Aboriginal Relations and Reconciliation 2014).

The muddying of jurisdiction has created questions for the interpretations of jurisdictional understandings of service delivery in the Indigenous/state governance network. For example, Gottfred and Beak (2013) explain that there has been a significant challenge that has arisen over land laws which are not protected by s.88 of the *Indian Act*. To deal with this, the

B.C. government developed new legislation in agreement with First Nations (band) governments that states provincial land laws can exist on First Nations reserve land when a legal gap emerges (Gottfred and Beak 2013). One example of this is the First Nations Commercial and Industrial Development Act (FNCIDA) (2012) which was developed in consultation with Indigenous nations and allows the province to implement federal laws on-reserve. According to Gottfred and Beak (2013), the legislation is important because it closes regulatory gaps concerning economic development in First Nations reserves, allowing First Nations to move forward on projects that were stalled or could not be created due to regulatory issues.

While jurisdictional understandings may undergo change, according to Gottfred and Beak (2013), jurisdictional ambiguities need not arise due to any changes in addressing service needs, provincial responsibility, or jurisdictional restraints. For example, Gottfred and Beak (2013) have said that in terms of social service delivery, the provincial government looks beyond jurisdiction to seek opportunities to partner; jurisdiction does not limit or deter the province from attempting to achieve betterment for society through service delivery. Furthermore, contemporary understandings of the definition of s.91(24) of the constitution are not affected: s.91(24) makes ‘Indians and lands reserved for Indians’ a federal responsibility, and thus, the province cannot legislate over Indians, and the B.C. government does not make attempts to legislate in a way that affects “Indianness.” So, while the pressures of devolution may shift interpretations of jurisdiction, through these modern partnership agreements, jurisdictional issues are dealt with.

Gottfred and Beak (2013) explain that the province honours the original principles of legislation by deferring to the federal government as the primary lead and does not step beyond those original tenets laid out in s.88 of the *Indian Act*. An example can be found in B.C.’s department of Aboriginal Relations and Reconciliation’s 2012/13 Annual Service Plan Report

(British Columbia 2012a). Here it describes a pilot project, the Aboriginal Action Plan, that will be facilitated in five off-reserve communities. This plan states that it intends to close the socio-economic gap of B.C.'s off-reserve populations (British Columbia 2012a). Gottfred and Beak (2013) explain that this is an example of legislating for First Nations people but not conflicting with s.91(24) because it is done so for the general Indigenous population and not specifically those that live on-reserve. This is a creative way to circumvent rigidities in jurisdiction, however it is unclear if the motives or outcomes of such provincial activities are colonial.

Perhaps unsurprisingly, Indigenous peoples in B.C. often view the jurisdiction of the settler colonial provincial government differently. Manuel (2015) explains that this jurisdiction is a function of colonialism. He says "You can't get more colonial than the government's responsibility for Indians: I'm not even responsible for myself, or my children? Consider colonialism's basic three elements: dispossession, dependency, and oppression. The dispossession of one's jurisdiction is part of colonialism." Similarly, Chapman (2015) argues that s.91(24) is a function of colonialism. She explains, "the Canadian government has not lived up to its responsibility of stewardship for First Nations peoples. Even going back to the Royal Proclamation [1763] that says we are not supposed to be molested or disturbed on our lands. But, it has been conquered, taken for their purposes." Jurisdiction of the settler colonial governments has been used to colonize Indigenous peoples, and as the provincial government expands into social service delivery examples of neo-colonialism abound.

In the N.W.T., this tension between federal and provincial conflicting jurisdiction demonstrates some distinctions not found in the other sub-nationals. This is due to the territorial status of the sub-national, which has meant that the role of the central state has had a longer history of involvement in natural resource management and service delivery. The tensions that

are present, due to the *BNA Act* and the *Indian Act* bestowing like jurisdiction to both the federal and sub-national governments, did not become a policy issue until much more recently for the G.N.W.T. because of the role that federal government continued to occupy in the areas of healthcare and education.

Since 1967, the G.N.W.T. has taken on more governance responsibilities from the central government, but Indigenous groups have for the most part resisted this expansion into Indigenous matters as they have advocated for self-government; however, increases in the G.N.W.T.'s jurisdiction requires a more active role of the G.N.W.T. in Indigenous issues of all sorts. This creates another set of competing interests for the matters of land and rights reconciliation, and this diminishes negotiations of a nation-to-nation basis. The G.N.W.T. wants to be involved to protect its own territorial interests (which are attaining province-like status and powers). It is difficult to ascertain when the G.N.W.T. became involved in Aboriginal issues. A 1979 G.N.W.T. organization chart included no territorial body that dealt with land claims, self-government, or Aboriginal issues (Dickerson 1992, 92). Records show that the Department of Aboriginal Affairs and Intergovernmental Relations (DAAIR) was established in 2006, and later renamed the Department of Executive and Indigenous Affairs (DEIA). The department's 2008 Business Plan mission statement makes it clear that the department is intended to manage intergovernmental relations amongst federal, territorial, provincial, Aboriginal, and other circumpolar countries concerning Aboriginal self-government and land claims. The Business Plan states: "The scope and nature of these agreements affect all N.W.T. residents-directly or indirectly-and will have a significant impact on the political and constitutional development of the N.W.T. It is therefore imperative that the G.N.W.T. remain an independent party to the negotiation of all land, resources and self-government agreements and actively shape the

architecture of the system of governance in the N.W.T.” (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2008, 2). DEIA, thus, states that it is to work on behalf of all of its citizen’s interests in these intergovernmental relations.

Looking at DEIA’s public documents, two intentions for this department emerge. The first is for the department to build stronger relationships with Indigenous governments. The first intention is made clear in the 2012 document “Respect, Recognition, Responsibility: The Government of the Northwest Territories Approach to Engaging with Aboriginal Governments” (Northwest Territories Aboriginal Affairs and Intergovernmental Relations 2012a). This document is referred to by the G.N.W.T. as an “expression of commitment” to building stronger relationships with Aboriginal governments. It states some criteria for G.N.W.T./Indigenous engagement, such as the respect for and acknowledgment of Aboriginal and Treaty rights under s. 35 of the *Constitution Act, 1982*. Interestingly, the document states that “the G.N.W.T. is committed to building and maintaining mutually respectful government-to-government relationships with Aboriginal governments.” However, Indigenous nations typically advocate a maintenance of relations along a federal Crown/Indigenous nations axis, because Indigenous nations are nations, and therefore should be negotiated with bilaterally by the Canadian nation state. The territorial government involvement in these relations impacts the ability for Indigenous nations to maintain the federal/Indigenous nation axis.

The second intention of DEIA is its role to protect and promote the rights and interests of the G.N.W.T. and the territorial public in land claims and self-government. This is very different from the role of a central Aboriginal-based department that would likely promote and protect the rights of Indigenous peoples. This is because the federal government has a fiduciary-like responsibility to uphold and maintain the interests of Indigenous peoples (as established in

Guerin, 1984). DEIA is not, thus, a department mandated to uphold Indigenous interests but to ‘balance’ these interests with the interests of the territorial public that is non-Aboriginal: it is, therefore, a part of the colonial operation.

One of the challenges with determining jurisdictional authority of the territorial state in the N.W.T. concerns population demographics. As Everts-Lind (2013) discusses, because the territorial population is at least half Indigenous, it can be difficult to determine if a program or policy is about Indigenous peoples or the specific subject matter it deals with. Everts-Lind (2013) explains, it can, for example, be difficult to discern if a program that focuses on high school graduation rates is specifically about Indigenous people’s academic success or general territorial academic success which includes many Indigenous people. He lists a number of common policy concerns that this one education issue raises, demonstrating the complexity of any single policy. For example, he suggests some observers may ask whether a program designed to improve Indigenous student graduation rates in the territory is stepping on the toes of s.91(24), or is it an education program targeting a part of the population that is marginalized? Is the pith and substance of the policy Indigenous-centred or a natural extension of the G.N.W.T.’s jurisdiction under the *Northwest Territories Act* over education in a region where a large percentage of the population is Indigenous? In essence, what is the core or intent of the program—is it about s.91(24) Indians or about people’s education needs, many of whom happen to be Indigenous? This is one of the primary challenges that modern Canadian federalism struggles with in regards to how s.91(24) is interpreted in today’s social service delivery schedules. Perhaps the obvious solution to this quandary that has plagued Canadian federalism—is it provincial or federal—may be Indigenous self-government.

These complexities arise in unique ways because the G.N.W.T. is a creation of the federal government and is not clearly constitutionally defined and so there is less clarity between the two states. The jurisdictional authority concerning s. 91(24) is a particular challenge in territorial politics. This is because the dichotomy of the jurisdictional responsibility of federal versus sub-national is of a differing nature compared to the southern provinces (Everts-Lind, 2013). The territory does not have policies or programs that legislate for “Indians, and Lands reserved for Indians,” but it does have policies and programs that serve Indigenous populations where there is a link to jurisdiction under the *N.W.T. Act*. The distinction is that the G.N.W.T. does not create policies explicitly for “Indians”, like those discussed for B.C.’s off-reserve populations. It does, however, create policies for those services under its jurisdiction and it extends these to the whole territorial population and does not distinguish between Indigenous or non-Indigenous. In an interview with G.N.W.T. employee Owen Everts-Lind (2013), he argued that in the N.W.T. s. 91(24) should not be understood as a straightforward dichotomy because “in a territory where half population is Aboriginal, it is difficult to determine if a program and policy is about the Aboriginal population or the subject matter it deals with.” Therefore, in terms of looking at territorial governance activities in accordance with s.91(24), it is an inaccurate distinction, in the sense that it creates a false dichotomy. Instead, the policy scope is an extension of social service jurisdiction via the *Northwest Territories Act*, and it is not a case of over-interpreted legislative authority in an inappropriate way.

An anomaly, however, does exist as there is a trilateral agreement on social service delivery for the Salt River Reserve. This is the only occurrence in the territory where s.91(24) could prevent sub-national encroachment because it is one of only two reserves in the N.W.T. (the other is Hay River). The trilateral agreement that defines the jurisdictional relationship

surrounding service delivery to the reserve is delineated in the Salt River First Nation (SRFN) Treaty Settlement Agreement, which clearly stipulates the parameters of G.N.W.T.'s role in service delivery on the reserve. However, according to Everts-Lind (2013), defining this jurisdictional relationship of service delivery with the Indigenous nations outside of the Salt River Reserve is more complex. These situations require intergovernmental dialogue with the Indigenous nations to ensure that the jurisdictional relationship works for both sides. In fact, recently there have been many memoranda of understanding (MOU) detailing the framework of this jurisdictional relationship to ensure that as either leaders or governments change, the framework will not vary or be ad hoc (Everts-Lind, 2013).

As this section demonstrates, the sub-nationals of Manitoba, B.C., and the N.W.T. have enhanced their role in the Indigenous/state governance network. In each sub-national, there is clear evidence of this enhancement through the creation and evolution of the bureaucratic apparatus, or the sub-national ministry, responsible for Indigenous peoples. The next section will consider how the sub-national has encroached into the delivery of social services in the areas of healthcare and education.

The Enhanced sub-national in the Service Delivery of Healthcare and Education

The areas of healthcare and education make up some of the most complex aspects of social service delivery in the sub-nationals' interactions with the Indigenous/state governance network.⁷⁵ This next section maps the complexities of service delivery in these two areas by articulating these complexities in the case of Manitoba, which is followed by a comparative analysis of B.C. and the N.W.T. As will be discussed, the areas of healthcare and education are highly complex areas of service delivery due to the jurisdictional delineation of the federal government's responsibility for healthcare and education for status Indians living on-reserve (through s.91(24) of the *Canadian Constitution Act, 1982*) and the enhanced role of the sub-

national in this service provision. This results in jurisdictional ambiguity over cost-sharing and responsibility for service delivery, which result in under-performing service provision for Indigenous peoples.

In Canada, INAC has traditionally provided all services to First Nations peoples residing on-reserve, but more recently, the sub-nationals have been engaging in this process by administering these services. In the first area of social service delivery, healthcare, the Manitoba provincial government's jurisdictional role, however, is quite different from that in B.C. and the N.W.T. In these regions, the sub-national governments have only recently become involved in the service delivery of healthcare, but since 1964 the Manitoba government has held sole and primary responsibility for healthcare on-reserve in a handful of First Nation communities. This is called the *1964 Agreement* and, while little is published on this document, it outlines a primary role for the province, and thus devolved role for the federal government, in various Manitoba First Nation communities. These communities include: Nelson House (Nisichawayasihk), Pukatawagan, South Indian Lake (O-Pipon-Na-Piwin), Brochet, Split Lake (Tataskweyak), York Landing, The Pas Reserve (Opaskwayak Cree Nation), Norway House, Cross Lake, Oxford House (Bunibonibee), God's Lake, Island Lake, St. Theresa Point, and Granville Lake (Canada Department of National Health and Welfare 1964).

Healthcare in the Indigenous/state governance network is complex because a lack of clear authority for this service has led to jurisdictional debate over responsibility, which put simply, centres on the lack of clarity in the Canadian federation over responsibility. As Arnason (2008) writes, "The *British North America* (BNA) Act of 1867 conferred the responsibility for Aboriginal Peoples and lands on the Government of Canada, simultaneously giving the provincial governments jurisdiction over health and social services. This shared responsibility

has resulted in years of complex intergovernmental relations regarding Aboriginal health” (21). The constitution, therefore, both enshrines healthcare as a responsibility of the federal government, regarding Indigenous peoples, and of the province, regarding the general or non-Indigenous population. The result is a scenario that allows, or perhaps encourages, the provinces to argue that according to the *Indian Act*, healthcare is a federal responsibility, while the federal government argues that the reserve populations are covered under the federal-provincial cost-sharing agreements (Allec 2005, 13). These jurisdictional issues are a “long standing conflict” that have resulted in a “tug of war” (Allec 2005, 13). As the Assembly of Manitoba Chiefs (2006) writes, “For too long the delivery of health services and programs to First Nations has been fragmented, being left to jurisdictional debates by other governments” (4). The result of this lack of clarity has been jurisdictional debate, at times muddying the issues at hand.

An added complexity to this jurisdictional debate of the responsibility of Indigenous peoples’ healthcare is that some aspects of healthcare have been devolved to the province and regional health authorities. A quick overview of First Nation healthcare demonstrates the complexity of healthcare jurisdiction in the Canadian federation.⁷⁶ This service provision was initially housed with the federal Indian Affairs department in 1880. In 1927, the Medical Branch was created within Indian Affairs where First Nations were the first people to receive insured medical services in Canada. In the 1940s, Indian Health Services became a part of the Department of National Health and Welfare. In 1962, the Health Services Branch evolved into the Medical Services Branch. Then the 1964 Agreement between Manitoba and Canada placed the most northerly First Nation communities under provincial authority for healthcare service delivery. In 1979, the federal government created the Indian Health Policy to improve First Nations’ health and access to healthcare. In 1984, the *Canada Health Act* was enacted with an

Aboriginal exemption clause.⁷⁷ In 1988, the Health Transfer Policy was developed to provide First Nation health services authority, but it was not implemented and in 1998, the Medical Services Branch was renamed First Nations and Inuit Health Branch (FNIHB) and was mandated to provide healthcare services that fall outside of the provincial jurisdiction as defined in the *BNA Act of 1867* (Allec 2005, 94-96; Arnason 2008, 19).⁷⁸

First Nation healthcare delivery in Manitoba has been affected by these federal jurisdictional shifts and by the provincial shifts in organizational design and layers of bureaucracy. Aside from the 1964 Agreement, further jurisdictional issues for on-reserve First Nation populations arose from within Manitoba Health's own organizational restructuring into 11 Regional Health Authorities (RHAs) in 1997 (Arnason 2008, 91-92). Healthcare services are delivered to First Nations reserves through the RHAs—the federal government funds these services through FNIBH and the provincial government provides funding to the RHAs (Arnason 2008, 97-98). This added an extra layer of bureaucratic organization. As well, the contemporary organizational structure of the Manitoba Government has an Aboriginal Health Branch, Aboriginal and Northern Health Office, and First Nation and Inuit Health Branch. These offices create various factions within the provincial bureaucracy that must then be navigated by service users, both patients and band-level administration, and coordinated amongst themselves.

Provincial activity on-reserve has grown as the federal government contracts much of the work through the sub-national governments and has presented a host of jurisdictional issues for First Nations communities. This scenario has led to a situation where some communities receive healthcare provision from two different levels of governments, resulting in fragmented service provision amongst communities and confusion within community administrative, organizational, and service levels. As the provincial government writes, “The fact that the Aboriginal population

in Manitoba continues to have a much poorer health status than that of the non-Aboriginal population underscores the need for provincial, federal, RHA, and First Nations officials to resolve jurisdictional issues that stand in the way of the provision of health services” (Manitoba Health 2008, viii). To aid in resolving these long-standing issues of jurisdiction, the province developed the Aboriginal Health Branch in 2008, which works as a liaison across the federal and provincial governments, with the political organizations, and tribal councils (Manitoba Health 2008, 70).

Consider this practical example of navigating these healthcare services provided by various levels of government when on-reserve. Kathleen Bluesky is the Coordinator for the Intergovernmental Committee on First Nations Health at the Assembly of Manitoba Chiefs (AMC) and she explained the complexity of navigation:

There is one person on-reserve whose role is to navigate—the health director. The community-base health workers do not see the jurisdictional barriers to the extent that we do at AMC. At AMC our job is to look at these things. When working in the community, they just work with what they have. If they don't have it, they send people to the nearest facility to get these services. That is just the standard, and they learn to function in this way. Jurisdiction is fiscal responsibility, and right now there is only one jurisdiction which is the federal government. People discuss jurisdictional barriers, but they might not be necessarily barriers. There is only one jurisdiction; the conversation needs to step back and recognize this. It's when people go off reserve that the barriers kick in. The Health Directors know that if services could be more accessible and available on reserve people would be better off. (Bluesky 2014)

For every community, the variety of barriers faced will change given the healthcare need, or jurisdiction or health providers that must be engaged, or the distance needed to travel to access care.

The issues that have arisen due to these complexities of jurisdiction are widespread, and can be summarized by three overarching issues: complex cost-sharing agreements, minimized responsibility, and limited service availability. As a report published by the Government of Manitoba says, “The ongoing discussion between all parties with no resolution regarding ‘who pays for what’ has a negative impact on First Nation people. This issue results in fragmented services, problems coordinating services, under funding, inconsistencies, service gaps and lack of integration” (Manitoba. Manitoba Health 2008, 69). Essentially, these issues of jurisdictional complexity are the result of neo-colonialism. Barry Mathers, Executive Director at Aboriginal and Northern Health Office with the Manitoba Government, explained just this to me in an interview where he argues that the federal and provincial governments develop today’s model of service delivery in a colonial way, with exclusion of First Nation peoples or Indigenous stakeholder group’s involvement. Mathers (2014) says, “The people are ignored, their inherent right is looked at as a fallacy, a myth.” Mathers continues to argue that the 1964 Agreement that shares health care responsibilities for First Nation between the provincial and federal government never included any input or voice from First Nation leadership. For example, the 1964 Agreement split services between the federal and provincial governments. These arrangements, Mathers explains, made sense then, but the population has now grown and the agreement provisions have not kept up with increasing population’s healthcare needs. Mather’s argument is that the fabric of the 1964 Agreement is colonial as its premise was to assimilate, with a service formula that has not grown to accommodate modern-day realities, and with contemporary

expressions of this agreement couched in modern-day language of government devolution. I would thus argue this is a clear expression of neo-colonialism in the narrative of Canadian federalism.

The first issue of jurisdictional complexity concerns the cost-sharing agreements for healthcare service delivery amongst the federal government and service providers. According to the Assembly of Manitoba Chiefs (2006), since 1958 health delivery cost sharing between the province and the federal government has been equal (19). When the federal government created the *Diagnostic Services Act* (1957) and *Federal Medical Act* (1968), it began to integrate First Nation health services and transferred money to the provinces without informing the concerned Indigenous peoples (Allec 2005). Arnason (2008) writes, “Provinces provide healthcare to most Canadians, but the federal government has assumed most of the responsibility for Aboriginal healthcare. However, the federal government is adamant that under section 92(7) of the *Constitution Act* health is a provincial responsibility and this responsibility should extend to First nation populations” (55). This claim is disputed by some Indigenous peoples because of the Treaty clause (in Treaty 6) for the medicine chest, which cements the provision of healthcare by the federal government to the Indigenous nations (Arnason 2008, 55). While this clause is in Treaty 6, because the Numbered Treaties are so similar, it is argued by some that the medicine chest promise in Treaty 6 can reasonably be made available to those under other Numbered Treaties. The federal government acknowledges that oral promises for medical support were made in Treaties 7, 8, 10, and 11, and there is archival evidence that Treaties 8 and 11 were intended to provide medical support (Boyer 2003, 20-21). Therefore, cost sharing agreements have generated jurisdictional ambiguity concerning healthcare. A number of legislative pieces

determine federal jurisdiction, including the Treaties, but the province has constitutional responsibility for healthcare.

This cost-sharing between the federal and sub-national governments has resulted in added complexity, as some agreements may be constitutional but are outside the scope of the Treaties because, as it was argued by the Manitoba Indian Brotherhood (MIB) in *Wahbung*, which was published in 1970, healthcare for status on-reserve First Nations ought not be devolved to the provinces on account of the Treaty promises that exist on a nation-to-nation basis (Manitoba Indian Brotherhood 2011: 1970, 137). Thus, while the constitution enables devolution from the federal to provincial governments, the Treaties establish a nation-to-nation relationship that is then diminished by this devolution of healthcare. Mathers (2014) argues that the provincial and federal governments assume the other level of government will deliver the service, and yet the First Nation communities are saying no one is delivering them. Federal and provincial governments cost-share healthcare for First Nation people on-reserve, but First Nations argue it is the sole responsibility of the federal government, based on Treaty obligations.

The next issue of jurisdictional ambiguity concerns the minimized responsibility taken on by both the levels of the central and sub-national governments. The *BNA Act* makes Indians a jurisdiction of the federal government, and healthcare a responsibility of the provinces: jurisdiction is, thus, a dilemma. Furthermore, Allec (2005) argues that the *Indian Act* does not expressly define who is responsible for First Nations healthcare (17). The outcome has been minimized responsibility. Whereas the province is responsible for general healthcare, it does not expressly say it is responsible for Indigenous healthcare: due to the cost associated with this service, the province does not contest the federal government's responsibility in the area (Allec 2005, 17). As Allec (2005) writes, "As a result, neither government acknowledges a mandate to

provide coordinated healthcare to First Nations on and off reserve. The federal government maintains it provides health services for First Nations as a matter of policy and practice, and not as a result of constitutional or Treaty obligation” (17). As Mathers (2014) states, “In terms of federal responsibility, representatives view it as a matter of policy not obligation; they assume the province should be responsible for it all.” The nature of such jurisdictional confusion and ambiguity results in both levels of government accepting only minimal levels of responsibility.

On the ground, in the community, there is reluctance to accept the idea that only one jurisdiction should be involved or responsible. Bluesky (2014) argues this and says that it is not an ambiguity of jurisdiction but a denial of responsibility. This leaves people in limbo, because they cannot get either jurisdiction to take responsibility. Bluesky (2014) says, “People use different terminology to describe what happens, but from what I have seen it’s a denial of responsibility.” An example discussed by Bluesky includes Manitoba Health and Non-Insured Health Benefits. Bluesky says, these services are relatively clear until people leave their community and at that point jurisdictional barriers set in:

When an individual leaves the community for health and/or social reasons, they are provided with transportation and accommodations by FNIHB through the Non-insured health benefits program. When the individual arrives in the urban centre, the province has amended their policies to ensure that these individuals are covered by FNIHB before being referred to Manitoba Health or any other Manitoba social service department (i.e. social assistance, disability services, etc.) and their policies also indicate that they will provide social services to individuals only when they have changed their on-reserve address to an urban address. Often times, people who are referred out of the community for medical reasons, find out when they get to cities like Winnipeg that they need long-

term care/treatment and must stay for a longer period of time. This issue of jurisdiction becomes a barrier for people to sustain themselves in the city while coping with chronic health and social issues. People become lost in the systems and become at risk of ending up on the street. (Bluesky 2014)

Therefore, the result of jurisdictional complexity and minimized responsibility is a human toll on people from First Nation communities who must navigate the healthcare system.

While there are many examples of jurisdictional disputes that result in minimized responsibility in healthcare, one of the more critical examples in recent memory is Jordan's Principle (Bluesky 2014; Kinew 2014).⁷⁹ Named after Jordan Anderson, a young First Nations child whose complex medical needs could not be met in his home community due to a lack of services and a dispute over healthcare provision and cost coverage between the Manitoba and Canadian governments. Jordan's Principle is a response to jurisdictional disputes of this nature that result in minimized responsibility on behalf of both levels of government, and which result in inadequate provision of healthcare coverage for First Nations peoples by virtue of the fact that they live on-reserve. The principle demands that, as a mitigating solution, the government of first contact immediately provide the necessary medical services to First Nations children on-reserve, those that are available to non-First Nations children living off-reserve, with responsibility for payment processed afterwards as an attempt to reduce the wait times or denial of services to children with complex medical and healthcare needs (First Nations Child and Family Caring Society of Canada 2014). The principle has received parliamentary support⁸⁰ and the courts have ruled in favour of Jordan's Principle.⁸¹ Under this pressure, the federal government announced the Child-First Initiative in July 2016 as a response to support Jordan's Principle. The Department of Indigenous and Northern Affairs Canada's website explains, "This initiative aims

to meet the needs of all First Nations children when there are gaps in existing programs and immediately provide health and social services and supports that are comparable to those available to other Canadian children” (Canada Indigenous and Northern Affairs Canada 2017). At this time, the federal government committed \$382.5 million over three years to be administered by Health Canada for the Child-First Initiative (Canada Government of Canada 2017).

The final issue that arises from jurisdictional ambiguity is the limit to service availability. Arnason (2008) writes, “This ambiguity has fostered the abdication and minimization of responsibility for Aboriginal health at provincial and federal levels” (98). To Arnason this issue of jurisdiction is in fact the primary barrier to more effective healthcare for Manitoba's First Nations people (114). As Allec (2005) writes, “As a result, some health services not covered by the Canada Health Act but otherwise provided by the provinces through the Regional Health Authorities may or may not be provided to First Nations communities” (13). An underlying issue is that First Nation people are eligible for medical expense coverage through the federal government, by way of the Treaties, that the provinces do not pay for. For the provinces to assume these costs, which are tied to Treaty promises, they would have to expand services which they currently provide to all non-Indigenous Manitoba residents. This would mean that either the federal government would have to expand its cost-sharing transfer payments, which is not likely, or provincial taxes would have to significantly rise, again not likely. But still, the remoteness of Manitoba's First Nation communities leads to a lack of sufficient medical care because the costs of providing healthcare are greater. For example, as of 1992/93 most of Manitoba's communities were without sufficient physician care to deal with medical needs (Arnason 2008, 24). This shuffling of responsibility and ambiguity creates confusing situations for Indigenous people and

their governments, which causes delays in decision-making and accessing services (Arnason 2008, 56). The confusion that surrounds s. 91 (24) and changes in legislation make it easier for governments to evade responsibility. “It gets very easy for each level of government being able to point to the other side. This adds to the apathy: people don't see it as their work” (Mathers 2014). All levels of government, therefore, can shirk their responsibility.

The issues surrounding healthcare on-reserve are complex. On reserves, health indicators are poor with rates of disease being higher for First Nations peoples than non-Indigenous populations and life expectancy being lower in part because the remoteness of these communities leads to restrictions in service availability and access (Assembly of Manitoba Chiefs 2006). These lower health care indicators arise for a number of reasons directly related to systemic colonialism such as access, poverty, and in some cases the jurisdictional issues addressed here, including the complex cost-sharing agreements, minimized responsibility, and limited service availability. Many, therefore, argue for decolonized health services or Indigenous self-determined service delivery. AMC (2006) argues that traditional healthcare procedures and medicines ought to be promoted and protected as a means of overcoming these lower health indicators (13). The Brotherhood of First Nations (1986) advocated for First Nation control of health services as an aspect of self-governance. Young (2003) argues that post-colonial healthcare programs could provide Indigenous nations with adequate and holistic healthcare services, but also wider aspects of social justice (47). As Mathers (2014) says, the context for healthcare policies for First Nation reserves was created in its colonial past and not meant for the long term: “That communities have grown is an anomaly: people expected them to die out.” Thus, Indigenous nations see healthcare as an avenue for de-colonialism.

In a sense, Young's argument bridges what Indigenous political advocates promote; neo-colonial healthcare delivery can be de-colonized with measures that reinforce self-governed healthcare administration. Bluesky (2014) argues that to resolve colonialism in healthcare, the First Nation must lead. She describes a healthcare model that unifies spiritual wellness as the foundation with westernized healthcare practices. She adds that there is still much to debate on this, in particular because those that provide traditional wellness do not want these services regulated by the federal or provincial governments. This means developing a healthcare system where the federal and provincial governments' jurisdiction stops at funding, and the First Nation communities take the lead on regulation, implementation, and oversight.

The process of devolution and healthcare parallels colonialism when First Nation people are left out of these conversations. Or, as Mathers (2014) puts it quite simply, "nothing about us without us." Bluesky (2014) explains that Indigenous peoples have long suspected that the federal government would off-load to the provinces: "It's not that First Nations don't want the services, they don't want these services to be offloaded without their input. They are talking about self-determination and they want the lead for health at the community level. There's no denial that provincial services would be a good thing, but they are saying that we know how to apply or maximize those services in ways that maximize benefit, in a holistic way." In a similar argument, AMC (2006) has written that the inclusion of First Nation peoples in the planning and decision-making process of healthcare delivery will help to restore self-government (6). Mathers (2014) says, "The resources must converge, provincial and federal, and be led by First Nations. We must change the western model: it was created to meet the needs of most Manitobans, but not created to engage with First Nations and Metis in meaningful ways." It is clear that First Nation people want adequate healthcare service on-reserve; there is no hesitancy to this. The

hesitancy arises because First Nation people want these services to be appropriate to the community. Bluesky calls this the “third jurisdiction”, which she defines as “a level of authority and decision-making that First Nations want.” Healthcare, we can see, is a part of sovereignty-building.

And yet, today healthcare service delivery in First Nation communities is being offloaded to the provincial government (Mathers 2014). Kinew (2014) explains most Indigenous leaders would not have wanted the province at the table, but now things are changing: “There is an understanding the province must be there.” The province’s role has been increasing since the 1990s, and in 2012 AMC’s chiefs entered a tripartite discussion on health: “Still lots of chiefs don’t recognize the province.” (Kinew 2014). These tripartite talks have still not occurred, yet since the 2012 resolution letters of invitation and support have been provided by both the past Manitoba Health Minister, Theresa Oswald, and past Federal Health Minister, Leona Aglukkaq (Kinew 2014). From the provincial government perspective, the province is engaging with communities to see what they want; “This is where the solution is found” (Mathers 2014).

Turning to B.C., the provincial government has also expanded its role in the delivery of both healthcare and education services. In fact, Gottfred and Beak (2013) have said that the B.C. provincial government has been most successful on two accounts in the Indigenous governance network: those of healthcare and education. The wider mechanics of federal jurisdiction for status Indians regarding healthcare apply in B.C. For example, in B.C. all healthcare services can be accessed off-reserve by any First Nations person who lives on-reserve (Gottfred and Beak 2013), which is typical across Canada where the provincial government provides the delivery of health services, while the federal government funds these services. Today, healthcare on-reserve is provided collaboratively by the provincial and federal governments in partnership with the

Indigenous nation, and 50% of these communities fully manage their healthcare services (Vancouver Coastal Health 2013). According to Gottfred & Beak (2013) Canada is devolving healthcare services to First Nations. Chapman (2015), however, explains that Indigenous nations did not relinquish their self-determination of healthcare and thus this jurisdiction is not for the federal government to give. She says, “My view is that we have ultimate jurisdiction over land and health. We were the first people here and through many occurrences that jurisdiction was taken away from us. We are doing everything we can to take the jurisdiction back, and we are not of the mindset that we have ever given this jurisdiction up. It’s not, therefore, reoccurring jurisdiction—it’s not the government giving this back to us—but us assuming what is ours.”

While the B.C. government approaches healthcare service delivery in much the same way that other sub-nationals do, there are some interesting distinctions to be found. As early as 1993, the B.C. government had provincial supports to develop and evaluate programs to better support Indigenous decision-making involvement in First Nations health services (B.C. Government 1995). The provincial initiative of the New Trust Relationship created some transformative changes in healthcare for BC Indigenous populations, which have evolved overtime. These changes are centreed around three tri-partite healthcare agreements that are distinct from other Indigenous/sub-national governance networks: The *Transformative Change Accord* (2005), the *Transformative Change Accord: First Nations Health Plan* (2006), and the *Tripartite First Nations Health Plan* (2007) (Lavoie 2008, 7). The *Transformative Change Accord* sets out a number of health indicators that the provincial government seeks to improve. The *Tripartite First Nations Health Plan* was created in 2007 between B.C., the federal government, and the Leadership Council Representing the First Nations of British Columbia (Lavoie 2008, 7). These

three tri-partite agreements further entrenched the B.C. provincial government into the healthcare services of Indigenous peoples.

These changes set by the New Trust Relationship led to more recent overhauls in healthcare for Indigenous peoples in B.C. with the *British Columbia Tripartite Framework Agreement on First Nations Health Governance*, signed on October 13, 2011, which led to the *First Nations Health Governance Structure* (2013). This structure is province-wide, is the only such structure in Canada and it is governed by the First Nations of B.C. (Gottfred and Beak 2013; Chapman 2015). Through this, the First Nations Health Authority (F.N.H.A.) assumed the programs, services, and responsibilities formerly mandated to the federal government (First Nations Health Authority 2016d). The First Nations Health Governance Structure receives its mandate and direction from BC First Nations peoples through several governance documents: *Tripartite First Nations Health Plan*, *British Columbia Tripartite Framework Agreement on First Nation Health Governance*, *BC First Nations Perspectives on a New Health Governance Arrangement*, and *Navigating the Currents of Change Transitioning to a New First Nations Health Governance Structure* (First Nations Health Authority 2016b). These changes are significant increases in the self-determination of Indigenous peoples over the healthcare in their nations. In fact, according to provincial civil servants Gottfred & Beak (2013), the success of these agreements is due to the foundation of collectivity set by the First Nations leaders who came to together and presented a unified front to negotiate with the provinces.

As discussed, decolonizing health services can enable Indigenous populations to create models of healthcare delivery to overcome negative health indicators. Browne and Smye (2002a) have argued this in the B.C. context. Here, they argue, a post-colonial analysis of healthcare is required to overcome the disproportionate negative health indicators ascribed to Indigenous

peoples. They explain that during the years 1991-1997, Indigenous women in B.C. had a life expectancy at birth that was 8.9 years less than for other B.C. residents and cervical cancer mortality rates among Indigenous women in B.C., during 1973 to 1985, were approximately six times higher than rates for non-Indigenous women. These are staggering indicators and when removed from the historical and contemporary colonial contexts, solutions to overcoming this disproportion can be lost. When colonial constructs are ignored, other systemic factors are considered such as cultural or racial differences or lifestyle choices. “As a consequence, culturalist explanations embedded in healthcare discourses erase social, economic and political issues as significant problematics in health service delivery” (Browne and Smye 2002a, 30). Browne and Smye (2002b) argue that post-colonial approaches to healthcare policy can act “as a tool or lens for a reflexive process informed by post-colonialism, which alerts us to the importance of historical, social, economic and political structures in the analysis of contemporary health policies as they impact on the...wellbeing of aboriginal people” (43-44).

The First Nations Health Authority is an example of such a de-colonial approach to healthcare. The F.N.H.A. premises its work in the colonial model by placing the health of Indigenous peoples in the context of colonial history. To do this, the F.N.H.A. maps the status of Indigenous peoples' health throughout pre-contact highlighting the role of traditional healing practices. It then moved on to track changes in health indicators through early contact and changes to health as a result of colonial measures such as the Indian Residential Schools and 20th century healthcare systems. The outcome of this placement in the colonial model provides a demonstration of how the health status of Indigenous peoples has been negatively impacted by colonial contact and policies (First Nations Health Authority 2016c). The F.N.H.A. uses this framework of the colonial model to inform the research it performs and the services it provides,

including: benefits, wellness programs, preventative healthcare programs, disease control, addictions and mental health, and many others (First Nations Health Authority 2016a).

Turning to the N.W.T., it was not until 1988 that the G.N.W.T. took over healthcare services from the federal government (Dacks 1990, 4). The Territory regulates this service delivery through the territorial Department of Health and Social Services. The G.N.W.T. has regularly developed discussion papers and commissions (1993, 1998, 2001, 2003) to assess and recommend improvements to the territory's health legislation (Whiteworks 2003) and today, the N.W.T.'s healthcare services are administered through the Social Services and 8 Regional Health and Social Services Authorities, which include 7 Health and Social Services Authorities, and 1 Community Services Agency (Tlicho) (Office of the Auditor General of Canada 2011). Each of these boards has a unique mandate (G.N.W.T. 2001-02) and this contributes to the complexity of healthcare for Indigenous peoples, which clearly weighs on the G.N.W.T. For example, the 2002-03 Department of Health and Social Services' Results Report discusses the intention to coordinate better health care delivery and improve healthcare performance and indicators. The report describes its goal as, "To improve integration and coordination of services: Effective partnerships with Aboriginal organizations and communities." In 2012, the Department of Health and Social Services initiated planning for a new Aboriginal Health and Community Wellness Division to administer and coordinate Indigenous healthcare (Department of Health and Social Services 2013 3). Interestingly, the N.W.T. is also the only jurisdiction that has a Metis health policy, and this policy provides Metis peoples with a healthcare program that is equivalent to the federal government's Non-Insured Health Benefits (Health Council Canada 2013, 23; Lavoie 2001, 7; G.N.W.T. 2012).

For the G.N.W.T. the complexity of healthcare and the struggle to overcome the challenges it faces is evident from its public documents, specifically as healthcare relates to self-government agreements. In the N.W.T., there is uncertainty as to how these services will be administered after Indigenous self-government is implemented. One G.N.W.T. report states: “Each board was structured according to local and regional interests, including Aboriginal self-government interests. The uncertainty in a vision of the governance structures and future advances in Aboriginal governance has influenced the nature and number of board structures and, in turn, the nature of health and social service delivery” (G.N.W.T. 2001-02) Specifically the number and nature of the boards might be impacted (G.N.W.T. 2001-04), resulting in issues of coordination and administration of healthcare service delivery.

A second area of social service delivery in the Indigenous/state governance network that is important to this discussion is education. This is one of the most contentious areas of devolution and neo-colonial activity. One of Canada’s greatest national tragedies has been the use of education as a colonial tool for assimilation; the residential schools are a clear illustration of cultural genocide in Canada.⁸² Formal education systems are important to any colonial project; they create the opportunity for colonial states to influence settler and colonized populations with a knowledge system that legitimizes and perpetuates itself (namely, it purports aspects of European diffusionism) (Memmi 1965; Fanon 1963). What is interesting about any analysis of First Nation education in Canada is how archaic the system remains. The colonial roots of this system, established by the *Indian Act*, remain a part of the contemporary governance network. Thus, there is opportunity for neo-colonialism in the narrative of Canadian federalism and provincial education systems.

Frideres and Gadacz (2012) argue that poor quality standards and outputs are entrenched features of colonial social service delivery models. This is clearly illustrated by First Nation education systems in Canada. As Mendelson (2008) writes, “The present non-system of education for First Nations children living on reserves is failing, and the overall results for Canada have shown no improvements over the last decade. It is difficult to think of another issue that is so clearly a social and economic disaster in the making” (19). One Manitoba Government employee stated, “We need to change socio-economic outcomes: any study shows a gap. This is thankfully narrowing, but there’s lots of work to do” (Anonymous 2014). As will be discussed, this continued lack of improvement in First Nations education systems and its outcomes demonstrate neo-colonial activity in the Indigenous/state governance network.

In Canada, the jurisdictional authority of First Nation education rests with the federal government under the *Indian Act* s.114-122 (Canada Department of Justice Canada 1985). As an example of the authority provided to the central state, this act states, in section 114(2), “The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.” In this mandate, original authority is clear. First Nation educational jurisdiction, however, becomes quite complex and less clear due to the process of devolution that began in the 1970s. This devolution has resulted in three significant jurisdictional challenges in First Nation education. The first challenge is that the system of education continues to suppress, not enhance, Indigenous authority (which restricts Indigenous sovereignty in the field of education). The second challenge is a lack of an Indigenous-centred educational system. The third challenge is a policy vacuum concerning leadership. These challenges are all direct results of colonial policy, or the mandate authorized in the *Indian Act*, which also ensures that contemporary education service delivery continues to be shaped through the colonial lens of the *Indian Act*. Thus,

contemporary education services are inherently colonial because administration and authority remain ultimately housed with the settler government.

Since the 1970s, education has been gradually devolved within Manitoba's Indigenous/state governance network. Critics argue that this process, however, has instituted neo-colonial, as opposed to anti-colonial, education services for the Indigenous/state governance network. This process of devolution began with the publication of the National Indian Brotherhood's *Indian Control of Indian Education* (1972) which demanded education be devolved from the federal government to the First Nations. The principles outlined in *Indian Control of Indian Education* includes the local authority of planning and executing the activities of schools such as budgets, staffing, curriculum, infrastructure, operation, and negotiations of agreements with the sub-nationals (Assembly of First Nations 2010). The model for this service provision would be based on federally funded but First Nation-run schools as education is a Treaty right, and thus must be provided by the Crown in exchange for lawful settlement. A process of devolution has taken place in varying degrees across the country and now most First Nation bands operate their schools, which are funded by the federal government (Swayze, 2005, 9). While the principles of the *Indian Control of Indian Education* provided the mandate and pressure to shift the jurisdictional authority to First Nation communities, the *Indian Act's* s.114-122 is still the legal structure that facilitates federal activity in Indigenous education (Swayze 2005, 9-10). This, of course, limits the degree of jurisdictional authority, the degree of self-determination over education that the First Nations truly have (Assembly of First Nations 2010, 5). Also, much of this devolution has gone to the provinces, thus the settler state remains in its decision-making role. Essentially, the fact that the *Indian Act*, which enables the settler government to maintain colonial power dynamics, is still in place, further enables colonial

activity in this realm of education service delivery. The continued presence of the *Indian Act* is a significant reason that Canada's recent attempt to remodel First Nations education through *Bill 33: First Nations Control of First Nations Education Act (2014)* was not supported by many Indigenous peoples (Canada Parliament of Canada 2014b), as decision-making would remain with the federal government, not an Indigenous authority.

This process of devolution has resulted in enhanced self-determination for First Nations communities, and also provincial enhancement. Some aspects of educational service delivery are situated under the authority of First Nations bands. First Nation communities have enhanced and improved upon their capacity in these areas of education policy significantly since the 1972 document (Assembly of First Nations 2010, 9). Consider that 60% of Canadian First Nation on-reserve population attend on-reserve schools and 40% attend off-reserve schools (Mendelson 2008, 4), and those on-reserve First Nation schools follow a provincial curriculum (Swayze 2005, 5). As well, though the band is in charge of education, the federal government requires provincial regulations be followed in a wide variety of areas. The band must ensure that provincial curriculum is followed and provincially accredited teachers are hired (Swayze 2005, 10). When the federal government creates educational policy, the sub-nationals are consulted and this curriculum influences all of INAC's educational policies (Swayze 2005, 24). Therefore, the provincial education system is pervasive for First Nation peoples.

Kinew (2014) argues that the Manitoba government is increasing its presence on-reserve, but this is not due to encroachment—or the province increasing its role out of desire to offer an enhanced service delivery—but because the federal government retrenched, which creates a vacuum that requires the enhanced presence of the sub-nationals. This process of devolution has resulted in enhanced provincial activity in all of Manitoba's First Nation communities. For

example, the Education Partnership Letter of Understanding was signed in 2009 by the federal government, the Manitoba government, and the Indigenous political organizations of AMC, SCO, and MKO. This document states a commitment to education consultation amongst these parties; it is not an invitation or agreement to initiate devolution. Specifically, the document states: “This Letter of Understanding is intended to enhance administrative cooperation with respect to education for First Nation students in Manitoba and is not intended to effect a transfer of program responsibilities among the Parties” (Canada Aboriginal Affairs and Northern Development Canada 2009). However, as Wilson (2013) argues, Manitoba’s Department of Education has in fact increased its presence on-reserve since this tripartite agreement. Another example is the training, including assessment, report cards, and reporting, provided by the Manitoba Government to Manitoba First Nation Education Resource Centre (MFNERC) staff and First Nation school staff (Giesbrecht 2014). Also, the province’s Frontier School Division and to a lesser extent other school divisions, enter into agreements with First Nations education authorities across the province to deliver school programs. There are initiatives provided and funded by Manitoba Education (Giesbrecht 2014).

The balance between providing educational standards that offer First Nation students an education that allows them to compete with other students nationally and internationally, and does not support those factors of neo-colonialism, is a clear challenge. Education provision does not, however, have to perpetuate colonialism. There are opportunities to use traditional knowledge in the education system. For example, MFNERC has developed and promoted a land-based learning curriculum that incorporates traditional and community practices with western, scientific approaches and methods to engage students in culturally appropriate school activities that take place on the land and under direction of community Elders and school staff. In ways

like this, education can be a tool of anti-colonialism while also providing students with knowledge development and educational skills to compete academically; in the end, it may be the most effective tool.

Returning to the three significant challenges to the devolution of educational jurisdiction for First Nations, I argue that these challenges suggest evidence of neo-colonialism. The first challenge is a suppression of Indigenous authority, the second is a lack of an Indigenous educational system structure, and the third is a policy vacuum on leadership. This challenge arises due to a restriction in legislation that limits First Nations to truly run their schools and education systems, and this limits sovereignty, because the legislation that is set out in the *Indian Act* s.114-122 allows the federal government to enter into arrangements of educational service delivery provision with the sub-nationals or other organizations, to provide services but not with the First Nation governments (Mendelson 2008, 2). In effect, First Nation communities cannot truly wield authority in the field of education because the legislation negates true devolution of authority to the First Nation governments. The *Indian Act's* s.114-122 were designed to assimilate First Nation peoples—not to provide sovereignty. Therefore, applying this legislation to today's educational system maintains a colonial relationship and the ideological premise of assimilation. It does not allow for federal government/Indigenous nation, or nation-to-nation, education agreements. Instead, it mandates external authority to the Indigenous nation's own education system and this maintains the process of colonialism.

The second challenge that has arisen from the process of devolution is the lack of a First Nation-controlled education system structure (Mendelson 2008, 8). An educational system structure, in this sense, refers to the secondary and tertiary levels of administration and bureaucracy of education, including school boards and ministries of education. The result of this

current structure is that most First Nation schools administer multiple roles, that of the department of education, school board, and service provider. This makes school mandates very complex and burdened with a variety of responsibilities that are usually tasked to multiple administrative and bureaucratic agencies, not a single body (Swayze 2005, 2). Thus, First Nation schools do not receive the same standards of quality provided to other education system structures that are funded by the sub-nationals. This social service-based inequity is an aspect of colonialism (Frideres and Gadacz 2012). Take, for example, the issue that arises surrounding curriculum. As Giesbrecht (2014) explains, First Nation schools can choose to use Manitoba curriculum or choose not to. Often, the schools choose to use provincial curriculum in math and sciences, and this can be criticized for not being Indigenous-based curriculum. The questions arise as to what types of pressures First Nations schools face in choosing curriculum. If it is common practice to use provincial curriculum for math and sciences, it seems pressure does exist to conform to the colonial state education system.

The third challenge to devolution of educational jurisdiction is a policy vacuum of educational leadership. The federal government no longer views itself as an educational policy leader for First Nation communities. It took the cue from the *Indian Control of Indian Education* to no longer provide policy direction leadership as this has only reinforced paternalism. INAC, therefore, sees its role as one of providing only funding, not of providing an education program (Mendelson 2008, 4). The result of this has been a policy vacuum: if leadership cannot come from the First Nations due to restrictions in the *Indian Act* (outlined in challenge one) nor the federal government due to the history of colonialism and paternalism, where does it come from? Mendelson (2008) asks, how can the gap be bridged between devolving authority of education to First Nations organizations while still ensuring educational quality through appropriate

leadership (5). This policy vacuum encourages or perhaps requires the province to fill the vacuum, allowing (or forcing) provincial encroachment.

There are a number of initiatives in place to address these challenges. For example, a number of First Nation educational organizations are developing across Canada (Mendelson 2008, 8) and there exist recommendations that champion the creation of a First Nations educational system (Bell et al. 2004; Royal Commission on Aboriginal Peoples 1996). As well, a number of First Nation educational initiatives have developed that require legislative authority that does not exist in the *Indian Act*. To counteract this, the federal government was developing the *First Nations Control of First Nations Education Act* (Canada Parliament of Canada 2014b), which is based in some degree on earlier precedents set by the *Mi'kmaq Education Act* and work in B.C. (Mendelson 2008, 14). This legislation has since died on the Order Paper in Spring 2014. The act would have made it possible to remove s.114-122 from the *Indian Act*—that which continues to reinforce colonialism (Mendelson 2008, 15). However, the *First Nations Control of First Nations Education Act* would have maintained colonial relations by instituting “federal inspectors, forced partnerships, or even subservience to provincial education standards” (Kinew 2014). Also, in Manitoba, a First Nation organization, the Manitoba First Nations Education Resource Centre (MFNERC), provides educational support service to 48 communities. In many ways MFNERC fills the leadership vacuum and provides additional support to First Nations educational system structures across the province. For some time, there was discussion of MFNERC becoming a provincial school division for First Nations education, but this has yet to happen (Giesbrecht 2014).

Furthermore, this process of devolution that has enhanced the presence of the provincial government in the Indigenous/state governance network is neo-colonial because it is not founded

on the nation-to-nation framework, and this limits the sovereignty of Indigenous nations. According to NIB's *Indian Control of Indian Education* (1972) education policy should only be devolved from the federal government to the First Nations, and any inclusion of the sub-nationals violates the Treaties (5). And yet, the province is currently involved. For example, the Manitoba government has an Aboriginal Education Directorate and an Aboriginal Education Action Plan which has an objective to "ensure an integrated approach to Aboriginal education and training within Manitoba Education, Citizenship and Youth and Manitoba Advanced Education and Training; to promote the removal of systemic barriers to Aboriginal student success; and to participate in, and ensure linkages with inter-sectoral initiatives related to Aboriginal education and training" (Manitoba Education 2010/11, 5). As well, 13 First Nation schools have an agreement with Frontier School Division (Swayze 2005, 16; Frontier School Division 2013). The encroachment of the provinces in First Nations education is pervasive, and this service provision is an indicator of neo-colonialism.

The statistics of contemporary education services also demonstrate neo-colonial activity. Frideres and Gadacz (2012) argue that an "attribute of colonization is the provision of low-quality social services for colonized Aboriginal individuals in such areas as health and education" (8). And Kineu (2014) says, "One of the steps of colonization is to underfund services. Indigenous peoples are totally marginalized economically and socially. It's very hard to have hope in this morass of oppression." Wilson (2014) says, "The first thing you notice when on reserve is what is not offered: education." This is because First Nations schools receive less funding than those funded by the provinces. An example of neo-colonialism comes from an interview with an employee of the department Manitoba Education, Sheila Giesbrecht (2014), who explained to me that Frontier Schools Division schools do better than First Nations schools

by traditional standards. These schools score higher on math and literacy, attendance, and graduations. Giesbrecht, however, goes on to explain that these standards do not always reflect what schools believe are indicators of success. So, we can see pressure to adhere to restrictions set by the sub-national, such as attendance, not that of the First Nations education authorities, such as learning on the land. “There are staggering distinctions between the feds and province”: reserve schools only get 75% of funding, but Frontier Schools Division is funded at highest rate of any school division in Manitoba (Anonymous 2014). It is easy to see, then, why Frontier Schools Division operates on many reserves. Yet, this means the First Nation school must relinquish control to the Frontier Schools Division.

In Manitoba, the evidence of low-quality social services has been clear for decades in the education outcomes of First Nations peoples. For example, in the years of 1951/52 1.9% of Indigenous students graduated Grade 12 compared to 33.9% of non-Indigenous students. In 1957/58 5.4% of Indigenous and 60.5% of non-Indigenous students graduated Grade 12 (Manitoba Indian Brotherhood 1971, 168). This is a significant gap in the educational outcomes of Indigenous and non-Indigenous populations. In fact, “The gap is as great as if we had never entered the field of academic education” (Manitoba Indian Brotherhood 1971, 168). Over time, many more Indigenous peoples began and continued to attend school; however, the gap remains. For example, in 1981, 47% of Indigenous peoples aged 15-19 were in school versus 67% of non-Indigenous, 17% completed high school versus 46% of non-Indigenous (Hull 1987, x). More recent statistics highlight the continuation of the gap, and suggest it is worsening. When comparing the education outcomes from the 1996 and 2006 census reports and data from INAC covering a period from 1996 to 2003, Mendelson (2008) writes, “Indeed, the static educational attainment data imply that educational outcomes for residents on reserve are actually getting

worse in relative terms” (1). Unfortunately, more recent statistics are unavailable at this time.⁸³ One Manitoba government employee has said, “No one could argue that services are on par on-reserve, especially education” (Anonymous 2014). Thus, we see that colonialism, its effect of poor quality social service provision, is still active in First Nations education systems.

Further to this, provincial schools perpetuate neo-colonialism through the curriculum that they provide which is based on settler-generated histories which can ignore Indigenous peoples and colonialism.⁸⁴ Education, therefore, is not just what is taught, but what is not taught. Consider that education can be a tool of colonialism when it legitimizes and perpetuates the colonial paradigm, and it can do this in two ways. First, knowledge and education present themselves as non-partial, pure knowledge, but education is not: these knowledge and education systems are in fact ideological (Said 2003, 10). Second, concepts that legitimize colonial inequality are perpetuated in the knowledge systems (state, newspapers, schools) of colonial society. Thus, education systems are intricately tied to ideological systems; in colonial education systems, this means that colonial paradigms are a part of how knowledge is presented. Therefore, colonial ideology is perpetuated through knowledge bases. This colonial ideology becomes society’s implicit knowledge, or it is normalized and accepted without question. Althusser (1971) demonstrates how knowledge systems become ingrained into our consciousness. That which we are taught by all sorts of our society’s institutions (such as schools) shapes our value systems often subconsciously, without our awareness that they are shaping our capacities of perception, understanding, and decision-making processes. As Taussig (1987) writes, “It is not with conscious ideology but with what I call implicit social knowledge that I am here concerned, with what moves people without their knowing quite why or quite how, with what makes the real and the normal, and above all with what makes ethical distinctions politically powerful” (366). In

essence, education provides us with tools that shape how we understand and see the world, often without us even realizing it.

Battiste and Henderson (2000) demonstrate how, in a settler society such as Canada, education can perpetuate Eurocentric viewpoints (86) and undermine diversity of thought or opinion. They call this “cognitive imperialism” (92), which means the mind—how we think and understand—has been colonized or trained to normalize and perpetuate colonialism. Education, therefore, can be used to advance and legitimize colonialism. In fact, Nepinak (2013) argues that provincial schools are continuing the assimilation project of the residential schools. Consider and apply the three challenges that the process of devolution has enshrined into First Nations education and we can indeed see neo-colonial activity: there is a suppression of Indigenous authority, a lack of an Indigenous educational system structure, and a policy vacuum concerning leadership.

Mendelson (2008) argues that the current model of organization for First Nations education maintains the assimilation of colonial paradigms as put forward in the *Indian Act* s.144-122; it is then critical to consider the role of the province in education. According to the Provincial Department of Education, Citizenship, and Youth, “The objectives are: to ensure an integrated approach to Aboriginal education and training within Manitoba Education, Citizenship and Youth and Manitoba Advanced Education and Training; to promote the removal of systemic barriers to Aboriginal student success; and to participate in, and ensure linkages with, inter-sectoral initiatives related to Aboriginal education and training” (2004). Yet, will this bring Indigenous content into provincial education system structures and have it stand on its own? Or will this legitimize and perpetuate neo-colonialism? Can this content that must be provincially-approved contribute to anti-colonialism and promote First Nations self-governance?

Turning to the service delivery sphere of education in B.C., there is much evidence that the role of the provincial government has been enhanced as well as the self-determination of Indigenous peoples in the service delivery of education. The indicators of education in B.C. are similar to much of Canada, where Indigenous students make up a disproportionate percentage of deficits. An example of these education gaps in B.C. can be evidenced by graduation rates: in 2005 Indigenous students graduated at a rate of 49% compared to non-Indigenous students who graduated at a rate of 82%. This gap is closing: as recent as 2014 saw completion rates of 62% and 87% for Indigenous and non-Indigenous students respectively (Auditor General of British Columbia 2015, 5). As of the 2014/15 school year, there were 72,000 Indigenous students enrolled in school: 62,000 in provincial schools and 10,000 in independent or band operated schools (Auditor General of British Columbia 2015, 23). There are 140 First Nations operated schools out of 203 First Nations communities (Auditor General of British Columbia 2015, 10).

As with the rest of Canada, the *Indian Act* regulates education for First Nations peoples living on-reserve. However, several interesting policy and legislative shifts have led to significant education-based changes in B.C. As discussed in Chapter 4, the B.C. provincial government had a sudden policy shift in the 1990s (due to a government change) that saw a significant increase of provincial state activity in Indigenous issues and this includes education policy. In addition to the province enhancing its role in sphere of Indigenous education, many significant accomplishments have been made to increase Indigenous self-determination in education.

These legislative and policy shifts are both recent and considerable. In 1999 the *Memorandum of Understanding* was signed between Indigenous leaders and public education partners to improve Indigenous student success (Auditor General of British Columbia 2015, 21).

In 2005 the B.C. government passed the *Transformative Change Accord* which identified education indicators that Indigenous students were underperforming and made recommendations to strengthen them over a course of 10 years. Later, in July 2006, the federal government enacted the *First Nations Education Act* with the province and the First Nations Education Steering Committee (F.N.E.S.C.). While this act is a tripartite agreement, the negotiations rested largely with the First Nations peoples and the federal government, and not the provincial government (Gottfred and Beak 2013). The role of the province, however, in implementing the *First Nations Education Act* is substantial and includes funding, a commitment to collaborative work with F.N.E.S.C., annual reporting, and other responsibilities for delivery and reporting (Canada Indigenous and Northern Affairs 2012).

In 2006, the *Education Jurisdiction Framework Agreement* and the *British Columbia First Nation Education Agreement* were both signed between the B.C. government and the F.N.E.S.C. This same year, the federal government also enacted the *First Nations Jurisdiction over Education in British Columbia Act*, which states: “section 9 (1) of the First Nations Jurisdiction over Education in British Columbia Act (Canada) authorizes, to the extent provided by an individual agreement between the government of Canada and a participating First Nation, the participating First Nation to enact laws respecting education on First Nation land” (British Columbia Ministry of Education Governance and Legislation Branch, 1). In 2012 the *Tripartite Education Framework Agreement* was signed amongst all three levels of government—the provincial, federal, and First Nations governments—to close gaps in student success (Auditor General of British Columbia 2015, 21). This *Tripartite Education Framework Agreement* (2012) comes from *Education Jurisdiction Framework Agreement* and states “Individual First Nations have primary decision-making responsibility for First Nation Schools, including the management

and delivery of education programs and services” (Indigenous and Northern Affairs Canada, 2012). This tripartite agreement, therefore, places much decision-making power in the hands of the Indigenous nations.

The governance model of the *Tripartite Education Framework Agreement* is predicated on First Nations governments and schools working with F.N.E.S.C. which administers education programs and services. While the Indigenous nations take the lead on decision-making through the legislative framework, the provinces are still involved in the delivery of education services. The federal government explains that “British Columbia and First Nations are working on a government to government basis towards building a new relationship and have set out their commitment to do so in the document entitled "The New Relationship" released in 2005” (Indigenous and Northern Affairs Canada 2012). Here, it is clear that the provincial government is heavily involved in education for Indigenous peoples. However, as provincial civil servants Gottfred & Beak (2013) state, “The province works with First Nations to articulate how to move forward. It is not prescriptive, but instead a structured engagement (which works better than non-structured) to effect on-going relationships and partnerships and clarify purpose.” These legislative and policies changes demonstrate that the provincial government is enhancing its engagement in many of B.C.’s First Nations communities through education; however, the Indigenous nations are also increasing their self-determination over their education.

Turning to education the N.W.T, as discussed in Chapter 5, settler colonialism arrived much later in the N.W.T., and this has greatly impacted the development of education service delivery for the territorial government. Until the 1950s education was provided by church-run schools; at this point the federal government implemented an education program that was then transferred to the G.N.W.T. in 1969 (Office of the Auditor General of Canada 2011, 7). During

the 1960s and 70s, residential schools were closed throughout the N.W.T. and the G.N.W.T. 's education delivery was initially administered through both the legislative acts of *Civic Education* (1978) and *Social Studies K-9* (1979), and the 1991 policy document "Our Students, Our Future: An Educational Framework" (G.N.W.T. Education, Culture, and Employment, 1997). Today, the education system in the N.W.T. is run by the Department of Education, Culture, and Employment and the *Education Act* (1995) and education delivery is administered through 8 regional education councils.

This education system has long struggled to meet performance standards and critics have focused on two main factors to this under-performance. The first is the lack of adequate representation of Indigenous teachers, and the second is a southern-developed curriculum that has continued to under-serve the specific education needs of the local, northern population. In the 1970s, over 30% of the non-Indigenous and over 70% of the Indigenous populations were functionally illiterate (Dickerson 1992, 129). The G.N.W.T. has long attempted to change its education system and improve upon these staggering indicators; however, the contemporary education indicators have not shown much improvement. For example, currently 44% of N.W.T. Indigenous students graduate from high school; while this is an improvement over ten years ago, when only 20% of Indigenous students graduated, it is still far behind non-Indigenous students whose graduation rates are 70% (Education, Culture and Employment, G.N.W.T. 2011, 5).

The G.N.W.T. has made recent policy-related changes to include local communities in the education structure in an attempt to improve educational outcomes. In 2009, the department of Education, Culture and Employment, created a collaborative working group, the Aboriginal Student Achievement Working Group (ASAWG) to overcome this gap. The group consists of G.N.W.T. departments of Justice, Health and Social Services and Education, Culture and

Employment, five Aboriginal organizations (the Inuvialuit Regional Corporation, the Dene Nation, the N.W.T. Métis Nation, North Slave Métis Alliance and the Native Women's Association of the N.W.T.), school boards, and non-governmental education organizations (Education, Culture and Employment 2011, 10). This working group is attempting to develop a curriculum that is more suitable to the territories' population, increase the number of Indigenous teachers and Indigenous language instructors, and develop programs for Elders in schools and culture-based education.

This working group builds on previous efforts by the G.N.W.T. In 2007 the Department of Education, Culture, and Employment announced a strategy to increase the number of Indigenous teachers in its schools (Office of the Auditor General of Canada 2011, 11), but this still remains a continuing challenge. In addition to this, in 2009 the department announced the Aboriginal Student Achievement initiative to close the gap in education outcomes between Indigenous and non-Indigenous students (Office of the Auditor General of Canada 2011, 22-3). Interestingly, the *Education Act* (1995) requires that education programs be based on Aboriginal culture (Office of the Auditor General of Canada 2011, 23).

While the provincial encroachment in First Nations education via the devolution process initiated by the *Indian Control of Indian Education* can be interpreted as neo-colonial, there are other views that this is instead anti-colonial. The *Indian Control of Indian Education* document advocated devolution and this was explicitly directed towards Indigenous nations and not the sub-nationals; however, Mendelson (2008) argues this document did contribute to the current process of federal devolution to the provinces. Wilson (2013) argues that the provinces should be more involved with service delivery; however, how does this happen without the Indigenous nations giving up jurisdiction? Wilson asks, is it a horrible thing to give up jurisdiction if we

know the provinces can do a better job than the federal government? It is about achieving community directed and controlled outcomes. Many First Nations communities are opposed to sub-national encroachment; however, examples of the provincial schools providing appropriate education do exist. For example, many sub-national programs and curriculum guides have begun to include Indigenous ceremonies and languages. As well, because de-colonialism in the field of education is not new, mainstream curricula are slowly changing to show a more nuanced understanding of First Nations cultures and histories than the previous settler colonial paradigm. As the Assembly of First Nations (2010) writes, education has been used for assimilation, but it can be used for liberation as well: “First Nations view education as a means to achieving self-determination and redressing the negative impacts of colonial practices” (6). Wilson argues that perhaps the question should actually be how do we maintain nation-to-nation status of relations while also having the provinces alongside us? Wilson goes on to argue that this shift in dialogue creates an opportunity for sovereignty reassertion. Instead of just reacting to what government is or is not doing, when a void is presented there is opportunity to create or enforce the Indigenous nation's own laws; “That is sovereignty” (Wilson 2013).

Conclusion

The devolution of the service delivery of healthcare and education to the sub-nationals and the evolution of sub-national ministerial administration responsible for Indigenous peoples is not simply an evolution in the flexible nature of Canadian federalism, but instead these activities have tendencies of neo-colonialism. This is because it exists at the expense of Indigenous sovereignty. Much like the premise of colonial intent towards Indigenous peoples, these services are provided under a guise of providing better services to Indigenous peoples. However, Indigenous peoples, who make up disproportionate negative indicators when looking at socio-economic indicators, have suffered at the hands of colonial service delivery. Indigenous peoples

have long advocated for control over their health and education of themselves, as evidenced in the continued struggle for self-determined control over modern healthcare and education provision.

These jurisdictional matters, that of healthcare and education, are complex. The federal and sub-national roles of funding and provision will surely continue to evolve and be in flux. This can lead to jurisdictional football as well as jurisdictional ambiguity. The example of jurisdictional ambiguity found in the region of the N.W.T., serves as a good reminder of the complexity involved in providing services for Indigenous peoples through the model of Canadian federalism. As Everts-Lind (2013) discussed, in the N.W.T., a sub-national whose population is 50% Indigenous, it can be difficult for the sub-national government to ascertain whether a policy is for Indigenous peoples or the general public; this makes navigating the policy terrain of s.91(24) difficult for the sub-national. The enhanced activity of the sub-nationals in the Indigenous/state governance network may enable greater divergence of resources and services available to First Nations communities throughout Canada. This might increase the presence of neo-colonialism through sub-national presence in a wide array of matters of importance for Indigenous peoples or provide important opportunities for Indigenous self-determination.

Conclusion: Settler Neo-colonialism and Canadian Federalism

This thesis examines the impact of a narrative of settler colonialism on the evolution of Canadian federalism and jurisdiction for Indigenous peoples. Section 91 (24) of the Canadian Constitution is generally considered by the state to refer to people with First Nation status who live on reserve and are a responsibility of the federal government; however, a detailed inspection of the *Royal Proclamation of 1763*, the *Canadian Constitution Act* (1867 and 1982), land management legislation, and case law reveals multiple interpretations of the role of the sub-nationals according to s.91(24). As well, modern approaches to governance, such as devolution, have enhanced the role of the sub-nationals in all policy matters, including those that impact Indigenous nations. The result has been a historically overlooked and increasingly prominent aspect of Canadian governance that has seen the provincial and territorial sub-nationals increasingly involved in Indigenous governance. This dissertation describes aspects of neo-colonialism at work in the present-day political and public administrative activities of these sub-nationals. This neo-colonialism is an outcome of the narrative of Canadian federalism that is influenced by settler colonial society, which contributes to the avoidance of the role of the sub-nationals in the Indigenous/state governance network and thus allows this role to remain overlooked.

In many ways, this thesis is an exercise in recording the strands of political pressures, policy mechanisms, and legal thought that have contributed to shaping the Indigenous/state governance network. Detailed attention to the role of the sub-nationals has not been paid since the late 1980s. In this sense, this project contributes to closing a knowledge gap. In other ways, it attempts to provide a critical analysis of settler colonialism in the Canadian state, such as enabling neo-colonialism through recent developments in the structures of federalism.

The question of jurisdiction in Canada is not an easy one. One of the limitations that this project faced was defining jurisdiction. Of course, the Canadian state defines jurisdiction according to an understanding framed by western democracy and Canadian liberalism. This definition reflects a limitation both in my own understanding of governance—this is because I have a Canadian education, and this shapes my understanding of the state—and it reflects the limitations of the Canadian state and its understanding and use of the concept of jurisdiction. A typical description of the state’s definition of jurisdiction is that of the distribution of the powers that determines its authority and responsibility. Canada is a federal state determined by the division of the federal and sub-national heads of power, and it is this distribution of autonomous powers, or jurisdiction, that determines state authority and responsibility.

How does jurisdiction get set in Canada? Macklem (2001) asks, “What constitutes a just distribution of power?” (28) and presupposes that “equality is said to exist simply when equals are not treated unequally” (29). Thus, in Canada, the jurisdiction of the state, its authority and responsibility, is based on a foundation of equality determined when citizens are not treated unequally, which can be generalized as “sameness.” Smith (2004) writes on the connection between federalism and equality, “The equality principle is a crucial principle of federalism” (28). This notion in Canadian federalism is based on the practice of liberalism, in which equality excludes unequal treatment through special or different status, and this notion became normative in the years following World War II as it remains (Hogg 2005, 628). In contemporary Canadian liberalism, equality means being blind to diversity, which is a notion that inherently excludes special status (Hogg 2005, 628). Indigenous difference is counter to this notion of equality (Macklem 2001, 30). For example, Canadian liberalism, that which is based on sameness or is blind to difference, is dismissive of Indigenous difference, it does not feel responsible for it, and

this perpetuates dismissiveness towards the principles or laws that uphold this difference, such as the Treaties or the *Indian Act*, to the detriment of Indigenous peoples (J. Henderson 2007, 5). Thus, how the Canadian state perceives just distributions of its jurisdiction is based on these limits of liberalism. These limits can impact or reduce the legitimacy of legal tenets that protect such difference by projecting an ideal of sameness.

These perceptions of just distribution greatly shape the Indigenous/state governance network. Perceptions of sameness create an expectation that equality is reached when one set of rights exist, instead of sets of laws that protect rights of difference. As Macklem (2001) states, “the question is not ‘whether equality’, but ‘which equality’” (31). Palmater (2011) contributes to this argument and says “equality can also mean difference in treatment and the protection of difference” (221). Thus, the Canadian state views jurisdiction through a lens of liberalism that does not accommodate Indigenous difference, but instead presupposes sameness. As Bannerji (2000) explains, Canadian liberalism perpetuates homogeneity (sameness) by creating a fixed ideal of what it means to be Canadian, yet it masks this ideal, this process of homogenization “through a constantly deferred promise” of cultural equity (9). In this way, minorities are made to support liberalism's status quo of equality (Bannerji 2000, 100). These views of equality limit Indigenous peoples to two choices: choosing assimilation or participating in a culture that is restricted to pre-contact cultural facets (Palmater 2011, 63). There are, however, other ways to view equality. For example, equality can be based on an equity where differences are considered equal, with laws that protect differences, and do not coerce differences to dissipate to sameness.

This thesis understands jurisdiction from this standpoint of Canadian jurisdiction, but also attempts to unpack these assumptions of equality to demonstrate the alternative possibilities that may encourage anti-colonialism. This project is not about whether the sub-national should be on-

reserve. This is not for me to say. This project is about describing the presence of the province, whether it is there under s. 88, or changes in federalism such as devolution or political reasons of encroachment, and assessing the degree to which such encroachments support or counter colonialism. One solution, however, to this dilemma of jurisdiction that is not dealt with in full is that of sovereignty. Why debate who has the authority for Indigenous peoples in Canada—the federal or provincial governments—when the answer clearly is neither but instead the sovereign Indigenous nations.

This narrative of federalism that maintains federal jurisdiction, it has been argued, is neo-colonial. Neo-colonialism has been exercised through the practice of devolution, or the offloading of responsibility from the central to sub-nationals. Devolution is both a wider trend of public administration that has impacted the structure of federalism, which is a type of governance organization, and practice that we use here in Canada. The presence of devolution is common evolution of public administration amongst western, democracies. The evolution of Canadian federalism demonstrates the flexibility of federalism, and how it has melded to various economic and political needs to accommodate the Canadian government's needs. Furthermore, this practice of devolution is found in all aspects of governance. Its presence, therefore, is perhaps not unexpected in the Canadian governing of Indigenous-related policies and practices. Yet, the role of the sub-national is consistently dismissed, and so the question arises whether or not the federal government is offloading its constitutional and judicial obligations under this guise of devolution. The history of settler colonialism demonstrates that narratives can be built to hide such state action to benefit settler society at the expense of Indigenous disempowerment.

Turning to federal jurisdiction for Indigenous peoples, this is determined by s. 91(24) of the *BNA Act, 1867*, which reads “Indians and lands reserved for Indians” are a head of power for

the federal government. This premise of Indigenous peoples being a matter of jurisdiction for the government, thus subverting the nation-to-nation relationship amongst sovereign nations that are recognized in the *Royal Proclamation of 1763* and the various Treaties, was determined in this sentence. It is a colonial premise, an indicator of the settler colonial government. That it remains a function of contemporary Canadian government is evidence that present-day federalism is an extension of historic settler colonialism.

From this federal jurisdiction, a role for sub-national jurisdiction arises. The *Indian Act* section 88 outlines a specific role for the provinces on-reserve. Further to this, there are various interpretations that arise from the courts and legislation that make clear that the provinces, in relation to s.91(24), can fill legislative vacuums that might arise, exercise fiduciary authority, and even legislate in ways that can promote or benefit Indianness. Throughout the history of Canada's governance, federalism has evolved from colonial to modern expressions. Throughout these changes, the provinces have been pressured to take on more responsibilities. This has led to the provinces having more activity in Indigenous politics, in particular since the post-World War II era, and also actively taking on jurisdictional authority in areas such as lands and natural resource management. Taken together, these constitutional, legislative, and governance practices make it clear that the narrative of Canadian federalism, which maintains that the sub-nationals do not have a role in the Indigenous/state governance network, is not accurate.

One of Canada's contemporary expression of federalism can be described as New Public Management (NPM), which is distinguished by two features. The first feature is a tendency of devolution from upper to lower levels of government and the second is looking to market-based indicators for direction on or delivery of public services. This thesis is more interested in the first feature, that of devolution and the consequences of this governance approach which can include

“unclear” or indeterminate jurisdictions, vacuums of authority, and a denial of responsibility. I argue that there are two characteristics to devolution: encroachment and devolution.

Encroachment is characterized by the sub-nationals seeking to increase their roles, often to increase control over land and natural resources. Devolution is characterized as pressure from the federal government, which might pull back from governance activity, generating a vacuum that the sub-national must fill. Examples of both encroachment and devolution can be found in contemporary Canadian federalism.

Because federalism is naturally flexible and has changed dramatically over the course of Canada’s history, the question arises if these activities are wider trends or expressions of changes to federalism, such as NPM, or if they are neo-colonialist. The answer lies in the motive for encroachment and retrenchment of the state, and the result of the intent: will the decision-making authority remain with the settler state or the Indigenous nation? I argue that neo-colonialism is a significant feature of these practices. This is because the narrative of Canadian federalism remains one of central state/Indigenous relations. This is not accurate. There are many examples of the sub-national actively participating in the Indigenous/state governance network, which can be found in the constitution, legislation, court decisions, and policy practices. I argue that the omission of this real activity is an outcome of settler colonialism, and the continuation of the silencing of the role of the sub-national reflects ongoing settler colonialism, or neo-colonialism. This is due to settler colonialism's practice of generating replacement narratives or place-stories, which are powerful narratives that mask the social, political, and economic inequalities that exist in settler societies amongst settler and Indigenous populations in ways that empower settler society at the expense of the Indigenous peoples and nations. Because neo-colonialism is a concept that uses the contemporary mechanics of society, the economy, or politics to exert

traditional colonial inequity in ways that can be difficult to ascertain, I argue that NPM is being used as a vehicle to enable neo-colonialism. The use of NPM to decentralize government responsibility is neo-colonial and is perpetuated by a narrative of social justice, much like colonialism was perpetuated by the narrative of betterment.

To evidence these neo-colonial indicators in the Indigenous/sub-national governance network, consider those very real practices that are at work in present-day sub-nationals. This thesis looks at three sub-nationals to consider a variety of settler colonial experiences in contemporary narratives of Canadian federalism. These include the imperial colonial foundations of Manitoba, B.C., and the N.W.T., and contemporary settler colonialism that can be found in the sub-nationals' jurisdictions of economies, political structures, and policy practices.

Each of the sub-nationals of Manitoba, British Columbia, and the Northwest Territories saw external colonial economic practices shape the economies of both settler society and Indigenous peoples. These external practices continue to shape the economies of Indigenous nations, and their relationship with the federal and sub-national governments. In earlier periods of imperial colonialism, it was through H.B.C. and settler-Indigenous trade. Much of this activity was resource-based, and these economic practices remain integral to the resource bases of these sub-nationals. Aboriginal title, therefore, is intrinsic to Indigenous peoples participating in these settler economies. Importantly, it is not possible to extract or isolate governance from economies. Looking over Canada's evolution of federalism, we see the influence of economics and politics shaping the evolutionary phase of each sub-national's settler government. To understand the narrative of federalism today, and measure the influence of settler colonialism on this narrative, the place of the economy is paramount. For both Indigenous and settler society, these colonial influences marked past economic practices and continue to influence them today.

The political environment of each sub-national demonstrates colonialism. Each sub-national is framed by the tenets of Westminster parliament and is inherently colonial in the sense that this government style is that of the colonial empire. Though this is true, and one reason that Indigenous self-government is struggled for, we also saw the role of Indigenous peoples in shaping these governments. In Manitoba, this Indigenous-based influence was immediate: Riel, a Metis leader and his provisional government set a pattern for various legislative procedures and practices. More recent administrations have had many important Indigenous leaders. In the N.W.T., the federal government in Ottawa orchestrated much of the territorial governance and thus Indigenous people's involvement arose later, but this has been a defining feature of this government and its policies for several decades. In B.C., the province was at arm's length from Indigenous matters until the 1990s; since this time, however, matters of Indigenous-based policy, those that were once considered only federal purview, have increasingly come under provincial practices. This has increased Indigenous/sub-national relations in the province. Today, each of these three sub-nationals has a department responsible for Indigenous issues. Thus, while the settler narrative of federalism maintains federal authority, we can see evidence that the sub-nationals have been increasingly involved in this realm of governance.

Each of the three sub-nationals have accepted more responsibility for the management of natural resources, which has a clear impact on Indigenous lands. In N.W.T, these powers were devolved through *N.W.T. Lands and Resources Devolution Agreement*, 2013, in Manitoba through the *Natural Resource Transfer Act*, 1930, and in B.C. upon joining confederation in 1871. Yet, in B.C. the provincial government maintained distance from Indian lands except for the McKenna-McBride Royal Commission (1912-16), which concerned Indian reserve lands. In Canada's history of governance, there has been much discussion as to the sub-national

involvement in these Indian lands, given that s. 91(24) makes the federal government a head of power for Indian lands, but also that the sub-nationals have control over natural resource management. Over time, as federalism evolved, the courts have increased provincial participation in land management in ways that intersect with Indian lands which can include reserve lands, Treaty lands, and traditional or ancestral lands, whether ceded or unceded. Today, modern land claims in each of these sub-nationals make clear that the sub-nationals have a place at the negotiating table.

This devolution is neo-colonial. On the one hand, it shifts the colonizer/colonized model from central state to sub-national, and this is an extension of colonialism. What characterizes this activity as neo-colonial and not traditional colonialism is that the governments package it as a process of devolution, and not a continuation of systemic colonial relations amongst settler colonial state and Indigenous nations. Past Ghanaian President Kwame Nkrumah, who coined the term neo-colonialism, has argued that neo-colonialism is more difficult to detect and resist than those features of colonialism that we associate with classic colonialism (Ashcroft, Griffiths, and Tiffin 2000, 146). In this way, the narrative of Canadian federalism and NPM offer a realm of governance that can easily mask neo-colonial practices as changes in federalist practices. Evidence for this view can be seen in the on-going manipulation of the narrative of Canadian federalism that omits sub-national involvement in the Indigenous/state governance network and uses replacement narratives to disempower Indigenous peoples and nations.

This feature of neo-colonialism masquerading as devolution can be found in a variety of sub-national activities. Perhaps the most explicit examples of sub-national neo-colonialism can be found in the devolved service provision of healthcare and education. As discussed in Chapter 3 on Manitoba, the jurisdictional activity of education and healthcare in the Indigenous/state

governance network is complex. These service delivery realms are marked by the inherent policy tensions that arise from the premise that the *BNA Act* and the *Indian Act* make First Nations peoples a jurisdictional authority of the federal government, while health and education are authorities of the provincial governments. This allows for jurisdictional vacuums and overlaps to result, funding shortfalls to arise, and enables the central and sub-nationals with legal arguments to avoid responsibility (or to play jurisdictional football). This tension, together with growing devolution to sub-nationals, has had a number of similar ramifications on both B.C. and the N.W.T.'s Indigenous/state governance networks.

There is a clear tension of striking a balance between neo-colonial involvement and self-determination in each of the N.W.T., B.C., and Manitoba sub-national/Indigenous governance networks concerning both education and healthcare service delivery. Given the practice of devolution in Canada, there is an opportunity to devolve these services to Indigenous nations that would greatly contribute to Indigenous self-governance which would better meet the needs of the citizens of Indigenous nations; however, the current practice of devolution most often takes Indigenous nations out of the decision-making model, once again, just as it has throughout Canada's long legacy of colonialism.

Neo-colonial Provincial Encroachment and Citizenship

One of the interesting trends that emerged in conversations with representatives of the sub-nationals is the discussion of Indigenous peoples and specifically First Nations peoples, as provincial citizens. The notion of state-centric citizenship is interesting because many Indigenous peoples view themselves as citizens of their Indigenous nation, not of Canada or a province. This issue that emerged in discussions with representatives of the sub-nationals is an unavoidable result of sub-national encroachment, or even neo-colonial infringement, into Indigenous politics, because, whereas most provinces treat off-reserve Indians as part of the general provincial

population, there are some cases when they do provide some Indigenous-specific funding provisions (Morse 1989, 71). As well, the lack of adequate services provided by the federal government and the population movement on- and off-reserve has encouraged provinces to think of service delivery not just for those off-reserve but also on-reserve: “In effect, the province ends up paying to solve problems caused by the inadequate federal services on reserves” (Long and Boldt 1988, 11). Therefore, when the provinces step in to provide services to these populations, these populations effectively become citizens of the province in the eyes of the province.

State citizenship of Indigenous populations is a contentious topic and yet specific examples arose in interviews with representatives of the sub-nationals. In an interview on B.C.’s Indigenous/state relations, provincial representatives said that the province recognizes First Nations both on- or off-reserve as provincial citizens, and so they make service delivery available to all people so as not to challenge jurisdictional responsibility (Gottfred and Beak 2013). In the N.W.T., it similarly discussed the use of policy terminology that operates to minimize distinction. Everts-Lind (2013) says the territory “uses the term Aboriginal, status is not as fundamental to undergoing business” and “the term northerner is used, not non-Aboriginal versus Aboriginal—it is inclusive, because the Aboriginal and non-Aboriginal live in the community together and legislate together.” And in Manitoba, one bureaucrat describes s. 91(24) as a difficulty, but says that in practice the province is not vigilant about the section: “We see Aboriginal peoples as Manitobans first” (Anonymous 2014). Yet, as discussed, the term Aboriginal is contentious because it is a state-generated term that seeks to erase the distinctions of the many Indigenous nations as well as their specific legal implications; it is a homogenizing term that is rooted in motives of assimilation. In a similar way, the use of northerner also eradicates the distinction of Indigenous and non-Indigenous by combining or merging the two

together, and this is a distinction that rests on rights recognition. These positions of the sub-nationals regarding Indigenous citizenship are quite contentious, because Canadian citizenship is seen by Indigenous peoples as an extension of colonialism and another attempt at assimilation by limiting their Indian status through Canadian citizenship enfranchisement (Shewell 2004, 134-170).

This meeting point of Canadian citizenship and Indigenous assimilation is longstanding in Canadian history. In fact, most Canadian and Imperial Crown policies have been designed to assimilate Indigenous peoples (Kymlicka 2003, 4) and many Indigenous peoples view the acceptance of Canadian citizenship as a means for the Canadian state to both ignore their Indigenous rights and to support the settler colonial state. To accept Canadian citizenship means that Indigenous peoples must comply with the colonial order and join the mainstream, rather than the colonial order generating or acknowledging a unique Indigenous rights-based citizenship status (Henderson 2002, 416). These Indigenous and Treaty rights do not manifest from Canadian common law and are not a product of the settler state; instead, they manifest from the Creator, time immemorial, and original occupancy. Put another way, these rights are protected by the Canadian constitution, yet they are legally independent from common law (Henderson 2002, 428). For example, the British used the Treaty process to gain rights or access to Indigenous territory: The Treaties—or other state applications of lawmaking—do not espouse or entrench rights of Indigenous peoples but instead confirm existing, inherent rights (Ladner 2009, 5). Thus, Aboriginal Treaty rights are not products of the Canadian legal process, but predate and exist outside of, and are independent of, the state.

The concept of Canadian citizenship jeopardizes the legal sanction of this independence or, basically, the sovereignty of these Indigenous and Treaty rights because this

citizenship would confer rights to Indigenous peoples under common law and this could override or deplete the independent nature and legality of Indigenous rights. So the settler state laws and citizenship could trump Indigenous laws and citizenship. And it is the contemporary Indigenous identity, not an essentialist or historic identity, that is threatened by the application of Canadian citizenship. For example, Meyer (2001) argues that Hawaiian contemporary Indigenous culture is vigorous and exists outside, or perhaps in spite, of colonialism. Thus, Indigenous knowledge exists in proximity to itself—not in location to western knowledge which tends to proximate this knowledge to an essentialist or historical conception. Therefore, Indigenous nationhood, whose continuance is widely ignored by settler society, exists independently and on its own accord, not in relation to colonial presence or practices. Applying this view to the experience of Indigenous peoples in Canada, we can see that these nations, and Indigenous rights, laws, and citizenship, continue to exist outside of the Canadian state and this independence could be jeopardized by Canadian citizenship.

Another contributing factor to the contentious nature of state citizenship and Indigenous peoples concerns conceptions of identity. There has been a waning colonial order, which has weakened globally (Kymlicka 2003), and this weakening has been accompanied by a shift in Indigenous perceptions of self-identity. Meyer (2001) writes this shift has moved questions relating to Indigenous identity from “how can we be more like them?” to “why do we want to be more like them?” (125). Long and Boldt (1988) write that “Indian's first loyalty is to their own group. They believe themselves to be nations” (551). This Indigenous cultural identity is evident in the way First Nations view Canadian citizenship, as a fidelity to First Nations Treaty or Indigenous rights (Henderson 2002, 421). Of course, many Indigenous people do identify as ‘Canadians’ and ‘Manitobans,’ etc. either in addition to or instead of their citizenship to their

Indigenous nation. However, for many, First Nations citizenship or membership entirely or predominantly belongs to the First Nations community (as defined by a region or territory such as a reserve or community), their people (as defined by a socio-cultural classification of organization such as clan, nation, language, or people), and Treaty/Indigenous rights (as defined by the original rights, Treaty, *sui generis* or s.35), which suggests a dual status form of citizenry.

Thus, when the provinces describe members of Indigenous nations as provincial citizens or prefer the use of the term Aboriginal, it can be perceived as a direct threat to the membership or status of Indigenous nations. The history of Canadian policy and legislation surrounding Indigenous nations' membership has been a tool used to keep First Nations people "in or out" of this membership by either mainstreaming or marginalizing these groups (Simpson 2007, 76). Some past policies have forced First Nations peoples to lose their Indian status and become Canadian (Simpson 2008, 254). From this history, it is clear that the invitation of Canadian citizenship is considered a proposition that will not recognize First Nations diversity (Monture-Angus 1999, 31), but demand sameness. Nor will it cater to notions of equality based on difference or acknowledge Indigenous views of the responsibilities attached to citizenship. Citizenship in Indigenous culture is determined by the cultural facets such as collective social kinship agreements, not the state-generated conceptions of individual autonomy and liberty (Henderson 2002, 420). In many ways, Canadian citizenship is a remaking of a colonial script. As Milloy (2008) writes "Unfortunately, subsequent Departmental reports charted the heritage of colonialism, of federal control and neglect of community development - the continuing deterioration of the social and economic conditions of First Nation, the failure of successive governments to alleviate those conditions and thus the hollowness of First Nations' Canadian citizenship" (12).

Canada, like other nation-states, offers national citizenship as a social bonding mechanism and now that overt colonialism is no longer a legitimate governing approach, citizenship remains one available tool for the continuance of state control (Cairns 2003, 498). This is because citizenship is important for democratic nations as a socializing tool (Cairns 2003, 501). The Canadian state maintains the old colonial expectation that First Nations will conform to Canadian legal standards (Monture-Angus 1999, 64). The Canadian government, therefore, advances the ideal of Canadian citizenry to First Nations to serve state interests. The state is not interested in establishing Aboriginal rights or providing self-government, because its political will lies in its legislative and commercial interests, or control over resources and confirming its own legitimacy which was tenuously gained through settler colonialism (Monture-Angus 1999, 47). Recently, a number of self-government agreements have been signed, but these are in many ways not founding sovereignty, as is Monture-Angus's argument. First Nations, thus, are hostile to the position of the Canadian government on citizenship, because First Nations peoples cannot be a self-determined or autonomous nation if they are citizens of the Canadian or settler society (Cairns 2003, 500). It is for these reasons that the discussion of citizenship at the provincial level is interesting. It reminds one of Cairn's "Citizen's Plus" thesis—Indigenous peoples are Canadian citizens with "extra" rights known as Aboriginal rights (Cairns 2000)—a thesis much critiqued because it fails to accommodate or even address Indigenous peoples' own understandings of their rights (Turner 2006). It is curious to hear provinces discuss First Nations as citizens, because of the historic discourse of citizenship that has overt assimilative overtones to it. It seems to be an element of neo-colonialism at work in the sub-nationals of the Canadian federation.

Final Thoughts

While discussing the tensions that arise concerning jurisdiction, it is clear that many of these tensions are due to the process of reconciling Indigenous sovereignty with that of the Crown. This discourse reminds me of a quote from Thomas Pynchon's *Gravity's Rainbow*: "If they can get you asking the wrong questions, they don't have to worry about the answers." Applying this quote to the matter at hand we can see that the settler colonial state has created a situation that has not required accountability because society as a whole does not demand such accountability.

As Barsh (2005) argues, Canadians are ambivalent to the presence and importance of Indigenous peoples and cultures in wider Canadian society. He writes that "Aboriginal peoples are the acid test of Canadian integrity and self-respect" (272). Applying Pynchon's quote to Barsh's argument, we get a sense that the marginalization of the Treaty relationship and the socio-economic standards in many First Nations communities demonstrate a Canadian settler society that is unencumbered by the colonialism that frames those relations between the Canadian state and Indigenous peoples. To Barsh, Indigenous peoples are, thus, the measurement of Canadian society's lack of accountability demanded of the federal government. Ermine (2007) has written with similar conviction that, "currently, the situation, and very often the plight of Indigenous peoples, should act as a mirror to mainstream Canada. The conditions that Indigenous peoples find themselves in are a reflection of the governance and legal structures imposed by the dominant society" (200). And what does this mirror reflect? Murphy (2003) writes, "Federal and provincial representatives face a public that is not unsympathetic to the plight of Aboriginal peoples, but whose understanding of the fundamental issues is frequently minimal and whose support can be fickle, particularly with regard to initiatives that require the commitment of substantial resources and public funds" (5).

Colonialism and neo-colonialism, therefore, continues to inform narratives of Canadian federalism because settler colonial society has yet to demand state accountability of the colonial past or neo-colonial present. Section 91(24) has a long history in Canadian federalism, which has created various implications, some even neo-colonial, for Indigenous peoples: it is time to ask the right questions. I hope that this thesis raises serious concerns about past and present government policy and can contribute to a better understanding of the influence settler colonialism has had on our governments and their policy on Indigenous self-governance.

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End Notes

¹ In addition to the expanding role of the sub-nationals in the settler state/Indigenous governance network, municipal-Indigenous relations have also increased in recent decades. These relations, which can include urban reserves and service and co-management agreements, are beyond the scope of this dissertation; however, they could certainly be a basis for further research on this topic.

² In Canada, colonial settlement itself was not encouraged by the fur trade.

³ While the disenfranchisement of Indigenous peoples from their lands and rights is not absolute, it has been significant. Indigenous peoples do continue to practice their traditional laws according to their worldviews; however, the impact of the assertion of Crown sovereignty on the relationship between Indigenous peoples and the rights and relationship to land ought not be overlooked.

⁴ This network also includes different branches of the state such as the courts, service delivery (such as education, health services, etc.), and also non-government groups such as citizens, non-governmental organizations and agencies, and so on.

⁵ The tension surrounding the term Aboriginal can be made more clear when considering its source. Again, the term Aboriginal comes from the *Constitution Act 1982*, which defines Aboriginal peoples as “Indian”, “Inuit”, and “Metis” (Canada 1982). In this sense “Indian” is defined as that who is registered with an Indian Band and therefore does not include non-registered Indians, though some presume that non-registered Indians are Metis (Franks 2000, 103). So, because all Indigenous peoples—who all have different legal and political relationships with the Crown—are then put together as one group, the rights differences can be overlooked, which means they can be diminished to the lowest common denominator or be diluted. As well, Cardinal (1988) argues that the term Aboriginal dilutes the identification of the Indigenous groups and their interests and confuses the debates (84). The term certainly discourages acknowledgment of the diversity throughout Indian country. And yet, because the term Aboriginal exists in the *Constitution Act 1982* s. 35(1), it therefore holds constitutional value and power. For these reasons of dilution and constitutional value, this is a contentious term and amongst many Indigenous peoples, the term Aboriginal is gaining increasing disdain.

⁶ Racism is quite a complex concept. Briefly, I would like to point out that racism and colonialism are interconnected concepts. Ashcroft, Griffiths, and Tiffin (2000) define racism as “a way of thinking that considers a group’s unchangeable physical characteristics to be linked in a direct, causal way to psychological or intellectual characteristics, and which on this basis distinguishes between ‘superior’ and ‘inferior’ racial groups” (181). Racism can result from colonialism, but it also helps to support colonial projects (Frideres and Gadacz 2012, 8-10). Satzewich and Liodakis (2010) discuss colonialism in Canada—and hence its racist motivations—as premised on two accounts: that of racial inferiority and also that of the belief that Indigenous peoples could and should become more like Euro-Canadian settlers (195-196). And while some argue racism in Canada is changing, even diminishing, others disagree. Frideres and Gadacz (2012) write “The level of racism and discrimination against First Nations peoples has decreased over the years, but a recent survey indicates that of all ethnic groups in Canada, First Nations still are the least desired in terms of marriage, work partners, and neighbours” (169). And in an interview with Derek Nepinak (2013), Grand Chief of Assembly of Manitoba Chiefs, he further describes racism as on-going in Canadian society, “Despite the idea that society has moved past racism, it is alive and well.” While racism is not limited to colonialism, it is closely associated with colonialism.

⁷ Often the *British North America Act, 1867* is used interchangeably with the *Canadian Constitutional Act, 1867*, but here I will use the former term to distinguish from the *Constitution Act of 1982*.

⁸ In this sense, s.91(24) established responsibilities and non-responsibilities in reflection to what is or is not covered under federal purview as is customary in federalist systems. For example, whatever the action or inaction the federal government takes will set the course for the provinces; “Federal inaction both prompts pragmatic responses from provincial governments concerned with meeting their statutory obligations and constrains provincial actions by heightening uncertainty, particularly about the all-important legal and fiscal relationship between the Government of Canada and aboriginal peoples” (Abele and Graham 1989, 144).

⁹ Aboriginal rights and title are both simple and complex concepts to define. Simply, these are Indigenous peoples’ inherent rights to govern themselves (sovereignty) and live on their ancestral lands. These rights and title have been stripped in various ways by the processes of colonialism, which makes them also complex. Slattery (1985) defines Aboriginal rights as title and also customary laws and institutions (123). Thus, there are two main types of Aboriginal rights: property rights and political rights. These two types of rights are inherently connected: “It can be

argued that Aboriginal title is the basis of all other Aboriginal rights; that all the other political and property rights flow from the doctrine of prior occupancy and the title of land that the doctrine implies.” (Kulchyski 1994, 10).

Today, after many centuries of Indigenous peoples’ struggles to maintain their rights under colonialism, Aboriginal rights are protected by the *Canadian Constitution Act*, 1982, section 35, however, in many ways they remain undefined and the courts have developed verdicts and tests to aid in defining these rights. Kulchyski (2013) demonstrates how Aboriginal rights are those rights that are recognized by the Canadian state, as opposed or in distinction to those ancestral rights of Indigenous peoples that are given by the Creator and practiced through language, land use, customary political, legal, and cultural practices. These rights, Kulchyski argues, are Indigenous rights and are a different set of rights than those Aboriginal rights recognized or enshrined in Canadian law.

¹⁰ Original occupancy is a complex legal concept that is concerned with Aboriginal rights and title based on the notion that Indigenous peoples lived in North America as robust civilizations long before European contact, and this in itself determines title and rights. According to Macklem (2001) there are four social facts that make up how we define Indigenous rights and title (or Indigenous difference from that of settler Canadians): Aboriginal culture, Aboriginal prior occupancy, prior sovereignty, and participation in Treaty (4). Original occupancy is one of the key determinants to Indigenous difference or one of the foundations to Indigenous rights and sovereignty in Canadian law. Yet, this is a Western understanding of rights and title that the state and courts use to determine ownership and legitimate use of lands/resources (and thus, Indigenous conceptions of rights might be based on a different source, such as the Creator—see endnote 5). In Canadian law, original occupancy can be traced through the common-law practices of the Crown/settler population, Treaties, the *Royal Proclamation of 1763*, court cases, and *Constitution Act, 1982* (Tully 1995, 47).

Throughout Canadian settler history there have been many situations where Canadian law did not recognize prior occupancy as enforceable to property rights (Macklem 2001, 85). For example, *St Catharine’s Milling* (1888) describes Aboriginal title as contingent on Crown recognition and not inherent right (or rights independent of the Crown based on prior occupancy) (Bell and Asch 1997, 48). Limitations to original occupancy can be found in more contemporary legal proceedings, such as *Calder* (1973) which affirmed that the Crown can terminate Aboriginal rights. Today, we associate *Calder* with the recognition of prior occupancy as a source of title due to later court decisions that have been built from the dissenting justice opinion (for example, *Delgamuukw*). The courts have also developed the concept of original occupancy in ways that have contributed to Aboriginal rights. For example, *Guerin* (1984) distinguishes Aboriginal title as *sui generis* which lets the courts look beyond the confines of past legal interpretations of British property law (Bell and Asch 1997).

¹¹Throughout the history of Indigenous peoples’ relations with the Canadian state, the concept of Indigenous title has been the subject of a great deal of controversy. While it is accepted that Indigenous peoples occupied the territory now known as Canada prior to European contact, the significance of this prior occupation—the cultures, political diplomacy, economic systems—have been consistently downplayed and, quite often, completely ignored by colonial powers. As well, the assertion of the Canadian state’s sovereignty is rarely questioned, though it rests on a tenuous platform (Ladner and McCrossan 2009).

In the past, the settler state has argued that Indigenous title did not exist because Indigenous peoples’ worldview was such that land could not be owned (Tennant 1990, 41) or, using precedence from *S. Rhodesia* (1919), because they were too “uncivilized” to have any such rights (Cook and Lindau, 2000, 151-3). This query of the nature and origin of these rights and title has allowed the state to shift the focus from state illegitimacy and the colonial violence in which Indigenous lands were taken (Kulchyski 1994, 7). Today, Canadian law has determined that Indigenous title does exist (in *Guerin* (1984) and *Roberts* (1989) (McNeil 1997, 143)) and that this title is an interest in land that is unlike any other interest: it is *sui generis* or unique (Monture-Angus 1999, 122).

The tests that the courts have developed to determine Indigenous rights and title, however, are often criticized as Eurocentric—or based on a measure developed by the Canadian state’s determinants of rights and title, not those held by Indigenous peoples themselves (Asch and Zlotkin 1997, 222; McNeil 1997, 145-146). Also, as Monture-Angus (1999) argues regarding *Delgamuukw* (1997), it is not clear that the concept of Aboriginal title holds any potential for Indigenous self-determination, as the courts have consistently refused to accept the logical extension—or self-governance—from this unique source of title. For example, Monture argues that, “If land is put to non-traditional use (and building schools, roads, sewers and so on may not be seen as traditional uses), this may represent a change in cultural values.” (131); thus, land title does not equate self-defining use of the land which is still then determined by the settler state. Macklem (2001), however, argues that *Delgamuukw* (1997) makes it clear it is the Aboriginal nation that has proprietary authority over title land, not the Crown; this allows Indigenous peoples to better protect their ancestral territory. This is important, as any time the content of Indigenous title grows, the

Crown's authority over title land diminishes (94). Both the federal government and Indigenous peoples want certainty of title: the federal government to legitimate the state and Indigenous peoples to gain protection from the encroachment of the state and private industry (Asch and Zlotkin 1997, 219). In the past, title of territory was often created to enable its extinguishment of title to the Crown (Sutton 1977, 152). For example, in *Johnston v. McIntosh* the court had to establish some type of Indigenous title based on occupation so that it could extinguish this title to diminish Indigenous sovereignty and to legitimate Crown ownership of territory (Bell and Asch 1997, 47). In this way, Indigenous title and extinguishment policy is propagated extensively by the Canadian state. In fact, contemporary mining and petroleum companies that seek the "right to take minerals from under the land and transport minerals over the land" assume that the Canadian government, and not the Indigenous peoples, own the land (Watkins 1977, 88).

While this theoretical question has plagued Canadian legal and political development, it completely ignores another possibility, which while once ignored by Canadian legal systems is increasingly making its way into the debate: the inherent rights of Indigenous peoples that were practiced prior to European contact. Indigenous peoples, in contrast to the Canadian state (which tried to evidence Indigenous rights in Western concepts of legal bearing), have always maintained that their rights exist from the Creator (Monture-Angus 1995; Venne 1997). According to Frideres and Gadacz (2012), Indigenous concepts of sovereignty are based on the spiritual premise of inherent rights as gifted from the Creator, whereas non-Indigenous or Western Canadian concepts are that sovereignty is tied to the state. Thus, according to Creator-rights based origin, Indigenous peoples entered into negotiations with the state based on these inherent rights, which exist independent of the Canadian state. However, the state has been unwilling to accommodate this spiritual premise of the Creator (or time immemorial-rights as always existing from the beginning of time) in the Canadian legal and political frameworks (Boldt and Long 1985). Instead, the settler state has based its understandings of Indigenous rights on Western values of politics, economics, and law which is Eurocentric (or an assumption that European Western values are better than those of Indigenous peoples) and excludes the Indigenous perspective of the Creator. As Monture-Angus (1995) writes, "Delegated rights to self-government are an affront to the beliefs and values of aboriginal peoples" (160).

¹² A monarchy has subjects and a republic has citizens, and this illustration is used to represent the distinction in the form that was first established to that which is currently practiced.

¹³ The *Royal Proclamation of 1763* and the question of whether these rights are acknowledged or created by the federal government exists because, as Borrows (1997) argues, Indigenous peoples and settlers have always seen the *Royal Proclamation of 1763* differently, and so tensions prevail: "Britain was attempting to secure territory and jurisdiction through the Proclamation, while First Nations were concerned with preserving their lands and sovereignty" (161). The legitimacy of Crown occupancy to the land holdings of settlers has not been conclusively determined and this jeopardizes the honour of the Crown (Macklem 2001, 91-92). Again, it is not clear if the proclamation creates or recognizes Aboriginal sovereignty. The reliance on the proclamation as a source of title for Aboriginal peoples was a continual debate in Canadian political and legal spheres until *Calder* (1973) determined another source for title (that of prior occupancy) (*Calder v British Columbia (AG)*, [1973]; Henderson 1985, 224).

¹⁴ Magna Carta is a document that is a set of legal rights for many, but not all, subjects of the British Crown. It was first sealed in Runnymede, England in 1215, and several subsequent documents were developed over the next century (see Breay 2002). While the intent, importance, and continued impact of the Magna Carta is contested, many have argued that Magna Carta led to many rights-based causes such as the American and French Revolutions, the movement that Mahatma Gandhi led to liberate India from British colonialism, modern-day parliamentary democracy, and the United Nations Declaration of Human Rights. From such a standpoint, Magna Carta is argued to be an important symbolic or actual bearer of rights.

¹⁵ Many scholars have described the process of settler colonialism in Canada to be one that followed a trajectory of diplomacy, protectionism, and then assimilation. Canada's history of colonial policy has always infringed on Indigenous sovereignty in the attempt to assimilate Indigenous peoples to establish legitimacy of the settler state. For example, Canadian Indigenous policy, as exercised through the reserves, began as purposed to limit settler encroachment and enhance diplomacy, but this quickly deteriorated into a process of colonialism and assimilation (Tobias 1983, 40-49). Pressure for Indigenous enfranchisement continued to mount due to "facilitate control and to save money" (Miller 2003, 19). By the 20th century, Canadian Indian policy was focused primarily on citizenship and formulated on "the assumption that Indians desired to be fully part of civil society" (Shewell 2004, 95). The state targeted citizenship because this is an important socializing tool for democratic nations (Cairns 2003, 501).

¹⁶ Enfranchised assimilation is the process of stripping Indigeneity through Canadian citizenship, or enfranchisement. However, in Canada this process of assimilation is not limited to simply gaining citizenship:

Indian status was lost (and thus, enfranchisement was inflicted) through marriage, education, and often just living off of the reserve. Though these provisions came long after 1857, most remained until revisions to the *Indian Act* were made in 1951 and 1985.

¹⁷ An excerpt from the ruling of *Daniels v. Canada* (2013) reads:

“The Plaintiffs ask this Court to issue the following declarations:

- (a) that Métis and non-status Indians are “Indians” within the meaning of the expression “Indians and lands reserved for Indians” in s 91(24) of the *Constitution Act, 1867*;
- (b) that the Queen (in right of Canada) owes a fiduciary duty to Métis and non-status Indians as Aboriginal people;
- (c) that the Métis and non-status Indian peoples of Canada have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.” (Federal Court, January 8, 2013, <http://decisions.fct-cf.gc.ca/en/2013/2013fc6/2013fc6.html>).

¹⁸ There are tensions in how the concept of s.91(24) providing authority of the federal government to Indian lands is understood. Today, Indian lands are defined by the settler state according to three aspects: 1) collective holding; 2) inalienability (except by the Crown); and 3) inherent interest protected by prior occupancy (Macklem, 2001, 88). Yet, this definition falls short for many people. For example, there are very real differences between Indigenous and European worldviews. As Atleo (2004) describes, there are significant differences between Indigenous and Canadian worldviews or understandings of law: “Constitutional, federal, state, provincial, and municipal laws are oriented around human issues and concerns, while Gitksan and Wet’suwet’en laws are oriented around humans, animals, and spirits in an equitable, or balanced relationship” (63). Thus, when the state attempts to define Aboriginal title it does so in a way that ties title to property in a Western sense. And yet, Aboriginal title is not just the use and ownership of land, but it is tied to the right of self-government (Asch and Zlotkin 1997, 214-215). Indian lands can also, therefore, be defined as ancestral right. It is thus not just use and ownership of land, but land ownership can also be a function of self-government or sovereignty.

¹⁹ What do these restrictions of the provinces actually mean? Sanders (1988) fleshes out these points. First, the notion that the province cannot single out Indians means that the provinces cannot dampen Indianness or infringe on the ability to express Indigeneity. Sanders explains that provincial legislation rarely uses the term Indian, and when doing so it is benevolent and not used to discriminate (155) However, provincial hunting laws do have affect thanks to s. 88 as found in *R. v. Dyck* (Sanders 1988, 155-156). Second, the provincial government cannot ever (in this federation) trump federal paramountcy. As stated, this means they do not trump the Treaties. It also means provincial sales taxes do not apply on-reserve, but it is not clear how the provision of child welfare or employment services or other provincially legislated services are to be delivered (Sanders 1988, 155). Further, some provincial laws of general application are enforceable (for example, minimum wage and automobile insurance) and other such laws are not (for example, building and zoning requirements).

²⁰ *Ultra vires* is a Latin term and means “outside of powers,” or to be outside the scope of authority or legality.

²¹ The term *sui generis* is used in Canadian law to define the relationship between Aboriginal peoples and the Crown. The term means unique. The case *R v. Guerin* established Aboriginal rights as *sui generis* (unique) and determined the relationship between First Nations and the Crown is both fiduciary-like and trust-like. Therefore, Indigenous peoples that are covered by s.91(24) or administered by the *Indian Act* are not wards of the state (so, it is not a trust relationship), however the state must when acting on their behalf exercise their decision-making power in ways that benefits the people (so it becomes trust-like). *R. v. Guerin* dealt with the Musqueam First Nation’s accusations that the Crown did not negotiate in their favour over their reserve lands which were used by the City of Vancouver for a golf course and withheld the terms of these contractual negotiations. The case revealed a set of decisions made by the state that were not to the benefit of the First Nations community, but instead benefited the private company and the contractual stipulations were purposefully withheld from the community.

²² The concept of honour of the Crown can be derived from the basis of the legitimacy of any state. In Canadian Indigenous politics, the honour of the Crown often comes to be tested by notions of Aboriginal title, because Aboriginal title presents legal tensions to the Crown’s acquisition of land and entrenchment of the state (or the ability to make laws as a sovereign on Indigenous lands or Turtle Island). Historically, colonial governments have based the concept of honour of the Crown on then-prevalent or commonly used international law of *terra nullius*. This argued that if land was not being used for productive uses of capitalism or in ways that serve a Christian God, it could legally and morally be appropriated by a colonial power for such uses. This understanding of honour of the

Crown is no longer accepted by modern law, on either international or domestic levels. Contemporary understandings of honour of the Crown maintain that land and sovereignty must be acquired and exercised through consensual negotiations and agreements.

In modern Canadian politics and law, Indigenous rights and title (more specifically, the inherent right to self-government) must be honoured or the state is in violation of its own legitimacy (or its honour of the Crown) (Tully 1995, 49). When Aboriginal rights and title are tested by the courts, the legitimacy of Crown occupancy to the land holdings of itself and settlers is being tested, which jeopardizes the legitimacy of the Canadian nation-state or the honour of the Crown (Macklem 2001, 91-92; McNeil 1997, 135; Bell and Asch 1997, 47). For this reason (to uphold state legitimacy), the courts have determined that “the Crown must act with honour and integrity and in the best interests of Aboriginal groups” (Ermine 2007, 201).

The concept of the honour of the Crown is important to the modern day Indigenous/state governance network as it is born from the historical Treaty negotiations, but it has also evolved to include fiduciary obligations and a trust-like relationship of accommodation and duty to consult (Pacific Business and Law Institute, 2007). Honour of the Crown applies equally to the federal and provincial governments (McCabe 2008, 266). According to Crane (2007), what makes the concept of honour of the Crown different in an Indigenous context to that of non-Indigenous is that the Indigenous peoples are not a “conquered” people, and thus their sovereignty does not lie with the Crown (1-2): it lies within their own governance models or as a reciprocal right entrusted by the Creator. As settler nations attempt to reconcile their colonial pasts and wrong-doings, courts face the challenge of undermining the sovereignty of the colonial state and judiciary by upholding the honour of the Crown. For example, Patton (2001) writes, “It appears that efforts to provide justice for colonised Indigenous peoples in common law countries such as Australia and Canada are sooner or later blocked by the legal and political requirements of their own claims to sovereignty” (34). This presents a barrier for Indigenous peoples’ sovereignty in settler nations because, as previously stated, the honour of the Crown can be tested by Aboriginal title.

²³ For further reading on the concept of provincial legislation-making ability regarding Indigenous peoples and their lands or the concept of provincial *ultra vires* (outside of the scope of legal authority) see: *Kruger and al v. The Queen*; *Dick v. The Queen*; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*; and *Lovelace v. Ontario (Kruger and al. v. The Queen, [1978]; Dick v The Queen, [1985]; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002]; Lovelace v Ontario, [2000])*.

²⁴ Lord Glenelg wrote to the Earl of Durham: “Until Circumstances make it expedient that they should be turned over by the Crown to the Provincial Legislature, and receive legislative Provision and Care, the Committee conceive that all Arrangements with respect to them must be made under the immediate Direction of Her Majesty’s Government, and carried into effect under the Supervision of Officers appointed by it” (Great Britain Colonial Office 1839, 8).

²⁵ A principle theory of neo-liberalism is that the private market will allocate resources more efficiently than a state market, because the state lacks competition and can become complacent in its activities (Fernandez and Ryan 2011, 1). Without competition and with such complacency, the state does not make efficient use of public dollars and thus implementing private sector incentives and motivators would enhance such efficacy. Neo-liberalism’s shift from Keynesian economics is a worldwide economic phenomenon and it is “the most successful ideology in the world history” (Krishna 2009, 61). Thus, it is widespread and often not questioned in its application. Canada engages in these neo-liberal activities: “Because of the global intensification of capital accumulation, Canada, like many Western democracies, is currently shifting its state policies, form, and governing practices” (Slowey 2008, 11).

Neo-liberalism is also connected to the Canadian state/Indigenous peoples’ governance network. Not only does the Canadian state support devolution, the department responsible for Indigenous-related matters (at the time of writing was the Department of Indian Affairs and Northern Development) is supportive and promotes devolution (Dacks 1990, 7). While Slowey (2008) argues that there are benefits of neo-liberalism for the Indigenous sovereignty movement, others argue that challenges remain. Slowey argues that even if devolution does not deliver targets or goals of Indigenous sovereignty, it does not necessarily impede sovereignty (53). Slowey defines neo-liberal globalization in political economic terms as the transition from social welfare state management to *laissez faire*/fiscal restraint and writes that this demonstrates its (neo-liberal) capacity to facilitate anti-colonialism. Slowey writes: “That is, self-determination is consistent with normative and neoliberal goals of economic, political, and cultural self-reliance” (Slowey 2008, xv). Dacks (1990) agrees and writes, “Viewed theoretically, devolution can be seen as an instance of decolonization which can be usefully related to the literature on political development in the Third World” (5).

Hall (2003) disagrees with this premise of how neo-liberalism can benefit the de-colonial project; he writes, “As the world’s first polity to emerge from the imperial control of a European empire, the government of the United

States benefitted enormously from the global penetration of this paradigm of “decolonization.” The ability of the United States to combine the idealized imagery of its own decolonization with the busy substance of empire building was probably the twentieth century’s most effective feat of paradox and illusion” (Hall 2003, 219). Thus, settler society has always tied economics to the politics of coercion and assimilation; the fur trade fueled colonization and de-colonization has enabled contemporary neo-conservative economics; however, de-colonialism does not dismantle colonization. Hall argues that de-colonialism has allowed neo-liberalism to achieve its political economic goals. Thus, neo-liberalism enables a neo-colonialism: exploitation still exists but there is an illusion of betterment as is the paradigm of decolonization. Furthermore, Krishna (2009) argues that neo-liberalism and colonialism are connected (162).

As Locke (2008) demonstrates, neo-liberal ideological approaches to housing have suggested the shift from social housing programs to private home ownership is based on unfounded assumptions that poverty is based on a lack of title (17). “In countries where Indigenous populations reside and rely on the social provisions of the state, progressive social policy commentators argue that neoliberalism has ushered in an era of ‘neo-colonization’” (Locke 2008, 14). The problem is that neo-liberalism ascribes to the idea that property ownership means economic success. But there is not a transition from state concepts of market capitalism, neo-liberalism—instead, these remain. Neo-liberalism does not have an interest in Indigenous sovereignty, it is about maximized economic development.

²⁶ One of the many interesting features of colonialism in Canada is that due to the scale of geography—Canada is a very large land mass—colonialist and explorers reached various parts of the country at different times and thus for different purposes. Due to this, the experiences of contact and colonial settlement are different and this can be illustrated by that of the experiences of Inuit with Canadian law.

For example, Europeans first began to make contact with Inuit communities living in the east around the year 1500 and 1800 with those living in the west (Frideres and Gadacz 2012, 282). Much of this contact was made on the premise of missionary work and whaling expeditions. Significant colonial interactions with the Canadian government occurred in the post-World War II era; however, consistent contact was made over these centuries through trade, the fur trade, and settler governance. This post-WWII contact was predominantly due to changes in international politics that led to increased interests in the region. Colonial settler interest in the region rose again in the 1960s due to the regions many resources (Frideres and Gadacz 2012, 283-284). The impact of these waves of colonial interaction is significant.

Canada has long had interest in the north, or those lands that Inuit have used and occupied for approximately 8500 years (Frideres and Gadacz 2012, 279), but this was initially limited to controlling the land so no other country could claim it and, thus, not to be responsible for those peoples, Inuit, living on the lands (Kulchyski 2012, 65). Because Inuit were self-sufficient, the matter of responsibility could be initially ignored by the Canadian government: however, as the fur trade grew and more Inuit became involved in this external economy, this self-reliance was impacted and a need for government financial support occurred (Kulchyski 2012, 65).

Due to this change in economies for Inuit, the courts were faced with a decision on government responsibility—provincial or federal jurisdiction—in *Re:Eskimo (1939)*. The desire to limit government responsibility for these peoples continued as did the desire to control the land. In the case, the courts ruled Inuit were a responsibility of the federal government (as per the *BNA Act*’s s.91(24)) and the federal government decided not to apply the *Indian Act* to Inuit (Kulchyski 2012, 66). Again, *Re:Eskimo* resulted “in one law, the bna act, where it says ‘indian’, it means indian and inuit. In another law, the indian act, where it says ‘indian’ it means indian and not inuit” (Kulchyski 2007, 67). Thus, Inuit were identified as Indians under the *BNA Act* (to effect a jurisdiction over the lands), but not those rights that come from the *Indian Act* (to limit a responsibility for the people). This can be further evidenced by the lack of Treaty made between Inuit and the federal government.

²⁷ There are exceptions to this, as Canada is a federalist system of government and the sub-nationals are autonomous orders of government that have differing policy procedures, government legislation, and sub-national level court systems. These sub-national branches of government generate unique governance approaches.

²⁸ The following excerpt illustrates the mutual benefit of the nation-to-nation status that is captured by Treaty and states: “These two rows will symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boats. Neither will try to steer the other’s vessel.” (This was excerpted from presentations to the Special Committee by the Haudenosaunee Confederation and from Wampum Belts by Tehanetorens, and printed on the back cover of the final report, *Indian Self-Government in Canada*) (Abele and Prince 2006).

²⁹ Bednasek and Godlewska (2009) evidence the impact of betterment discourse on the policies developed and implemented by the Department of Indian Affairs. They write, “Within Canada, Aboriginal peoples became the target of betterment discourses” (446). Such a discourse is based on a premise that Indigenous peoples will prosper if they are more like settlers. This ignores the prosperity that existed prior to European contact and devalues Indigenous worldviews and ways of living. Betterment discourses are associated with assimilation and “civilization” practices.

³⁰ While the state may look at the special status as that based on s.91(24), many Indigenous peoples would argue that this status is based on their inherent right to self-determination as nations. Again, the *BNA Act* says Indians and Indian lands are head of power for the federal government, thus sealing a special responsibility of protection between Crown and Aboriginal peoples (Kulchyski 1994, 7). This special status as a peoplehood is recognized by a number of state documents: the *Royal Proclamation of 1763*, *BNA Act*, the *Indian Act*, the *Constitution Act, 1982*, the *Citizenship Act*, the *Immigration Act*, the *Fisheries Act*, the Treaties and the land claims processes, and tax exemptions (Boldt 1988, 50, 250). Indigenous-based perspectives of special status, however, are often premised on that of traditional knowledge. Traditional knowledge is a wide field of knowledge, but one of the core principles is that the Creator entrusted the lands that exist now as Canada to the Indigenous inhabitants to take care of (a relationship often described as guardians) and to share in harmony with the other inhabitants (or other Indigenous nations and animals). Thus, for Indigenous nations, Aboriginal rights can be said to be provided by the Creator (Lyons 1985, 19). Weaver describes Aboriginal rights as a recognition of “unique ethnicity” and “resources” (140) and thus “on the basis of this uniqueness, they demand special resources from the state” (141).

³¹ Illustrative examples of these governance networks will be discussed further in Chapters 3-5.

³² According to INAC there are 63 First Nation communities or reserves, yet AMC uses the statistic of 64. The 64th community has a Headman, not a Chief; this is the basis of the discrepancy.

³³ The five main First Nations groups in Manitoba are the Cree, Ojibway, Dakota, Ojibway Cree, and Dene.

³⁴ Any definition of the Metis is controversial and far more complex than the space of a footnote allows. However, the Metis in Canada can be understood to be a recognized Indigenous peoples. The Metis are the result of European and First Nations intermarriage. The Metis emerged as a distinct bicultural and bilingual peoples which produced a distinct ethnicity, culture, language, and a nation amongst the dominant First Nations and European groups. It is commonly understood that the orchestrators of the fur trade encouraged the intermarriage of Europeans and North American First Nations women. This intermarriage was encouraged to build relations amongst corporate Europe and First Nations communities and to boost the traders’ morale. Intermarriage became a key strategy for the successful operation of the fur trade. The encouragement of intermarriage, reinforced by the fur trade, was used to serve diplomatic and economic interests at the time. Over time the offspring of these unions were, at first, often subsumed into either the First Nations or European ethnic orientations. The Metis came to develop their own cultural practices in the wider Canadian national consciousness that bridged the language, cultural practices, and worldviews of both the First Nations and Europeans. Today, Metis people continue to have unique cultural practices, language (Michif), and several political organizations across Canada, and they are a recognized Indigenous people in the *Canadian Constitution Act, 1982* (See: Dickason 1985; Halldorsen; Sealy 1978; Spry 1985; Peterson and Brown 1985).

³⁵ For more see Kulchyski 2007; Grafton 2011.

³⁶ This contribution to Manitoba’s province making is not the only contribution of the Metis in Canada. Metis settlements existed elsewhere, across the nation. As Harris and Warkentin (1974) write, “The creation of this small Indigenous society—a group that was to have profound impact on the development of Canada—is unique in Canadian history” (248). This description of the Metis—as impacting the development of Canada—is in fact my first association of my own ancestors who are Metis. My father always said that our ancestors, generations of fur traders, were the new people that formed this new country. My father, a storyteller, wrote a play entitled *How the Metis Saved Canada*; with this story came a tacit duty (which I will admit is also idealistic) to continue to make and uphold the virtues of Canadian society. For an excellent book that looks at how the Metis contributed to Canada’s nation making see Ralston Saul (2010).

Also, while the Red River Valley is an important land base for the Metis, it is not the only homeland for the Metis. European and First Nations intermarriage was common throughout all of North America throughout all stages of colonial development—not just in Rupertsland (contemporary Manitoba). The historic Metis developed in two branches, one centred in the “Northwest,” the area that encompasses the Great Lakes, Red River region, and the western side of Hudson Bay. The other main geographical area of Metis emergence, although less acknowledged by historians, is the “Northeast” or the St. Lawrence Valley. (Dickason 1985, 19-20.) Thus, intermarriage in eastern

Canada was as commonplace as in the north-western frontiers; however, the development of Metis communities and the Red River Metis identity was the result of particular conditions of the west (Dickason 1985). Metis communities also developed west of Manitoba, in particular after the Red River resistances which pushed the Metis westward.

³⁷ Despite the strong socialist/communist centre of Winnipeg, Manitoba is, according to Wiseman (1996), a politically conservative-affiliated province which can be evidenced by the strength of the Conservative Party (51) (though from 1999 to 2016 it was not in power for an unprecedented four terms). This is an interesting political schism of the province, given the strength of the provincial NDP and the collapse of the provincial Liberal Party since Wiseman wrote this, but it holds true to the history of provincial political culture and it may be clearer at the federal level, where the Conservative Party maintains a majority. According to Elections Canada, the federal election of 2011 saw 11 Conservative Party members, two NDP members, and one Liberal Party member elected to the federal government (<http://www.parl.gc.ca/SenatorsMembers/House/PartyStandings/standings-e.htm>).

³⁸ According to the Treaty Relations Commission of Manitoba the following Treaties were signed in Manitoba: Treaty No. 1 (1871), Treaty No. 2 (1871), Treaty No. 3 (1873), Treaty No. 4 (1874), Treaty No. 5 (1875), Treaty No. 6 (1876), and Treaty No. 10 (1906) (http://www.trcm.ca/about_Treaties.php).

³⁹ European diffusionism is the theory that all cultural progress has origins in European culture (Blaut, 1993). The theory is tied to the rise of European imperialism and capitalism and enabled the expansion of international colonialism as European thinkers attempted to create a system of beliefs that would support activities related to capitalism to validate and normalize the idea “that progress is inevitable, natural, and desirable” (19). See Chapter 2 for further discussion.

⁴⁰ There are also positive aspects of the reserve. This can include community, cultural centres, language and traditional culture. For many, reserves demonstrate the continuing self-determination of Indigenous peoples.

⁴¹ This can be evidenced in the Alberta court case of *Horseman v. R.* (1998), which defended not just the Treaty right (in question was Treaty 8 and the Alberta government) to hunt without a hunting license (thus, Treaty right trumped provincial legislation), but it further extended this hunting right to protect the action of sale of hunting proceeds for monetary gain.

⁴² Mawedopenais’s quote can be found in Morris (1991, First published in 1880).

⁴³ Interestingly, various Manitoba Hydro-Electric Board Annual Reports reveal that employment at the Crown corporation is growing. In 1996, Manitoba Hydro employed 3, 983 people and by 2005 this had grown to 5, 496 employees, and in 2014 this statistic rose to 6,556 full-time employees (Manitoba Hydro 2005; Manitoba Hydro 2014). Perhaps this is evidence that the corporation is growing outside of international exports.

⁴⁴ The environmental outcomes of these projects are vast, and while beyond the scope of this project, are extremely integral to understanding how these modern-day projects reinforce neo-colonialism. But consider this: Fanon (1965) says that colonial projects cost more than they provide. And Waldram (1999) illustrate how this cost does not outweigh the benefit. They describe these hydro projects as ironic because the very communities relocated for these hydro projects cannot, as a result of the socio-economic and environment impacts of the relocation, then afford to heat their homes with this very hydro electricity (70). Other sources that provide excellent discussions of the socio-environmental impacts include Waldram (1988); Thibault and Hoffman (2008); Mercredi and Turpel (1993).

⁴⁵ For more examples that demonstrate stratification in Manitoba, see Waldram (1993, 1988) and Chodkiewicz and Brown (1999).

⁴⁶ See www.hydro.mb.ca/corporate/facilitaties/maps/hydraulic_stations.shtm for map of stations.

⁴⁷ Examples of post-colonial agreements do exist. One example is that Quebec’s *Paix des Braves* focuses not only on natural resource extraction or a single industry, but insists that industry concern itself with community development strategies (Martin and Hoffman 2008, 33).

⁴⁸ For those readers unfamiliar with the geography of Manitoba, the east side of Lake Manitoba may not seem to belong to the north. This is because this region begins as close to the province’s capital as one hour north. It does not extend all the way to the northern region of the province. To better describe why a seemingly southern region is considered north, Lithman (1992) illustrate the boundary as “north of a sloping line from Dauphin to Sagkeeng” (4). Further to this, Friesen (1992) illustrates differences in how the development of the north is perceived by non-Indigenous and the Indigenous populations. He writes, “The truth of the northern Manitoba story has at least two faces, Aboriginal and European-Canadians” (Friesen 1992, 50). The first group ignored its role in the nation—it was not important to confederation or the railway expansion—until post-World War II industrial expansion made northern towns (and the natural resource base) important to the provincial economy. As well, there are historic political differences that shape the north for both Indigenous and non-Indigenous populations. For example,

Indigenous peoples' political spheres are shaped by the Treaties, the *Indian Act*, the *Natural Resources Transfer Act*, the right to vote in the 1952 provincial election and 1961 federal election (45). For non-Indigenous populations, the political sphere is shaped by modifications of the provincial borders and additions of municipalities. The north in Manitoba, therefore, has two sets of political and economic indicators for its inhabitants.

⁴⁹ The notion that Europeans "discovered" North America is deeply entrenched in settler society, but it is not accurate as the Indigenous populations had been living in the areas with viable economies, societies, and cultures for time immemorial. The Supreme Court of Canada has acknowledged this in *Haida Nation v. British Columbia* (Minister of Forests) (2004).

⁵⁰ The Treaties are formal agreements that the federal government considers documents of Aboriginals ceding land ownership to the Crown. The Treaties outline both a set of negotiated agreements between the two partners, the Crown and the Indigenous nation, and stipulates a set of Treaty Rights for the Indigenous nation. Treaties had been used prior to European contact in North America by both Indigenous and European communities for political diplomacy and, upon contact, they were used as a peaceful means of negotiations.

The stipulations of the Treaties, or what they promised and what was exchanged (land title), are contentious for two reasons. First, Penner (1988) writes of this issue: "Whatever does it mean to extinguish all rights, titles, and privileges to the land? It is surely unreasonable to believe that any sovereign people would negotiate and sign away all its rights" (Long & Boldt 1988, 32-33). While this topic has been greatly debated, it remains unanswered. Second, many theorists have provided detailed accounts of "irregularities" in the Treaty process which resulted in a set of state documents that vary greatly from the oral histories of the Indigenous nations. As Kulchyski (2007) writes, "The Treaty-making process was a fairly straightforward process. . . the written versions of the numbered Treaties all look basically the same . . . but the Treaties are more than these few written pages . . . they include a spirit" (40-42). For this reason, many Indigenous peoples have contested many of the Treaties by arguing that the spirit or intent of the Treaties has been ignored by governments. Essentially, the state's written record is woefully lacking what the oral Treaties have recorded as negotiated. The Treaty Relations Commission of Manitoba has written that understanding the original spirit and intent of the Treaties will achieve reconciliation of Treaty rights and obligations (Treaty Commission of Manitoba 2009).

⁵¹ Today's land claims process is often referred to as "Modern-day Treaties." In some ways, it is misleading to call the process modern as the complaints about land allotment are not a modern feature of Indigenous politics. Land disputes are the basis of the earliest discussions about Treaties since the 17th century, and the disputes have not subsided. Formal complaints concerning land have been made with the Department of Indian Affairs as far back as the 1870s (and earlier in the previous jurisdictions of Upper and Lower Canada) (Frideres and Gadacz 2012). However, because no Treaties were signed between 1923-1975, it is the post-1970 era of land reconciliation that the term modern land claims process is concerned with (Abele 2009, 28). So, in this sense it is a temporal perspective, not the grievance that defines the terminology.

After the Calder case, the federal government developed two types of land claims: comprehensive claims and specific claims. Comprehensive claims always involve land. Comprehensive claims or an Aboriginal title claim are a part of the land claims' process that deals with the unfinished business of Treaty-making. If Aboriginal land rights have not been dealt with by past Treaties, a comprehensive land claim can be made. A modern Treaty would then be negotiated between the Indigenous nation, the Canadian government, and the province or territory. Specific claims, on the other hand, are not necessarily land-related. Specific claims are made when there is a grievance concerning obligations under historic Treaties (usually the complainant finds that the original written form of the Treaty is insufficient or how it has been implemented/interpreted is insufficient).

⁵² This is a legal argument premised on the *Royal Proclamation of 1763* saying "Indians who we are connected" and the British colonialists did not venture past the Rockies until afterwards, thus these Indians did not have title—or land protection—according to the *Royal Proclamation of 1763* (Tennant 1990, 216). Therefore, the B.C. provincial government has argued that the *Royal Proclamation of 1763* does not apply to the province because the lands were unknown to the King at the proclamation's signing and thus cannot be used to provide title protection due to the lack of knowledge of their existence (Kulchyski 2007, 27). The problem with this argument, according to Tennant, is the assumption that Indigenous title could only be created by the *Royal Proclamation of 1763*. This would be akin to all rights protected by the Charter being only those at the time of its making and not afterwards (Tennant 1990, 216). Similarly, Slattery (1988) has argued that legislation is intended to extend into the future unless clearly stated it does not (217). Regardless of these lens that offer us different ways to understand the *Royal Proclamation of 1763* in B.C., the province holds to its interpretation of Indigenous title. This is one legal interpretation of the *Royal Proclamation of 1763*. There is disagreement on the validity of this argument. For example, Kulchyski (2007) demonstrates two opposing arguments: 1) the *Royal Proclamation of 1763* has constitutional value and thus extends

to the entire nation or 2) the *Royal Proclamation of 1763* is British policy and thus extends to the entire colony (Kulchyski 2007, 27-28). Note also that the proclamation itself says it applies to “any lands” west of the headwaters of rivers that flow into the Atlantic. Also, Justice Hall argues in the Calder case that several explorers had mapped B.C. well before 1763 and the Hudson’s Bay Company had been in trade west of the Hudson Bay to the Rockies for a century prior, and thus the British would have known from such maps of its existence (*Calder v British Columbia (AG)*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 399-401).

⁵³ In settler colonial nations, the national narrative surrounding land is premised on some basic concepts of land and civilization. For example, Young (2001) writes, “Nomadic people were never in possession of the land in a European sense, which is how colonialists were able, following the 17th-century English philosopher John Locke, to declare the land empty, “*terra nulla*”” (51). Blaut calls this the “myth of emptiness,” which suggests that colonized lands were empty, or at least as good as, since Indigenous peoples’ concept of land ownership and private property did not align with that of Europeans’ concepts (Blaut 1993, 25). It is this proposition of *terra nullius* that has been used to defend European entitlement to exploit Indigenous peoples and their lands.

These same concepts of colonial ownership of land can be seen in Canada. While the Crown assumed ownership via the colony, legal tensions of what this ownership truly involved have arisen. For example, in a narrative on the history of Canadian constitutional-making, land is described as waste lands: “The Waste Lands of the Crown afford sufficient means for the accommodation of a much greater number of settlers than is required.” (Public Archives of Canada, 1907-19, 402). The value of land not being used for capitalist purposes reduces the land to waste. Colonial views of land also recast the value of land to a commodity. Tilby (1912) has written on the development of the Canadian Constitution (the *BNA Act*) and describes the notion of Canada as a colony and as a possession of Britain. After the settlement of Upper Canada in 1784, “The soil of the country, according to the invariable provision of British Law, belonged wholly to the Crown.” (Tilby 1912, 146-147). Later in Canadian nation-building, therefore, as the colony grew to a nation and detached from the British empire, the ownership of land was assumed to simply transfer under the Crown. This assumption, in part, allowed for an implicit Crown sovereignty to be established.

⁵⁴B.C. is not the only sub-national to ignore Aboriginal title: Quebec and the Yukon did at various historical points as well (Tennant 1990, 216). Both now have recognized title, since the James Bay and Yukon agreements have been negotiated.

⁵⁵ Fort Victoria was established in 1841 and became an official colony in 1849. In 1858 mainland B.C. became a colony. The whole territory joined the Canadian federation in 1871 (Penikett 2006, 72-73; McKee 2000, 12).

⁵⁶ A common experience of residential school survivors was being removed from families and communities and being placed against their will in schools that attempted to strip them of their language and cultural knowledge (see Tennant 1990). This is now considered cultural genocide, and while Tennant discusses the positive nature of political organizations that derived from schools, this does not diminish the effect of this genocide.

⁵⁷ Prior to this era, Indigenous peoples access to the courts was greatly restricted under the Indian Act. Before court access was restricted, the political group the Allied Indian Tribes of British Columbia formed in 1916 and it considered, in its early days, the use of the courts to assert Aboriginal title. They did so in part because the Judicial Committee of the Privy Council had ruled in a case in Nigeria in 1921 that Aboriginal title “was a preexisting right that must be presumed to survive” (McKee 2000, 25). It was hoped the Judicial Committee of the Privy Council (then the highest court for Canada, in Britain) would make a similar ruling in B.C.; however, the opposite happened and in 1927 the Indian Act’s section 141 was amended and Indians were no longer legally able to raise finances off-reserve to access the Canadian courts. The Indian Act, s. 141 reads,

Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months (Tennant 1990, 111-112). This ban was not lifted until 1951 and since then Indigenous groups in B.C. have used the courts to pressure the state to acknowledge their rights that were violated by Canadian settler colonialism.

⁵⁸ Many provincially published documents were reviewed in researching this project. These include the Annual Service Plan Reports from the years 2001/02 through to 2010/11, as well as the Budgets from the years 2001 through to 2010 (while the budgets from the years 1995-2000 are publicly available on-line, they did not include discussion of Indigenous peoples), and the 2010 Strategic Plan (British Columbia 2002; 2003; 2004; 2005; 2006;

2007; 2008; 2009; 2010a; 2011; British Columbia Ministry of Finance 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; British Columbia 2010b).

⁵⁹ For more information, see Woolford (2005), Cassidy (1992), or Penikett (2006).

⁶⁰ Many argue this because of the provincial government's motivation for this referendum. Penikett (2006) has argued that Gordon Campbell's Liberal opposition filibustered the Nisga'a Treaty hoping to limit these proceedings, clearly reflecting a lack of support for land claims which, under Campbell's administration, contributed to the provincial Treaty referendum in 2002 (3, 126-127), where the government wanted to get public support to shift First Nations reserve status to municipal powers (133). As well, in an interview with Andrew Woolford (2015), he states that "When Gord Campbell came in with the referendum, this was a major obstacle and confirmed that B.C.'s involvement was premised on ways of raising populist furor of fear over treaty, and over settlers losing property. This galvanized many people and got more people involved in arguing against this perspective and eventually pushed even the liberals themselves towards a still limited but more open negotiating stance than they originally came into power with." Clearly, Campbell's administrative intention was not supported by the public, but the intention of the provincial government to curb the modern lands claims process ought not be overlooked. This is evidenced by the referendum results of 80% support for Treaty the process (two million referendum ballots were mailed to British Columbians approximately 760, 000 ballots were returned) (McKee 2000, 121-122).

⁶¹ The Nisga'a final agreement was negotiated outside of the B.C. Treaty process (Woolford 2005, 11).

⁶² Tennant (1990) offers a discussion on cultural variation throughout B.C. (see Chapter 1). Acknowledging the high degree of cultural variation in B.C. is not to say that Indigenous nations throughout the rest of Canada are not diverse or are less diverse than those in B.C. It is simply to note the high degree of cultural diversity, as reflected in the varied linguistics of those Indigenous nations living in what is now B.C., and how difficult it is to meet diverse needs through a single, uniform policy.

⁶³ Of course, Aboriginal rights do exist in Canada. When the *Canadian Constitution* was patriated in 1982, Aboriginal Rights were written into section 35 (1): "The existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." However, these rights were not defined. The courts have developed tests that provide some basic tools or frameworks to meet out a sense of what these rights are. They offer tests that tell us if an Aboriginal right has been infringed or upheld. According to *Sparrow* (1990) there are three types of Aboriginal rights: 1) the rights derived from Aboriginal title; 2) the rights to culture and self-determination; and 3) pre-existing rights (Ahenakew 1985, 25; *R. v. Sparrow*, [1990]). The *Sparrow* test is based on Eurocentric measures (Ladner & McCrossan 2009, 272). Indigenous scholars argue that court-developed culture tests are Eurocentric because they define Aboriginal rights according to stereotypes of pre-contact, and rights ought to reflect the response and exchange of contact (Borrows 2002, 70). The restriction of Aboriginal rights to pre-contact activity presents them as "endangered" and not modern (Lawrence 2005, 5). This creates frozen rights: "Canadian courts have not yet come to terms with the fact that, like others, Aboriginal people are at once traditional, modern, and postmodern" (Borrows 2002, 75). In addition to this, the *Sparrow* test legitimated state infringement on the constitutionally entrenched Aboriginal rights (Ladner 2005, 933-934). *R. v. Sparrow* (1990), however, was still a victory for First Nations. Today, *R. v. Van der Peet* (1996) defines Aboriginal rights as a custom, practice, or traditions that is integral to the distinctive Indigenous culture (*R. v. Van der Peet*, [1996]). There are several limitations with this current approach to Aboriginal rights. Namely, it takes the court process to test infringement or upholding; this is both timely and costly.

⁶⁴ Another example can be found in *Baker Lake* (1979) where J. Mahoney found that Aboriginal title is independent of the *Royal Proclamation of 1763* and that it is recognizable by common law. For further reading see Elliot (1980). The point is also made by Judson in the *Calder* case (*Calder v British Columbia* (AG) 1973).

⁶⁵ It ought to be noted that this project concerns on-reserve First Nations peoples (those with Indian status) and the sub-national government. Two points need to be made here. First, there are only two reserves in the N.W.T. This creates an obvious tension to my thesis and research query. Nevertheless, s.91(24) of the *Canadian Constitution Act* does pertain to the N.W.T., as it does to the rest of Canada. In the N.W.T. the First Nations groups are the Dene peoples who are made up of five distinct language and cultural groups: Gwi-chin in the Northwest, the North Slavey in the Sahtu region, the Dogrib in the North Slavey region, the Chipewyn in the South Slave region, and the South Slavey in the Dehcho region (Kulchyski 2005, 94). There are further distinctions to these groups demarcated by language, culture, or territory, but these are the basic five stratifications that state has delineated in negotiations in the land claims process.

Second, Inuit nations are not a part of the following discussion on Indigenous peoples and the N.W.T., as Inuit have a different set of legal parameters to the political relationship with the federal and provincial

governments. While Inuit make up a significant percentage of the Indigenous population in the N.W.T., they have a different set of legal regulations outside of s.91(24) (See *Re: Eskimo (1939)*).

⁶⁶ Territorial legislatures, like the provinces and federal state are based on Westminster style parliamentary system. The political structures of the territories, however, are different than the provincial legislatures and parliament. Representative politics (or territorial elections and elected representatives—the accountable executive order) came later to the territories than the provinces (this was endowed to the provinces when they joined the federation) (Abele 2011, 230-231). Whereas these assemblies do not (until recently, and only in select legislatures) have fixed terms and can exist for a maximum of five years before government is dissolved, the territories in Canada have traditionally had four year fixed terms (except for Nunavut) (Smith 2004, 78). The territories do not have as wide-ranging responsibilities as the provinces, and the federal government has a stronger presence (Smith 2004, 78). Because the territories do not have provincial powers, they are relegated to legislative powers entrusted by the federal Parliament (Smith 2004, 78). That said, the territories' vast resources make them, politically, quite powerful in Canadian federalism (Smith 2004, 77). While the N.W.T. does not have provincial status, its cabinet ministers are included in all federal-provincial dialogues and forums (McArthur 2009, 206). Thus, many refer to the territories as the northern provinces, reflecting their distinction and acknowledging their important place in confederation.

⁶⁷ With the recent process of federal devolution, the very mechanics of the territorial state will change. Also, as Indigenous self-government agreements are made, the territorial state will change in response (Everts-Lind 2013).

⁶⁸ To better explain, consider J. Henderson (2007) who writes, "First, unlike provinces whose sovereignty is derived from the Constitution Act, territories are created by federal statute and cannot amend their own constitutions. They could as a result, be disbanded, or have their territories altered by later federal acts" (57). While this is technically, true it is highly unlikely to occur. However, Henderson's point is important to note: the territorial government relies on the federal government to perform many of the functions that the provincial governments have the autonomy to perform themselves. The federal government, therefore, has a heightened role in territorial governance.

⁶⁹ The N.W.T. entered confederation in s.146 of *British North America Act, 1867* (Thomas 1956, 6).

⁷⁰ This is rather an ironic outcome, as Kulchyski (2005) points out: "A dynamic or process was set into play whose outcome continues to be uncertain but one element of which was and is a dramatic loss of power at the community level. And this in the interest of bringing officially sanctioned democracy" (55-56). But, in all seriousness, the role of the central state ought not be overlooked. As Thomas has written, "It has been argued that the Temporary Government Act was deliberately intended to fasten despotic rule on the North-West for an indefinite period" (Thomas 1956, 14).

⁷¹ Statistics accessed from the N.W.T. Bureau of Statistics reveal that as of July 1, 2001 the Indigenous population in the N.W.T. was 20,903 and the non-Indigenous population was 19,942. According to Northwest Territories (2001b), the N.W.T. has the second highest percentage of Indigenous people's making its territorial population. On these 2001 statistics Northwest Territories (2001b) wrote, "Fifty percent of the people living in the Northwest Territories are Aboriginal." This is significant when compared to the rest of Canada, which at the time had an average of 3.3% of the population being Indigenous (Northwest Territories 2001b). As of July 1, 2015 the Indigenous population in the N.W.T. was 22,050 and the non-Indigenous population was 22,038 (Northwest Territories Bureau of Statistics 2015).

⁷² Examples of unmet expectations abound: Ray (2000) argues the Treaties in Canada were made under false translations and different, even incompatible, world views (213-214). Borrows (1997) argues that the Royal Proclamation of 1763 says that it will not interfere with Indigenous lands; however, this was not respected under the colonial settler regime (165). McLeod (2007) argues the government has always used a literal or narrow interpretation of the Treaties to best serve its own needs. Venne (1997) has argued that written versions of the Treaties do not hold the true negotiations (173).

⁷³ So many Indigenous scholars have demonstrated the vitality and accuracy of oral traditions. Wilson (2005) demonstrates that the language and Indigenous world view have preserved traditional knowledge by way of oral narrative which remain unscathed by colonialism (23). Alfred (1995) similarly argues that revitalizing traditions of Indigenous nationhood can indeed create a modern and viable alternative to Canadian state colonialism. King (1997) argues that according to post-colonial theory, oral narrative is necessarily affected by colonial presence and this impacts its legitimacy by jeopardizing its authenticity as traditional knowledge. In this, King (1997) is rejecting the notion that Indigenous literature is a reaction to colonialism; instead, he argues Indigenous knowledge goes back beyond contact. Cruikshank (1990) confirms this and writes, the "critical intelligence embedded in narrative" (354) is still intact. Carlson (2007) also demonstrates this by tracing the use of pre-contact precedents (traditional narrative) as decision-making guides used to aid Indigenous peoples through the turbulence of colonialism (167).

⁷⁴ This cross-ministry representation can be found in the Ministries of Advanced Education and Education (Aboriginal Education), Ministry of Attorney General (Aboriginal Litigation and Research Group, Missing Women Working Group), Ministry of Children and Family Development (Aboriginal Child and Family Development), Ministry of Community, Sport and Cultural Development (B.C. Arts Council, Sport and Recreation Programs), Ministry of Forests, Lands and Natural Resources (First Nations Relations Branch), Ministry of Health (Aboriginal ActNow, Aboriginal Health Living), Ministry of Labour, Citizens' Services and Open Government (Service B.C.), Ministry of Public Safety and Solicitor General (Community Safety and Crime Prevention, Corrections, Human Trafficking in B.C.), Crown Corporations (B.C. Assessment Authority, B.C. Housing, B.C. Hydro, B.C. Oil and Gas Commission, Columbia Power Corporation, Community Living British Columbia, First Peoples' Heritage Language and Culture Council, Industry Training Authority, Knowledge Network, Provincial Capital Commission, and Royal B.C. Museum).

⁷⁵ Discussion of these features of service delivery were chosen for the province of Manitoba simply because I have worked in both fields as a researcher. It's not the intention to discount the frequency and pertinence of these services in either B.C. or the N.W.T.

⁷⁶ During this course, many changes also occurred in the general system of Canadian healthcare. Until 1953, Canadians had a system of private healthcare insurance, not public. In 1948, Saskatchewan passed the *Universal Health Insurance Act* and the federal government created the National Health Grants Program to provide funding to the provinces. In 1957, the *Diagnostic Services Act* was created which set out a 50-50 cost sharing between the federal and provincial governments, but this only covered costs for services provided in hospitals. In 1968, the *Federal Medical Act* was created which included a 50-50 cost sharing arrangement between the federal government and the provinces. In 1972, the provinces signed "into" the *Federal Medical Act* due to this large financial cost sharing incentive. In 1977, both the Federal Provincial Fiscal Arrangements and *Established Programs Financing Act (EPF)* were created for health and education. In 1982, the *EPF* and cash transfers to the provinces were frozen. In 1984, The *Canada Health Act* was created. In 1997, the *Manitoba Regionalization Act* split Manitoba into seven RHA boards to deliver health (Allec 2005, 94-96).

⁷⁷ There are five similar exemptions to the *Canada Health Act*, including Aboriginals, RCMP, Armed Forces, veterans, and federal inmates. These other four groups have legislative acts over health, but not Indigenous peoples. Instead, the legislation stipulates federal control over healthcare as the act states "federal jurisdictions over healthcare. . . Hence, the federal government exerts its 'public policy' versus 'Treaty or constitutional right' to healthcare provisions" (Allec 2005, 95). Aboriginal peoples are, therefore, the only population in Canada with this unique federal legislation.

⁷⁸ In addition to these jurisdictional shifts, a number of policy documents exist that contribute to the complexity of this sector. The recent federal documents include the following: 2004-05 Implementation of the National Aboriginal Health Blueprint process, mandated by the Federal-Provincial Accord (2003), to develop a national blueprint by 2005 Accord on Health Renewal, in 1991-1995 the AMC negotiations the Health Framework Agreement (HFA) with the federal government; 2003, 2004, 10-year Plan to Strengthen Healthcare, Aboriginal Health Transition Fund 2004, Aboriginal Health Human Resources Initiative 2004, Blueprint on Aboriginal Health: A 10-Year Transformative Plan (Allec 2005, 94-96).

⁷⁹ This initiative is named after Jordan River Anderson, a First Nations boy from Norway House First Nation, Manitoba who was born with complex medical needs that could not be met by the existing healthcare services in his community. Due to this, he spent his short life in healthcare facilities in Winnipeg, Manitoba while the federal and provincial government argued over which level of government had the responsibility to provide Jordan with the medical attention he required to live with his family in his community. Jordan died in Winnipeg in 2005 at the age of five with never being able to visit his home or live with his family in his community.

⁸⁰ In 2007, Members of Parliament unanimously voted in favour of a Private Members motion to support Jordan's Principle (Blackstock 2012). This vote, however, did not entrench the principle into law nor provide a mechanism to ensure it was implemented or followed and inadequate provision of First Nations children's medical needs continued (Kinew 2014).

⁸¹ In *Pictou Landing Band Council and Maurina Beadle v. Canada* (2013) the court ruled in support of Jordan's Principle and the federal government was required to reimburse Pictou Landing First Nation for costs incurred through healthcare spending for services provided to Jeremy Meawasige, a First Nations child living on-reserve, that the provincial government made available to children off-reserve (*Pictou Landing Band Council v. Canada* (Attorney General), 2013 FC 342 (CanLII).; First Nations Child and Family Caring Society of Canada 2014). This court case is based on a situation similar to Jordan's struggle for adequate provision of healthcare, which arose in

2010 when the federal government refused payment for Jeremy Meawasige medical expenses. Jeremy lived with his mother, Maurina Beadle, in the First Nation of Pictou Landing, Nova Scotia, and the community provided healthcare services beyond those covered by the federal government for First Nations peoples but in alignment with those available through the provincial government for non-First nations citizens (Blackstock 2012).

⁸² The residential schools in Manitoba included Assiniboia (Winnipeg), Birtle, (Brandon), Cross Lake (St. Joseph's), Dauphin (McKay), Elkhorn (Washakada), Fort Alexander (Pine Falls), Guy Hill (The Pas), Norway House (Notre Dame Hostel), Norway House, Pine Creek (Camperville), Portage La Prairie, Sandy Bay (Allec 2005, 12).

⁸³ I worked at MFNERC and a constant issue for our research was a lack of statistics. INAC does not readily share this type of information; even with those communities that make up the research statistics. Manitoba Education does not capture Aboriginal-specific data.

⁸⁴ This may change due to the efforts of the Truth and Reconciliation Commission of Canada (TRC). In June 2015, the TRC releases 93 "Calls to Action" and several of these recommended changes to the education system, including funding and curricula (see: Truth and Reconciliation Commission of Canada 2015).