SHIFTING INSTITUTIONAL CONTROL: CHANGING INDIGENOUS POLICY GOALS THROUGH MÉTIS AND FIRST NATIONS IDENTITY ASSERTIONS

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ABSTRACT

The late 20th and 21st centuries witnessed the mobilization of Indigenous peoples who have engaged with the federal government to assert identity-based rights and title to land in Canada. Indigenous political engagement with the federal government on behalf of the Crown is built upon a colonial model that protects the interests of non-Indigenous peoples and colonial knowledge systems. By asserting identity through collectives and expanding the definition of who is considered to be Indigenous and is entitlement rights, Indigenous peoples have eroded the federal government's control of Indigenous identity. This dissertation demonstrates the institutional and policy impact that Indigenous peoples create through legal challenges and negotiations, leading to a third order paradigm shift in policy and institutional change.

Previous research paid limited attention to the motivations for Indigenous engagement and to the process by which Indigenous ideas have affected policy outcomes. Positioning Indigenous motivation, and Indigenous ideas as central to the collection and analysis of data, this thesis poses the question *"How do Indigenous assertions of identity demonstrate efforts to control or change policy development in Canada?"* The question is addressed using participant observation in a longitudinal study of Indigenous-Crown engagement combined with Indigenous methods of reflexivity. The research explores the topic to reveal the story and results of the engagement.

Using the policy theory of historical institutionalism, as well as Peter Hall's framework of three levels of change and social policy learning, this thesis analyzes three case studies to illustrate Indigenous policy change: the Mi'kmaq peoples of Newfoundland, Métis and non-status First Nations, and the Algonquin of Ontario. I argue that although Hall's framework is an appropriate starting point for building an Indigenous model of institutional change, although paradigmatic (third order) change as posited by Hall does not precisely fit the pattern of Indigenous-led change. This research contributes to the understanding of institutional and policy change in Canada by providing insight into worldviews essential to understanding Indigenous policy and institutional changes and by demonstrating the source of the desire for engagement.

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DEDICATION

"This paradigm-shift must come from all levels of government and public institutions….. Ideologies and instruments of colonialism, racism and misogyny, both past and present, must be rejected…. A complete change is required to dismantle colonialism in Canadian society."[1]

- Marion Buller, MMIWG2S Chief Commissioner, Nêhiyaw-iskwew from the Mistawasis First Nation in Saskatchewan

[1] Kristy Kirkup, "Trudeau avoids calling the violence against Indigenous women a genocide,'" *National Post* (June 3, 2019), https://nationalpost.com/news/canada/newsalert-inquiry-on-missing-murdered-indigenous-women-released (accessed July 7, 2019).

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CHAPTER 1 – THE CASE FOR RE-EXAMINING INDIGENOUS POLICY CHANGE IN CANADA

Introduction[2]

In an Indigenous context, policy learning models do not reflect the reality of modern change initiated by Indigenous Peoples and communities.[3] The challenges made by Indigenous Peoples endeavouring to change policy are grounded in their identity, which is informed by their worldview.[4] However, previous research has considered neither the role of identity in the actions taken by Indigenous Peoples who engage in policy challenges and change, nor even their motivation for engagement.[5] This dissertation seeks to address these research deficiencies by asking, *"How do Indigenous assertions of identity demonstrate efforts to control or change policy development in Canada?"* In addressing this question, the dissertation analyzes key themes, including colonization, restrictions, and disenfranchisement, as they appear to underlie most policy challenges. This dissertation serves to demonstrate how Indigenous Peoples affect policy and institutional change through public engagement. When accounting for Indigenous worldviews in the role of ideas in policy, as well as incorporating the role of colonization as a motivation and a context, a model of change emerges, a distinct paradigm shift in which the Crown's control over Indigenous identity is diminished. The following discussion outlines the policy problem surrounding Indigenous policy change in Canada, followed by the methods, limitations and plan for the dissertation. This dissertation argues that Indigenous Peoples create institutional and policy change through government engagement by bringing legal challenges, which culminates in third order change.

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[2] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.

[3] The term Indigenous is used when discussing the collective of Constitutionally recognized people under Section 35 of the Constitution Act, 1982. Periodically, reference is made to specific groups, either how they recognized themselves or the Constitutional distinction, depending on the context. *The Constitution Act,* 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[4] Margaret Kovach, *Indigenous Methodologies* (University of Toronto Press, 2010): 21.

[5] Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981). While this book explores Indigenous policy change, it is grounded in government experience rather than Indigenous experience.

Policy Problem – Standard Models Just Don't Cut It

Historically, Indigenous policy in Canada was developed and controlled by the federal government through legislation.[6] By asserting authority through legislation, the government controls Indigenous Peoples and process as seen in the *Indian Act* and the land claims policy literature.[7] Associated with this authority, is the goal of certainty – certain who is Indigenous. By maintaining control of and certainty about legal Indigenous identity, the government aims to control particular aspects of Indigenous Peoples' lives and to determine who accesses identity. Although Indigenous Peoples across the country are working to change this rigid, top-down policy development, hard work is not enough: to make an impact, Indigenous peoples must engage the government in a way that the Honour of the Crown must be upheld.[8] Current policy change models do not represent the change that happens through Indigenous engagement. This dissertation demonstrates through case studies what Indigenous-led change looks like.

When Indigenous Peoples attempt to change policy based on claims of identity, the Crown finds itself in danger of losing a level of control, its policy goal of authority in doubt. Why is this important? The Indigenous-Crown relationship is centered around legislated identity, and the government controls who that relationship is with based on their control of identity.[9] The government understands Indigenous Peoples in terms of Section 35 of the *Constitution Act 1982*, which includes First Nations Peoples (Indian), Métis, and Inuit.[10] This distinction requires attention as Indigenous Peoples approach identity based on community worldview as descendants of the First Peoples rather than government definitions. This is illustrated in the identity claims made in the case studies explored.

There are various ways to explore policy and institutional change, but irrespective of the method used, no model or method describes the change based on assertions of Indigenous identity.

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[6] J. Crossley "The Making of Canadian Indian Policy to 1946," *PhD Dissertation* (University of Toronto, 1987).
[7] Government of Canada, Aboriginal Affairs and Northern Development Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: AANDC, September 2014), 11.
[8] Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous peoples* (July 2017), https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html (accessed June 8, 2020).
[9] Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous peoples* (July 2017).
[10] Section 35, *The Constitution Act,* 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

According to Canadian political economist Peter Hall, policy change falls into three general categories: first, second and third order changes.[11] First order changes are incremental, that is change occurs gradually. Second order changes occur through what Hall calls "punctuations" to the equilibrium, in other words, disturbances to the established understandings. Third order changes occur when the entire paradigm shifts.[12] Hall cites as an example the shift from Keynesian fiscal policy with its emphasis on demand management to monetarism and the supply of money.[13] Generally, third order changes come after first and second order changes have accumulated anomolies.[14] However, in Indigenous policy making, Hall's order is often reversed, with third order paradigmatic change coming before simpler changes. For example, modern Canadian Indigenous land policy underwent an enormous shift as a consequence of a monumental legal land claims case (*Calder v British Columbia (AG)* [1973] SCR 313, [1973] 4 WWR 1).[15] Once institutions were established for dealing with land claims in response to Calder, the policies then went through incremental changes and the occasional punctuation change, such as the abandonment of the surrender of title (extinguishment) in the settlement process.[16] For much of land claims policy history, Indigenous Peoples had to extinguish their rights to land in exchange for a negotiated settlement.[17] The extinguishment element removed from the policy was a punctuation. This dissertation explains how Indigenous policy and institutional change in Canada is undergoing a paradigm shift as Indigenous Peoples assume the authority to control their identity, a government policy goal, by using government institutions.

In a world of ever more complicated legal and political relationships between Indigenous Peoples and government, determining identity and membership becomes a critical element in broad political and public policy questions. Simply put, it has become increasingly important to

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[11] Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics,* 25, no. 3 (1993): 279.
[12] Hall, 277.
[13] Hall, 284.
[14] Hall, 280.
[15] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313. Resolving Aboriginal Land Claims, 2001.
[16] Government of Canada, Aboriginal Affairs and Northern Development Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. Ottawa: AANDC, September (2014), 11.
[17] Bruce McIvor, "Canada's Misguided Land Claims Policy," *First Peoples Law* (November 24, 2014), https://www.firstpeopleslaw.com/index/articles/170.php (accessed July 6, 2020).

determine who is, legally and politically, a Métis person, a non-status or status First Nations person, or an Inuk (Inuit) person.[18] Furthermore, understanding the community affiliation, if any, of a specific Indigenous person is increasingly important at the local level. More generally, how Indigenous identity is defined, implemented, and adjudicated has emerged as a central element in Indigenous-government relations, intra-Indigenous relationships, and the application of Indigenous law in Canada. Indigenous worldview assertions of identity and community are key to policy change and learning. Defined for this dissertation, worldview is a cultural lens for interpreting the world and assigning meaning to those interpretations.[19] With Indigenous-led change, advocacy of a community held-idea (worldview) of identity is a perception behind the basis for change.

Recognizing institutional change and policy change led by Indigenous engagement involves examining how the elements of policy change are used, as well as their effects. The elements involved are goals, settings, and instruments. Peter Hall explains these factors as "the overarching goals that guide policy in a particular field, the techniques or policy instruments used to attain those goals, and the precise settings of these instruments."[20] Hall describes first and second order changes as 'normal policymaking,' where policy adjustments happen without challenging the entire paradigm.[21] In contrast, third order change occurs when the shift in policy is radical, when the entire policy paradigm shifts.[22] According to Hall, the process for third order change is different from that for the first and second order change; the third order process is 'disjunctive' rather than consisting of continuous adjustments.[15] Third order change applies to broader policy change when whole processes, systems, and paradigm areas shift. First and second order change generally applies to Indigenous policy change in segmented policy areas, such as land claims or housing, when there is already a template in place. When applied to Indigenous Peoples, third order change may occur when Indigenous Peoples threaten or upset the

[18] With respect to First Nations peoples, there are two legal categories: status and non-status. This is reference to those entitle to registered Indian status with the Indian Act. The Indian Registrar records people entitled to said registration and maintains the registry list. Government of Canada, Indigenous and Northern Affairs Canada, *What is Indian Status?* (June 9, 2018), https://www.aadnc-aandc.gc.ca/eng/1100100032463/1100100032464 (accessed July 4, 2019).
[19] Leroy Little Bear, "Jagged worldviews colliding," *Reclaiming indigenous voice and vision*, ed. M. Battiste (2000): 77.
[20] Hall, 278.
[21] Hall, 279.
[22] Hall, 284.

government's certainty about knowing what is right for Indigenous Peoples. Indigenous-led changes based on identity and community worldviews fit into the category of third order change.

Key to any kind of policy change, particularly third order change, is social learning. When social learning occurs, often outside the state, change comes from a different space than it does in typical policy learning.[23] As Hall argues, "We can define social learning as a deliberate attempt to adjust the goals or techniques of policy in response to past experience and new information. Learning is indicated when policy changes as the result of such a process."[24] Social learning applies differently to Indigenous-led change because, as discussed in Chapter 8 of this dissertation. Indigenous-led change is intentional, and learning occurs when information is introduced via judicial means.

That the federal government seeks to maintain the authority to control Indigenous identity is observable in the case studies explored in this dissertation: the Mi'kmaq Peoples of Newfoundland, Métis and non-status First Nations, and the Algonquin of Ontario. The challenges initiated by these Indigenous groups are grounded in denial of access to Indigenous rights based on institutional and federal concepts of identity and/or title to land. The long history of Indigenous Peoples engaging with public policy systems and processes culminated in the reduction of the federal government's exclusive control of Indigenous identity. The authority over identity and the certainty that it knows best defines the Crown's fiduciary duty to specific groups of people, in this instance, Indigenous communities. A fiduciary duty is an "obligation owed by the government to Aboriginal Peoples and respect for both Aboriginal rights (that all groups possess) and treaty rights (that some First nations peoples possess)."[25] As indicated by Senator Yvonne Boyer, an obligation that the federal government has largely ignored.[26] The constructed legal identity understood by the government sets the parameters of its responsibility to Indigenous Peoples. It is, therefore, pivotal to account for this dynamic in Indigenous-government relationships.

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[23] Hall, 288.
[24] Hall, 278.
[25] Yvonne Boyer, *First Nations, Métis and Inuit Health Care: The Crown's Fiduciary Obligation*, Discussion Paper, Series in Aboriginal Health No. 2. (University of Saskatchewan, Native Law Centre, 2004): 8.
[26] Yvonne Boyer, 8

Methods

Exploring the Indigenous role in policy change reveals that considerable institutional changes occur as a result of Indigenous Peoples engaging with institutional processes. This dissertation contributes to the understanding of institutional and policy change in Canada because it provides insight into worldviews essential to understanding Indigenous policy and institutional changes and because it demonstrates where the desire for engagement originates. This is achieved by exploring the engagement process of three case studies and the arguments they put forth. The engagement process is compared to the understanding put forward by Peter Hall, observing the deviation from his model. To see how Indigenous Peoples create change in colonial systems, Western approaches, such as Historical Institutionalism and Hall's policy change models are used to illustrate the differences when examining Indigenous-led change.

Historical Institutionalism (HI) is a method of institutional analysis studying how change occurs with the understanding that institutions are "formal and informal rules and procedures that structure conduct" and accounting for actors' interaction within structures.[27] Applying HI to policy learning and change illustrates how Indigenous-led change fits within colonial systems and understandings, and how Indigenous worldviews are entering non-Indigenous systems. These systems are institutional arrangements that originated as a nation-to-nation system, where Indigenous Peoples were treated as equals to non-Indigenous nations.[28] These systems evolved, limiting Indigenous voices and associated worldviews through the federal government's colonial policies.[29] Processes used as instruments for institutional engagement are diplomatic arrangements involving Indigenous communities and governments, including petitions, formal agreements, negotiations, and court processes.[30] Ideas are a primary element in institutional and policy development, and Indigenous worldviews as policy ideas need acknowledgment and to be held in proper balance when institutional and policy change are examined.

[27] John L. Campbell, *Institutional Change and Globalization*, (Princeton, N.J.: Princeton University Press, 2004): 4
[28] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaties of Peace and Neutrality (1701-1760)," https://www.rcaanc-cirnac.gc.ca/eng/1360866174787/1544619566736 (accessed July 7, 2019).
[29] Canada, Parliament, Special Joint Committee of the Senate the House of Commons Appointed to Examine Consider the Indian Act, *Minutes of Proceedings and Evidence.*, (1946).
[30] The use of these various methods is explored further in the case studies.

Indigenous methodology has developed as an approach where front and centre are the perspectives and voices of Indigenous Peoples. Oftentimes data collection approaches include activities that are used in participatory action research and qualitative inquiry: however, it also includes Indigenous approaches to data collection.[31] What centres Indigenous methodology is that the analysis is conducted through an Indigenous lens. I am first and foremost an Indigenous woman. I see the world through the land-based teachings that were shared with me by my father, my maternal grandmother, and numerous Elders. I have been mentored and advised to pursue a career in academia to help provide context and content to important topics, such as land and identity politics. As an Indigenous academic, I centre all of my work within relational approaches. I work towards understanding how the translation of worldviews and consensus based priority setting translates to policy ideas, policy formation, and a space to create change.

Identity grounds the legislation process by the Crown, however this process has been, and is being challenged by Indigenous collectives.[32] The structured observation in data analysis within this work captures worldviews as ideas, as well as the roles of identity and colonization as themes and continuous undercurrents. This study is a longitudinal examination of the engagement history between particular cases and the Crown. The sequence of events illustrates the efforts by Indigenous Peoples to assert recognition and self-determination through institutional mechanisms. I begin by a review of primary sources, such as public documents and grey literature that were used for negotiation purposes. These documents are complimented with community-based studies and public records that have been made available to me. This work centres on Indigenous voice and Indigenous perspectives, reflecting on how Indigenous People engage with the crown to push back while creating necessary change. Currently, in the literature, much research surrounding Indigenous perspectives of policy change are topic-specific, focusing on micro levels of change such as environmental issues, child welfare, and food sovereignty, to mention a few key areas. However, there is an absence when approaching colonial institutions and creating change broadly.

[31] Margaret Kovach, *Indigenous Methodologies*. (Toronto: University of Toronto Press, 2010): 36.
[32] Challenges observed through the many court challenges initiated by various Indigenous Peoples and communities.

Through discourse analysis, the role of Indigenous worldviews as ideas are exposed through the assertions made by communities. For example, in the Algonquins of Ontario (AOO) case, the engagement history spanning two centuries points to original agreements and petitions, and assertions in pursuing the recognition.[33] In another case, the Mi'kmaq Peoples of Newfoundland were faced with the unique challenge of proving their existence because they were explicitly left out of Confederation negotiations.[34] After they asserted community identity, a new government-recognized band creation mechanism was used.[35] A third example is the Métis People's engagement with the Crown, which has been well documented in the Canadian court systems.[36] Their engagement and negotiations culminated in their eventual recognition as Section 91(24) 'Indians' in the *British North America Act 1867*.[37] All these examples indicate that a common theme that emerged across cases was community assertions of access to rights, often through highlighting historical injustices.

A common goal for Indigenous Peoples engaging with the Crown is to create desired change. When positioning the role of colonization as a setting for this dissertation, I considered identity as an instrument for change and the role of colonization as the motivation for engagement. The reason for this determination is observing that the Indigenous-led challenges were grounded in identity assertions from community perspectives. Through thematic analysis of instances of Indigenous-Crown engagement, I realized that it is imperative to position colonization at the core. As Margaret Kovach, a *Nêhiýaw* (Cree) scholar from Saskatchewan argues, "Indigenous knowledges in any form of academic discourse (research or otherwise) must ethically include the influence of colonial relationships, thereby introducing a decolonizing perspective to a critical paradigm."[38] The relationship between Indigenous Peoples and the Crown is entirely colonial. My goal is not to interpret the story beyond the documents in this research but rather to base my

[33] Government of Ontario, *The Algonquin Land Claim* (May 3, 2019), https://www.ontario.ca/page/algonquin-land-claim#section-4 (accessed July 7, 2019).
[34] Maura Hanrahan, "The Lasting Breach: The Omission of Aboriginal People from the Terms of Union between Newfoundland and Canada and Its Ongoing Impacts," *Royal Commission on Renewing and Strengthening Our Place in Canada. St. John's: Government of Newfoundland and Labrador* (2003), 219.
[35] Government of Canada, Department of Indian Affairs and Northern Development Corporate Services Departmental Audit and Evaluation Branch, *Evaluation of the New Bands/ Band Amalgamation Policy Project 98/16* (September 2001), 8.
[36] Some of the many Métis cases are explored in chapter 5.
[37] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[38] Margaret Kovach, 30.

analysis firmly on the documents: Indigenous Peoples use the process of engagement, conveying their voice and worldviews through their history (their story) to create change.

I synthesized the research by looking at the stories and assembling them around engagement and reflexive thought. In examining the history of engagement—who started what, when, and what led to what— I as the researcher focused on three categories of research: observing the role of colonization, identity, and use of worldview. In my research, reflective analysis revealed shifts in legal concepts of Indigenous identity through Indigenous worldview assertions that created space for other Indigenous worldviews. This analysis resulted in the realization that government-controlled goals could be altered through Indigenous assertions and engagement. Using the inroads made by the AOO as inspiration, other non-status Indigenous collectives can make the case for land claims recognition. Despite limited scenarios for new *Indian Act* band creation and recognition, the Mi'kmaq People of Newfoundland were able to achieve this recognition through other policy creation mechanisms (Order in Council).[39] This precedent also provides space for other communities to negotiate similarly. The Métis legal history affected constitutional space for generations, and through the Daniels case, affected institutional definitions and government control over who has access to statutory rights as Indigenous Peoples.

Limitations

The main limitation with this dissertation is the small number of cases it explores. Nevertheless, these cases have made substantial contributions to diminishing the government's control over Indigenous identity. The reason there continues to be a shortage of cases to examine is the length of time each case takes. The Daniels case began in 1999 but was not resolved until 2016, and the Powley case began in 1993, with the final decision reached in 2004, less lengthy than many.[40] Taking a legal challenge before the courts and engaging all the way to the Supreme Court of Canada takes time, resources, and dedication. The same is true of negotiation processes, which are no shorter in length. For example, the modern Algonquin land claim in Ontario has been

[39] Government of Canada, Indigenous and Northern Affairs Canada, *About band membership and how to transfer to or create a band,* https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470 (accessed September 24, 2019).
[40] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99. R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.

active for four decades and has not yet concluded.[41] As more developments take place through negotiations and court challenges, more cases will become available. They will be useful in future research to determine if the federal government changes its approach to policy development based on community self-determination.

Plan of the Dissertation

In studies of Indigenous institutional and policy changes in Canada, Indigenous worldviews are often overlooked. Because Indigenous motivations and roles have been left out of studies, the impacts of policy on Indigenous Peoples have gone unnoticed. To expose this impact, Indigenous-led policy and institutional change has to account for the roles of colonialism, Indigenous worldviews, and Indigenous-led engagement. The following chapters examine these issues in detail. Chapter Two provides a general overview of legislated Indigenous identity in Canada and introduces the case studies. Chapter Three provides the conceptual background for the dissertation and frames Indigenous policy and institutional change through the lens of historical institutionalism, policy and institutional learning, and change. Chapter Four examines identity assertion by the Mi'kmaq Peoples of Newfoundland through political organization and court action. In Chapter Five, the identity efforts by Métis and non-status First Nations Peoples are discussed, highlighting steps taken toward asserting Indigenous identity and worldviews. Chapter Six reviews the history of the Algonquin Peoples in an Ontario land claim, a collective that created a unique approach to land rights by including non-status First Nations communities. Chapter Seven, focusing on examples of Indigenous ways of knowing, reveals how worldview informs knowledge beyond identity and interpretations of land. The dissertation concludes with an evaluation of Indigenous policy and institutional change in Canada, arguing that it has produced a unique form of third order change within the framework of historical institutionalism.

[41] Government of Ontario, *The Algonquin Land Claim* (June 21, 2013, updated August 5, 2016), https://www.ontario.ca/page/algonquin-land-claim (accessed originally March 2015).

CHAPTER 2: LEGISLATING INDIGENOUS IDENTITY AND THE PUSHBACK

Introduction[42]

As an introduction to the larger topic area of Indigenous-led policy change in Canada, this dissertation begins by explaining how identity became legislated and how Indigenous Peoples began engaging institutions based on identity to access Constitutionally protected Indigenous-specific rights. With respect to Indian status, people fought to access an identity that provided rights and protections under the *Indian Act*. In the area of land claims, assertions of community concepts of land and tenure through the courts established an entire policy area for the federal government. These judicial decisions demonstrate the role Indigenous Peoples play in affecting policy change and development. In studying case studies, we can see shifts that have taken place over decades and generations of engagement. According to Hall, paradigm shift in policy making occurs when the government either changes a goal or loses control of this goal.[43] With respect to Indigenous policy and institutional change, large institutional shifts occur when Indigenous engagement diminishes the government's power over and certainty about Indigenous identity. The role of the judiciary is significant because the research revealed that all policy change considered in this dissertation began in court action, observed in the forthcoming discussion.

Legislating Indigenous Identity in Canada and Indigenous Challenges to the Legislation

As the British Crown established relationships with Indigenous Peoples, it needed to regulate with whom these relationships were formed. A constructed definition was the basis of engagement. Race-based legislation established who was able to access rights and agreements with the Crown. Before 1867, the colonial government regulated the identity of Indigenous Peoples after imposing responsibility through the *Royal Proclamation, 1763* and through pre-Confederation legislation in Upper and Lower Canada.[44] The *Constitution Act, 1867* includes Section 91 (24), which determines that 'Indians' fall under federal jurisdiction in the

[42] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[43] Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics,* 25, no. 3 (1993): 280.
[44] King George III. *Royal Proclamation, 1763*. Yvonne Boyer, *First Nations, Métis and Inuit Health Care: The Crown's Fiduciary Obligation*, Discussion Paper, Series in Aboriginal Health No. 2. (University of Saskatchewan, Native Law Centre, 2004): 18.

jurisdictional separation of powers.[45] Initially, the Crown did not take responsibility for Inuit or Métis People. As illustrated by Academic Larry Chartrand, while Treaty 3 discussions were taking place the federal government refused to recognize what they called at the time "Half-breed Bands" in Ontario.[46] Eventually the federal government had no choice acknowledge Métis title to land and the scrip process was implemented as a mechanism used by the Crown to settle Métis title to land in western Canada.[47] After having established its relationship with Indigenous Peoples, the Crown shifted its focus to the settlement of lands, using identity as the basis for access to lands through agreements. Today, there are three categories of Indigenous Peoples recognized under the *Constitution Act, 1982*.[48] Until recently, there were sharp differences in federal responsibility for each category.

Under the category 'Indian,' the government saw itself as being responsible for Indians entitled to registration under the *Indian Act*. Non-status Indians and Métis People were not provided the same level of federal responsibility until the 2016 Supreme Court of Canada Daniels case.[49] Post Confederation legislation was developed over the years concerning the recognition of Indigenous Peoples as Indian. Through the development of Indian policy, the creation of an Indian registrar as an administrative tool controlled who had access to Indigenous rights and whom the legislation protected. In the early part of the 20th century, there was a dispute between the province of Quebec and the federal government regarding who was responsible for Inuit People. In 1939, it was determined by the Supreme Court that Inuit were a federal responsibility under section 91 (24) of the *British North America Act* (also referred to as the *Constitution Act, 1867*).[50]

More than 75 years later, on April 14, 2016, the Supreme Court of Canada determined that Métis and non-status Indians now exist under the legal definition of Indian and are due the associated

[45] *British North America Act*, 1867, Section 91 (24).
[46] Larry Chartrand, "Metis Treaties in Canada: Past Realities and Present Promise," *Métis Treaties Research Project* (2016): 8, 9.
[47] Camilla Augustus and University of Calgary, Faculty of Graduate Studies Research, *The Scrip Solution: The North West Metis Scrip Policy, 1885-1887*. Calgary (2005).
[48] *The Constitution Act,* 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[49] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[50] Reference whether "Indians" includes "Eskimo", [1939] SCR 104, 1939 CanLII 22 (SCC), http://www.canlii.org/en/ca/scc/doc/1939/1939canlii22/1939canlii22.html (accessed April 15, 2016).

fiduciary responsibility from the federal government (the government must act in the best interest of the Métis People as they must for First Nations and Inuit People).[51] The Supreme Court of Canada Powley decision in 2003, provided mechanisms for determining Métis and non-status communities, but it was the Daniels case in 2016 that explicitly placed Métis People under Section 91(24) jurisdiction.[52] The judicial system has been an instrument to determine government responsibility and the associated definitions of who is entitled to rights associated with Indigenous identity. As Indigenous Peoples challenge institutional policies, they have shaken the certainty previously held by the government about the definition of peoples and who can access the rights and associated protections. This shift in certainty, and introduction of doubt, is observable in the challenges to the *Indian Act* and the Daniels case challenge.

To control Indigenous identity, the government introduced mechanisms such as enfranchisement and 'marrying out' (gender discrimination) to reduce Indian populations.[53] Official gender discrimination of Indigenous (Indian) women began in the 19th century when the British Crown began setting the terms for whom it considered Indian and what that meant for the relationship between the Crown and Indian Peoples. In 1839, the first legislation regarding Indian Peoples after the *Royal Proclamation*, *1763*, was *An Act for the Protection of the Indians in Upper Canada*, established protections for Indian lands.[54] Beginning in the 1850s The colonial government established official Indian identity in 1850 Upper and Lower Canada in *The Act for the better protection of the Lands and Property of Indians in Lower Canada* and *The Act for the protection of the Indians in Upper Canada from imposition, and the property occupied by them from trespass and injury.*[55] In the initial definitions, the legislation applied to Indians and people who intermarried, but the term Indian was not explicitly defined. The assumption of what Indian identity meant carried through to the 1857 *Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians* (20 Vic. c.26) and the 1859

[51] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[52] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43, para 5.
[53] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act* 31st Victoria, Chapter 42. S.C., 1869, c". 6. Section 6.
[54] *An ACT for the protection of the Lands of the Crown in this Province, from trespass and injury*, The Statutes of Upper Canada to the Time of the Union, volume 1 — Public Acts (1839), chapter 15.
[55] *An Act for the better protection of the Lands and Property of the Indians in Lower Canada, Statutes of Canada, 1850*, c. 42 (13-14 Vict.), *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*. Statutes of Canada, 1850, c. 74 (13-14 Vict.).

Act respecting Civilization and Enfranchisement of certain Indians.[56] This pre-Confederation legislation was biased against women in the context of qualifying for enfranchisement but did not provide for the removal of women's Indigenous identity. The targeted gender discrimination through legislation began post Confederation, although, in reality, it had existed for centuries.

Following the assent of the *British North America Act 1867*, Canada passed new legislation in 1868 and 1869 that defined Indians and set the terms for how someone retains that legal identity distinction. Legislation passed in 1868, *The Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* established that any descendants from a marriage of an Indian man and a non-Indian women would be considered Indian.[57] Likewise, In 1869, the following year, *The Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the (1868) Act* removed Indian status (legal identity) from women when they married someone from outside their community. According to Section 6 of the Act, if the woman married another person considered Indian, she would assume the identity of her husband's community:[58]

> Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.[59]

The *Indian Act* was introduced in 1876, consolidating all previous legislation, and legislating identity through Section 6 of the Act.[60] The new legislation imported the gender discrimination from earlier laws. From 1876 to 1951, a series of changes was made to the Act, further restricting Indigenous cultural practices and the rights of Indian women under the Act.[61] Challenges to these restrictions were later made through judicial systems.

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[56] *Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians, 1857* (20 Vic. c.26) and *An Act respecting Civilization and Enfranchisement of certain Indians*, *1859*, c. 9.
[57] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C., 1868, c. 42.
[58] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act* 31st Victoria, Chapter 42. S.C., 1869. Section 6.
[59] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act* 31st Victoria, Chapter 42. S.C., 1869. Section 6.
[60] *Indian Act, 1876.* S.C., 1876, c. 18. Section 6.
[61] J. Crossley "The Making of Canadian Indian Policy to 1946," *PhD Dissertation* (University of Toronto, 1987).

After 1960, changes to the *Indian Act* regarding gender discrimination were primarily due to efforts by Indigenous women asserting their rights to identity through engaging federal and, in some cases, international institutions. The mobilization of women drawing attention to gender discrimination in the legislation of Indigenous identity started in the 1960s. Mary Two-Axe, a woman from Caughnawaga, founded *Equal Rights for Indian Women,* a provincial organization from Quebec, and submitted a brief to the *Royal Commission on the Status of Women* in 1967.[62] As a lobbyist, she was celebrated for her work, received many awards, and was the first woman to be reinstated under the *Indian Act* amendment, *Bill C-31* in 1985.[63] Another woman Jeannette Corbière Lavell challenged the *Indian Act* under the *Canadian Bill of Rights* following the collapse of her marriage. In *Re Lavell and Attorney-General Canada (1971)*, it was decided that she was not discriminated against; however, the decision was reversed at the Federal Court of Appeal level.[64] In 1971, Yvonne Bedard, a woman who also lost her legal identity through marriage, challenged the *Indian Act* for gender discrimination and won.[65] Lavell and Bedard submitted a joint appeal in *Attorney-General of Canada v. Lavell; Isaac v. Bedard* (1973). At this Supreme Court level, the courts overturned previous victories.[66] With no further instruments to engage in Canadian institutional processes, another disenfranchised woman took Canada to the *United Nations Human Rights Committee* in 1981. Mary Sandra Lovelace Nicholas was successful at the United Nations in *Lovelace v. Canada* (1983), but the response by the federal government was not immediate.[67] Pressure from these Indigenous women who asserted identity and demonstrated inequities in the legislation, has contributed to the Indigenous impact on the *Indian Act* legislation.

These women, and many others like them, were excommunicated from their families and communities by the gender discrimination that removed their legal status as Indian, as registered under the *Indian Act.* Once a woman married outside her community, she retained no rights to

[62] Marie Fern Paul, "Bill C-31: The Experience of Indian Women who 'married Out,'" Ph.D. diss., University of New Brunswick, Department of Sociology (2010), 19-20. Wayne Brown, "Mary Two-Axe Earley: Crusader for Equal Rights for Aboriginal Women," *Electoral Insight – Aboriginal Participation in Elections*, Elections Canada (November 2003) https://www.elections.ca/content.aspx?section=res&dir=eim/issue9&document=p10&lang=e.
[63] Paul, 20.
[64] Paul, 21.
[65] Paul, 22.
[66] Supreme Court of Canada. Attorney General of Canada v. Lavell, [1974] S.C.R. 1349.
[67] Paul, 23.

the community, including rights to property and rights to be buried with her ancestors. The discrimination was particularly galling because while Indian women lost the right to their legal identity, women who married Indian men gained access to their husband's Indigenous identity.[68] In other words, men could transmit identity, rights and associated culture, but women could not. Fighting for more than just equal treatment, the women were fighting for rights to access their communities and rights to pass a legal identity to their children.

In the 1980s, the international community began to put pressure on the federal government to change the discrimination and inequity contained in the *Indian Act*. As a result, the government made amendments to the *Indian Act* policy. In an attempt to remove gender discrimination from the *Indian Act, Bill C-31* was introduced and implemented in 1985, but this amendment to section 6 of the *Indian Act* only perpetuated gender discrimination. [69] Under the new amendments, two types of Indian registration developed: 6 (1) and 6 (2). Section 6 (1) refers to a person who has full registered status under the *Indian Act* and can pass this status to their descendants despite the identity of the other parent.

6 (1) Subject to section 7; a person is entitled to be registered if

- **(a)** that person was registered or entitled to be registered immediately before April 17, 1985;
- **(b)** that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
- **(c)** the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions.

Section 6 (2) is reserved for children born after 1985, and only one parent is entitled to register under Section 6 (1). The changes to the Act reinstated those who lost status through enfranchisement, or through marriage, among other changes related to band membership, but left women's status inferior to men's as grandmothers could not pass status, but grandfathers could.

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[68] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*. S.C., 1868, c. 42. *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act* 31st Victoria, Chapter 42. S.C., 1869, 6.

[69] Canada, Department of Indian Affairs Northern Development, *Bill C-31.*, 1992. *Indian Act*, R.S.C., 1985, c. I-5.

This double standard in transmission of status led Sharon McIvor to challenge the *Indian Act* through the judicial system.

There were three significant changes made to the *Indian Act* in 1985 to advance Indian policy: 1) the removal of discrimination, 2) the restoration of status and membership rights, and 3) the increased control of Indian bands over their affairs.[70] Under these changes, Sharon McIvor was one of 100,000 people who eventually applied to have Indian status instated/reinstated.[71] When her children were denied status, Sharon began her process by writing a letter to the government.[72] The government responded by explaining that only she qualified for status. Sharon McIvor appealed the decision in 1987, but in 1989 she once again received a letter from the government explaining that the decision was upheld.[73]

McIvor launched a Charter Challenge, "alleging that the status provisions in the Act discriminated on the basis of sex and marriage" through the *Court Challenges Program*.[74] The Court Challenges Program was a federally funded program to aid historically disadvantaged peoples to take cases to court to bring challenges forward based on equity Charter rights, It had been in existence for 20 years when it was cancelled in 2006.[75] Cancelling this program initially caused a funding problem for Sharon, but she was able to secure funding to continue her case because of the support from the Assembly of First Nations (AFN) Women's Council, which has "led several fund-raising events among Chiefs."[76] Despite obstacles, Sharon McIvor continued to challenge the *Indian Act* through institutional processes for remaining inequities.

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[70] Canada, Department of Indian Affairs Northern Development. *Bill C-31*., 1992.
[71] Ginette Petitpas-Taylor, "How Sharon McIvor is Taking on the Indian Act," *Feminist Alliance for International Action, News* (April 23, 2008) http://www.fafia-afai.org/en/news/2008/how-sharon-mcivor-taking-indian-act. (accessed February 25, 2010).
[72] Daphne Bramham, "The Long, Hard road of Sharon McIvor." *The Vancouver Sun*, (November 09, 2007) http://www2.canada.com/vancouversun/news/editorial/story.html?id=48a6212d-c539-4cba-8d5f-4a57f5feeec9 (accessed February 25, 2010).
[73] Bramham.
[74] Public Service Alliance of Canada, "Justice for Sharon McIvor and all First Nations women – at last!" *PSAC Press Release* (June 4, 2009) http://psac.com/news/2009/issues/20090604-e.shtml (accessed February 22, 2010).
[75] Administrator, "Help Sharon McIvor win Equality for Aboriginal Women," *Nation Talk* (November 13, 2007). CUPE, "Sharon McIvor's Fight Against the Indian Act's Gender Discrimination isn't Over Yet." *Press Release*, (April 23, 2009) Http://cupe.ca/aboriginal/Sharon-McIvors-indian-act-gender-discrimination (accessed February 23, 2010).
[76] Assembly of First Nations, "AFN Praises Sharon McIvor on October 6th, First Nations Women's Day," *AFN Announcements* (October 6, 2008).

Through McIvor's institutional challenges, the changes to the *Indian Act* with *Bill C-31* were found deficient in 2007 by Justice Carol Ross, who stated "one's female ancestors are deficient or less Indian than their male contemporaries. The implication is that one's lineage is inferior."[77] The government appealed the decision of the British Columbia Supreme Court (B.C.S.C.), and, once again, the courts ruled in McIvor's favour.[78] On November 5, 2009 the Supreme Court ruled that it would not hear the McIvor case, leaving the government with two options: 1) appeal this decision, or 2) pursue the amendment to the *Indian Act* by April 9, 2010 as directed by the B.C. court of appeal decision.[79] The federal government released a statement stating it would not appeal this decision at the federal level.[80] The policy response to the newly highlighted inequity was the introduction of *Bill C-3*, *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada,* which received assent on December 15, 2010.[81]

Although McIvor was successful in her challenge to the government, the new gender changes proved insufficient. The new amendments to the *Indian Act* under *Bill C*-3 left a 1951 cut-off rule. If a grandchild traced their Indigenous identity through a female person, but the grandchild was born before 1951, they would be denied their Indian status, thus leaving female lineage subordinate to male lineage.

> **(2) Paragraph 6(1)(*a*) of the Act is replaced by the following:**
> (*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;
> R.S., c. 32 (1st Supp.), s. 4
> **(3) Paragraph 6(1)(*c*) of the Act is replaced by the following:**
> (*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph

[77] McIvor v. The Registrar, Indian and Northern Affairs Canada 2007 BCSC 827, 120.
[78] Public Service Alliance of Canada, "Justice for Sharon McIvor and All First Nations women – at last!" *PSAC Press Release* (June 4, 2009).
[79] Administrator, Cision News Wire (CNW) Telbec, "Sharon McIvor's Case Turned Away by Supreme Court of Canada." In *Press Release* (November 05, 2009), http://www.canadianaboriginal.ca/index2.php?option=com_content&task=view&id=68&Itemid=9&pop=1&page=0 (accessed February 24, 2010).
[80] Canada, Indian and Northern Affairs Canada, "Backgrounder – McIvor: an Overview," *News Releases* (June 03, 2009).
[81] *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18. Gender Equity in Indian Registration Act S.C. 2010, c. 18

12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
(*c.1*) that person
(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,
(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and
(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted.[82]

Thus, a grandmother who had lost status, but later had it returned could pass status, but if a grandmother had never lost her status, she could not pass status.

The ongoing deficit of gender in the transmission of status led to the Descheneaux challenge to the *Indian Act* through institutional processes. In 2011, Stéphane Descheneaux, Susan Yantha and Tammy Yantha, members of Abénakis of Odanak First Nation in Quebec, launched a case regarding the remaining discrimination in the *Indian Act*. Justice Chantal Masse asserted that the current legislation was discriminatory.[83] On August 3, 2015, the Superior Court of Quebec ruled in favour of the plaintiffs. The judgement states, "that paragraphs 6(1)(a),(c) and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe Section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative."[84] Initially, the federal government appealed the decision, but following the 2015 election, the Attorney General dropped this case after a

[82] Indian Act, RSC 1985, c I-5.
[83] James Munson, "Ottawa drops appeal in case on women's right to Indian status," *iPolitics* (February 25, 2016) http://ipolitics.ca/2016/02/25/ottawa-drops-appeal-in-case-on-womens-right-to-indian-status/ (accessed March 1, 2016).
[84] *Descheneaux* c. Canada (Procureur Général). 2015 QCCS 3555. Superior Court. Canada. Province of Quebec. District of Montreal, 78.

review.[85] The response by the federal government was a two-phase change. The first phase of the *Indian Act* amendments targeted changes in gender equity discrimination identified by Justice Masse. Two major concerns were differential treatment among cousins and differential treatment among siblings.[86] The second phase included more comprehensive changes that involved consultation with Indigenous Peoples and communities.[87] The second phase participation of Indigenous Peoples demonstrates the institutional space created for Indigenous participation resulting from Indigenous engagement.[88] The new bill, *Bill S-3*, eliminated the 1951 cut-off rule, enabling all status women to pass on their status to their descendants. This measure was instituted for families that lost entitlement to legal Indian status through the 1869 legislation.[89] The changes to the *Indian Act* and concepts of Indian under Section 91(24) of the 1867 *British North America Act* in the later part of the 20th century are the result of challenges by Indigenous Peoples asserting identity using institutional mechanisms.

Changes to the *Indian Act* policy, based on equality challenges to Indigenous identity, are incremental. When Indigenous Peoples challenged institutions through the judicial system, policy amendments occurred. These changes expanded the population the Crown was responsible for based on legal Indigenous identity. Policy creation has also occurred through Indigenous action. An example is the government's reaction to the Calder decision (1973) on the 'Aboriginal' title to land by creating the Office of Native Claims (ONC).[90] This development in Indigenous land claims was a government reaction to commentary from the Supreme Court of Canada Calder case.[91] Changes to colonial institutions and policies happen through challenges to

[85] Munson.
[86] Government of Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Response to the Descheneaux Decision* (January 31, 2018), https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623 (accessed February 20, 2019).
[87] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan" https://www.aadnc-aandc.gc.ca/eng/1522949271019/1522949383224 (updated, June 13, 2019).
[88] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada. "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan"
[89] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada. "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan"
[90] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act," *History* (December 5, 2011), http://www.sct-trp.ca/hist/hist_e.htm (accessed December 2017).
[91] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313. Resolving Aboriginal Land Claims, 2001.

the status quo concerning government-accepted Indigenous identity. An example is seen in the Daniels decision (2016) in which the Métis and non-status First Nations plaintiffs asserted identity in the context of 'Indian' for Section 91(24) purposes of access to constitutionally protected rights.[92] These series of challenges to institutions have developed into more prominent policy and institutional change.

Indigenous Peoples Creating Influence in Colonial Institutions and Policy

Over the years, there have been changes in federal legislation, as illustrated in the evolution of the *Indian Act*.[93] Changes to Indigenous policy in land claims have also occurred, a result of Indigenous Peoples asserting their identity and worldview in institutional processes. The source of the modern comprehensive claims policy is the 1973 Calder decision.[94] In 1969, the Nisga'a First Nation initiated legal action against the federal government concerning title to land. Although the decision of the Supreme Court of Canada was split, the judges recognized that 'Aboriginal' title to land existed.[95] Currently, the source of 'Aboriginal' title is British common law, and land claims are based on 'Aboriginal' rights, as set out in Section 35 of the *Constitution Act, 1982*.[96] Through the 1973 policy statement, the modern claims process was formalized. Made by *the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on claims of Indian and Inuit people,* this policy statement laid the groundwork for acknowledging 'Aboriginal' title, requiring settlement with peoples who do not have previous agreements with the government.[97] Once they were established, land claims policies went through incremental changes. These changes were mostly the result of government feedback loops (government's evaluation of policies and programs that inform the future direction).[98]

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[92] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[93] John Milloy, "Indian Act Colonialism: A Century of Dishonour. 1869-1969," National Centre for First Nations Governance (2008).
[94] Canada, Indian and Northern Affairs, *Resolving Aboriginal Land Claims: A Practical Guide to Canadian Experiences* (Ottawa: Government of Canada, 2001): 9.
[95] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313. Resolving Aboriginal Land Claims, 2001. 9.
[96] The *Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[97] Canada, Department of Indian Affairs and Northern Development, *A statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on claims of Indian and Inuit people,* 3, 4.
[98] Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94, no. 2 (2000), 265-66.

In 1981 the federal government released the policy *In All Fairness – A Native Claims Policy: Comprehensive Claims,* which reaffirmed the 1973 policy. After a review of the claims policy, the federal government released another revised policy in 1986 and published it in 1987 as *Comprehensive Land Claims Policy, 1987.* This revised policy included "New approaches to the cession and surrender of title, self-government….and negotiating procedures."[99] After the government established the policy, for four decades it underwent incremental changes. In the 21st century, advancements were made to the policy, but, significantly, these changes were only made because Indigenous Peoples challenged Canadian institutions through the instrumental process of the judicial system.

With the continued evolution in land claims policy, the federal government released a publication regarding Indigenous claims: *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences* in 2003.[100] This document provides historical context and explains how the policies changed over time. An example of change is the development of the right to self-government in 1995, protected under Section 35 of the *Constitution Act, 1982*.[101] The Senate Standing Committee on Aboriginal Peoples studied comprehensive claims agreements and implementation and released a report in 2008: *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Interim Report: Special Study on the implementation of comprehensive land claims agreements in Canada*.[102] Because the Crown asserts sovereignty over the land, the Senate Standing Committee stated, "Aboriginal title is concerned with the effect of Crown sovereignty upon the pre-existing property rights of the tribal inhabitants."[103] The Government publications concerning land claims frame the government's position in negotiations as one that stems from Section 35.[104] This position aligns policy with the constitutional changes made after

[99] Canada, Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy* (1987), 6-7.
[100] Canada, *Resolving Aboriginal Claims; A Practical Guide to Canadian Experiences* (Ottawa: Government of Canada, 2003).
[101] Canada, *Resolving Aboriginal Claims; A Practical Guide to Canadian Experiences* (2003), 7.
[102] Standing Senate Committee on Aboriginal Peoples. *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Interim Report: Special Study on the implementation of comprehensive land claims agreements in Canada*. Canada. Senate Committee Reports. May 2008.
[103] P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011), 1.
[104] Standing Senate Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Interim Report: Special Study on the implementation of comprehensive land claims agreements in Canada*. Canada. Senate Committee Reports (May 2008). AND Government of Canada, Aboriginal Affairs and

the 1981 policy as Canada patriated the constitution in 1982, introducing Section 35 on 'Aboriginal' constitutional protections.[105]

Prior to 2008, Indigenous land claim policy documents included extinguishment clauses for Indigenous rights to a particular territory. Extinguishment of title to land by Indigenous Peoples refers to the surrendering of rights to land by Indigenous Peoples in exchange for a settlement of an outstanding claim.[106] Academic Michael Asch and lawyer-academic Norm Zlotkin explain that some Indigenous Peoples in Canada choose not to participate in negotiations leading to agreements because they are unwilling to extinguish title derived from their rights.[107] In 2014, as a response to the review by the *Standing Senate Committee on Aboriginal Peoples* report on comprehensive land claims, the government released a policy update on comprehensive claims in which it excluded the extinguishment clause in the framework document.[108]

Within the policy update, identified through core principles, is the significance of the judicial process, as well as the centrality of the Honour of the Crown.[109] Its importance is explained in Haida Nation *v*. B.C. (Minister of Forests) [2004] 3 S.C.R.: "In all cases, the honour of the Crown requires that the Crown act with good faith."[110] The federal government has indicated that Honour of the Crown is a guiding principle for its dealings with Indigenous Peoples, and the

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Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. Ottawa: AANDC, September 2014.

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

[106] Government of Canada, Parliamentary Research Branch, Mary Hurley and Jill Wherrett. *Settling Land Claims.* (September 1999) http://publications.gc.ca/Collection-R/LoPBdP/EB/prb9917-e.htm (accessed September 24, 2019).

[107] Michael Asch, and Norm Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 2002), 211.

[108] Government of Canada, Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, 6. Standing Senate Committee on Aboriginal Peoples (May 2008), *Honouring the Spirit of Modern Treaties: Closing the Loopholes.* Interim Report. Special Study on the implementation of comprehensive land claims agreements in Canada. Government of Canada, Aboriginal Affairs and Northern Development Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: AANDC, September 2014).

[109] Government of Canada, Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights,* 7-8.

[110] Haida Nation *v*. B.C. (Minister of Forests) [2004] 3 S.C.R., para 41.

concept has been challenged as a principle by Indigenous Peoples in the courts. [111] For example, the Honour of the Crown was at the centre of the argument in the Manitoba Métis Federation decision (2013) over the dispersal of Métis lands. The Manitoba Métis People argued that Sections 31 and 32 of the *Manitoba Act, 1870* failed to comply with the Honour of the Crown.[112]

The federal government illustrates their desire for certainty by using it both in Constitutional amendments (*Constitution Act, 1982*) that includes the concept, as well as explicitly in policy documents, such as land claims policies.[113] Section 35, subsection (3) of the *Constitution Act, 1982,* uses certainty in relation to subsection (1) of Section 35 of the Act, tying directly to Aboriginal rights that are the result of treaties. The government uses treaties provisions to establish the pre-existing certainty regarding 'Aboriginal' rights generally.[114] Certainty provides clarity for the government over ownership and use of land, for example.[115] The government agenda surrounding certainty is evident in the language in policy documents and discourse surrounding land and rights. Associated with the certainty of land and 'Aboriginal' rights is the certainty surrounding identity connecting to those rights.

This certainty of identity also serves as an agenda item for the government when considering the Crown perspective. The Crown uses the concept to limit their responsibility for Indigenous Peoples as much as possible, illustrated in the appeals launched by the federal government in court challenges.[116] Concerning the *Indian Act* challenges, for example, all legal victories were met with an automatic appeal. The appeal was dropped in the Descheneaux case, after a review by the new Attorney General, which was not typical government behaviour. This desire to limit and control for whom the federal government owes a fiduciary duty, demonstrates the importance of controlling and limiting identity, creating certainty as a priority item.

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[111] Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous peoples,* (February 14, 2018) https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html (accessed June 12, 2020).
[112] Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 SCR 623, 2013 SCC 14.
[113] Constitution Act, 1982. Land Claims policy, renewing the claim
[114] John Helis, "Achieving Certainty in Treaties with Indigenous Peoples: Small Steps Towards Adopting Elements of Recognition," *Constitutional Forum / Forum Constitutionnel* 28, no. 2 (2019), 2.
page 2.
[115] Helis, 2.
[116] McIvor v. The Registrar, Indian and Northern Affairs Canada 2007 BCSC 827, 120. Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.

Until recently, changes to Indigenous policy in Canada were most often incremental (first order changes). As a result of government and Indigenous feedback, punctuations (second order changes) also occurred, seen in the evolutionary development of land claims policies after the establishment of the ONC. These policy changes were based on feedback loops, not on judicial challenges discernible in legal identity policy. Beginning with the Calder case in 1973, Indigenous policy and institutional relationships began to shift. When Indigenous Peoples engaged in judicial actions or negotiated with the government, which feared losing in court, they effected significant changes in colonial institutions and policies, expanding their legal identity and rights. Unlike the earlier gradual changes, these sweeping changes are at the level of paradigmatic, third order change.

Expanding Colonial Institutions and Policies

The Newfoundland Mi'kmaq Community's Band Creation

Indigenous Peoples are expanding accessibility to institutions and policies by challenging the status quo based on community ideas of membership. One such example is the expansion of the First Nations band-creation framework. The formal policy in band creation centres around 'band division,' 'band amalgamation' and 'newly constituted bands.'[117] For this third option, the policy states, "Members of the group requesting the formation of the new band must be mainly status Indians comprising an existing, viable and ongoing community located at the site of the proposed reserve."[118] Under this distinctions, only band creation can happen with already Indian Act-registered people.

The situation in Newfoundland was different, as the desire to create a band did not fit any of the above criteria. The Mi'kmaq community achieved band creation in Newfoundland through court actions and negotiations resulting from Indigenous engagement with the Crown.[119] The government federally recognized communities in Newfoundland through Order in Council as

[117] Government of Canada, Department of Indian Affairs and Northern Development Corporate Services Departmental Audit and Evaluation Branch, *Evaluation of the New Bands/ Band Amalgamation Policy Project 98/16* (September 2001), 8.
[118] Government of Canada, Department of Indian Affairs and Northern Development Corporate Services Departmental Audit and Evaluation Branch, *Evaluation of the New Bands/ Band Amalgamation Policy Project 98/16* (September 2001), 8.
[119] Government of Canada, Indigenous and Northern Affairs Canada, *How to create a band?* https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470 (accessed June 22, 2019).

opposed to band creation policies.[120] On its website, the federal government now states, "If asked and under exceptional unusual circumstances, the Governor in Council can create a new band from a formerly unrecognized group of persons (as was the case with the Qalipu Mi'kmaq First Nation)."[121] As non-status First Nations collectives negotiated for recognition under the *Indian Act*, this instrument developed out of necessity. This is an example of Indigenous Peoples engaging with institutional processes to create mechanisms for identity and rights acknowledgment.

When Newfoundland and Labrador joined Confederation in 1949, the Mi'kmaq Peoples of Newfoundland were ignored as Indigenous rights-bearers based on Indigenous identity. The government in Newfoundland refused to acknowledge that there was an Indigenous population present.[122] After years of engaging the federal government through court processes and negotiations, the first band recognized in Newfoundland under the *Indian Act* was the Miawpukek First Nation in 1984 (Conne River).[123] In 2002, talks began about developing a second Mi'kmaq band on the island of Newfoundland, reaching an Agreement-in-Principal in 2016.[124] In 2009, the Qalipu First Nation of Newfoundland began the enrolment process, and according to Indigenous and Northern Affairs Canada (INAC), formally Aboriginal Affairs and Northern Development Canada (AANDC), 26,000 applications were received, 23,877 of which were deemed eligible for registration. Over the next two years, the government received 4,000

[120] Government of Canada, Indigenous and Northern Affairs Canada, *About band membership and how to transfer to or create a band,* https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470 (accessed September 24, 2019).
[121] Government of Canada, Indigenous and Northern Affairs Canada, *About band membership and how to transfer to or create a band.*
[122] Sandro Contenta, "In Newfoundland, too many want recognition as Mi'kmaq Indians, federal government says," *The Star.com – Insight*, (May 5, 2013), http://www.thestar.com/news/insight/2013/05/05/in_newfoundland_too_many_want_recognition_as_mikmaq_indians_federal_government_says.html (accessed April 15, 2016).
[123] Adrian Tanner, Canada, Privy Council Office issuing, and body Canada, Royal Commission on Aboriginal Peoples issuing, *Aboriginal Peoples and Governance in Newfoundland and Labrador: A Report for the Governance Project, Royal Commission on Aboriginal Peoples* (1994), 35. Eleanor Alwyn, *Traditions in a Colonized World: Two Realities of a First Nation.* (Toronto: University of Toronto, 2004), 157, 148, 149. Miawpukek First Nation, *About Miawpukek*, http://www.mfngov.ca/about-miawpukek/, (accessed December 18, 2017).
[124] Qalipu Mi'kmaq First Nation, "History." *Chronology Qalipu Mi'kmaq First Nation*, http://qalipu.ca/site/wp-content/uploads/2013/07/CHRONOLOGY.pdf (accessed March 15, 2016).

more applications.[125] In an area of the country where once people thought there were few First Nations Peoples, large numbers of individuals were self-identifying as Indigenous Peoples.

Throughout the band creation process, membership was a concern for the federal government. Greg Rickford, parliamentary secretary to the Minister of Aboriginal Affairs, took issue with the number of applicants under the original agreement. In the House of Commons on March 28, 2013, Rickford stated, "The Federation of Newfoundland Indians and the Government of Canada never anticipated that four times that, over 100,000 people, would sign up to attempt to become members of that first nation. It is simply not reasonable to expect that there would be more than 100,000 credible applications to be members of the Qalipu band."[126] As a result of the large number of applications, the federal government renegotiated the membership qualification.[127] In July 2013, the supplemental agreement was finalized, and on September 22, 2014 the Qalipu Mi'kmaq First Nation (QMFN) was officially established.[128] Since then, there have been substantial enrolment and identity issues in the community.

Challenges to the supplemental agreement emerged as the membership never passed this document, and the courts have identified inequities.[129] The government's reactions demonstrate that the Qalipu People are not entirely self-determining in their membership and that the government still holds a level of power to control identity as it did by bringing forth the supplemental agreement. The government's intention to control membership relates to its goal of certainty: being certain about the number of people they are responsible for under the Agreement, including financial responsibilities. The Qalipu's challenges before the courts as a result of the supplemental agreement demonstrate that they are willing to assert self-

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[125] Government of Canada, Indigenous and Northern Affairs Canada, "History of the Qalipu Mi'kmaq First Nation," *Indian Status: Have you applied to join the Qalipu Mi'kmaq First Nation?* (April 13, 2016), https://www.aadnc-aandc.gc.ca/eng/1372946085822/1372946126667 (accessed April 17, 2016).
[126] House of Commons, Hansard #231 of the 41st Parliament, 1st Session. Greg Rickford, (March 28, 2013), https://openparliament.ca/debates/2013/3/28/greg-rickford-2/ (accessed September 28, 2019).
[127] Tristan Hopper, "Ottawa rushes to tighten up entry rules before 70,000 Canadians are declared Mi'kmaq," *National Post – Canada: Politics* (May 6, 2013), http://news.nationalpost.com/news/canada/swamped-with-a-st-johns-worth-of-newfoundland-mikmaq-applicants-feds-look-to-tighten-up-entry-rules (accessed April 18, 2016).
[128] Government of Canada, Indigenous and Northern Affairs Canada, "History of the Qalipu Mi'kmaq First Nation." Qalipu Mi'kmaq First Nation Act S.C. 2014, c. 18.
[129] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?* Indian Status (May 21, 2019), https://www.aadnc-aandc.gc.ca/eng/1319805325971/1319805372507. (accessed June 1, 2019).

determination of identity. The Mi'kmaq People who sought band creation were not people previously associated with other bands. Engaging the federal government through institutional processes (courts and negotiations), they expanded the mechanisms used to recognize Indigenous Peoples in Canada. They thus asserted their existence in the modern context, grounded in community understandings and in areas still being unpacked in the membership challenges in the judicial system.

The Métis Case

Indigenous Peoples have challenged institutional understandings of identity through institutional instruments, most recently observed in *Daniels v. Canada 2016*. The Métis and non-status First Nations Peoples have a long history of engaging colonial institutions, asserting their identity and rights. Métis People asserted their rights when policies by the Hudson's Bay Company attacked the Métis economy in the 19th century.[130] In the 20th century, Métis People once again asserted their identity and associated rights to be included in the *Constitution Act, 1982,* Section 35.[131] The Supreme Court of Canada (SCC) *Daniels v. Canada 2016* decision resulted in the Métis and non-status First Nations expanding the institutional definition of 'Indian' and associated policy areas attached to the *British North America Act, 1867*.[132] Cases such as *Daniels v. Canada*, erode the policy goal of certainty surrounding government responsibility. When the Métis and non-status First Nations People were recognized as Indians under Section 91(24) in the Daniels case, the federal government appealed the decision. When the federal government loses control of the membership of an Indigenous community, it can no longer be certain about its responsibilities: an element of doubt is thus introduced.

Métis People engaged colonial systems when identity-based policies were issued restricting their activities, such as proclamations issued by the Hudson's Bay Company.[133] The response was collective action, petitions, negotiations, and, at times, physical conflict. Conflicts in Red River

[130] Hudson's Bay Company History Foundation, *The Northwest Company* (2016), http://www.hbcheritage.ca/history/acquisitions/the-north-west-company (accessed January 18, 2019).
[131] In this video, Mr. Frank Tomkins tells his story of going to England to secure Section 35 rights in the Constitution Act, 1982. (topic of speech). Frank Tomkins, *Mr. Frank Tomkins,* February 2017 Métis Nation-Saskatchewan Annual General Meeting (February 19, 2019), https://www.youtube.com/watch?v=qLRSnOgNBVc&t=6s (accessed July 4, 2019).
[132] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[133] Jennifer Hayter, *Racially "Indian," Legally "White": The Canadian State's Struggles to Categorize the Métis, 1850-1900*, Doctor of Philosophy Thesis, Department of History (University of Toronto, 2017), 38-39.

and Batoche dominate much of the historical narrative, but the Métis have achieved much using diplomatic measures.[134] By and large, following the late 19th-century land treaties and scrip settlement era, the federal government ignored its' responsibilities to the Métis and non-status communities.[135] To facilitate settlement of western Canada in the 19th century, the federal government 'negotiated' treaties for First Nations Peoples and issued scrip to Métis People as a means to extinguish 'Aboriginal' title to land.[136] Although the treaties are considered negotiated documents, it was more 'a take it or leave it' situation. Once the treaty was written and taken to the people, there was little room to negotiate.[137] In some instances, 'outside promises were made,' but they were rarely kept.[138] Originally associated with the land promised in the *Manitoba Act,* scrip for Métis People was a land voucher; later, it was a process introduced to the Northwest Territories in 1876.[139]

For Métis People to qualify for scrip, they had to be in the territory at the date of effective control (July 15, 1870) and to be the offspring of a mixed marriage (Indigenous and European).[140] Today the definition of Métis is not based on this definition. Under the Métis National Council definition, tracing one's family to scrip records is part of what qualifies a person for registration as a Métis person. However, the National Council's definition also includes a connection to historical and contemporary Métis communities and community acceptance.[141] It is through this definition that asserting identity rights has impacted policies and institutions. Currently, the Métis National Council (MNC), representing Métis People, is facilitating federal agreements that provide Indigenous-specific services, such as education funding, services based on specific criteria of identity. The facilitation of these arrangements is

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[134] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.).
[135] Camie Augustus, University of Saskatchewan Archives, "Métis Scrip," *Our Legacy* (2008), http://digital.scaa.sk.ca/ourlegacy/exhibit_scrip (accessed June 26, 2019).
[136] Augustus, "Métis Scrip."
[137] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, Facsimile ed. Aboriginal Education Collection (Toronto: Coles Publishing, 1971).
[138] Privy Council of Canada, W.A. Himsworth, *Copy of a Report of a Committee of The Honourable The Privy Council, Approved By His Excellency The Governor General In Council On The 30th April, 1875,* https://www.aadnc-aandc.gc.ca/eng/1100100028664/1100100028665 (accessed September 25, 2019).
[139] Augustus, "Métis Scrip."
[140] Augustus, "Métis Scrip."
[141] Métis National Council, *Métis Registration Guide* (Ottawa, On., 2011), 4.

through the *Canada Métis Nation Accord*, *2017* an instrument to facilitate the fulfilment of fiduciary duty assigned to the federal government de facto through the Daniels case, by providing a mechanism.[142]

Métis People have used legal instruments to assert legal identity and recognition to access Indigenous rights in the modern era. In 1993, two brothers were charged with hunting a moose near Sault. Ste. Marie, Ontario. The Powley brothers asserted they had a right to hunt under Section 35 of the *Constitution Act, 1982* as Métis People.[143] Initially, the brothers were acquitted, but the Crown appealed, and the case reached the Supreme Court of Canada after the province of Ontario lost at every earlier stage. In 2003, the Supreme Court ruled in the Powley's favour, producing what became known as the Powley test for determining government-approved identity and recognition of what constitutes a rights-bearing community after European contact.[144] The Powley test, according to the federal government, is established through three primary criteria:

1. The individual has to identify as a Métis person;
2. The individual has to be a member of a present-day Métis community; and,
3. The individual has to have ties to a historic Métis community. [145]

And further to this, there are criteria for proving 'historic rights-bearing community':

a. The community shared a 'distinctive' collective social identity;
b. The people lived together in the same geographic area; and,
c. The people shared a common way of life. [146]

Because Métis People used the judicial system as a means to test identity-rights, they were successful in gaining access to Indigenous rights associated with this identity.

In April 2016, the SCC Daniels decision introduced the most substantial institutional change brought about by Métis and non-status First Nations Peoples through the judicial process. The case began in 1999 with Harry Daniels, a Métis person and the Chief of the Congress of

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[142] The Métis National Council, Canada, "Canada-Métis Nation Accord," *Aboriginal Policy Studies* 7, no. 2 (2019): Aboriginal Policy Studies, 01/31/2019, Vol.7(2).
[143] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.
[144] Tanisha Salomons, and Erin Hanson, "Powley Case," *Indigenous Foundations*, http://indigenousfoundations.arts.ubc.ca/home/land-rights/powley-case.html (accessed April 2016).
[145] Government of Canada, Indigenous and Northern Affairs Canada, *Métis Rights* (April 14, 2016), https://www.aadnc-aandc.gc.ca/eng/1100100014413/1100100014414 (accessed April 21, 2016).
[146] Government of Canada, Indigenous and Northern Affairs Canada, *Métis Rights.*

Aboriginal Peoples (CAP), and co-applicants Leah Gardiner and Terry Joudrey, both of whom were non-status First Nations Peoples. Although they filed a court action in 1999, the case only went to trial in 2011, and final arguments were heard in 2015.[147] The Supreme Court reached a decision in 2013, but that decision was appealed in April 2014, and the Supreme Court of Appeal heard the case on October 8, 2015. The Supreme Court of Canada ruled that Métis and non-status Indians were Indians according to the *British North American Act, 1867* (BNA Act) and thus a federal responsibility of the Crown. The final decision announced in 2016 ruled in favour of Daniels et al. on the legal identity of Métis and non-status Indian Peoples.[148]

Métis leaders celebrated this case as a legal victory.[149] They perceived that because of the imposition of the Indigenous worldview of identity, the standards were changing. Inclusion of Métis People in Section 35 of the *Constitution Act, 1982*, as one of three Indigenous Peoples (Aboriginal), had been an advancement at the time; however, the federal government had taken no formal responsibility for the Métis and non-status First Nations Peoples. The Métis and non-status First Nations Peoples argued that at the time of the *British North America Act, 1867*, there was no distinction between Indians (or potential degrees of), and Métis People.[150] The argument in the case centred around legal distinctions of identity created by the federal government in legislation (the *Indian Act*) that separated First Nations and Métis as Indigenous Peoples.[151] This case challenged the concept of Indians based on how Métis perceived identity in the historical sense, and their argument was based on a lack of historic distinction before 1876.

Land Claims and the Algonquin

The modern land claims process in Canada traditionally takes place between the federal government, provincial or territorial governments, and an Indigenous collective, typically an *Indian Act*-recognized band. From the federal government's perspective, the process is grounded

[147] Tim Fontaine, CBC, "Unanimous ruling says Ottawa has jurisdiction over all indigenous people," *CBC Aboriginal* (April 14, 2016, updated April 17, 2016), https://www.cbc.ca/news/indigenous/metis-indians-supreme-court-ruling-1.3535236 (accessed April 21, 2016).
[148] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[149] Métis Nation of Ontario, *A significant victory for the Métis Nation* (April 14, 2016, updated June 1, 2016), http://www.metisnation.org/news-media/news/a-significant-victory-for-the-metis-nation/ (accessed August 24, 2019).
[150] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[151] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.

in certainty about who has title to the land and about who are the rights-bearers. All land claims have a goal of certainty.[152] There are exceptions in cases where the federal government negotiated an agreement with Métis People in the territories of Canada; however, there has yet to be a federal agreement with a non-status Indian community in a Canadian province.[153] Like Métis, the Algonquin People in Ontario also have a long history of colonial engagement. The Algonquin People followed the *Royal Proclamation, 1763* and assisted in coordinating the *Treaty of Niagara, 1764*. Although they submitted petitions for land settlement, they never entered a settlement or agreement.[154] Based on a history of land settlement denial, the Algonquins of Ontario (AOO) formed as an organization of status and non-status Algonquin People to settle the outstanding land question. The Algonquin People never surrendered title to the land, which is recognized as unceeded Algonquin territory in territorial acknowledgments in Eastern Ontario.[155] The AOO succeeded in influencing the land claims policy landscape by creating a space where non-status First Nations Peoples are involved in a comprehensive land claim in a Canadian province. Until the AOO land claim, only communities recognized by the federal government entered land claims agreements. The AOO engaged the institutional process of land claims, demonstrating a long history of attempted diplomacy, first by years of official diplomatic engagement in petitions, then in the modern court and negotiation process, asserting community perceptions of history and community.

According to the Government of Ontario, the history of the claim process began in the 1980s. In 1991-1992, there was an agreement to enter into negotiations.[156] While this may be the Government's perspective of the current claim, Indigenous Peoples have a much longer historical perspective of this claim, just as they have their perspective of who they are. Anishinaabe scholar

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[152] Government of Canada, Aboriginal Affairs and Northern Development Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: AANDC, September 2014). Canada, Department of Indian Affairs and Northern Development, *A statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on claims of Indian and Inuit people.* Canada. *Resolving Aboriginal Claims; A Practical Guide to Canadian Experiences* (2003).
[153] Sahtu Dene and Metis Land Claim Settlement Act S.C. 1994, c. 27, https://www.eia.gov.nt.ca/en/priorities/concluding-and-implementing-land-claim-and-self-government-agreements/existing-agreements (accessed July 2, 2019).
[154] Algonquins Of Ontario (AOO), *Our Proud History,* AOO, http://www.tanakiwin.com/algonquins-of-ontario/our-proud-history/ (accessed April 10, 2019).
[155] Ontario Federation of Labour, *Traditional Territory Acknowledgements in Ontario* (May 2017).
[156] Government of Ontario, *The Algonquin Land Claim*.

Lynn Gehl explains that claims to land and acknowledgement of Indigenous title to the land have spanned several centuries.[157] Although the Government may understand that this is a claim some 30 years in the making, it is actually two hundred years old or more. The claim is currently opposed by some registered First Nations communities, some of which argue that parts of the area are traditional territory.[158] The Ontario government presented this case as the first "modern day, constitutionally protected treaty" in Ontario.[159] The dispersal of Algonquin People necessitated including non-status Algonquin People in the modern land claim – expanding the definition of who is entitled to gain access to institutional processes in Indigenous policy making. This new arrangement complicates the land claim negotiations because status and non-status First Nations Peoples have different colonial histories and, as a result, have different needs and interests. Despite the complication of community division, the land claim continues to move forward.

This Algonquin land claim is controversial because of contrasting views on identity. While Haudenosaunee (Iroquois) People were originally assigned Indigenous title to the land by the government, Algonquin People claimed it did not belong to them.[160] Currently, Haudenosaunee People, along with other *Indian Act* status Algonquin communities, claim the deal to be illegal. They maintain that claimants are, in fact, not Indigenous Peoples.[161] One Chief was quoted as saying, "Prime Minister Justin Trudeau could technically qualify as an Algonquin under the loose criteria set to determine eligibility to participate in a ratification vote on the proposed deal."[162] However, upon examination of the historical records, it is clear that there is a long history for requests for recognition. Bonnechere Algonquin First Nation made public their membership criteria, including an appeals process for those denied access.[163] At this point, the

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[157] Lynn Gehl, *The Truth That Wampum Tells: My Debwewin on the Algonquin Land Claims Process* (2014), 19-21.
[158] Jorge Barrera, 'Non-Aboriginals' on the list of Ontario Algonquins set to vote on treaty deal covering Ottawa: report" *APTN National News* (February 11, 2016), https://aptnnews.ca/2016/02/11/non-aboriginals-on-list-of-ontario-algonquins-set-to-vote-on-treaty-deal-covering-ottawa-report/ (accessed April 24, 2019).
[159] Government of Ontario, *The Algonquin Land Claim* (June 21, 2013, updated August 5, 2016), https://www.ontario.ca/page/algonquin-land-claim (accessed originally March 2015).
[160] Gehl, 32, 35.
[161] CBC, "Chiefs say proposed Algonquin land claim deal illegal, fraudulent," *CBC Aboriginal* (March 3, 2016, updated March 4, 2016), http://www.cbc.ca/news/aboriginal/algonquin-land-deal-illegal-1.3475359 (accessed March 31, 2016).
[162] CBC, "Chiefs say proposed Algonquin land claim deal illegal, fraudulent."
[163] Bonnechere Algonquin First Nation, *Algonquin Nation Standardization Criteria* (April 2002). Http://www.bafn.ca/identificationcriteria.html (acccessed March 2015).

federal and provincial governments are satisfied with how the AOO determined their community. The Algonquin land claim is unique as it changes certainty by setting a precedent of settling Indigenous land title with a non-status First Nations group.

Within the AOO structure, there is an understanding of two separate collectives: status First Nations beneficiaries, and non-status First Nations beneficiaries, each with separate interests and histories. Creating space expands access to the rights of Indigenous Peoples, as it gives the government less control in determining identity, thus reducing certainty for government determination of Indigenous rights beneficiaries. Indigenous Peoples asserting recognition in a system external to traditional membership ideas access and exercises the rights associated with identity. However, the idea is viewed by some as external because Indigenous Peoples do not have complete control. Academic Toby Rollo refers to this context as "Internal Exclusions": "Indigenous peoples are expected to advance their claims to land and culture through the formal processes of negotiation developed by settler colonial states."[164] The government has a clear and lasting role in determining identity based on what it deems acceptable. This power of determination is no longer absolute because gains have been made in judicial processes. As a result, the government is likely to be open to community definitions in negotiations rather than losing in court.

Indigenous Engagement, Legal Identity, and Rights

As we have seen in the three cases discussed above, Indigenous People have played a major role in the changing definitions of Indigenous legal identity and associated rights. After they were denied as a modern Indigenous population by the federal and provincial governments, the Mi'kmaq People of Newfoundland created a new band process by asserting community through their collective worldview. The Métis and non-status First Nations Peoples engaged institutions based on community understandings of identity and associated rights. Denied settlement of Indigenous title to land, the AOO expanded land claims to include non-status First Nations collective based on community definitions of identity developed around a community

[164] Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims. (Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide)," *Canadian Journal of Law and Jurisprudence* 27, no. 1 (2014), 226.

worldview. These three cases show Indigenous Peoples engaging federal government institutions based on assertions of identity by communities and the federal government retaining less control over accepted Indigenous identity and associated rights. The government is concerned with losing control because identity determines the legal relationship between the government and First Nations. The actions taken by the Algonquin People created space in land claims for federally unrecognized Indigenous collectives to engage in Indigenous rights and policy platforms.

Policy Learning: Goals of Certainty Surrounding Identity and its Effects

As a result of the Indigenous-led initiatives, the courts have influenced Indigenous policy and government behaviour. A federal government goal is having and maintaining certainty in Indigenous policy, certainty both of beneficiary identity and of title to land.[165] Because it aims for certainty, the government sometimes prefers to avoid the judicial system and engage in negotiations. It may enter into an agreement with a non-status Indigenous collective if it believes that the courts would expect the government to negotiate or if it is likely to lose.[166] In the literature on comprehensive claims, most scholars examine previous claims to make recommendations for identifying problems or elements of success. Christopher Alcantara argues that instrumental policy learning occurs when mechanisms change, but the goal remains the same, adding that in Canada, in the context of land claims, certainty remains the goal.[167] In 2009, INAC (Indian and Northern Affairs Canada at the time) released a document entitled *Impact Evaluation of Comprehensive Land Claims Agreements* whose preamble asserts that the goals of a land claim are "clarity and certainty as to the ownership of land and access to the resources."[168] Certainty to land title is connected to certainty of identity because it is their identity that connects people to a title. With the release of the updated comprehensive land claims policy in 2014, the

[165] Government of Canada, Aboriginal Affairs and Northern Development Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. Ottawa: AANDC, (September 2014), 11-12.
[166] Christa Scholtz, "The Influence of Judicial Uncertainty on Executive Support for Negotiation in Canadian Land Claims Policy." *Can J Pol Sci* 42, no. 2. (2009), 425.
[167] Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy / Analyse de Politiques* 35, no. 3, (2009), 327, 337-338.
[168] Government of Canada, Indigenous and Northern Affairs Canada, *Impact Evaluation of Comprehensive Land Claim Agreements*. Evaluation, Performance Measurement and Review Branch, Audit and Evaluation Sector, INAC. (February 17, 2009), 11.

government made it clear that maintaining certainty about Indigenous identity was its main reason for engaging in modern treaty-making, likely because certainty bolsters political palatability.[169] Whether it relates to Indigenous identity, Indigenous title, or Indigenous rights, the goal of certainty is a constant in the government position. However, certainty surrounding the entitlement to Indigenous rights is shifting because of Indigenous interventions.

According to Michael Asch, key to moving forward is non-Indigenous parties rethinking approaches and changing the dynamic of the discussion.[170] This rethinking includes how we think about constructed Indigenous identity. The government continues to link certainty to identity: to who has access to Indigenous rights, to who negotiates land settlements, and to federal government responsibility. Asch argues that change needs to start with settler populations, beginning in relationship building.[171] Although changes in thinking are evident in cases such as Delgamuukw and in the value and inclusion of oral testimony, for Indigenous and Western views to be given equal weight outside the judicial setting, a shift in thinking is required. [172]

In land claims policy, Alcantara's understanding of Canadian government policy also focuses on certainty.[173] Rooted in certainty is the identity of peoples entitled to negotiate Indigenous issues with the Crown. Historically, Canada has practised instrumental policy learning, and, according to Alcantara, a shift in goals necessitates social learning.[174] Alcantara maintains that more research is needed about "what causes Aboriginal policy change in a significant way."[175] The conversation about certainty in this dissertation excludes the debate about individual versus collective rights because Indigenous rights in Canada are always collective. Alcantara's application of instrumental policy learning to the goal of certainty in land claims illustrates government controls over identity and associated rights as a means of certainty.

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[169] AANDC, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, 10.
[170] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 162.
[171] Asch, 64.
[172] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.
[173] Alcantara, 328-331.
[174] Alcantara, 336, 339.
[175] Alcantara, 338.

The constructed idea of Indigenous identity and its imposition on Indigenous Peoples has historical roots. According to historian Robert Berkhofer, many of the stereotypes came from missionaries conveying to Europe what they were encountering in North America – through their cultural lens.[176] The concept of 'authentic nativeness' is bound to colonial understandings and preconceived notions and, at times, internalized by Indigenous Peoples.[177] The preconceived notions impact how people see themselves, and those who lack access to traditional land have less support than others in community understandings of identity. Land connects people to culture in multiple ways. People who are removed from their land through adoption can be disconnected from their land and the associated community that transmits identity.[178] Indigenous perspectives of identity, dominated by colonial constructed identity, involves stereotypes about 'nativeness.' When people do not fit the preconceived notions, which at times are internalized by Indigenous Peoples, these false conceptions contribute to a crisis of identity.[179] Indigenous identity is complex and further complicated by non-Indigenous constructs.

Identity issues for urban Indigenous Peoples differ from those in rural communities. Because land is a tool for identity transmission, the courts have acknowledged how the lack of access to land affects identity.[180] Bonita Lawrence examines identity in the context of mixed-blood urban Indigenous Peoples, many of which are disconnected from their land, arguing that for some, a crisis of identity exists as they try to live up to the stereotype of 'Indianess.'[181] This "is a constant drain on their sense of self-worth."[182] The problem, she says, rests with people not fitting the model of authentic nativeness held by settler society, adding that lighter skinned Indigenous Peoples often struggle the most with authenticity in the urban environment, where

[176] Robert Berkhofer, "The Idea of the Indian: Inventions and Perpetuation," *The Whiteman's Indian* (New York, Vintage Books, 1978), 4-5, 9
[177] Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press 2004), 135.
[178] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 115.
[179] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 135, 136, 151.
[180] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010. Paragraph 85. *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), 33.
[181] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 135.
[182] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood,* 135.

many are cut off from communal identity.[183] The family members of urban Indigenous People may perpetuate this crisis of identity and self-worth. In her study, Lawrence found that the 'White' family of an mixed-blood urban Indigenous individual would often deny the person's nativeness.[184] Lawrence determined that reclaiming heritage was critical to Indigenous People, but those who grew up in Indigenous communities or around Indigenous People had a less complicated sense of personal identity than those with a mixed heritage.[185] It appears that those raised in their Indigenous communities have a strength of identity, provided through connections and modes of cultural transmission such as language and food, the parts of identity that go beyond appearance and being on the territory.

In *The White Man's Indian,* Berkhofer argues that colonial people's perceptions of and labels for Indigenous Peoples provided the impetus for colonial powers to control identity and perception, creating a pan-Indian identity.[186] Pam Palmater, a Mi'kmaq Canadian academic and lawyer, says, "Having created and then imposed this identity upon First Nations Peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true essence or significance of the concept."[187] This identity developed by others and foisted on non-Indigenous people affects the way they perceive themselves. Those who are less visibly Indigenous in appearance struggle with identity, especially when identity is based on appearance.[188] The reality is that Indigenous Peoples are not uniform in appearance, nor in cultural practices. However, the pan-Indian idea of identity perpetuated by stereotypes is reinforced in mainstream society through language and images.

As Palmater argues in her book *Beyond Blood: Rethinking Indigenous Identity,* "Maintaining an Indigenous identity is no less an 'essential and self-validating pursuit' for non-status Indians as it is for status off-reserve Indigenous Peoples. In fact, it may be more of a concern for non-status Indians who must face additional hurdles maintaining their identities."[189] She argues that this

[183] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood,* 135.
[184] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 140.
[185] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 143.
[186] Berkhofer, 184.
[187] Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity.* Saskatoon, SK, Purich Publishing Inc. (2011), 134.
[188] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 150.
[189] Palmater, 121.

challenge occurs because the traditional territory is a large part of Peoples' connection to their identity.[190] The traditional territory is more than a place a house rests. It is where family and community – language and culture, traditional practices – all take place, and these all transmit identity. Bonita Lawrence adds, "Identity comes from the land rather than a claim."[191] The settler definition and understanding (skin colour and legal definition) are contrary to the way Indigenous Peoples receive and understand identity. However, it is the settler definition that Indigenous Peoples use to access their identity and, therefore, their associated rights and Indigenous title.

As we have seen, many Indigenous Peoples tie their identity to the land, which is a focal point of Indigenous People's struggle for recognition. Thus, to access rights or gain access to a community, Indigenous People often focus on land. As discussed earlier, the loss of their land base and community contributed to identity loss and hardship for status-First Nations women who married non-status men. The land figures prominently in the Delgamuukw decision, a case that, as Palmater contends, reveals a "special relationship between Aboriginal peoples and the land, which is an essential part of their identity."[192] In acknowledging that the land is part of Indigenous identity, the courts demonstrate how lack of access to land can erode Indigenous identity, leading to the low self-worth that Lawrence identifies in her work.[193] The women who fought for the reinstatement of Indian status were also fighting for access to their communities in both the physical and community senses.

The land is the place where culturally specific traditional teachings occur. For example, in Northern Saskatchewan, youths learn about culture while at cultural camps and on traplines with family. Without the strong connection between land and identity, urban Indigenous Peoples often do not know their community and feel disconnected from the land. According to Lawrence, this disconnection is especially true for those who are adopted, as for them, "Nativeness is only tolerable as a subordinated identity."[194] In other words, Indigenous identity for many adopted

[190] Palmater, 121.
[191] Bonita Lawrence, *Fractured Homeland: Federal Recognition and Algonquin Identity in Ontario* (Vancouver: UBC Press, 2012), 11.
[192] Palmater, 75.
[193] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*.
[194] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 141.

people is secondary to their adopter's family identity. Widespread in the dominant society, this attitude is the result of the stigmatization of Indigenous identity, the foundation of the assimilation policies of the Canadian government.

Identity is intertwined with worldview. Defined as Indigenous community perspectives and understandings, worldview is informed by community, which, in turn, informs identity. The concept of 'Indian' is a non-Indigenous creation with political, legal, cultural and administrative authority that developed into a source of cultural identity for individuals and Indigenous communities.[195] For Indigenous Peoples who struggle most with identity—non-status First Nations Peoples—returning to the land and re-establishing culturally specific traditional connections can help them reconnect with their identity. Although the constructed identity of Indigenous Peoples by non-Indigenous peoples continues to pervade society, Indigenous efforts to challenge stereotypes have led to a growing recognition of community-based definitions. When Indigenous Peoples gain control over definitions of identity for their community members, the federal government becomes less certain about being able to control those for whom they are responsible.

The problem with constructed identity by non-Indigenous peoples is that it does not account for the connection to the land. By not including land (territory) in identity, the non-Indigenous understanding is misguided. As Indigenous Peoples work to regain or retain their culture and identity, they often return to the land. Some people fighting for identity recognition struggle to gain access to communities and land. Currently, the structures of colonialism continue to frame conceptions of Indigenous identity. While the non-Indigenous constructs of institutions inform the process for land claims and identity entitlement, Indigenous Peoples work to expand those understandings based on the Indigenous community worldview. By using worldviews as ideas in policy change, the assertions made by Indigenous Peoples shift the policy and institutional landscape.

Indigenous worldviews are not all the same. For example, Indigenous Peoples may have different understandings of their connection to the land and different interpretations of history in

[195] Palmater, 134.

relationship to the land. Of course, there is a wider gap between Western and Indigenous worldviews than there is between Indigenous worldviews. Paul Nadasdy describes Indigenous concepts of land and understandings and how these different from those of the government.[196] The works of Bonita Lawrence, Lynn Gehl, and Joan Holms also reveal differences in the historical perspectives of Indigenous and non-Indigenous peoples and underline the importance of critical examination and equal consideration of differences. For example, the Ontario government and the federal government understand the Algonquin land claims as a 30-plus year engagement, but the AOO uses over 200 years of history to support what it considers to be the length of the claim.

Moving forward in settlement and relationships in Canada will require commitment and understanding from both the government and Indigenous Peoples. As academic David McNab argues, "Canadian Aboriginal policy must be viewed at least as much from the perspective of First Nations as from that of non-Aboriginal governments."[197] I contend that the federal government has not sufficiently considered Indigenous policy from the Indigenous perspective or worldview and that concepts of title and ownership of land are still grounded in colonial constructs and a divergence in understanding land. This is not to say that there has been no progress and that settler society, including the government, has not made some attempts to understand the Indigenous perspective, as is made clear in Amy Craft's *Breathing Life into the Stone Fort Treaty*, which explains Indigenous perspectives on Treaty 1.[198] In Saskatchewan, the Office of the Treaty Commission, a federal agency, has sponsored the book *Treaty Elders of Saskatchewan*, contributing to culturally specific Indigenous understandings of land and relationships.[199] The work details Saskatchewan Indigenous understandings of relationships with others and with the land, among other topics addressed.[200] As the work of the Office of the Treaty Commission makes clear, mutually beneficial perspectives and understanding will

[196] Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations." *American Anthropologist* 104, no. 1 (2002).
[197] David T. McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario*. Waterloo: Wilfrid Laurier University Press (1999), 9.
[198] Aimee Craft, *Breathing Life Into The Stone Fort Treaty: An Anishinabe Understanding of Treaty One*. (Saskatoon: Purich Publishing Ltd., 2013).
[199] Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations*. (Calgary: University of Calgary Press, 2013).
[200] Treaty Elders of Sask, 14, 39.

provide weight to Indigenous insights and worldviews and contribute to Asch's idea of relationship-building.

The Judiciary and the Role of Indigenous Ideas in Institutional and Policy Learning in Canada

Recent policy regarding Indigenous Peoples has been influenced by judicial decisions, which direct the government to change its policies. For example, when Indigenous People challenged gender equity in the *Indian Act*, the government responded with a policy change.[201] Although many Indigenous institutional challenges begin in court, negotiation remains the preferred method for the government when dealing with Indigenous claims. According to Christa Scholtz, "judicial behaviour is influencing policy practices," determining if the government is willing to face an issue in court or if it believes that negotiation will result in greater success (or fewer losses). [202] As Scholtz argues, "There is a significant relationship between judicial uncertainty and the propensity of the Federal government to accept Indigenous claims for negotiation."[203] In her research into the judicial connection to claims, Scholtz focuses largely on specific claims, as there was a much smaller sample size with comprehensive claims at the time. In exploring judicial uncertainty and the government's negotiating behaviour, she determines variables that affect government behaviours, such as policy changes in the broader political arena or group mobilization.[204] This insight is borne out by the AOO and Qalipu negotiations: their land claims moved out of court and into negotiation. With the Daniels case, the government chose to continue court processes and lost in the Supreme Court of Canada.

Recourse to the judiciary can encourage groups to mobilize and assert their worldview and rights.[205] When Indigenous Peoples and groups are successful in the courts, others learn from these successes, launching institutional challenges. An example of successful court action is seen in the evolution of the *Indian Act* in the last 35 years. However, despite recent court decisions that ruled in favour of Indigenous Peoples, there is still risk and uncertainty in courts for them, just as there is for the government. For Indigenous Peoples, this uncertainty is rooted in the

[201] Gender Equity in Indian Registration Act S.C. 2010, c. 18.
[202] Scholtz, 438.
[203] Scholtz, 420.
[204] Scholtz, 433, 438.
[205] Scholtz, 439.

ethnocentric bias described by Asch and Zlotkin.[206] According to anthropologist Paul Nadasdy, the problem with both the claims process and court system is that they are continuations of the colonial system imposed on Indigenous Peoples.[207] As Nadasdy argues, this system is not only exogenous, but it has also transformed Indigenous People's thinking, their understanding of property and their relationship to the land.[208] Because colonial relationships are already established, Indigenous Peoples have learned to use non-Indigenous processes to assert Indigenous worldview through identity and rights.

Conclusion

As Taiaiake Alfred argues, "The imposition of labels and definition of identity on Indigenous People has been a central feature of the colonizing process from the start."[209] The Crown established the colonial relationship with Indigenous Peoples through relationship treaties. This diplomatic relationship became a legislative one that gave control of Indigenous Peoples and their identity to the federal government (*Indian Act*). As policies and institutional mechanisms developed, resistance to the control also developed. For example, those that lost access to their cultural and legal identity through policy asserted their identity and pointed out legislative inequalities through institutional means. Indigenous women have challenged the government in court for recognition of their birthright, as have individual Indigenous men such as Descheneaux. Indigenous communities have been at the centre of the formal land claims process, engaging the Crown through the courts and challenging the perspective to land title in Calder (1973).[210]

Many comprehensive claims (land and/or self-government) or requests for federal recognition of Indigenous identity have begun with judicial action. Both Newfoundland Mi'kmaq band creation and the Algonquins of Ontario land claim negotiations began with legal cases filed. For the Métis and non-status First Nations Peoples, recognition as Indians under Section 91(24) of the *British North America Act* occurred through the Daniels case, permitting them to access similar rights as

[206] Asch, 222.
[207] Nadasdy, 258.
[208] Nadasdy, 258.
[209] Taiaiake Alfred, *Peace, Power, Righteousness* (Ontario: Oxford University Press, 1999), 84.
[210] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act."

other constitutionally recognized Indigenous Peoples.[211] The Crown's decision to enter negotiations with Indigenous Peoples depends on whether it believes success is possible in the courts.

Indigenous identity and recognition have been historically determined by the Crown and not by self-determination. In developing Indigenous policy, the federal government's goal is to control who qualifies for Indigenous rights and to seek certainty about Indigenous identity. The government's goal of certainty is the focus of its Indigenous land claims policy, a goal that allows the government to control acceptable definitions of Indigenous identity in order to control, in turn, who has access to Indigenous rights. Built on non-Indigenous perceptions, identity legislation has excluded Indigenous concepts of identity, which are grounded in community worldviews and are most often connected to the land. In the court challenges described above, Indigenous Peoples have shone a light on their identity and worldviews, resulting in substantial changes to Indigenous policies. I argue that these are sweeping, paradigmatic, third order changes, unlike the incremental first and second order changes seen in land claims policies.

[211] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.

CHAPTER 3 – APPROACHING INDIGENOUS-LED CHANGE FROM A POLICY PERSPECTIVE

Introduction[212]

Indigenous institutional and policy change in Canada occurs in a unique fashion, presenting a deviation from current models that explain change. Imperative when exploring Indigenous policy change are both the context of colonization and Indigenous worldviews; ignoring the colonial legacy undermines Indigenous inspiration for change. An option for studying such change is 'New Institutionalism,' a form of institutional analysis that accounts for human dynamics interacting with and through established institutions.[213] Under this broad, umbrella term fall rational choice theory, organizational theory, and 'historical institutionalism.'[214] As previously highlighted, historical institutionalism is a form of institutional analysis studying how change occurs and an understanding of institutions shape rules and procedures of interaction of actors.[215] This dissertation uses historical institutionalism as a lens through which to examine Indigenous-led policy and institutional change because these changes occur at the institutional level. Indigenous Peoples create institutional and policy change in a colonial environment by using institutional processes, whether they be constitutional and rights-based negotiations or formal court processes. This dissertation about Indigenous policy change remains grounded in historical institutionalism because Indigenous Peoples use colonial institutions bound by settler concepts to advance both their legal and constitutional rights. This chapter explores the application of HI and policy learning in Indigenous policy, connecting to Indigenous capacity for change.

Although there are various ways to examine change in policy learning, few methods explain policy or institutional change created when Indigenous Peoples interact with colonial structures.[216] An exception, at least potentially, is Peter Hall's framework of three levels of change. Despite its focus on conventional policy making, and not on unique circumstances of

[212] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[213] John L. Campbell, *Institutional Change and Globalization*, (Princeton, N.J.: Princeton University Press, 2004), 2, 3.
[214] Ellen M. Immergut, "The Theoretical Core of the New Institutionalism," *Politics & Society* 26, no. 1 (1998/03/01 1998), 5.
[215] Campbell, 4

Indigenous policy change, Hall's categories direct our attention to the sources of policy change.[217] As discussed in Chapter 1, for Hall, first order policy change occurs through incrementalism (changes tend to be small and gradual), whereas second order policy change occurs through a process of "punctuations," change or disruption to the equilibrium (established understandings). Both forms of change happen through internal government processes. Hall also identifies third order change—broad, sweeping change—which has its origins in civil society and is commonly associated with social change and learning.[218] When Hall's framework is applied to Indigenous policy change, it is clear that typical third order change does not account for methods and actions of Indigenous Peoples; Indigenous-led engagement and change is the result of legal pressure not social or political pressure. When Indigenous Peoples engage the government through judicial mechanisms, they can achieve third order change by affecting government goals—in this case, the goal of certainty regarding Indigenous identity.

Static theories of policy change, such as rational choice and sociological institutionalism, fail to account for the distinctive way in which colonial relationships structure interaction. Indigenous institutional and policy changes occur through Indigenous agency and initiatives that change non-Indigenous legal concepts by challenging definitions. And while the social learning that historical institutionalists imagine, as well as the third order change posited by Hall, do not precisely fit the pattern of Indigenous-led change, Hall's framework is the most appropriate starting point for building an Indigenous model of institutional change.

As colonial history permeates all aspects of modern Indigenous life, change occurs not simply as a process of standard social learning. For example, conventional social learning frequently occurs through an expansion of existing concepts of political equality. The evolution of gender rights is an example. With Indigenous social learning, Indigenous Peoples are not seeking equality but to correct colonial-based injustices. Thus, the huge role that colonial history has played in the lives of Indigenous People makes Indigenous-led policy change distinct from conventional social learning. While first and second order change tends to be government led,

[217] Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics,* 25, no. 3 (1993), 289.
[218] Hall, 289.

change initiated by Indigenous Peoples falls into the category of third order change—far-reaching, exhaustive, and systemic. Previous research has not accounted for Indigenous perspectives on the role of ideas in third order change.[219] Engaging systems and institutions through negotiations and court actions, Indigenous-led changes challenge Peter Hall's theories. Hall argues that first and second order changes precede third order change. In other words, sweeping change starts with incremental shifts and minor disruptions in common understanding.[220] However, in recent Indigenous-led policy change, the sweeping change has been ushered in with few, if any, previous incremental changes or shifts to existing policy.

Why Historical Institutionalism?

As discussed earlier, the umbrella term 'new institutionalism' includes historical institutionalism, rational choice, and sociological institutionalism.[221] New institutionalism, also known as neo-institutionalism, is a framework that combines classical institutionalism with behavioural pedagogies.[222] Historical institutionalism, as explained earlier, is used to explore Indigenous-led change because it frames the mechanisms used (judicial and constitutional institutions and processes), explains how interaction is shaped by the institution, and accounts for variables previously overlooked when exploring why standard models are not adequate for explaining Indigenous-led change. When evaluating the impact of Indigenous-led policy change and impact on institutional change in Canada, the Indigenous engagement is a reaction to a colonial thought and institutions. Previous frameworks considered only institutional behaviours, such as constitutional principles and the party politics, both of which influence policy change. Based on the ideas of Campbell, historical Institutionalism and the methods of examining behaviour are useful tools in contextualizing the colonial relationship and determining why Indigenous-Crown engagement happens within a set of institutions and parameters.

Within historical institutionalism, "institutions are sets of formal and informal rules and procedures, such as those codified in the law or deployed by bureaucratic organizations like

[219] Michael Howlett, "Policy Paradigms and Policy Change: Lessons from the Old and New Canadian Policies Towards Aboriginal Peoples," *Policy Studies Journal* 22, no. 4 (1994), 632.
[220] Hall, 280.
[221] Immergut, 5.
[222] John T. Ishiyama, and Marijke Breuning, "Neoinstitutionalism," *Encyclopaedia Britannica,* Encyclopadica Britannica Inc. (November 19, 2015) https://www.britannica.com/topic/neoinstitutionalism (accessed July 3, 2019).

states and business firms."[223] In Canada, the constitutional framework is an institution that guides processes. For instance, the *Royal Proclamation, 1763* outlines land acquisitions from Indigenous Peoples, how those lands are to be governed, and sets the parameters in which such acquisitions and governance occur.[224] The *Royal Proclamation* remains relevant in Crown-Indigenous relations as it plays a central role in land dealings and continues to surface in court actions.[225] The document is also specifically mentioned in the context of Indigenous Peoples in the *Constitution Act, 1982*.[226] The *Royal Proclamation* contains directions on how to employ land agreements and how the government should behave, outlining rules in the policy document within the colonial institution.[227] The *Royal Proclamation* influences Crown policy-shaping institutional relationships with Indigenous Peoples, as institutional relationships are determinants of behaviour and engagement.

A variety of institutions may be involved in Indigenous-led policy change. Examples are judicial and other legal processes, such as litigation.[228] As recent changes to the Indian Act demonstrate, the Canadian judiciary often forces change in policy. Although political will is not always required for Indigenous policy change to occur, it can be important, particularly in decisions not mandated by the courts. The key role of political will—and political parties— in Indigenous policy change is demonstrated in the inquiry into Missing and Murdered Indigenous Women, Girls, and Two-Spirit People (MMIWG2S).[229] Before Stephen Harper's departure as Prime Minister, he was pressured to open an inquiry into the MMIWG2S, to which he responded in a conversation with Peter Mansbridge less than a year before the 2015 federal election by saying "it isn't high on our radar."[230] When the Trudeau liberals defeated Harper's conservative government in the election, the new government launched the inquiry just a few short months

[223] Campbell, 25.
[224] King George III. *Royal Proclamation, 1763*.
[225] King George III. *Royal Proclamation, 1763*.
[226] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11. King George III. *Royal Proclamation, 1763*.
[227] King George III. *Royal Proclamation, 1763*.
[228] Darren C. Treadway, Wayne A. Hochwarter, Charles J. Kacmar, and Gerald R. Ferris, "Political Will, Political Skill, and Political Behavior," *Journal of Organizational Behavior* 26, no. 3 (2005), 231.
[229] Native Women's Association of Canada (NWAC), *Indian Act Timeline,* https://www.nwac.ca/wp-content/uploads/.../The-Indian-Act-Said-WHAT-pdf-1.pdf, (accessed June 26, 2019).
[230] Ryan Maloney, "Stephen Harper's Mansbridge Interview: 7 Key Moments," *Politics,* Huffington Post (September 8, 2015, updated September 10, 2015), https://www.huffingtonpost.ca/2015/09/08/stephen-harper-mansbridge-interview_n_8105382.html (accessed June 12, 2020).

after taking office.[231] In studies of Canadian policy change like MMIWG2S, there are many examples of how institutions shape Canadian policy.[232]

One mechanism the government can use to instigate policy and institutional change is research conducted in Royal Commissions.[233] The governance institution informs the institutional organizational structure and process. Using a mechanism like an inquiry does not necessarily result in changes, as evidenced in *the Royal Commission on Aboriginal Peoples, 1996* (RCAP).[234] Although Prime Minister Mulroney initiated RCAP, the study was released after Jean Chrétien became prime minister. With the leadership change and time that had passed since the 1990 Kanesatà:ke Siege, there was little political appetite to implement any change resulting from the commission.[235] This example again demonstrates the importance of political will in policy change. These examples also illustrate how institutions shape engagement, just as Canadian governance structures shape processes of inquiry, fitting within historical institutionalism's understanding of institutions shaping behaviour.

Although not always the case, changes do take place through Royal Commission recommendations. One example is the change that occurred following the *Royal Commission on the Status of Women, 1967*.[236] As a result of this commission, the federal portfolio of the Status of Women was created, which made policy and institutional changes.[237] Another example, the *Royal Commission on the Economic Union and Development Prospects for Canada* (also known as the Macdonald Commission), recommended a free-trade agreement with the United States.[238]

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[231] Native Women's Association of Canada (NWAC), *Indian Act Timeline,* https://webcache.googleusercontent.com/search?q=cache:61PoiluYHEkJ:https://www.nwac.ca/resource/indian-act-timeline-en/+&cd=1&hl=en&ct=clnk&gl=ca (accessed July 6, 2020).
[232] Previous methods did not account for institutional context (Constitutional principles, the political party in power).
[233] Inquiries Act, R.S.C. 1985, c. I-11.
[234] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996). Upon the release of the report, no action was taken by government to implement recommendations.
[235] 1990 Kanesatà:ke Siege is wording chosen by community representative Ellen Gabriel. The definition was the result of an email exchange, see appendix.
[236] Canada. Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada*, (Ottawa: The Royal Commission on the Status of Women in Canada, 1970).
[237] Government of Canada, Status of Women, *Who we are* (April 30, 2019), https://cfc-swc.gc.ca/abu-ans/who-qui/index-en.html, (accessed July 3, 2019).
[238] Canada, Privy Council Office, *Report - Royal Commission on the Economic Union and Development Prospects for Canada*, vol 1 / Donald S. Macdonald, chairman, Monograph, (1985),

Other recommendations, such as an elected senate, remain as current issues in the political arena.[239] Even when they do not effect substantive change, Royal Commissions can be useful political vehicles. Historical institutionalism is interested in understanding how change takes place within institutional structures; learning through Royal Commissions is a demonstration of how study and feedback creates learning within institutions.

Among the theoretical perspectives assembled under the new institutionalism umbrella is 'rational choice theory.' Rational choice theory assumes that policy change is the product of calculation based on individual preferences that are aggregated in some manner.[240] It is problematic for studying the Indigenous impact on policy development as it does not speculate on the origins of preferences or account for behaviour that is anything other than self-regarding. Rational choice theorists pay little attention to different types of change (evolutionary versus revolutionary), or the exact nature of constraints on decision-making.[241] In rational choice theory agendas are subject to manipulation rather than preconception, and interests are narrowly defined to exclude social and intergenerational considerations. Indigenous Peoples are motivated by future concerns for their children and grandchildren, about future generations in general, and about love of the earth as a relative.[242] The inability of rational choice theory to encompass these kinds of considerations, or to conceive of change as the product of mobilization by Indigenous Peoples themselves, excludes this model as a useful tool for examining the role of Indigenous Peoples in policy and institutional change.

Another new institutionalism analytical framework associated with rational choice that does not effectively explain Indigenous policy change is political economy. This framework does not account for the pursuance and distribution of income and wealth from the perspective of Indigenous worldviews. Much deeper than financial arrangements, Indigenous community

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http://publications.gc.ca/site/eng/472251/publication.html (accessed February 27, 2019). Canada, Privy Council Office, *Report - Royal Commission on the Economic Union and Development Prospects for Canada*, (1985).

[239] Canada, Privy Council Office, *Report - Royal Commission on the Economic Union and Development Prospects for Canada*, (1985).

[240] Campbell, 15.

[241] Campbell, 16.

[242] Assembly of First Nations (AFN), *Honouring Earth,* https://www.afn.ca/honoring-earth/ (accessed November 28, 2019). The AFN provide resources regarding environmental relationships, as well policy perspectives of the organization and what positions they are representing on behalf of First Nations communities and peoples.

engagements with the government follow a rights-based approach related to constitutional arrangements, rather than financial. For example, Comprehensive Land Claims negotiated with the federal government may include financial compensation, but this is not the crux of the negotiation. Central to these claims is a rights-based approach to self-government.[243] The premise behind engaging with Canadian institutions for Indigenous Peoples is recognition of communities and individuals as Indigenous rights holders.

A further framework considering policy learning and change is 'organizational institutionalism,' which posits that organizations based on a voluntary membership change mandated goals to address the interests of those they serve.[244] Indigenous lobby groups switch goals or reorganize based on particular mandates and multiple agenda action items. Upon accomplishing goals, Indigenous lobby groups typically shift their focus to something else. What organizational institutionalism and other institutionalism models do not explain is that interest groups with their voluntary membership differ from rights-bearing collectives in their desire for policy changes. The framework also does not capture the role of colonialism and Indigenous Peoples' complex relationship with this construct. Although organizational institutionalism may be useful in examining some cases of Indigenous policy advances, the framework cannot explain all situations. While Indigenous interests or lobby groups support individual court cases and policy challenges, typically rights-bearing communities advance change. For example, the Mi'kmaq Peoples of Newfoundland engaged in a long process, negotiating membership based on genetic/family ties for accessing rights and recognition.[245] These were rights-bearing collectives that were supported by Indigenous organizations but remained distinct as communities. When the Miawpukek First Nation Peoples began negotiations to form a band recognized by the *Indian Act*, they broke away from the lobby group.[246] The Federation of Newfoundland Indians (FNI) assisted with the negotiation of the Qalipu band creation, but in no way was FNI to become the

[243] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Ongoing negotiations," *Treaties, agreements and negotiations* https://www.rcaanc-cirnac.gc.ca/eng/1100100030285/1529354158736 (accessed July 3, 2019).
[244] Campbell, 17.
[245] Kelly Anne Butler, *The Country,* writer: Kelly Anne Butler, directors: Phyllis Ellis, James Yates, (2018).
[246] Adrian Tanner, Canada, Privy Council Office issuing, and body Canada. Royal Commission on Aboriginal Peoples issuing, *Aboriginal Peoples and Governance in Newfoundland and Labrador: A Report for the Governance Project, Royal Commission on Aboriginal Peoples* (1994), 35.

actual band—the membership lists do not translate to band list members.[247] Although organizational institutionalism can account for some actions of lobby groups, it is not sufficient to understand the change initiatives and actions of these rights-bearing collectives.

Historical institutionalism is as much concerned with change as it is with stability. Importantly, within this theory, "institutions that guide decision making reflect historical experience."[248] This experience can be seen in Canada, with, for example, the Peace and Friendship Treaties (1725-1779), other relationship agreements, and established relationships with Indigenous Peoples.[249] The Canadian governance system operates as a constitutional monarchy, and the policy and governance apparatus is built on previous systems. In other words, the system is built on constitutional norms and precedent (path dependence). Once people are on a particular path, they tend to stay with it and are bound by knowledge and past experiences, rather than seeking broad change.[250]

Hall argues that a notable feature of historical institutionalism is the asymmetry of power.[251] Prior to colonization, Indigenous Peoples had relationships with other nations, so treaties, for example, fit within an already existing worldview. As Indigenous Peoples became subject to British colonialism, understandings of colonial systems grew and changed within colonial contexts. The long history of Algonquins attempting engagement with the Crown by using diplomatic channels illustrates this growth and change.[252] Accordingly, the institutions implemented policies to create stability, and Indigenous Peoples influenced stability by using institutional processes to challenge the policies based on claims of identity observed in the case studies. The colonial history in the Indigenous-Crown relationship centres around power as challenges are to reclaim power that is the result of colonial injustices, such as the right to self-define identity.

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[247] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 75.
[248] Campbell, 25.
[249] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Peace and Friendship Treaties (1725-1779)," https://www.rcaanc-cirnac.gc.ca/eng/1360937048903/1544619681681 (accessed June 22, 2019).
[250] Campbell, 13.
[251] Hall, 280.
[252] Algonquins Of Ontario (AOO), *Our Proud History,* AOO, http://www.tanakiwin.com/algonquins-of-ontario/our-proud-history/ (accessed April 10, 2019).

As government policies were formed, such as the *British North America Act, 1867,* relationships shifted, and Indigenous Peoples began to use systems that the government would understand to effect change. According to Campbell, "Policy processes do not occur in a vacuum but within the institutional systems of a country or a sub-unit of a country, as might be found in federal forms of government."[253] Within historical institutionalism, institutions structure the engagement. As Indigenous Peoples' rights were increasingly recognized within the Canadian institution, their actions of engagement within institutions (especially in the courts) created policy change. An example of an all-encompassing change is the expansion of the concept of 'Indian' to include Métis People, brought about by the Daniels case.[254] Some Indigenous Peoples, Daniels, for example, have adjusted the institutional apparatus by eroding the government's goal of certainty of Indigenous identity and associated rights, but the stability of the institution remains.[51] Because Indigenous Peoples understand the Crown's institutional apparatus, they create change through the institutional channels available. Thus, Indigenous policy and institutional changes are led by Indigenous Peoples who are negotiating, creating changes, and using the judicial system effectively. However, adjustments to policy goals and institutional frameworks remain within the parameters of the Canadian institutional setting.

Historically, government-led inquiries and Indigenous policy shifts have largely ignored the role of colonization. Other observable examples of institutions shaping policy development that fit with historical institutionalism's understanding are government inquiry committees. One such inquiry was the Joint Senate-House Committee on the 1946-1948 *Indian Act*. The inquiry led to the 1951 *Indian Act* amendments.[255] The last sizeable government-initiated change to the *Indian Act* was the result of another Joint Senate-House Committee on the *Indian Act* in 1959.[256] Canada took an assimilationist approach to Indigenous Peoples, and, when policies did not work, the government blamed the people, not the policies.[257] Government reviews of policy failures have led to the punctuations (change or disruption to existing understandings) of second order

[253] Campbell, 5.
[254] Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99.
[255] Canada, Parliament. Special Joint Committee of the Senate the House of Commons Appointed to Examine Consider the Indian Act, *Minutes of Proceedings and Evidence.*, (1946). Indian Act, S.C. 1951, chapter 29, section 8
[256] John F. Leslie, "The Indian Act: An Historical Perspective," *Canadian Parliamentary Review,* vol. 25, no. 2. (2002), 26.
[257] H. B. Hawthorn, *A survey of the contemporary Indians of Canada: a report on economic, political, educational needs and policies*, (Ottawa: Indian Affairs Branch, 1966), 35-43.

change but also to an on-going disregard for Indigenous input in policy review and development.[258] Nevertheless, changes following these punctuations have been influenced by Indigenous Peoples through challenges to the status quo in judicial systems. As Indigenous Peoples have engaged institutions, the space for Indigenous participation in policy has gradually developed.

Throughout the 20th century, the federal government commissioned studies outside of joint government committees to examine the socio-economic condition of Indigenous Peoples looking to improve policy. The tendency to blame Indigenous Peoples for policy failure or lack of socio-economic improvement is exemplified in the *Hawthorn Report* (1966-1967), a government survey of the economic, political and educational needs of registered First Nations Peoples designed to inform policy. In examining Indigenous Peoples' lack of response to policy changes, the *Hawthorn Report* failed to account for embedded colonialism or problems with the government's approach.[259] According to John Crossley, concerning Indigenous Peoples, civilization was a long-standing policy goal and problem for the government.[260] As with the *Hawthorn Report*, *the Royal Commission on Aboriginal Peoples* (RCAP) did not result in substantive changes, even though it included Indigenous considerations. Historically, government methods of inquiry for change, such as parliamentary committees and commissions, have done nothing more than create dependency relationships, either maintaining the status quo or disregarding findings. Real change occurs when Indigenous Peoples affect the policy field. A recent example is the hearings from community members with the Senate regarding *Bill S-3*, the most recent amendment to the *Indian Act*.[261] Negotiations are preferable for all parties due to risk, but not always possible, and court processes become necessary.

[258] Hawthorn, p 35-43.
[259] Yale D. Belanger and David Newhouse, "Emerging from the shadows: The pursuit of Aboriginal self-government to promote Aboriginal well-being," *The Canadian Journal of Native Studies* 24, no. 1 (2004), 135.
[260] John F. Leslie, Assimilation*, Integration or Termination? the Development of Canadian Indian Policy, 1943-1963*, (2000), 198-199.
[261] Standing Committee on Indigenous and Northern Affairs regarding Bill S-3, An Act to Ammend the Indian Act, (elimination of sex-based inequities in registration), June 8, 2017 Hearings. First Session, Forty-second Parliament, 2015-16-17.

Following the *Hawthorn Report*, the federal government made another attempt at policy development with First Nations Peoples in Canada through the *White Paper* in 1969.[262] The *White Paper* was problematic for First Nations Peoples because it was an attack on rights that flowed from being First Peoples and from formal agreements such as the treaties.[263] The federal government designed the proposed assimilationist the policy to remove these "special" rights. The proposed policy was met with a response by First Nations leadership and was the impetus for organizing the current lobby groups.[264] In Alberta for example, leadership organized through the Indian Association of Alberta (IAA) led by Harold Cardinal, and responded through a calculated response; The Red Paper.[265] Significantly, this is the first time Indigenous Peoples were successful in blocking legislation that impacted identity-based rights through large-scale collective action. In this situation, it was not a change implemented through Indigenous-led engagement, instead it was action to block change, similar to the actions taken by #IdleNoMore four decades later attempting to stop legislation.[266] The attack on identity-based rights by government led to the development of lobby groups, which continues to provide support for Indigenous-led change in the 21st century.

The historical institutionalism framework accounts for varying institutions Indigenous Peoples engage in advancing their agenda. The theoretical term generally refers to larger structures in which organizations interact, constraining or limiting outcomes but not providing solutions.[267] An example of a structure of interaction is negotiated models of settlement in Indigenous land claims policy. When I studied the tripartite Saskatchewan *Treaty Land Entitlement Framework Agreement, 1992*, one of the obstacles with the policy process was implementation. Although room within the Canadian governance institution for a land claims settlement process exists,

[262] Canada, *Statement of the Government of Canada on Indian Policy (White Paper)*, 1969.
[263] Leon Bear, "The Indian Association of Alberta's 1970 Red Paper Published as a Response to the Canadian Federal Government's Proposed 1969 White Paper on Indian Policy," *Master's Thesis* (University of Lethbridge, 2015), 2.
[264] Bear, 1.
[265] Bear, 1.
[266] Ken Coates, *#IdleNoMore: And the Remaking of Canada* (University Authors Collection. Regina, Saskatchewan: University of Regina Press, 2015), 1.
[267] Campbell, 25.

there was no prescribed model on how to achieve a settlement.[268] Thus, the term historical institutionalism is useful for this dissertation as it concerns policy outcomes and tests institutional development, such as the creation of policy processes and structures.[269]

As a useful tool for examining how philosophies of politics influence institutional decision-making, historical institutionalism can help explain that although institutions shape political design, they also constrain potential change. In Canada, the parliamentary system represents institutional governance, and within this system, policies are developed, passed into law, and shape institutional arrangements. For example, the *Indian Act 1876* was developed under Canadian governance and informs the structural relationship between the government and registered First Nations Peoples. According to Daniel Béland, "Historical institutionalism is based on the assumption that a historically constructed set of institutional constraints and policy feedbacks structures the behaviour of the actors and interest groups during the policy-making process."[270] However, Indigenous policy change is distinct from other policy and institutional changes in Canada, as it is founded in beliefs held outside government by non-governmental actors and without a social movement to support it. As Indigenous People work to effect policy change, they exercise colonial rights to access their Indigenous rights.[271] Although the relationship between the Crown and Indigenous Peoples has evolved and innovation has taken place, Indigenous-Crown relations have endured through the institutions of Canada. As the Canadian government retains international sovereignty, the power structure keeps Indigenous Peoples at a secondary level to government.

Policy Learning within Historic Institutionalism

Understanding how institutions and their policies change is a comparative process, as change can involve temporal and spatial values of examination.[272] One example of this type of comparison is examining Indigenous women's advancements in the context of women's advancements for

[268] Rebecca Ann Major, and University of Saskatchewan, College of Graduate Studies Research, *Breaking the Chain of Dependency: Using Treaty Land Entitlement to Create First Nations Economic Self-sufficiency in Saskatchewan*, (2010).
[269] Campbell, 24.
[270] Daniel Béland, "Ideas, Institutions, and Policy Change," *Journal of European Public Policy* 16, no. 5 (2009), 1.
[271] Campbell, 25.
[272] B. Guy Peters, Guillaume Fontaine, and Jose-Luis Mendez, "Substance and Methods in the Comparative Study of Policy Change," *Journal of Comparative Policy Analysis: Research and Practice* 20, no. 2 (2018/03/15 2018), 133.

equality in general. As women's space in Canada became generally more equitable, success in gender challenges to the Indian Act increased. The comparative element was the political temperament at the time. One reason policies change, can be the result of policy cycles, which involve feedback loops as part of the 'natural cycle.'[273] Conceived as a five- or six-step process (some claim up to eight) in policy development, the natural cycle is part of a broader policy cycle concept.[274] The policy cycle follows the steps of identifying a problem, agenda setting, policy-making, budgeting, policy implementation, and evaluation.[275] Evaluation is a way to determine if changes are required and prescribing learning when necessary – looking improved paths to meet policy goals.

Policy learning—an approach to explain policy change and processes within the institutional setting— explains Indigenous policy changes in recent decades as resultant efforts from engaging colonial institutions rather than changes initiated by the government. The 'civilization' era of Indigenous policy and legislation illustrated path dependence with amendments made to the *Indian Act* and the learning happening within government.[276] When shifting to the late 20th century and 21st century, the learning (and associated changes) come from ideas inserted into institutions through Indigenous engagement. This is further elaborated in Chapter 8 in the discussion surrounding the cases and their impact.

Policy learning, as theorized by Michael Howlett, is the underlying beliefs and values that demonstrate a change in policy.[277] This concept provides space for the ideas and values Indigenous peoples use to create change. Hall explores conceptions of policymaking as social learning, arguing that "the notion of social learning is on the verge of becoming a key element in contemporary theories of the state and policymaking."[278] Hall's policy learning in historical institutionalism can be useful in exploring how Indigenous change happens in institutions,

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[273] Christopher W. Larimer and Smith, Kevin B., *The Public Policy Theory Primer*, sec. ed. (Boulder, CO: Westview Press, 2013), 83, 87, 89.
[274] Eugene Bardach, *A Practical Guide For Policy Analysis: The Eightfold Path To More Effective Problem Solving*, (2008).
[275] Liberal Arts Instructional Technology Services, *The Public Policy Process,* The University of Texas, http://www.laits.utexas.edu/gov310/PEP/policy/ (accessed February 12, 2019).
[276] J. Crossley "The Making of Canadian Indian Policy to 1946," *PhD Dissertation* (University of Toronto, 1987).
[277] Howlett, 632. Stéphane Moyson, Peter Scholten, and Christopher M. Weible, "Policy Learning and Policy Change: Theorizing Their Relations from Different Perspectives," *Policy and Society* 36, no. 2 (2017/04/03 2017), 162.
[278] Hall, 275-276.

particularly in evaluating how Indigenous-led change affects outcomes and how the model for change is unique within policy change understandings. However, he draws attention to two problems that exist when social learning is used to study the state:

The first problem is the thin role ideas play in policy learning, ideas that are pivotal when examining how Indigenous Peoples advance their claims. Indigenous Peoples use ideological worldviews as they challenge the Crown, particularly on issues of identity. Both the state and Indigenous Peoples approach specific problems from differing worldviews, which may limit or stall conversations, as the parties fail to agree on starting points in negotiations, creating constraints. Ideas influence decision-making in policy and governance, frame the system, and establish standards and parameters to work within.[279] As states are path dependent (make policy choices and decisions based on past practices and policy adjustments based on feedback on policy evaluations), ideas develop with learning from outside typical policy networks or outside the political institution of government.[280] Ideas can also come from society or political arenas. The state is linked to society by a flow of ideas between two spheres.[281] Daniel Béland calls for policy examination in the context of identity, as well as understanding the role of ideas.[282] Indigenous ideas and worldviews create change in policy and Canadian institutions, as exemplified in the inclusion of oral testimony in the Delgamuukw case and subsequent decision.[283] Ideas come from many places, and Indigenous Peoples use institutions as ways to transmit ideas in their political engagements with colonial institutions.[284] As emphasized previously, for Hall, "part of social learning, or third order change, is the role of ideas. Policy paradigms suggest that the policymaking process can be structured by a particular set of ideas, just as it can be structured by a set of institutions."[285] This is a key consideration when implementing Hall's model because he points to the need to consider the role of ideas in the policy process.[286] In the current political arena, Indigenous Peoples are shifting ideas so that they encompass Indigenous rights and identity.

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[279] Campbell, 289.
[280] Hall, 288
[281] Hall, 290.
[282] Daniel Béland, "Identity, Politics, and Public Policy," *Critical Policy Studies* 11, no. 1 (2017).
[283] Delgamuukw v British Columbia, [1997] 3 SCR 1010.
[284] Hall, 289.
[285] Hall, 290.
[286] Hall, 279.

The second problem identified by Hall is that some see social learning as a confirmation of the autonomy of the state; however, when Indigenous groups challenge or negotiate with the government the International sovereignty of the state is never in question. State control in Canada is supported by the concept of international state sovereignty, which places Indigenous Peoples in a subjugated position. Under the current federal reconciliation agenda, the relationship is set in the already established constitutional framework, and it is the government ideology guiding the discourse.

Hall identifies two approaches to studying the state and policy change. One is a state-centric approach in which the state is not easily influenced by "societal pressure," an insulated approach, which may be seen in some circumstances. However, historically, far from being insulated, the Canadian state has responded to societal value changes, as evidenced in the evolution of the role of women and discourse analysis in public policy.[287] This second approach, which Hall terms the second state-structuralist approach, is observable in Indigenous policy change and with actors outside of government who impact policy change.[288] Another aspect of this approach is that it does not emphasize state autonomy at the same level (meaning the state can be influenced through judicial processes, for example), and thus reveals the usefulness of state-structuralist research within historical institutionalism. Indigenous Peoples impact institutions and bring about policy change through initiatives taken within the Canadian state, building on the previous experience, just as the state does. When a policy change pathway proves useful, such as the Canadian legal system or political negotiations, it influences future actions. Hall understands learning as a result of a process that creates change, but where the change comes from is as important as the process.[289] The motivation for Indigenous engagement is grounded in the setting of colonialism and in challenging government-held ideas using instruments of government. For example, large scale political protests do not necessarily engage state participation, but institutional processes such as the court or negotiating instruments do. The case studies in this dissertation demonstrate that institutional behaviour is privileged within the colonial system, while Indigenous Peoples assert their Indigenous worldview in the colonial process to create

[287] Christopher J. C. Dunn, *The Handbook of Canadian Public Administration*, 3rd ed. (Don Mills, Ont.: Oxford University Press, 2018), 408.
[288] Hall, 290.
[289] Hall, 276.

change. The problem is that the Indigenous engagement process is subjugated by the state: the state establishes and controls the process and, therefore, Indigenous parties and the government do not have equal power.

As we have seen, in Hall's construct, there are three types of policy change: first, second, and third order change. Policy change is also influenced by three factors: goals, settings, and instruments, which work as indicators of change occurring in policy learning.[290] For example, in first order change, the goals and instruments remain the same but the settings change. This is observable in the first era of post-confederation Indigenous policy where the policy goal was assimilation (sometimes referred to as a civilization policy) and the instrument was the *Indian Act*. The settings in this scenario are the elements in the *Indian Act* that act as controls over the lives of registered First Nations Peoples and would be amended to suit government needs. In second order change, the goals remain the same; however, the instruments change along with the settings. An example of this second order change is the abandonment of the extinguishment clause in land claims policy. The goal of certainty remains in the land claims policy, the instrument was the act, but the setting changed (what settlements look like) as a result of the extinguishment removal. Finally, in third order change, all three factors—settings, instruments, and goals—change significantly.[291] With respect to Indigenous identity, the government's goal of certainty in who qualifies for legal Indigenous identity and associated rights is affected by Indigenous challenges. Indigenous action observed in the case studies of this dissertation illustrate how government goals are shifted by creating change to instruments and settings.

First order change is accomplished through incrementalism, which, as described by Charles Lindblom, refers to series of small changes directed or initiated by the government and associated with path dependence. [292] Following Confederation, first order change delineated the Indian policy process. First order change involves a change in settings.[293] Second order change can be punctuations in the policy equilibrium, and again change is brought from within government and the policy collectives. In this scenario, both the setting and the instruments

[290] Hall, 280.
[291] Hall, 276.
[292] Charles E. Lindblom, "The Science of "Muddling Through," *Public Administration Review* 19, no. 2 (1959), 85.
[293] Hall, 278.

change. The third order change is most closely associated with paradigm shifts and driven by social actors and change from outside of government.[294] With third order change, settings instruments and goals change or are altered.[295] Indigenous-led policy change is not driven or supported by society at large, nor is it part of a social movement. Indeed, the lack of public support for Indigenous policy is demonstrated in a recent survey published in the *Globe and Mail*.[296] Instead of representing a shift in Canadians' values, then, Indigenous policy change occurs when the institutional system is used to advance rights. In second order change, policies go through extended periods of stability, but when punctuations occur, they are more dramatic than shifts observed in incrementalism. According to Hall, third order changes are more challenging to model.[297] This third order change is considered revolutionary, with the change coming from the people through social movements rather than through the government. It also does not happen homogeneously; if it did, we could use social learning to describe Indigenous policy change and impacts on institutions.

For Hall, at the root of third order change is social learning. Applying social learning to policymaking is, according to Hall, "a deliberate attempt to adjust the goals or techniques of policy in response to past experience and new information."[298] If we consider that the setting for Indigenous policy is colonial institutional constraints and the mechanisms used to effect change, then the policy or institutional change would be first or second order change. However, if the impact of the change affects the government's goals (for example, by changing the goal of certainty), then likely third order change and a paradigm shift have occurred. According to Hall, this third order change is propelled by societal pressure occurs outside the political arena.[299] As Howett argues in his discussion about Peter Hall,

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[294] Campbell, 29.
[295] Hall, 279.
[296] Eric Andrew-Gee, "Non-Indigenous Canadians show less support for policies that improve the lived of Indigenous peoples, survey shows," *Globe and Mail.* (October 15, 2019), https://www.theglobeandmail.com/canada/article-non-indigenous-canadians-show-less-support-for-policies-that-improve/ (accessed December 10, 2019). Andrew Parkin, *Towards Reconciliation: Indigenous and non-Indigenous Perspectives*, Environics Institute, (October 15, 2019), https://www.environicsinstitute.org/projects/project-details/towards-reconciliation-indigenous-and-non-indigenous-perspectives (accessed December 10, 2019).
[297] Hall, 280.
[298] Hall, 276.
[299] Hall, 289.

> As the new paradigm emerges, there will be a sixth stage of *institutionalization of the new paradigm,* in which the advocates of a new paradigm secure positions of authority and alter existing organizational and decision-making arrangements in order to implement the new ideas now circulating in the policy community.[300]

In Indigenous-led policy change, we can see that Indigenous Peoples who have advocated for paradigm change have changed decision-making arrangements, so government is no longer the sole determiner of Indigenous identity.

Indigenous policy change does not always lead to third order change in the modern era.[301] For example, when working with Indigenous Peoples on Indigenous policy, the government's stated goal is certainty. The government aims to be secure in its certainty that it has the right to control certain aspects of Indigenous Peoples' lives: certainty about identity, which connects to access to Indigenous rights, settlement negotiation, and federal government responsibility. Often, instead of occurring at the level of goals, changes are made to instruments (tactic) and settings (strategy). In examining Indigenous policy learning in Canada in the context of the 1986 claims settlement policy, Christopher Alcantara points out that while the strategies and tactics to complete treaties changed, the goals of the policymakers did not.[302] Alcantara adds that the government-directed policy was problematic, arguing that the Crown engaged in instrumental learning when it encountered "Aboriginal opposition to the extinguishment clause" and treaty negotiations consequently slowed down."[303] The most significant change to Indigenous land claims policy took place in 2014 with *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. In the current land policy, extinguishment is no longer required.

Unlike third order change, first and second order change is part of 'normal policymaking,' which does not entail paradigm shifts: instruments can change, settings can change, but goals remain absolute and unchanged. [304] On the other hand, third order change reflects "radical changes in the

[300] Howlett, 635.
[301] Meaning, change that isn't initiated by Indigenous people but is Indigenous policy.
[302] Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy / Analyse de Politiques* 35, no. 3 (2009), 326.
[303] Alcantara, 326.
[304] Hall, 279.

overarching terms of policy discourse associated with a paradigm shift."[305] In other words, there is a drastic shift in the theoretical approach to policy content or practices, and this is not necessarily a smooth transition as the goal or total approach to policy changes. Critics argue that the problem with Hall's approach to policy learning is that it cannot always be used to explain revolutionary change.[306] Although revolutionary change is almost always third order, it does not, as we have seen, necessarily occur as a response to changing norms and values in society. Revolutionary policy change initiated by Indigenous Peoples, for example, does not occur because of a shift in public attitudes or a groundswell of public support. On the contrary, this major change occurs because Indigenous Peoples have undertaken to challenge the government's goal of certainty in matters that are essential to them. The common understanding of third order change explains neither the role of colonialism in Indigenous motivation nor the lack of social support.

Hall draws on Thomas Kuhn in relating types of policy change to paradigm shifts. Thomas Kuhn first wrote about paradigm shifts in 1962 in *The Structure of Scientific Revolutions*, an influential work used in multiple disciplines, although grounded initially in natural science. Kuhn explains that there are two essential characteristics involved in a paradigm. The first is a theory that is distinct enough to draw a cohort of a school of thought, or away from other theories.[307] Old ways of understanding a change of this scale were either through incrementalism, punctuated equilibrium, and then eventually social movements from outside government.[308] Second, the theory must provide an avenue for the cohort to use in resolving problems.[309] In this case, the new avenue for achieving lasting policy for Indigenous Peoples was the mechanism of the courts. Indigenous People understood that to circumvent Indigenous policy development as a top-down process using assimilative strategies, the courts enable some colonial issues with government to be resolved.

[305] Hall, 279.
[306] Campbell, 26.
[307] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, International Encyclopedia of Unified Science; v. 2, no. 2. (Chicago: University of Chicago Press, 1962), 10.
[308] Hall, 280.
[309] Hall, 280-281.

Essential elements in a paradigm, according to Kuhn, do not need explicit explanations. Instead, paradigmatic elements should explain new definitions or distinctions in the field.[310] Accordingly, Indigenous Peoples advance conceptions of identity and a rights agenda through the courts and other institutional mechanisms. The challenges facing Indigenous Peoples created motivation to engage the government to create a space for change not typical of first, second, and third order change. As Kuhn argues, "Replicability with other examples is another critical element in a new paradigm"[311] With respect to Indigenous policy change observed through the case studies, separate challenges contributed to a larger shift. The change brought by Indigenous Peoples demonstrates a pattern, sometimes using different instruments, creating change in the settings of Canadian federalism as third order change—all varying efforts create favourable policy and institutional change for Indigenous Peoples in Canada.

In Hall's model, there are six stages to a paradigm shift): Paradigm Stability, Accumulation of Anomalies, Experimentation, Fragmentation of Authority, Contestation, and Institutionalization of a New Paradigm.[312] These stages are useful for understanding Indigenous policy change, but they neither precisely explain nor fit the change. For example, although Indigenous-led challenges can be considered to be an accumulation of anomalies, in Indigenous policy change the experimentation is lacking, at least in the traditional sense. Although Indigenous institutional and policy change demonstrates fragmentation of authority (the government has lost absolute control of Indigenous policy to the courts), the contestation stage appears to be absent, as there is no competition among different paradigms.

The path to a paradigm shift is often a crisis.[313] For Indigenous Peoples, the crisis was the loss of self-determination through colonization. Indigenous Peoples, as actors from within a cultural group, were targets of assimilative Christianity and Western values-systems.[314] Thus, they reacted to crises by using colonial systems as lines of defence and assertions of nationhood. As

[310] Kuhn, 18-19.
[311] Kuhn, 23.
[312] Peter Hall, "Policy Paradigms, Experts, and the State: The Case of Macroeconomic Policy-Making in Britain," *Social Scientists, Policy, and the State,* ed Brooks, Stephen, Alain-G Gagnon, Conway, Thomas, Hall, Peter, Lindquist, Evert, Pal, Leslie, Weiss, Carol, Wagner, Peter, and Wittrock, Bjorn. (1990), 68.
[313] Campbell, 27.
[314] Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,* The Truth and Reconciliation Commission of Canada, (2015), 191, 192.

Canada expanded its territory with the purchase of Rupert's Land from the Hudson's Bay Company (HBC), the crisis of Métis legal standing led to the 1870 *Manitoba Act* negotiations, for example.[315] Indigenous actors have been working within institutional structures to create a paradigm shift, where the culmination of their efforts affects the government's goal of certainty. Crises have created reactions, which have been used to advance Indigenous roles in policy and institutional change through battles won using institutional mechanisms.

Today, the legal position of Indigenous Peoples results from testing identity and associated Indigenous rights in the courts and other institutional processes. The paradigm shift or third order change that has occurred through Indigenous Peoples' initiatives is different from other third order change because it is rooted in a distinct identity without broad public support.[316] The endogenous and exogenous factors that Michael Howlett mentions in his work require consideration because the these factors can only be approached from Indigenous worldviews.[317] In examining Indigenous policy changes and policy paradigms in the work of Hall, Sabatier et al., and Weaver, Howlett argues that Sabatier et al. have more success in defining exogenous variables than Hall.[318] For Indigenous Peoples the exogenous factor is the colonial system and associated institutions, while the endogenous factor is the worldview and positionality in colonial institutions. To understand both factors can enhance social learning in third order change. Howlett argues that to verify a true paradigm shift has occurred, one must be able to articulate the exogenous and endogenous variables and provide empirical evidence that the shift has occurred.[319] In the 21st century, cases brought before the court have created space for greater involvement of Indigenous Peoples in policy development. Variables are identifiable when considering why Indigenous Peoples are engaging government for change.

[315] D. Bruce Sealey, Antoine S. Lussier, and Manitoba Métis Federation, *The Métis: Canada's Forgotten People*, Irene M. Spry Collection of Western Canadian History (Winnipeg: Manitoba Métis Federation Press, 1975), 83.
[316] Andrew-Gee, "Non-Indigenous Canadians show less support for policies that improve the lived of Indigenous peoples, survey shows. Parkin, *Towards Reconciliation: Indigenous and non-Indigenous Perspectives*.
[317] Howlett, 642.
[318] Howlett, 642.
[319] Howlett, 643.

Substantive and Symbolic Change in the *Indian Act*

Institutions can evolve by recombining old policies, as demonstrated through changes made over the years to the *1876 Indian Act*.[320] Bricolage, as described in John L. Campbell's *Institutional Change and Globalization,* is a policy learning tool that borrows policy ideas within the institutional structure and recombines and adds institutional elements.[321] According to Campbell, there are two types of bricolage: 1) substantive bricolage where there is a recombination of existing institutional principles, and 2) symbolic bricolage, which takes place in society within a particular rhetorical discourse.[322] Symbolic bricolage is observable in the reorganization of the federal department responsible for the relationship with Indigenous Peoples, such as the "Principles respecting the Government of Canada's relationship with Indigenous peoples," known as the 10 Principles.[323] Although there have been symbolic changes with more Indigenous inclusion in policy development and more appropriate dialogue, they are still a continuation of colonial practices. The state continues to act in a parental role, whereas substantive change would involve a more proactive approach in dismantling colonial structures and institutions. Policymaking and institutional change tend to be path dependent and occur through bricolage.[324]

For example, when the Saskatchewan government was negotiating Métis harvesting with the Métis Nation-Saskatchewan in 2011-2012, part of the process involved looking at models in other jurisdictions to see what could be borrowed and adapted for Saskatchewan.[325] This concept of institutional change within substantive bricolage accounts for the previous Indigenous policy eras in Canada up to 1951, meaning, Indigenous autonomy was deeply restricted and changed through policy implementation. The *Indian Act,1876* was consolidated from previous policy and implemented nationally, and the first years of the policy involved a series of changes.[326] When the government was dissatisfied with Indigenous Peoples and activities, the government would

[320] Government of Canada, Indian and Northern Affairs Canada, *Background on Indian Registration*, (November 28, 2018), https://www.aadnc-aandc.gc.ca/eng/1540405608208/1540405629669 (accessed July 3, 2019).
[321] Campbell, 28.
[322] Campbell, 69-70.
[323] Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous peoples* (July 2017), https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.
[324] Campbell, 26, 70.
[325] I was the policy analyst responsible for this work while employed under the Department of Environment at the Métis Nation-Saskatchewan.
[326] J. R. Miller, *Sweet Promises: A Reader on Indian-white Relations in Canada*, Aboriginal Education Collection, (Toronto: University of Toronto Press, 1991), 325.

modify the legislation. For example, when First Nations Peoples organized to address policy, the *Indian Act* was amended to prevent registered First Nations Peoples from hiring lawyers.[327] The symbolic aspect of the changes during this time is that by and large, non-Indigenous peoples were unconcerned about the government's treatment of Indigenous Peoples, so there was little need to pander to public support through symbolism.[328] The *Indian Act* legislation constrained Indigenous People, as the legislation was used to address what the government perceived to be problems. The symbolic change today is the reconciliation agenda that is grounded in current colonial structures, as discussed previously.

Historical institutionalism is interested in evolutionary shifts through punctuations in the equilibrium and explains the type of change occurring beginning in the middle of the 20th century.[329] Following the incremental period of the *Indian Act*, the legislation went through punctuations. In 1947, a Joint Senate-House Committee was established to study the situation of registered First Nations Peoples in the context of policies of the day. As a result of the study, the *Indian Act* was amended in 1951, enabling First Nations Peoples to hire counsel (among other changes).[330] A significant change because injustices could now be challenged. With this change, the government acknowledged that the previous limitation placed on the people governed by the Act was unreasonable. Another reason the change could be considered a punctuation was that it was a considerable change followed by a period of maintaining the status quo with the Act.[331] A second punctuation came when Prime Minister Diefenbaker called a Joint House-Senate

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[327] Kory Wilson,"Appendix B: Indian Act Timeline," *Pulling Together: Foundations Guide,* https://opentextbc.ca/indigenizationfoundations/back-matter/appendix-b-indian-act-timeline/ (accessed July 3, 2019).

[328] There were cases where settler populations were unhappy with the treatment of Indigenous peoples. In the Saskatchewan archives, letters are available from farmers complaining to the government of both the treatment of themselves as Canadian citizens and of Indigenous peoples. While locating research on Kawacatoose for another project, I found a letter describing the situation on the prairies at the end of the 19th century. It would be impossible to take an absolute measure of how people felt at the time, as the letters in the archives may not be representative. At the same time, there was not an enormous outcry in public venues such as newspapers about the treatment of Indigenous peoples as a whole. Sarah Carter's work examines the lives of Métis women on the prairies at the end of the 19th century, many of whom went to great lengths to hide their identity because of the way society treated them. This research supports the idea that Canadians were not opposed to the government's treatment of Indigenous peoples as private citizens were also mistreating Indigenous peoples.

[329] Campbell, 26, 70.

[330] Canada, Parliament, Special Joint Committee of the Senate the House of Commons Appointed to Examine Consider the Indian Act, *Minutes of Proceedings and Evidence.*, (1946). Indian Act, S.C. 1951, chapter 29, section 8. Indian Act, S.C. 1951, chapter 29, section 8.

[331] Bryan D Jones and Frank R. Baumgartner, *The Politics of Attention: How Government Prioritizes Problems* (Chicago: U of Chicago, 2005), 125.

Committee to review the *Indian Act* in 1959 and amend the *Indian Act* in 1960.[332] Such changes represent significant punctuations as registered First Nations Peoples gained full citizenship, permitting those registered under the *Indian Act* to vote in Canadian elections.[333] These changes were the last government-directed changes to the *Indian Act*, which ended a policy era.

The first Indigenous-led change to the *Indian Act* policy came with *Bill C-31* in 1985 after First Nations women had been vocal about the gender discrimination contained in the Act.[334] In *Bill C-31*, there were three key changes to the 1985 *Indian Act* amendments that advanced Indian policy: 1) the removal of gender discrimination, 2) the restoration of status and membership rights, and 3) increasing control of Indian bands over their affairs.[335] These changes were both substantive and symbolic, as they were made in the context of the patriation of the Canadian Constitution and the implementation of the *Canadian Charter of Rights and Freedoms* (CCRF), at a time when current sentiment supported equality.[336] However, although they were both substantive and symbolic, the changes were not sufficient, and court challenges to the Act continued.

Another punctuation in the *Indian Act* was *Bill C-3* in 2011.[337] As a result of action taken by Sharon McIvor, this was the first major change to the Act since 1985. The courts concluded that transmission of status was not made equal in *Bill C-31*.[338] McIvor was a First Nations woman and was not able to pass status to her children and grandchildren, but her male counterpart was able to pass his status to both. For McIvor's children to pass status to the next generation, they would have to procreate with another status person. In other words, the bill did not remove gender discrimination in status transmission. McIvor decided to challenge the legislation based

[332] Canada, Parliament. Report of the Joint Committee of the Senate and House of Commons, *Minutes of Proceedings and Evidence* (1959).
[333] Elections Canada, "A Brief History of First Nations Voting Rights," *Mapping the Legal Consciousness of First Nations Voters Understanding Voting Rights Mobilization* (August 27, 2018), https://www.elections.ca/content.aspx?section=res&dir=rec/part/APRC/vot_rights&document=p4&lang=e (accessed July 3, 2019).
[334] Indian Act, RSC 1985, c I-5.
[335] Government of Canada, Indian and Northern Affairs Canada, *Background on Indian Registration*.
[336] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[337] Gender Equity in Indian Registration Act S.C. 2010, c. 18.
[338] McIvor v. Canada (Registrar of Indian and Northern Affairs), S.C. 2010, c. 18. Gender Equity in Indian Registration Act S.C. 2010, c. 18.

on inequity in the registration process in court.[339] She faced several roadblocks, including years of court delays and the removal of the court challenges program by the federal government.[340] She was, however, dedicated to challenging the inequities in the *Indian Act*, and, subsequently, the court ruled in her favour. Her dedication was also supported publicly, legally, and financially.[341] McIvor's actions initiated substantive changes in the registration processes but revealed little symbolic change. There was little need to appeal to public sentiment because the change was mandated by the courts and not by the political will of the government, which, of course, depends on public support.

Recent changes to the *Indian Act, Bill S-3*, resulted from another case that went before the courts. In this case, Stephan Descheneaux, Susan Yantha, and Tammy Yantha, three members of the Abénakis of Odanak First Nation in Quebec, filed a court challenge arguing that the *Indian Act* continued to discriminate against women.[342] On August 3, 2015, the Superior Court in Quebec ruled in favour of the plaintiffs.[343] Following a review of the case, the federal government announced in February 2016 that it would drop the appeal launched by the previous government.[344] The reaction to this case was a two-phase approach pertaining to identity. The first phase of legislation received Royal Assent on December 12, 2017, and came into force on December 22, 2017.[345] The second phase of the equity implementation of the *Indian Act* occurred through a consultation process.[346] Indigenous Peoples were consulted on the policy

[339] McIvor v. Canada (Registrar of Indian and Northern Affairs), S.C. 2010, c. 18. Gender Equity in Indian Registration Act S.C. 2010, c. 18.
[340] CUPE, "Sharon McIvor's fight against the Indian Act's gender discrimination isn't over yet," *Press Release*, (April 23, 2009), http://cupe.ca/aboriginal/Sharon-McIvors-indian-act-gender-discrimination (accessed February 23, 2010).
[341] McIvor v. Canada (Registrar of Indian and Northern Affairs), S.C. 2010, c. 18. Gender Equity in Indian Registration Act S.C. 2010, c. 18. Assembly of First Nations, "AFN Praises Sharon McIvor on October 6th, First Nations Women's Day," in *AFN Announcements,* (October 6, 2008).
[342] *Descheneaux* c. Canada (Procureur Général). 2015 QCCS 3555. Superior Court. Canada. Province of Quebec. District of Montreal.
[343] *Descheneaux* c. Canada (Procureur Général). 2015 QCCS 3555. Superior Court. Canada. Province of Quebec. District of Montreal.
[344] James Munson, "Ottawa drops appeal in case on women's right to Indian Status," *iPolitics.* (February 25, 2016), http://ipolitics.ca/2016/02/25/ottawa-drops-appeal-in-case-on-womens-right-to-indian-status/ (accessed September 2016).
[345] Government of Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Response to the Descheneaux decision* (January 31, 2018) https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623 (accessed February 20, 2019.
[346] Government of Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Response to the Descheneaux decision*

changes affecting identity in the *Indian Act*, and significantly, the second phase removed the 1951 cut-off rule that was implemented in Bill C-3.[347] Removing this cut-off rule meant that children born or adopted before 1951 whose mother lost status, were now entitled to status. Women who lost status before 1951 were now entitled to be registered. However, challenges to the legal identity of Indigenous Peoples entitled to status under the *Indian Act* do not guarantee that public perceptions of "Indian" identity will change. As with the changes ushered in by *Bill C-3*, the government does not need to pander to public opinion as it is legally required to make the changes, so there is no need to evoke symbolism to garner public support.

In the initial era of policy development, the *Indian Act* changed incrementally, followed by the 1951 and 1960 punctuations—all changes initiated and controlled by the federal government. However, the changes in *Bill C-31, Bill C-3*, and *Bill S-3* demonstrate new punctuations created through Indigenous engagement with institutional processes rather than through government initiatives. As discussed earlier, Indigenous initiatives that result in change are not typically based in social movements, which are often associated with social learning in policy. Change rooted in social movements usually involves citizenry value changes, whereas change based on Indigenous initiatives is rooted in centuries of discrimination, subjugation and discontent. As Rochon, Thomas, and Mazmanian argue, a social movement's success is evaluated "in terms of policy change, process change, or value change."[348] A movement is considered to be successful if change can be observed in all three of these dimensions.[349] However, because Indigenous policy change does not originate in the social values held by Canadians, these same dimensions cannot be used to evaluate its success. Regardless of method, each challenge in which Indigenous Peoples create change that betters the population is a success.

https://www.rcaanc-cirnac.gc.ca/eng/1522949271019/1568896763719 (accessed July 6, 2020).
[347] Canada, Crown Indigenous Affairs, *Removal of 1951 Cut-off.* (August 19, 2019) https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/08/removal-of-the-1951-cut-off.html (accessed November 26, 2019).
[348] Thomas R. Rochon and Daniel A. Mazmanian, "Social Movements and the Policy Process," *The Annals of the American Academy of Political and Social Science* (1993), 76.
[349] Rochon and. Mazmanian, 77-78.

The Paradigm Shift

Hall's claim that when there is a shift from one paradigm to another, the argument for the change alone does not determine the outcome. Also key in enabling one paradigm to replace another is the positional advantage one side may have within an institution, such as power and resources.[350] When Indigenous policy change is examined, it is clear that the Canadian government has a position of strength in two ways. First, the institutions are designed to uphold governance structures. As a result, Indigenous Peoples may align with settler concepts of western measurements of success, such as finances, an alignment which is known as the standard approach in nation development.[351] Although an Indigenous group may be limited by lack of capital, its circumstances do not limit potential when there is strong leadership.[352] Second, because sovereignty is not a point of discussion and is considered a given from the government's perspective, the two parties will never be equal at the negotiating table. Thus, Indigenous Peoples or groups will always be subject to government systems. For this reason, legal arguments represent the best method for Indigenous Peoples to gain positional advantage and to shift the paradigm within the context of state sovereignty.

When one considers the role Indigenous Peoples play in policy development, policy change may be described both as first or second order incremental change and as third order change brought by the people without social support. Ultimately, Indigenous Peoples' incremental gains have culminated in a paradigm shift by eroding the federal government's goal of controlling Indigenous identity. The government's certainty is disrupted because the government no longer has absolute control over determining Indigenous identity or community, like they once did. Cases such as *Daniels v. Canada (2016)* and *R. v. Powley (2003),* as well as negotiations based on these legal principles, demonstrate this.[353] Through mobilization and efforts made within the colonial system, Indigenous Peoples have etched a position in policy and institutional processes. For example, the important Duty to Consult policy was implemented as a result of court action

[350] Rochon, 77-78.
[351] Stephen Cornell and Joseph Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't," *Rebuilding Native* Nations, ed. Miriam Jorgensen (University of Arizona Press: Tucson, 2007), 7.
[352] Stephen Cornell and Jorgensen, Kalt, and Contreras, "Seizing the Future: Why Some Native Nations Do and Others Don't," *Rebuilding Native* Nations, ed Miriam Jorgensen (University of Arizona Press: Tucson, 2007), 311.
[353] Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99, R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43. Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations,* AOO, https://www.tanakiwin.com/our-treaty-negotiations/overview-of-treaty-negotiations/ (accessed April 12, 2019).

by Indigenous Peoples.[354] In fact, as Indigenous Peoples use Canadian institutions to assert their identity and associated rights, policy change has evolved. With restricted access to resources, lack of general support, the domination of the institutional design, and the absence of social values most often found in policy learning, it is all the more remarkable that Indigenous Peoples have successfully effected change.

Despite their achievements in the courts, Indigenous Peoples still have unequal power when negotiating with the federal government because the negotiations fall within the Canadian state structure. In exploring the power dynamics between Indigenous Peoples and the Canadian government within the context of land claims negotiations, Toby Rollo argues that land claims demonstrate how a most fundamental issue in nationhood – sovereignty – is not negotiable, keeping Indigenous Peoples in a subjugated position.[355] These particular dynamics ensure the government maintains the advantage and remains in the position of power. When considering policy changes (both big and small), authority issues are central, particularly when one considers from where the change derives.[356] As we have seen, first and second order change derives from the government, but third order change derives from the people or the public. Even in third order change, the government can use its authority to resist change or at least limit is scope. Thus, the power dynamic between Indigenous People and the Crown is inescapable and must be considered regardless of the scale of change.

Even if Indigenous Peoples are able to reduce the power inequality and achieve strong positionality, third order change, paradigm shift, and policy experimentation may fail.[357] A renowned policy experiment and failure during the assimilative era was the Indian Residential School system.[358] This policy was abandoned not because the government showed goodwill but because Indigenous Peoples resisted.[359] The first organized step was the National Indian

[354] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, 3 S.C.R. 511.
[355] Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims. (Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide)," *Canadian Journal of Law and Jurisprudence* 27, no. 1 (2014), 229.
[356] Hall, 280.
[357] Hall, 280.
[358] Canada, *What we have learned: The Principles of Truth and Reconciliation,* The Truth and Reconciliation Commission of Canada, (2015), 111.
[359] National Indian Brotherhood, *Indian Control of Indian Education: Policy Paper Presented to the Minister of Indian Affairs and Northern Development*, The Brotherhood, (1972).

Brotherhood's (NIB) 1972 call for Indian control of Indian education.[360] Although the federal government had started closing the schools in the mid-20th century, it was not until the 1990s that the last schools closed.[361] Then, as part of ongoing efforts, Chief Phil Fontaine of the Association of Manitoba Chiefs leader in 1990 called for the government to acknowledge the damage created by Indian Residential Schools.[362] Indian Residential School survivors then settled what started as the largest class-action lawsuit in Canadian history.[363] In this case, it was not failure or experimentation that led to policy change but Indigenous Peoples working for rights' recognition and the end to marginalization from policy practice in Canada.

As Hall argues, a policy actor's first reaction in making policy change within an existing paradigm is to deal with anomalies and experiment with modern instruments. For example, a modern policy experiment is the *First Nations Land Management Act* (FNLMA) intended to address some communities wanting more autonomy from the *Indian Act*, especially with respect to land control. It is a policy that enables a greater autonomy for First Nations communities as the FNLMA provides for less government control in decision-making areas like land.[364] However, when all result in failure, the authority of the existing paradigms is undermined.[365] Discrediting previous understandings creates space for considerations of a new paradigm. Hall explains in his research how this took place with respect to changing complete fiscal policies in the British government.

A paradigm shift can be an aggregate of anomalies, experimentation with new forms of policy as a reaction to institutional challenges, and policy failures that shift paradigm authority over policy. Thus, paradigm change in the past 40 years in Canadian policies and institutions is not

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[360] National Indian Brotherhood, *Indian Control of Indian Education: Policy Paper Presented to the Minister of Indian Affairs and Northern Development*.
[361] Hector Langevin, *They Came for the Children,* The Truth and Reconciliation Commission (2012), 20.
[362] CBC News, "FAQs on residential schools, compensation and the Truth and Reconciliation Commission," *A history of residential schools in Canada*, (May 16, 2008, updated March 21, 2016), https://www.cbc.ca/news/canada/a-history-of-residential-schools-in-canada-1.702280 (accessed November 30, 2019).
[363] Gloria Galloway, "Courts approve class-action lawsuit for Indigenous students who say they were abused at day schools," *The Globe and Mail* (July 8, 2018), https://www.theglobeandmail.com/canada/article-court-approves-class-action-lawsuit-for-indigenous-students-stripped/ (accessed February 22, 2019).
[364] Canada, INAC, *First Nations Land Management Act*, https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973. First Nations Land Management Act (S.C. 1999, c. 24).
[365] Rochon, 77-78.

necessarily a reflection of policy failures as the institution is designed to change based on instruments in place. Rather, it is often the result of court actions and claims processes.[366] In fact, the accumulation of legal victories is an aggregate of anomalies. The updated policies to the *Indian Act* can be seen as experimentations with policy reacting to successful Indigenous-led judicial cases, such as the McIvor and Descheneaux cases.[367] Such shifts can spill into the broader political arena.[368] For example, in the 2015 election, the shifts that were underway because of Indigenous initiatives were capitalized on by the Liberal Party in promises of new nation-to-nation relationships.[369]

Capacity to Incite Change

How susceptible a government is to societal pressure depends on the institutional structure. One form of government may insulate itself, while others have processes available that enable individuals or collectives to bring issues forward in an organized way.[370] Hall argues that what best insulates governance from societal pressure is a coherent policy paradigm.[371] A critical component of paradigm change is a shift in who has authority over policy. Because of the in-roads made by Indigenous Peoples in institutional and policy change, Indigenous Peoples now have some authority over policy development and control of programs like child welfare.[372] According to Hall, "Process leading to change of this magnitude could not be confined inside the state itself – it [the process] is effected by electoral competition and broader societal debate."[373] Process is key in change, but where the change comes from is just as important. For example, when a challenge and resultant change is brought by an Indigenous group it is self-determining. If it comes from government directly, paternalistic policies are a likely result.

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[366] Hall, 280

[367] McIvor v. Canada (Registrar of Indian and Northern Affairs), S.C. 2010, c. 18. Gender Equity in Indian Registration Act S.C. 2010, c. 18. *Descheneaux* c. Canada (Procureur Général). 2015 QCCS 3555. Superior Court. Canada. Province of Quebec. District of Montreal,\.

[368] Hall, 280.

[369] Liberal Party of Canada, *Trudeau Presents Plan To Restore Canada's Relationship With Aboriginal Peoples,* (July 7, 2015), Https://www.liberal.ca/trudeau-presents-plan-to-restore-canadas-relationship-with-aboriginal-peoples/ (accessed November 30, 2019).

[370] Hall, 280.

[371] Hall, 291.

[372] Assembly of First Nations (AFN), "National Chief Bulletin – Co-Development of Federal Legislation for Indigenous Children and Families," *News* (November 30, 2018), https://www.afn.ca/2018/11/30/national-chief-bulletin-co-development-of-federal-legislation-for-indigenous-children-and-families/ (accessed December 1, 2019).

[373] Hall, 291.

The paradigm shift in Indigenous policy from the end of the 20th century and beginning of the 21st occurred because the courts found that Indigenous policy had failed or was contrary to the principles of Canadian Law. As Hall argues, "The most cynical bureaucrats and politicians must still rationalize their actions in terms that will draw popular support, provide some semblance of consistency, and motivate those who have to carry out the relevant policies."[374] When policy development happens, the government may not need to sell the idea to the public, but there must be a level of faith in the option chosen to deal with the matter at hand. The paradigm shift occurring in Indigenous policy is precipitated by Indigenous Peoples and their use of colonial apparatus to create spaces within the agenda and institution. Hall further argues, "Policymaking in virtually all fields takes place within the context of a particular set of ideas that recognize some social interests as more legitimate than others and privilege some lines of policy over others."[375] Indigenous Peoples create change through mechanisms that are privileged in Canadian institutions, through courts, and based upon previous Crown policies that must be altered to restore the place of Indigenous Peoples in Canada. It is through these institutions that Indigenous Peoples assert their worldviews and concepts of identity.

Methods and Application of Historical Institutionalism to the Case Studies

Applying case studies to historical institutionalism and learning using mixed/Indigenous methodology requires a reflexive lens, particularly during analysis. Following the sequence of events in Indigenous-Crown engagement allows insight into the interactions in the institutional setting. Through a document review, the sources for engagement were collected to observe the interactions and the assertions made by the different Indigenous collectives through institutional settings. The outcomes from the engagement create the pattern for what the engagement reveals, what precedence in policy is set, what arguments were made, and what instruments were used. Through comparisons with standard policy models, one can determine whether Indigenous-led engagement and change follow a standard explanation or whether they require a different explanation. The story of events and outcomes illustrates the role Indigenous worldviews play in the changes. Observations help determine if a change resembles a third order change by establishing where the change is coming from (government, social movement, or other), the role

[374] Hall, 291.
[375] Hall, 292.

ideas play (whether common conceptions have changed based on arguments made by Indigenous Peoples), and the effect Indigenous Peoples have on government goals of certainty with respect to Indigenous identity. Reflexive analysis functions by connecting the ideas in the larger stretch of history.

When conducting reflexive analysis, a review of the complete story allows for extraction of points connected to colonization, and application of the lens grounded in community understandings. This dissertation focused on three Indigenous collectives that impacted government control of identity through the use of institutions. Exploring relational connections between the cases illustrates the trend in Indigenous-led change and the common features that contribute to the change, such as the community-based assertions of identity.

The original research began with a comparison between the Algonquins of Ontario (AOO) and the Qalipu Mi'kmaq First Nation (QMFN). The AOO claim was for identity acknowledgement through land and the QMFN claim was for *Indian Act* band recognition without a land base. After the first survey of materials and the evolution of the Daniels case in the Canadian court system, it became possible to see that a larger policy and institutional shift was occurring as a result of identity assertions through community worldviews and engagement. In combination with these events, as a researcher exploring theory, it became clear to me that the current policy change and learning models did not align with changes to Indigenous policies in recent decades. Applying the three cases to a revelatory historical institutionalism study exposes that more than one case deviates from standard explanations but still uses many of the same elements in recombination. At the same time, even with the variation and different histories, there is an observable trend. Most importantly this examination focuses on the role of colonization and Indigenous-based engagements.

Conclusion

Indigenous policy change in Canada is different from other policy change processes. Indigenous policy change does not fit the standard models of change because the colonial setting creates the conditions for the engagement. However, aspects of some theories such as historic institutionalism can be useful. Because Indigenous People use government institutions to assert

change, the historical institutional model has been used in this research. Indigenous Peoples such as the Mi'kmaq People of Newfoundland, Métis, non-status First Nations Peoples have engaged colonial institutions to create constitutional space, to facilitate institutional change, to assert their identity, and to advance policy, rights and recognition. How institutions shape behaviour is observable in how Indigenous Peoples and communities chose to use colonial models to assert their positions. Overcoming colonialism motivates Indigenous People to pursue action, actions that ideally would restore communities and Peoples to an appropriate nation-to-nation positionality, honouring historical relationships. Institutions reflect historical experience, creating space for the path dependent behaviour often observable in policy change.

In addition to historic institutionalism, this dissertation also draws on Hall's theories of policymaking as policy learning and his ideas about the sources of policy change. Hall's framework is the most appropriate starting point for building an Indigenous model of institutional change. When policy changes that occurred in the first era of *the Indian Act* policy are examined, it is clear that these changes are incremental and are small shifts in established understandings, initiated by the government and not by Indigenous Peoples. These changes align with what Hall terms first and second order changes and illustrate government path dependency. Changes that occurred in Indigenous policy starting at the end of the 20th century are of a different nature. Unlike the earlier first and second order changes, these changes were precipitated by Indigenous Peoples and their use of colonial apparatus—namely, the courts—to create spaces within the agenda and institution. These changes were also much broader and can be considered paradigmatic shifts or to use Hall's terminology—third order change.

The source of paradigmatic Indigenous policy change differs from that of typical third order change in two key respects: First, the impetus for typical third order change is a groundswell of public support, often coming from social movements. Rather than springing from broad social or political pressure, paradigmatic, third order Indigenous policy change comes from Indigenous-led engagement and legal pressure. Change emanating from social movements typically involves value changes among the public at large, whereas change based on Indigenous initiatives emanates from years of discrimination and subjugation of a small part of the population. Second, third order change is often brought about by pressure from interest groups, organizations in

which membership is voluntary. Paradigmatic Indigenous policy change, in contrast, originates with rights-bearing collectives who put pressure on the government through the courts. Critical to understanding sources of the policy change are ideas. For Indigenous policy change, ideas of identity are informed by Indigenous worldview and in the context of colonial influences. Indigenous-led change is grounded in the worldviews of those individuals or groups engaging institutions, manifested in concepts of identity. For example, when Harry Daniels challenged the government in court, he asserted a community-held idea of identity based on Indigenous worldviews.

In establishing Indigenous policy, a key goal for the government is certainty about Indigenous identity. If it is certain about Indigenous identity, it can limit rights. In pursuing this goal, the government is aided by policies such as the *Indian Act, 1876,* which have been used to limit the government's responsibilities towards Indigenous Peoples. In generating third order change and expanding definitions of Indigeneity, Indigenous Peoples have unsettled the government's goal of being certain about who is and who is not Indigenous. Thus, although the government still maintains sovereignty over Indigenous Peoples, due to the actions of a few rights-bearing groups, the government can no longer entirely control the definitions of Indigenous identity.

The next three chapters explore the case studies illustrating the engagement history with colonial institutions (including pre-confederate institutions and the post-confederate federal government). Observations in the case studies demonstrate how Indigenous Peoples used colonial or exogenous processes, such as formal colonial-style diplomatic engagement and legal systems, to insert Indigenous perspective into non-Indigenous institutions. Through the assertions of community-based identity and using worldviews as ideas in policy, the impact of Indigenous engagement is uncovered.

CHAPTER 4 – THE MI'KMAQ PEOPLE OF KTAQMKUK (NEWFOUNDLAND) AND THE RECOGNITION OF NEW INDIAN ACT BANDS

Introduction[376]

Exploring the modern colonial history (1949–present) of the Mi'kmaq People of Newfoundland, illustrates Indigenous agency and engagement. The following discussion provides a historical overview of the engagement and illustrates how there were differences in the creation of the two bands, specifically around membership. In the creation of the second band, the Qalipu Mi'kmaq First Nation, identity was more self-determining in the beginning of the process compared to the creation of the first band, which addressed issues of self-determination later. When the federal government limited the second band's membership in a supplemental agreement because it argued that too many people had originally qualified, it clearly intended to control identity and certainty around membership numbers. As a means of influencing notions of identity, potential band members continued using judicial instruments through court challenges based on what qualifies for community-determined identity. The story of Newfoundland band creation demonstrates that identity can be an instrument in effecting change and that worldview (ideas) through identity assertions affect the institution of band creation.

The Maritime provinces of Canada are the homeland of the Mi'kmaq People, their traditional territory including Gaspé (Québec), New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and parts of Maine in the U.S.A.[377] According to oral testimony and archeological research, Mi'kmaq People inhabited the island of Newfoundland both before and after contact.[378] Mi'kmaq People belong to the Algonquian-Canadian language family of the Wabanaki Confederacy, an inter-tribal government that includes Abenaki, Maliseet, Passamaquoddy, and Penobscot Peoples.[379] After Newfoundland and Labrador joined

[376] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[377] Government of Canada, Indigenous and Northern Affairs Canada, *Aboriginal Peoples in the Atlantic Region* (September 9, 2013), https://www.aadnc-aandc.gc.ca/eng/1100100019246/1100100019247 (accessed March 28, 2019).
[378] Maura Hanrahan, "The Lasting Breach: The Omission of Aboriginal People from the Terms of Union between Newfoundland and Canada and Its Ongoing Impacts," *Royal Commission on Renewing and Strengthening Our Place in Canada. St. John's: Government of Newfoundland and Labrador* (2003), 219.
[379] Hanrahan, 219.

Confederation in 1949, Premier Joey Smallwood claimed there were no Indigenous Peoples in Newfoundland at Confederation, but historical sources undermine his claims.[380] Disenfranchised as Indigenous Peoples when Newfoundland joined Confederation, the Mi'kmaq People of Newfoundland have sought legal recognition as Indigenous Peoples with the right to status and the benefits and rights that come with that legal distinction. Through asserting their identity as a community, they have successfully created two government-approved bands—the Miawpukek First Nation and the Qalipu Mi'kmaq First Nation. These bands are recognized under the *Indian Act,* and, by extension, have access to Section 35 rights of the *Constitution Act, 1982*. Through the following story of the Newfoundland Mi'kmaq People's band creation, Indigenous-led institution and policy change is demonstrated as Indigenous collectives created a new institutional mechanism for 'Indian' band creation in Canada.

The Mi'kmaq People of Newfoundland worked arduously to establish recognition with governments that lacked political will, demonstrated throughout most of the 20th century by the absence of engagement by the federal and provincial governments.[381] Despite lack of government interest, the Mi'kmaq People of Newfoundland engaged post-Confederation institutions to establish two government-accepted bands based upon community-based identity. Through lobbying, court engagement, and then negotiation processes, Indigenous Peoples succeeded both in challenging the colonial policy measures that limit recognition and ultimately in having their identity recognized in Newfoundland. Because of ongoing challenges with membership complications, the registration process for the newest recognized community is not yet finalized. However, the changes made to community definitions of identity are part of a shift toward a more community-determined approach. Through this evolving process and challenges to membership criteria, the community challenged the government's goal of certainty and expanded how Indigenous collectives are recognized in Canada.

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[380] Trina Roache, "What's next for the Qalipu of Newfoundland and Labrador – Part 3," *APTN National News* (February 3, 2017), https://aptnnews.ca/2017/02/03/whats-next-for-the-qalipu-of-newfoundland-and-labrador-part-3/ (accessed July 8, 2019).

[381] Adrian Tanner, Canada, Privy Council Office issuing, and body Canada, Royal Commission on Aboriginal Peoples issuing, *Aboriginal Peoples and Governance in Newfoundland and Labrador: A Report for the Governance Project, Royal Commission on Aboriginal Peoples* (1994), 31.

History of the Mi'kmaq People

The Mi'kmaq People have occupied Newfoundland for hundreds of years. According to Maura Hanrahan, archeological evidence demonstrates pre-contact land-use, and there is a written record of the presence of the Mi'kmaq People in the region dating to the 16th century.[382] In her research on Mi'kmaq history, Hanrahan also noted that there is an oral history, confirmed by Elders who she interviewed; the oral history is also found in non-Indigenous research.[383] In Canada, the colonial legacy with the Mi'kmaq People began around the 16th century, starting with fishing by the Europeans and resulting in the extended colonial history in North America.[384] Not long afterwards, other parts of the continent witnessed colonization, but no other peoples in Canada have a longer history with the colonial institutional process than the East Coast Mi'kmaq People. For at least 300 years of this lengthy colonial relationship, the Mi'kmaq People had their identity defined through colonial documents and agreements.[385] With Newfoundland and Labrador's late entry into Confederation in 1949, the Mi'kmaq People in this province, along with the Inuit, were left without access to Indigenous rights and had to assert recognition of their identity. These assertions are a reaction to oppressive colonial policy and to the denial of identity-based rights.

Historians have considered several reasons for the omission of Indigenous Peoples when Newfoundland and Labrador joined Confederation. David Mackenzie succinctly summarizes these arguments: First, negotiators for the new government were simply concerned with, what was for them, more pressing issues. Second, the negotiators believed that the issue of jurisdiction would fade with time because of assimilation. Third, politicians like Smallwood argued that the common law rights of Newfoundland's Indigenous Peoples would be lost if they became covered by the *Indian Act*.[386] The *Indian Act,* a colonial control mechanism, regulates and controls First Nations Peoples recognized legally and registered with the federal government. At the time

[382] Hanrahan, 219-220.
[383] Hanrahan, 219-223
[384] Government of Newfoundland and Labrador, "The International Fishery of the 16th Century," Heritage https://www.heritage.nf.ca/articles/exploration/16th-century-fishery.php (accessed December 7, 2019).
[385] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Peace and Friendship Treaties (1725-1779)," https://www.rcaanc-cirnac.gc.ca/eng/1360937048903/1544619681681 (accessed June 22, 2019).
[386] David Mackenzie, "The Indian Act and the Aboriginal Peoples of Newfoundland at the Time of Confederation," *Newfoundland and Labrador Studies* 25, no. 2 (2010), 162.

Newfoundland and Labrador joined Confederation (before 1960 and general enfranchisement), the *Indian Act* positioned registered First Nations Peoples as wards of the state. Smallwood was ostensibly concerned that in becoming wards of the states, Indigenous Peoples in Newfoundland would lose other rights. Regardless of how it happened, Mi'kmaq, along with the Inuit, were left out of the terms of the union between Newfoundland and Canada and afterwards had to create for themselves a space as rights-bearing peoples.

The Inuit in Labrador received health, welfare and education services in 1954, but it was not until 1973, that the Mi'kmaq eventually received provincial recognition and some services.[387] This recognition (combined with political mobilization in the rest of Canada in the 1970s) created the platform for Indigenous advocacy groups to advance Mi'kmaq identity-recognition in Newfoundland and support the peoples with historic colonial challenges.[388] With this support, these people engaged colonial institutions to assert their presence based on the community's worldview of identity.[389]

The Rise of Indigenous Organizations in Canada and Newfoundland

In the second half of the 20th century, motivated by government policy and grounded in the colonial experience, Indigenous Peoples in Newfoundland and across Canada began to mobilize and create political lobby organizations. The mobilization began as a reaction to the release of the 1969 *White Paper*, which advocated dismantling the *Indian Act.* The publication sparked the formation of the National Indian Brotherhood in 1970 and the Native Association of Newfoundland and Labrador (NANL) in 1973.[390] Once formed, these political organizations created systems to support Indigenous Peoples in learning to engage federal institutions. Adrian Tanner explains the significance of the White Paper and its aftermath for the Mi'kmaq:

> For much of this century, Mi'kmaq ancestry was something of a social liability. In the early 1970s, with new attention being paid to non-status Indians in Canada in the wake of the 1969 White Paper, the Newfoundland Mi'kmaq underwent a remarkable political and cultural renaissance. They took an active role in the formation of the first Aboriginal political association in the

[387] Tanner, 31.
[388] Mackenzie, 161.
[389] Mackenzie, 161.
[390] National Indian Brotherhood – Assembly of First Nations, *Consolidated Financial Statements of the National Indian Brotherhood* (March 31, 2015), https://www.afn.ca/uploads/files/finance/financial_statements-2015.pdf, 7. Tanner, 34.

> province, elders were encouraged to pass on their handicraft skills again, and renewed interest was shown in Mi'kmaq language, spirituality and ceremony.[391]

Although Indigenous Peoples have a long-standing history of lobbying for their needs as community collectives and fighting against unjust policies and procedures, the White Paper provided the impetus for the organization of national advocacy and resistance to combat policy change created without consultation.

More than a response to the *White Paper*, the formation of advocacy groups was also a reaction to the Supreme Court Calder decision. In this landmark decision, Canadian law recognized for the first time that 'Aboriginal title' to land predated the colonization of what is now Canada. It represented a shift towards Indigenous rights in the courts. The Calder decision also established a legal acknowledgment that Indigenous occupation of land provides rights persisting beyond European settlement.[392] In 1974, as a result of the Calder decision, the Office of Native Claims was established to review Specific and Comprehensive Land Claims.[393] While Calder was before the courts on the West Coast, the Indigenous Peoples of James Bay pushed for a negotiated settlement in Northern Quebec in response to hydroelectric projects.[394] The James Bay Peoples were successful in settling a litigated agreement that became a template for comprehensive claims settlements in Canada.[395] As voices and lobby groups for Indigenous Peoples, advocates reacted to identity-based policy, and in the case of the Native Association of Newfoundland and Labrador (see p. 90), conducted land claims research.[396] After the Calder decision, support systems such as lobby groups, as well as new judicial instruments, became essential tools for advancing Indigenous interests in the modern era.

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[391] Tanner, 43.
[392] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act," *History* (December 5, 2011), http://www.sct-trp.ca/hist/hist_e.htm (accessed November 11, 2019).
[393] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act."
[394] JBNQA, 1975 – validated by *James Bay and Northern Quebec Native Claims Settlement Act S.C. 1976-77, c. 32.*
[395] JBNQA, 1975 – validated by *James Bay and Northern Quebec Native Claims Settlement Act S.C. 1976-77, c. 32.*
[396] Tanner, 35.

The groups that emerged in response to government policies were rights-based lobby groups supporting Indigenous Peoples, but they were not social movements, which are characterized by rallies and public demonstrations.[397] The groups supporting Indigenous Peoples in Canada neither rallied nor demonstrated; their purpose was to assist court actions and negotiations.[398] This was not, however, the case in the U.S.A, where political mobilization through rallies and demonstrations was commonplace in the 1970s. As Rima Wilkes argues, "Indigenous political organizations in Canada were not social movement organizations in the way that the [American Indian Movement] AIM was. That is, they were set up to represent various Aboriginal groups within the Canadian political system but were not necessarily meant to challenge that system."[399] The same applies to the Mi'kmaq in Newfoundland: never part of a social movement, they secured support and assistance through politically organized rights-based groups.

One of the key advocacy groups for Indigenous Peoples in Newfoundland and Labrador was the Native Association of Newfoundland and Labrador (NANL), which began as a pan-Indigenous collective. Initially a part of NANL, the Inuit People withdrew and joined an affiliate of the Inuit Tapirisat of Canada, the Labrador Inuit Association.[400] In 1976, the Innu also broke away, leaving the Mi'kmaq People and leading to a name change to the Federation of Newfoundland Indians (FNI).[401] When the Innu broke away, they started their own organization to reflect their desire to return to a traditional lifestyle for survival, in which trapping was critical. After abandoning trapping some years earlier, the Innu had suffered financially. It was the Innu's economic circumstances in part that created the political will to fight for their recognition.[402]

There was a general sense in Newfoundland and Labrador that Indigenous culture existed but only in Labrador among the Innu and Inuit. According to a report submitted to the Royal Commission on Aboriginal Peoples (RCAP) from the Privy Council Office, "In Labrador, there is general public acknowledgement of the existence of the aboriginal people and their distinctive

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[397] Rima Wilkes, *The Protest Actions of Indigenous Peoples a Canadian-U.S. Comparison of Social Movement Emergence* vol. 50, (2006), 513.
[398] Wilkes, 514, 518.
[399] Wilkes, 514, 518.
[400] Tanner, 34.
[401] Tanner, 35.
[402] Government of Newfoundland, Heritage Newfoundland, *Innu History,* (Adrian Tanner 1999), http://www.heritage.nf.ca/articles/aboriginal/innu-history.php (accessed April 3, 2019).

cultures, but on the island there has been a tendency, both popularly and officially, to overlook Mi'kmaq population and their culture."[403] Thus, the Indigenous Peoples on the island had less recognition than the Inuit and Innu on the mainland, who had been the first to receive funding for services in the 1950s and to document ancestry for land claim purposes.[404] While settler society acknowledged the people still living a cultural life in Labrador, they did not offer this courtesy to the Mi'kmaq living on the island. [405] As a result of this lack of acknowledgement, the Mi'kmaq People on the island experienced ongoing disruption to both their culture and traditional economies through colonial experience and had to work hard to sustain their culture.

The Mi'kmaq Peoples' work involved not only sustaining the Mi'kmaq culture and identity but also learning how to communicate this identity to others. As Mi'kmaq academic Kelly Ann Butler points out in *The Country,* a documentary about the history of the Qalipu Mi'kmaq First Nation Peoples pursuing federal recognition as registered First Nations, knowing one's history and culture is essential in embracing identity.[406] As the documentary makes explicit, although the Mi'kmaq People knew who they were, they needed an organized way to communicate their collective identity to the federal government. Because Indigenous nations have culture-specific issues when negotiating with the federal government and colonial institutions, resistance to a pan-Indian identity will strongly influence outcomes.

In the mid 20th century the federal government published several evaluations and studies, such as the 1966 *Hawthorn Report*, that blamed Indigenous Peoples for their lack of civilization.[407] In response to the political climate, organizations previously mentioned such as the NANL (later the FNI) began to develop with the goal of supporting Indigenous communities intending to assert identity and community. FNI was in operation from 1976 to 1988, when the government announced it would no longer fund its research or register its members under the *Indian Act*. The FNI reacted with a court action to have the members declare status under the *Indian Act* in

[403] Tanner, 38.
[404] Tanner, 38.
[405] Mackenzie, 1.
[406] Kelly Anne Butler, *The Country,* writer: Kelly Anne Butler, directors: Phyllis Ellis, James Yates, (2018). Referring to the group broadly as there are currently processes engaged concerning appealing membership.
[407] H. B. Hawthorn, *A survey of the contemporary Indians of Canada: a report on economic, political, educational needs and policies* (Ottawa: Indian Affairs Branch, 1966).

1989.[408] In 1995, the government restored funding to the FNI to assess the institutional capacity of bands.[409] The government was compelled to create an out-of-court exploratory table (non-binding discussion group) in 2002 and commence negotiations with FNI in 2003. These actions marked a surge in court decisions favouring Indigenous Peoples.[410] The exploratory table with the Newfoundland Mi'kmaq People through FNI began shortly after the Mi'kmaq's New Brunswick victory in the Donald Marshall case.[411] According to Indigenous and Northern Affairs Canada (INAC), this exploratory table with FNI led to the 2008 *Agreement to Recognize the Qalipu Mi'kmaq First Nation*.[412] This agreement included an enrollment process, albeit with some Mi'kmaq input, which engaged the Mi'kmaq People who were resourced and supported by FNI.

In the early 2000s, the Newfoundland and Labrador government took a new approach to understanding Indigenous issues by establishing the 2003 Royal Commission in Newfoundland, which studied the situation of the province, including the Indigenous populations. *The Royal Commission on Renewing and Strengthening Our Place in Canada: The Lasting Breach: The Omission of Aboriginal People from the Terms of Union Between Newfoundland and Canada and its Ongoing Impacts* was released in 2003. The Royal Commission report concluded there were 4,500 Mi'kmaq People in 12 communities.[413] Population identification is essential as a substantial dispute over membership ensues when the government becomes dissatisfied with the number of potentially qualified applicants.[414] Just a few years previously, the *Royal Commission on Aboriginal Peoples* released its report in 1996, recommending that, along with the need to recognize the Labrador Métis, the people belonging to FNI deserved recognition as legitimate

[408] Eleanor Alwyn, *Traditions in a Colonized World: Two Realities of a First Nation* (University of Toronto, 2004), 268.
[409] Alwyn, 269.
[410] Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples,* issue 7, evidence (June 3, 2014), https://sencanada.ca/en/Content/Sen/Committee/412/APPA/07ev-51482-e (accessed July 8, 2019).
[411] R. *v.* Marshall, [1999] 3 S.C.R. 456.
[412] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process*.
[413] Hanrahan, 222.
[414] Tristan Hopper, "Ottawa rushes to tighten up entry rules before 70,000 Canadians are declared Mi'kmaq," *National Post – Canada: Politics* (May 6, 2013) http://news.nationalpost.com/news/canada/swamped-with-a-st-johns-worth-of-newfoundland-mikmaq-applicants-feds-look-to-tighten-up-entry-rules (accessed April 18, 2016).

bands.[415] Today, the Labrador Métis are known as the Nunatukavut Community Council, as they officially changed their name in 2010.[416]

The Newfoundland Royal Commission report detailed the consequences for the people when they joined Confederation in 1949.[417] Several people interviewed recalled hearing Newfoundland premier Joey Smallwood, saying at the time, "There were no Indians on the Island."[418] This incorrect understanding informed the omission of Indigenous Peoples from the term of the union.[419] The Privy Council Office for the Royal Commission on Aboriginal Peoples reported the following:

> The 1948 Terms of Union of Newfoundland with Canada contain no reference to aboriginal people. This lack of reference was even though the Proceedings of the National Convention include a series of statements by various delegates concerning the implications of Confederation for the assumption of federal responsibilities towards aboriginal peoples.[420]

The Royal Commission on Aboriginal Peoples helped the government of Newfoundland and Labrador understand the Indigenous populations in its province, which led to the inclusion of Mi'kmaq People in the provincial commission.

According to Sally Weaver, a policy paradigm shift began in the late 20th century that favoured Indigenous Canadians.[421] As a result of Indigenous Peoples engaging courts and negotiations and creating change through judicial victories the shift was beginning, but not because of reasons found in Weaver's work (a shift in government thinking).[422] The potential of Weaver's theory of a paradigm shift is supported by Michael Howlett, with the caveat that there were only a few

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[415] Hanrahan, 268.
[416] CBC News, "Labrador's Métis Nation adopts new name," *Newfoundland and Labrador CBC* (April 13, 2010), https://www.cbc.ca/news/canada/newfoundland-labrador/labrador-s-m%C3%A9tis-nation-adopts-new-name-1.927252 (accessed April 18, 2016). Nunatukavut, *Who we are,* http://www.nunatukavut.ca/home/home.htm (accessed March 3, 2019).
[417] Newfoundland and Labrador, *Royal Commission on Renewing and Strengthening Our Place in Canada* (Office of the Queen's Printer, St. John's, Newfoundland, 2003).
[418] Roache.
[419] Cindy Styles, "Learning Mi'kmaq Doesn't Make Me An Indian," *The Globe and Mail* (June 1, 2016) https://beta.theglobeandmail.com/opinion/learning-mikmaq-doesnt-make-me-an-indian/article30229643/?ref=http://www.theglobeandmail.com& (accessed April 1, 2019).
Mackenzie, 162.
[420] Tanner, 26.
[421] Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981).
[422] Weaver, 101.

court cases to examine at the time. [423] In the decade before the patriation of the *Constitution Act, 1882* and since Weaver's 1990 study, Indigenous Peoples have increased their use of colonial institutions, including court processes and negotiation mechanisms.[424] The Mi'kmaq People of Newfoundland used these institutional frameworks to assert their identity, culture, and rights.

Miawpukek First Nation's Engagement

In the first years after Newfoundland's entrance into Confederation, other than a small financial arrangement for Inuit services in Labrador, little happened for the Indigenous Peoples who were not recognized when the province joined Confederation, particularly, the Mi'kmaq People. In 1977, the Naskapi-Montagnais Innu Association and the Labrador Inuit Association put forward claims, which were accepted in 1978.[425] Once political mobilization started, consideration began for other claimants in the area, including the Miawpukek First Nation, which was instrumental in the creation of NANL in 1973 as a means to formally engage the federal government.[426] The Miawpukek community became the first federally recognized First Nation community in Newfoundland.[427] According to Eleanor Alwyn, community organizer Gerry Wetzel and Mi'kmaq community member Marilyn John contacted the Native Council of Canada (NCC) for assistance in developing an organization.[428] When NANL was reformed under the Federation of Newfoundland Indians (FNI), the organization consisted of Miawpukek and 10 other Mi'kmaq communities.[429] Between 1976 and 1981, a series of studies and discussions took place, resulting in 1979 with funding for FNI, and later in 1981 with the financial arrangement with Miawpukek First Nation.[430] This period of organization prepared the peoples for engaging institutional processes to assert their identity and associated right as Indigenous Peoples.

[423] Michael Howlett, "Policy Paradigms and Policy Change: Lessons from the Old and New Canadian Policies Towards Aboriginal Peoples," *Policy Studies Journal* 22, no. 4 (1994), 643.
[424] Howlett, 638-639.
[425] Alwyn, 268.
[426] Alwyn, 146.
[427] Government of Newfoundland, Heritage Newfoundland, *Mi'kmaq Organizations and Land Claims,* http://www.heritage.nf.ca/articles/aboriginal/mikmaq-land-claims.php (accessed December 19, 2017).
[428] Alwyn, 146.
[429] Alwyn, 146.
[430] Alwyn, 268.

Once Mi'kmaq identity was established in Newfoundland, seen in services and funding agreements, discussions for entering the *Indian Act* began shortly thereafter. According to Adrian Tanner, "In the years since 1972, a growing variety of Newfoundland government departments and agencies have become involved in administering funds earmarked for aboriginal peoples. Also, in this period, the aboriginal organizations have become increasingly active."[431] The *Royal Commission on Aboriginal Peoples, 1996* (RCAP) acknowledged both the government support and political organization happening at the same time.[432] The increased government involvement and Indigenous organizational activity are not mutually exclusive; the activity by Indigenous organizations was the direct result of policies advanced at the national level by the colonial institutions.

When they organized politically, the Indigenous Peoples of Newfoundland were seeking identity and rights that flow from *Indian Act* recognition. Their work over the years was part of a learning process for establishing a federally recognized First Nations community registered under the *Indian Act*. Miawpukek's federal recognition process began in 1981 with a financial agreement; however, previous to that, two years of negotiations had gone nowhere.[433] Community member Marilyn John was active in the struggle for identity and rights. Not only did she conduct much research, she also approached national and international organizations, achieving NGO status at the United Nations. While she was conducting her research, the federal government attempted to intervene, but John kept all copies of her research, accumulating all necessary documents to launch court action.[434] In 1983, following many years of negotiation, lobbying and legal action, the Miawpukek community split with FNI to negotiate their community settlement with the assistance of the Native Council of Canada (NCC).[435] According to Alwyn, during the negotiations, the community did not believe it was fairly represented and indicated that it could prove sufficient Indigenous ancestry that would be accepted by the government.[436] However, problems arose with the negotiation of membership qualifications because the band handled membership and residency differently from other Indian Act-registered First Nations.

[431] Tanner, 37.
[432] Hanrahan, 247-249
[433] Alwyn, 147.
[434] Alwyn, 148.
[435] Tanner, 35. Alwyn, 147.
[436] Alwyn, 147.

These membership and residency issues were centered on differences between regulated band registration through the *Indian Act* and the band membership of Miawpukek. In the Miawpukek First Nations membership, only people who resided in the community were entitled to membership; those who lived close by and direct relatives who relocated for economic or education purposes were excluded.[437] Eleanor Alwyn interviewed Marilyn John about membership and the development of community recognition. According to John, the federal government resisted providing increased support to the Miawpukek and other Indigenous groups while the 1969 White Paper was on the table.

> Then there was a suggestion to include everyone in Newfoundland through genealogy research …. Indian Affairs didn't want a big list, and they cut out people from St. Alban's, Glenwood, Badger, Grand Falls/ Windsor and St. George's despite much documented evidence that there was continual contact between the Aboriginal people of these areas.[438]

Under Order-in-Council P.C. on June 28, 1984, Miawpukek community members had to establish residency and band registration between 1984 and 1986 to be considered members of the band.[439] Eventually, the membership required a re-evaluation as requirements proved to be too arbitrary. Through an additional Order-in-Council P.C. 1989-2006, children, siblings, and children of siblings were allowed band membership.[440] The problem with membership criteria was that they did "not [respect] the traditional oral history of the band."[441] The residency clause is rife with issues, compounding control that exists in the *Indian Act* legislation that is dependent on racialized identity-legislation. When Indigenous Peoples must cater to definitions of identity and connections that are not self-determining but put in place by a colonial apparatus and regulated by legislation, membership becomes problematic.

Despite membership issues, the Mi'kmaq community persevered, politically mobilizing using government instruments such as administrative processes to achieve federal recognition. The community organized in a way that colonial institutions understood, using negotiating tools and lobby groups. This band incrementally developed under the *Indian Act*, perhaps with what some

[437] Alwyn, 149.
[438] Alwyn, 149.
[439] Alwyn, 153.
[440] Alwyn, 153.
[441] Alwyn, 154.

might see as punctuations (changes to established understandings), but the actions are natural progressions following court processes and negotiations. The band's incremental development can be seen in the actions it took on reserve status and land claims following federal recognition. After band creation, the Miawpukek community converted to reserve status in 1987.[442] The previous year it had submitted a land claim, which the government rejected (while indicating it was willing to review the claim if new documentation surfaced). But without funding, the Miawpukek community could not continue its research. It was not until 1994 that it finally received more funding to research the land claim. In 1996, the community resubmitted its land claim and was provided with additional funding as some areas required more research.[443] To date, however, the land claim has yet to be settled.[444] The land claim is an example of the work that the Miawpukek community continues to engage in as it incrementally develops under the *Indian Act*.

Qalipu Mi'kmaq First Nation's Engagement

Acknowledging there were Indigenous Peoples entitled to be registered with the federal government as status First Nations through community identity was an advancement in Indigenous policy. Although a negotiated process, it was still problematic because, as we have seen, the government interfered in determining criteria for membership. When the Miawpukek First Nation broke away from the FNI, the FNI continued advocating on behalf of other communities.[445] This ongoing work by FNI led to the start of a new band in Newfoundland: the Qalipu Mi'kmaq First Nation, the most recent band in Newfoundland to be registered under the umbrella of the *Indian Act*.[446] The community asserted its identity, entering constitutional space that entitled people to rights protected under section 35 of the *Constitution Act, 1982*.[447] Over a lengthy period, the Mi'kmaq People engaged the federal government, negotiating an agreement

[442] Miawpukek Mi'kamaway Mawi'omi (Miawpukek First Nation), *About Miawpukek,*
[443] Alwyn, 268-270.
[444] Government of Newfoundland, Heritage Newfoundland, *Mi'kmaq Organizations and Land Claims.*
[445] Tanner, 35.
[446] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 75.
[447] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process* (March 28, 2017), https://www.aadnc-aandc.gc.ca/eng/1372946085822/1372946126667 (accessed December 19, 2017). Government of Canada, Indigenous and Northern Affairs Canada, *Agreement for the Recognition of the Qalipu Mi'kmaq Band,* Government of Canada (November 30, 2007). (2011 Agreement in Principal). Government of Canada, Indigenous and Northern Affairs Canada, *Supplemental Agreement,* Government of Canada (2013). (Including Annex A to Supplement Agreement).

that became problematic once the government interfered with community-defined membership. Evidence of changes to membership criteria persuaded the potential members of the Qalipu Mi'kmaq First Nation to challenge the government in court.[448]

It is not unusual for the government to indicate its intention to negotiate once an Indigenous group initiates a judicial court action. Judicial pressure can develop political will if a government fears it will lose in court.[449] As scholars like Christopher Alcantara have argued, the government fears losing its certainty, and loss of certainty leads to loss of control.[450] Christa Scholtz concurs that it is concerns about certainty that determine how the government acts when Indigenous groups initiate cases against it.[451] The government may negotiate after a challenge and also after an Indigenous group receives a judicial victory.[452] In the case of the Qalipu Mi'kmaq First Nation, the government initiated exploratory talks for the creation of the FNI between 2004 and 2006 following a court action initiated by the Indigenous group.[453] Subsequently, an Agreement-in-Principle (AIP) was signed outlining the band creation and the membership criteria. As with the Miawpukek First Nation, the Qalipu enrollment process was problematic, and a future supplement agreement further complicated it. On November 30, 2007, it was announced that an Agreement-in-Principle was in place.[454] According to the federal government, "In 2008, the Government of Canada and the [FNI] … signed the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* to establish a landless band for Mi'kmaq peoples of Newfoundland."[455] The negotiations resulted in the creation of the second Mi'kmaq First Nations Band in Newfoundland.

[448] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141. Wells v. Canada, 2018 FC 483. Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484. Doucette v. FNI and Canada, 2018 FC 497. Howse v Attorney General of Canada, 2015 FC 1063.
[449] Christa Scholtz, "The Influence of Judicial Uncertainty on Executive Support for Negotiation in Canadian Land Claims Policy," *Can J Pol Sci* 42, no. 2. (2009), 425.
[450] Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy / Analyse de Politiques* 35, no. 3 (2009), 326.
[451] Scholtz, 438.
[452] Manitoba Métis Federation Inc. v. Canada (Attorney General) 2013 SCC 14, [2013] 1 S.C.R. 623.
[453] Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples.*
[454] Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples.*
[455] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?* Indian Status (May 21, 2019), https://www.aadnc-aandc.gc.ca/eng/1319805325971/1319805372507 (accessed June 1, 2019).

Establishing an Indigenous community based on identity recognized under the *Indian Act* is a long process. As seen with the Miawpukek, so too is negotiating and establishing the specifics of membership. By November 2009, there were 27,000 applications for "founding members" of the Qalipu Mi'kmaq First Nation (with 23,877 eligible).[456] By the deadline (November 30, 2012), about 104,000 applications had been received.[457] Because of the high number of applications and the likelihood that many would qualify under the agreement, the federal government returned to membership discussions. The announcement of a supplemental agreement regarding membership by the federal government and the FNI came on July 4, 2013 in an attempt to resolve issues from the previous 2008 Agreement.[458] What began as a self-determining membership idea became restricted when the original criteria created a membership that was too large for the government to accept.[459]

Under the original band membership criteria established in 2008, identity-based membership was less divisive than the amendments implemented in 2013. Initially, the criteria were as follows:

- Is of Canadian Indian ancestry
- Is a member of a Newfoundland Pre-Confederation Mi'kmaq Community (or is descendant of such person)
- Was not registered on the Indian Register on the date of the Recognition Order (September 22, 2011)
- If a person self-identifies "as a Member of the Mi'kmaq Group of Indians of Newfoundland on the date of the Recognition Order, and
- was accepted by the Mi'kmaq Group of Indians of Newfoundland as a member of the Mi'kmaq Group of Indians of Newfoundland on the date of the Recognition Order.[460]

[456] Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples.*
[457] Government of Canada, Indigenous and Northern Affairs, *History of the Qalipu Mi'kmaq First Nation enrolment process* (March 23, 2017), https://www.aadnc-aandc.gc.ca/eng/1372946085822/1372946126667 (accessed July 8, 2019).
[458] Government of Canada, Indigenous and Northern Affairs, *History of the Qalipu Mi'kmaq First Nation enrolment process.*
[459] House of Commons Hansard #231 of the 41st Parliament, 1st Session. Greg Rickford (March 28, 2013), https://openparliament.ca/debates/2013/3/28/greg-rickford-2/ (accessed September 28, 2019.
[460] Government of Canada," Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*

In the supplemental agreement, the original membership criteria were changed to a points system. To meet group acceptance, every applicant was required to provide objective evidence to establish a current and substantial connection to Mi'kmaq Peoples of Newfoundland.[461] Establishing this connection was particularly difficult for applicants not residing in or around one of the locations in which the Mi'kmaq groups lived.[462] Despite living away from the community, these applicants had to show maintenance of sustained and active involvement in the community.[463] On its website the federal government explains its requirements: "The connection had to go beyond close contacts with family members and include participation in the cultural and social life of the Newfoundland communities forming the Mi'kmaq Group of Indians of Newfoundland."[464] Understandings of Indigenous relationships and community were based on *Indian Act* concepts of kinship ties/blood relations, which were, in turn, largely based on Western concepts of the nuclear family. Most Indigenous concepts of kinship are often more expansive than blood relations, such as customary adoption.[465] Under section 6 of the *Indian Act*, on band membership, it is explicit that blood connections allow people to qualify for Indian status.[466] However, the supplemental agreement had stricter qualifications for membership than Section 6.

Unsurprisingly, this complete overhaul of the Qalipu membership caused discord between the community and federal government.[467] As recorded in the documentary *The Country*, the new membership criteria divided families. In the documentary, a woman is shown receiving an acceptance letter, while her brother is refused membership because he had insufficient points to satisfy membership.[468] Previous applications under the original membership process were reviewed under new criteria through a new appeal process. However, 3,000 of these applications

[461] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*
[462] Government of Canada, Indigenous and Northern Affairs, *Supplemental Agreement* (July 4, 2013), https://www.aadnc-aandc.gc.ca/eng/1372160117898/1372160248148. Accessed July 8, 2019 (accessed July 23, 2019)
[463] Government of Canada, Indigenous and Northern Affairs, *Supplemental Agreement.*
[464] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*
[465] Brenda Macdougall, "Wahkootowin: Family and Cultural Identity in Northwestern Saskatchewan Metis Communities," *Canadian Historical Review* 87, no. 3 (2006), 443.
[466] Indian Act, RSC 1985, c I-5.
[467] Government of Canada, Indigenous and Northern Affairs, *Supplemental Agreement.*
[468] Butler.

were rejected for deficiencies and other reasons in the new process. Additionally, the applicants rejected under the first membership process were not entitled to use the new appeal process.[469] The membership process, as well as the government's control of identity, demonstrates the power dynamics between the Indigenous group and the federal government, revealing that the Indigenous negotiating position was subservient to that of the colonial institution.

Legal Issues in Qalipu Band Creation

As discussed, potential Mi'kmaq band members reacted strongly to the *2013 Supplement Agreement*. Just prior to the signing of the agreement, the leadership of the Qalipu Mi'kmaq First Nation and the FNI signed an indemnity agreement, citing that Canada would handle the costs associated with "the execution and/or implementation of the Supplemental Agreement," including court costs.[470] When the Canadian Broadcast Corporation (CBC) reported on this clause and released the document, there were no less than five cases before the courts on the new identity criteria and the enrollment process.[471] After the supplemental agreement was negotiated, more individuals brought legal challenges, arguing that the initial membership requirements were more self-determining than those in the supplemental agreement, which, furthermore, expropriated people's right to appeal and fair process. In these legal challenges, people used the court to address concepts of self-identification.

As mentioned earlier, under the supplemental agreement, the government and the FNI leadership established new timelines and new evidence criteria for membership. The enrolment committee had until August 31, 2015, to review applications, and March 31, 2016, was the new deadline for submitting an appeal if one was not satisfied with the enrolment committee's decision.[472] On June 19, 2014, *the Qalipu First Nations Act* received Royal Assent, solidifying membership criteria under the supplemental agreement.[473] Following the assent of the Act, enrolment deadlines were extended once again due to the large number of applications to reassess. The

[469] Wells v. Canada, 2018 FC 483, para 124.
[470] Nic Meloney, "Canada Signed Private Agreement with Qalipu Mi'kmaq Days before Contentious Changes to Application Process | CBC News," CBC News (April 25, 2018), https://www.cbc.ca/news/indigenous/qalipu-mikmaq-enrolment-indemnity-agreement-1.4631899 (accessed July 2019).
[471] Meloney.
[472] Qalipu First Nation, *Enrolment.*
[473] Government of Canada, Indigenous and Northern Affairs Canada, *Supplemental Agreement,* Government of Canada. 2013. (Including Annex A to Supplement Agreement).

initial application review deadline was August 2015, but the deadline was moved to June 30, 2016 and the appeal deadline to January 31, 2017.[474] At the same time deadlines were extended, the review committee "expanded from four to eight members" in the review process.[475]

More significant than the extended timelines were changes to self-determination for membership. Under the new agreement, all members, except those initially denied membership, would be reassessed.[476] Those that could or would appeal in the original process, no longer had access to appeal mechanisms. During this period of band enrolment, government policies and actions reflected conversations between the government and FNI leadership. These same policies and actions that informed the supplement agreement revealed a less self-determining path containing inequalities, such as lack of access to appeals processes. It is for these reasons that potential Qalipu members and those losing founding member status questioned developments in membership equality, advancing arguments against new methods of asserting identity and problems with equality within the appeals process.

While there were cases before the courts, the enrolment committee followed the current policies in place, issuing decision letters on January 31, 2017. Although some people lost founding member status, they still qualified to be registered Indians under the *Indian Act* as a child of a founding member.[477] The Enrolment Committee, equally represented by the FNI and the Government of Canada, completed the review of all applications in January 2017, leading to the appeals process that began on February 1, 2017.[478] Appeals are being reviewed by the independent Chief Appeal Master, Geoffrey Brown, who was jointly selected by the government and the FNI. A legal firm was also contracted by the FNI to provide additional Appeal Masters who will work under the oversight of the Chief Appeal Master.[479]

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[474] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process*.
[475] Qalipu First Nation, *Enrolment.*
[476] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*
[477] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process*.
[478] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process*.
[479] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*

Before the completion of the appeals process under the new agreement, there were 18,044 approved founding members (13,365 of the applications of original founding members remained on the list).[480] There were 10,512 applicants removed from the list before the new appeals process. While 4,679 applications qualified as founding members under the supplementary agreement, they did not qualify as founding members under the previous agreement.[481] The applicants now had until April 13, 2017 to submit an appeal as the (enrolment) committee issued letters on the date of the appeal deadline.[482] In the final appeal stages, court decisions began impacting the enrolment processes, and accommodations from the decisions started affecting membership policies.

Cases heard by the Federal Court after the 2013 supplemental agreement began expanding the newly limiting membership criteria through requests for judicial reviews. The majority of cases brought against the federal government were judicial reviews and appeals to turn judicial reviews into class actions. A judicial review is a federal court process and can be brought by those affected "by an order of a federal decision-maker."[483] Two of the first cases heard were *Foster v. Attorney General of Canada and the Federation of Newfoundland Indians 2015 FC 1065* and *Howse v. Attorney General of Canada and the Federation of Newfoundland Indians 2015 FC 1063*. The announcements for both came on September 10, 2015, and both parties were represented by Gowling WLG.[484] In Foster's case, he was refused initial enrolment for failure to provide a birth certificate.[485] By being denied in the first enrolment process, he was not entitled to appeal membership.[486] In Howse's case, the individual failed to provide a signature in one of two required places on the application, was thus denied membership, and consequently the opportunity to appeal because of the implementation of the supplement agreement.[487] In both

[480] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*
[481] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?*
[482] Government of Canada, Indigenous and Northern Affairs Canada, *History of the Qalipu Mi'kmaq First Nation Enrollment Process*.
[483] Gowling WLG, *Federal Court Declares Rejection of Membership Applications for Canada's Newest First Nation Unfair* (September 10, 2015), https://gowlingwlg.com/en/insights-resources/client-work/2015/federal-court-declares-rejection-of-membership-app/ (accessed March 17, 2019).
[484] Gowling WLG.
[485] Gowling WLG.
[486] Gowling WLG.
[487] Gowling WLG.

instances, these individuals missed an opportunity to appeal their original decision because the supplement agreement indicated that appeals from initial refusal letters would not be reassessed.

The ruling in these cases indicated that the change in membership process was both "procedurally unfair and unreasonable."[488] When reviewing the Howse case, evidence indicates a questioning of jurisdiction for the federal judiciary, finding the courts had jurisdiction to conduct a review.[489] Concerning "procedural fairness," the presiding judge found there was none.[490] The plaintiffs had raised a breach of fiduciary duty; however, the judge found no breach. The judge found that the committee's decision was unreasonable, just as the judicial procedure was unfair.[491] This legal victory was significant for those disenfranchised from appeal processes due to the introduction of the supplemental agreement. This institutional engagement based on community-based challenges in the courts expanded the definition of identity, and these cases raised questions about settled judicial jurisdiction and other matters in membership challenges.

Four other cases were launched on the Qalipu enrolment process, all coming before the courts at the same time. The first case to receive a ruling was *Douglas Doucette v. the Federation of Newfoundland Indians, the Qalipu Mi'kmaq First Nation, and Her Majesty the Queen in Right of Canada (Court file no: T-407-17)*.[492] In the Doucette case, the applicant was seeking a court decision to strike down both the 2008 agreement and the 2013 supplement agreement.[493] The dismissal of the case on November 3, 2017 led to an appeal submitted on November 13, 2017.[494] In the appeal, Doucette sought an injunction to prevent the removal from the membership list of 10,512 founding members, but the courts denied the injunction.[495] Under the first agreement,

[488] Gowling WLG.
[489] Howse v Attorney General of Canada, 2015 FC 1063, para 21.
[490] Howse v Attorney General of Canada, 2015 FC 1063, para 40.
[491] Howse v Attorney General of Canada, 2015 FC 1063, para 36.
[492] Doucette v. FNI and Canada, 2018 FC 497.
[493] Gary Kean, "Various legal actions against the Qalipu enrolment process at different stages," *The Western Star* (December 13, 2017), https://www.thewesternstar.com/news/local/various-legal-actions-against-qalipu-enrolment-process-at-different-stages-170142/ (accessed March 14, 2019).
[494] Kean.
[495] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 105.

self-identification criteria were more self-determining and more reflective of membership criteria used in the Métis Powley hunting case discussed in Chapter 2.[496]

A comparable case to Doucette was *Brake v. Attorney General of Canada and the Federation of Newfoundland Indians*. Gerald Brake's case sought to convert a judicial review to class action.[497] However, on appeal to the federal court, Judge Brown dismissed the case. In the "Order and Reasons" for the dismissal, the judge pointed to three other cases in the courts concurrently, *David Robert Wells v. Canada, Sandra Frances Wells v. Canada and FNI*, (the two plaintiffs are not related), and the above mentioned Douglas Doucette case.[498] When citing these cases, the judge observed that the Wells case was nearing an agreement and becoming a test case based on judicial review.[499] The Doucette and Brake cases were both dismissed.[500] However, they are important to acknowledge as they are cited in other cases and relate to the accumulation of cases for those initially accepted but then disenfranchised from their identity through the supplement agreement.

Similar to the Foster and Howse cases, David Robert Wells and Sandra Frances Wells had no avenue to appeal membership refusals because of the 2013 supplemental agreement. Their applications were rejected because "they had not provided the documentary evidence required by the supplement agreement to prove they self-identified as members of Mi'kmaq community by the date the QMFN [Qalipu Mi'kmaq First Nation] was created."[501] While Mr. Wells identified through government census, documented family history, and self-identification (the only requirement under the original agreement), he could not provide documentation that was acceptable under the new terms of the agreement.[502] Accordingly, the committee advised Mr. Wells that he did not meet the criteria, the decision was final, and appealing was not an option.[503] Ms. Wells self-identified in employment but also failed to meet the self-identification criteria

[496] Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484. Abbott v. Auditor General of Canada and Federation of Newfoundland Indians, 2019 FC 1302, para 176.
[497] Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484, para 1.
[498] Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484, para 3.
[499] Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484, para 4.
[500] Kean.
[501] Wells v. Canada, 2018 FC 483, para 3.
[502] Wells v. Canada, 2018 FC 483, para 3, 35.
[503] Wells v. Canada, 2018 FC 483, para 37.

under the supplement agreement.[504] Ms. Wells was rejected by the enrollment committee for the same reasons as Mr. Wells.[505] Similar issues about disqualification through the new self-identification criteria were raised in the Doucette and Brake cases.

The Wells case became particularly important as a test case for Qalipu memberships. As a result of this case, the federal government altered its policy. The federal court released the Wells decision on May 8, 2018.[506] Both clients were represented by Gowling WLG, like Foster and Howse.[507] The judgment made significant declarations about the supplement agreement. First, the court declared that the respondents did not have the authority to amend the appeal provisions, making Section 6 of the 2013 supplement agreement "invalid and unenforceable."[508] Second, the court found it was "not reasonable" to apply self-identification evidence amendments that required the documentation be predated to June 23, 2008.[509] This case brought by citizens advocating their right to self-determination affected the membership policy, which was amended to reflect the federal court decision.[510] Unless citizens requested and received judicial reviews, the federal government did not expand membership guidelines and allowances. The two individuals (David Robert Wells and Sandra Frances Wells) who had been refused membership challenged the changes to the membership criteria because they lost their right to appeal when they lost their founding member status under the supplemental agreement.[511] Moreover, through the efforts of individuals asserting rights to identity, the court ruled that sections in the supplement agreement were invalid.[512]

Challenges continue regarding the enrolment policy for the Qalipu Mi'kmaq First Nation. *Benoit v. the Federation of Newfoundland Indians and Canada 2018* case decision on June 3, 2018 followed the Wells decision. In Benoit, the plaintiffs were all founding members through successful applications under the original 2008 agreement, subsequently qualifying for

[504] Wells v. Canada, 2018 FC 483, para 39.
[505] Wells v. Canada, 2018 FC 483, para 41.
[506] Wells v. Canada, 2018 FC 483.
[507] Gowling WLG.
[508] Wells v. Canada, 2018 FC 483, 47.
[509] Wells v. Canada, 2018 FC 483, 47.
[510] Government of Canada, Indigenous and Northern Affairs. *Have you applied to join the Qalipu Mi'kmaq First Nation?*
511 Wells v. Canada, 2018 FC 483, para 3.
[512] Wells v. Canada, 2018 FC 483, para 124.

registration as Indians under the *Indian Act*.[513] Interestingly, the judge drew attention to the fact that the supplement agreement had not been ratified.[514] This procedural difference between the agreements creates doubt surrounding the legality of the supplement agreement and the amendments that worked as a mechanism to disenfranchise members. The plaintiffs were founding members and had voting rights with FNI as stakeholders, and as a result, had the right to question the actions taken by the FNI.[515] Because the FNI had agreed to and implemented the supplemental agreement, it was considered responsible for actions that disenfranchised the membership.

The declaratory order by Judge Gillian Butler states that the plaintiffs should remain on the founding members' list until the validity of the supplementary agreement is confirmed.[516] The Benoit case ruling supports the Wells' ruling, with portions of the agreement already declared invalid.[517] In Brake's case, the judge suggested that there will be "reassessments or amendments to the supplemental agreement" from the Wells declaration.[518] One other judicial reference in Benoit was the pending Abbott litigation case. Similar to Wells, an expectation existed that the Abbott case may become a test case for the invalidity of individual sections in the supplemental agreement.[519] Abbott questioned the validity of the amendments based on the process as the membership did not ratify the supplement agreement.[520] On October 16, 2019, Judge Lafrenière dismissed the Abbott case, but there is an opportunity to appeal.[521]

The cases cited above are connected through identity inequities in the Qalipu band enrolment processes, inequities that are largely the result of the supplement agreement. The cases of Foster and Howse relate to a lack of access to appeal after the first agreement was replaced by way of the supplement agreement. Doucette and Brake both tried to strike the supplement agreement because so many had lost membership through new amendments. Wells and Wells were

[513] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 19.
[514] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 23.
[515] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 75.
[516] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, 35.
[517] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, 36.
[518] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, 36.
[519] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, para 113.
[520] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141, 46.
[521] Abbott v. Auditor General of Canada and Federation of Newfoundland Indians, 2019 FC 1302.

disqualified through new amendments and denied an appeal but granted a reassessment in the courts. The Wells case also found sections of the supplement agreement invalid and was cited in Benoit. The plaintiffs in the Benoit case had their membership upheld based on validity issues addressed in Wells and the resulting policy changes. Other connections among the cases include that Foster, Howse and Wells were all missing evidence and denied appeals. The Wells case is similar to the Benoit case in that all the plaintiffs qualified under the original agreement criteria. Lastly, in Doucette and Brake, both cases challenged the removal of founding members from the membership list based on the new supplement agreement criteria. Other than Doucette and Brake, all other plaintiffs were successful.

These cases raise questions about the validity of the supplement agreement amendments, particularly the requirement for acceptable evidence for identification. By requiring documentary proof of identification, the supplementary agreement denied the importance of cultural evidence, family connections, and self-identification. These cases provide legal space for community-based understandings of identity and membership criteria. As part of the process of establishing recognition of an unrecognized First Nations community under the *Indian Act*, potential community members have engaged institutional processes to assert Indigenous worldviews, to advocate for understandings of identity, and to make membership policies more equitable.

Conclusion

The second half of the 20th century witnessed the mobilization of Indigenous Peoples asserting identity-based rights and title to land in Canada. The Mi'kmaq Peoples of Newfoundland were faced with the challenge of proving their identity as Indigenous Peoples to the federal government. The Mi'kmaq Peoples used a variety of methods to engage government. As part of their efforts, the people organized with the assistance of Indigenous lobby groups, essential support for Indigenous Peoples and communities advancing recognition of rights. For decades, the FNI engaged the government through negotiations, court processes, and the facilitation of commitments made by the federal government, such as carrying out research and representing peoples in agreement signing. The first federally recognized Mi'kmaq First Nations band was Miawpukek First Nation, which was granted reserve status in 1987, shortly after submitting a land claim in 1986. Although the land claim remains unresolved, the establishment of the Miawpukek First Nation is significant to policy development because the community established

the first government-recognized Mi'kmaq First Nation in Newfoundland after being excluded from Confederation. Furthermore, the Mi'kmaq successfully asserted identity and operationalized a different process for bands entering the *Indian Act* when using Order in Council.

The second *Indian Act* recognized band created in Newfoundland is the Qalipu Mi'kmaq First Nation. Unlike the Miawpukek, the Qalipu did not break away from FNI to negotiate band status. Their first signed agreement establishing band status was in 2008, but a supplemental agreement was signed in 2013 when over 100,000 people applied. With the implementation of the supplemental agreement, problems emerged with identity, particularly self-identification. Although the Qalipu are officially established as a band, the membership criteria are shifting and expanding as a result of institutional processes used by potential band members, such as judicial reviews. The supplement agreement disenfranchised some people from the community and membership process. The potential Qalipu Mi'kmaq First Nation members engaged the government and FNI through legal means to assert their positions within their understanding of the community, engaging institutional processes, advocating their position, and pushing back against the government interference with identity. Their efforts are seen in judicial challenges and the federal government response to the challenges. Through membership negotiations, Mi'kmaq Peoples have advanced recognition of Indigenous identity and community.

Through prolonged engagement with the federal government and by employing institutional processes, the Mi'kmaq Peoples proved their existence and used institutions to claim Indigenous rights. In examining the policy settings during FNI engagement with the federal government, what becomes clear is the assimilation agenda, especially before the patriation of the *Constitution Act, 1982*, with the denial of rights-based Indigenous identity. In the broader scope, the setting is colonization and associated with marginalization. The instruments used by the peoples to assert legitimacy and worldview were the product of the colonial institutions, some of which came from claims processes established as a reaction to the Calder decision. As it was a long process, primarily because of membership problems from government interference, the peoples moved the bar of certainty by pushing community identity worldviews. The government wanted certainty in numbers for band membership bringing in the supplement agreement.

Mi'kmaq band creation also shows that when one process fails, other instruments become options.

CHAPTER 5 – MÉTIS PEOPLE, CONSTITUTIONAL CHANGE AND INDIGENOUS RIGHTS

Introduction[522]

This chapter reviews the history of interaction between Métis People and colonial entities, highlighting diplomacy, judicial engagement, and results from the interaction. Historically, Métis People favoured diplomacy, and when faced with court actions, used them as an opportunity to advance a diplomatic agenda. Métis People made the best gains through diplomacy even when promises were not honoured. In the modern context, diplomacy and court challenges continue as mechanisms to affect policy and institutional change. Through negotiations, Métis People achieved Constitutional recognition, and through judicial means, they changed Constitutional definitions. By surveying the history and examining the two mechanisms for change, this chapter illustrates how the Métis People used identity as an instrument to impede the government's goal of being certain about who is and who is not Indigenous.

By asserting their identity based on their worldview and by (at times) working with non-status First Nations Peoples, Métis People have affected policy change in Canada. When Indigenous Peoples engage exogenous systems, such as the courts, they assert Indigenous concepts of identity and worldview. Indigenous Peoples' engagement forces a dialogue that results in negotiations and the expansion of concepts and associated rights. The position of Indigenous Peoples within colonization creates motivation for engagement. Through two hundred years of challenges, the Métis People (and at times the non-status First Nations Peoples) have advanced identity and rights in courts and political arenas to influence policy change. Advances in Indigenous policy, together with overall institutional development, strengthen third order change—change that comes from outside government directive and in which government goals are altered. In Canada, institutions guide the relationships and rules for engagements. Change in policy and institutions can be understood through historical institutionalism, the study of how institutions shape behaviour and how entities interact. Using the institutional structure, Métis and non-status First Nations Peoples have created third order—or paradigmatic—change, which impedes the federal government's goals for Indigenous Peoples—particularly its aim to be secure

[522] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.

in its certainty of who is and who is not an Indigenous person, and which allows for identity-based policy development.

Background

In central and western Canada, ethnogenesis stemmed from the fur trade, creating Constitutionally recognized and distinct Métis People. Métis, Michif, 'half-breed,' and 'bois brulée' are all names used for those that descended from the fur traders and Indigenous Peoples in Western Canada. Historically, the population was often referred to as half-breeds by fur trade employees and colonial governments. Initially, the Hudson's Bay Company (HBC) discouraged relations between employees and Indigenous Peoples, although the Northwest Company (NWC) encouraged intermarriage as a means of relationship building.[523] Eventually, the HBC also encouraged relationships as the Company started to view the Métis People as a potential source of general labourers.[524] In 1821, the two major trading companies—the NWC and the HBC—amalgamated, creating a monopoly in the territory.[525] Before the amalgamation, tensions were high as the HBC had started to exert control over the lives of Métis People, and competition between the companies resulted in violence. Once the amalgamation took place, through proclamations and policy limitations on economic opportunities, the Company tried to exert stronger control over Métis People's lives. Many Métis families originated from relations between Company chief factors (head traders at a trading post) and women from Home guard populations.[526] These unions were the start of a culture and people, many of whom settled in the Red River district Settlement, who had education and experience of colonial institutions through the fur trade companies. My own family is an example of this fur trade history.

In my maternal grandmother's family, Charles Thomas (b. 1793) was born of a relationship between a chief factor and a Moose Factory Mosoniwililiw (Moose Cree) Iskwew (woman). Charles' father, the chief factor named John, married Margaret from the James Bay area (Moose

[523] Carol Judd, "Mixed Bloods of Moose Factory, 1730-1981: A Socio-Economic Study," *American Indian Culture and Research Journal* 6, no. 2 (1982), 70.
[524] Judd, 67.
[525] Hudson's Bay Company, *The Northwest Company* (2016), http://www.hbcheritage.ca/history/acquisitions/the-north-west-company (accessed December 7, 2019).
[526] Homeguard Indians were the Indigenous peoples that lived around the trading forts. Government of Canada, TERMIUM Plus, *Homeguard Indian* (January 27, 1986). http://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=1&index=alt&srchtxt=HOMEGUARD%20INDIAN (accessed July 4, 2019).

Factory). Charles' wife, Hannah Mannall, was also the product of such a relationship: her father, John Mannall, was the chief factor of Kenogamissi House, and her mother was an Indigenous woman connected to the Algonquins of Ontario.[527] As was the case in my family, many HBC families worked throughout Rupert's Land and transferred as needed. John Thomas, an HBC employee from England and father of Charles, worked in northern parts of Ontario in the James Bay region until his retirement, when he was dishonourably discharged and consequently refused his claim to land in Red River.[528] At the time, Red River developed as a retirement community for HBC employees. John was offered land in Red River to settle with his Indigenous wife, but he did not claim it according to government records.[529] Although taking leave from the Company around the time his father John retired in disgrace, Charles returned to HBC shortly thereafter and worked in Northwestern Canada before concluding his employment in the Montreal region.[530] With skills beyond those of a labourer, he spent most of his career as a clerk and at times a trader. While Charles was stationed in various locations, his children were born across Rupert's Land.

Charles's father encouraged the HBC to educate Métis children and requested that teachers and materials be sent to the forts. His journals acknowledge that he was one of the first to write about the new population and treat them as essential parts of the community.[531] In the 19th century, John Thomas, his Indigenous wife, and their children created a new culture in the HBC, as it became common practice to educate the children of the mixed unions.[532] When his son Charles eventually retired from the HBC, the Company offered him a small trading post in the east,

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[527] Greater Golden Lake, *2014 Elections for Algonquin Negotiation Representatives* (January 24, 2014), Https://studylib.net/doc/5214321/2014-elections-for-algonquin-negotiation-representatives?fbclid=IwAR06uC8ZRS4vQkoJ0AcmOwjfJRnt6IPqKQuHxW-vkSy9191-VBLfqRH53PA (accessed January 22, 2019).
[528] John Sr. Thomas, (1751-1822) (fl. 1769-1814) JB/nt August 25, 1989; rev. August 1992; rev. May 2009; SB rev. Nov. (2016). Elaine Allan Mitchell, "THOMAS, JOHN," in *Dictionary of Canadian Biography*, vol. 6, University of Toronto/Université Laval (2003), http://www.biographi.ca/en/bio/thomas_john_6E.html (accessed December 12, 2019).
[529] Elaine Allan Mittchell, "Thomas John," *Dictionary of Canadian Biography* Volume 6 (1987), http://biographi.ca/en/bio/thomas_john_6E.html (accessed June 3, 2020).
[530] Charles Thomas, (1793-1895) (fl.1808-1832) JHB Oct. 1986; rev. August 1992; rev. and reformatted November 1999 CAW; rev. April 2009 LF, Archives of Manitoba, https://www.gov.mb.ca/chc/archives/hbca/biographical/index.html (accessed July 4, 2019).
[531] Judd, 71.
[532] Judd, 72.

which came to be known as Charlie's Hope at Golden Lake, Ontario.[533] There he spent the remainder of his life under the scrutiny of the company. Today, this community, as well as our Thomas family, is one of the researched communities under the Métis Nation of Ontario. This family, now spread throughout the Métis homeland, has maintained enduring familial connections through Charles Thomas's siblings, who were extremely independent much to the government's displeasure (Simpson's Athabasca Journal).[534] My maternal grandmother's family remained in the area for generations, and for economic reasons, my mother was the first generation raised outside the community. Working in the fur trade for generations and educated through colonial systems, Métis People were familiar with colonial processes and engagement with the institutions. The assertion of identity and rights began with HBC policies raised against Métis activities. The people engaged administrative structures to assert their rights and place in Canadian Constitutional frameworks.

Policies Mobilized Against the Métis People and Early Stages of Diplomacy

Reviews of policy and institutional engagement of Métis People with the colonial institutions, such as the Hudson's Bay Company (HBC) and the Crown, are scarce in the literature. What can be extracted from available sources is that the Hudson's Bay Company was the first to use policies against the Red River colony Métis. Established in 1812 by Lord Selkirk as a fur trade centre, Red River, as mentioned, later became an agricultural and retirement colony for Company employees and displaced Highland Scots.[535] Although it was initially necessary to the fur trade and commerce, the area did not attract year-round settlement, possibly because locals were aware of the potential for flooding. Red River was the second settlement Lord Selkirk established on a flood plain, the first being the 1804-1818 Baldoon Settlement in Southwestern

[533] Bonnechere Museum, "The Story of Charles Thomas," *Cultural History* (2019), http://www.bonnechere.ca/cultural-history/the-charles-thomas-story/ (accessed January 27, 2019).
[534] E.E. Rich, ed. *Simpson's Athabasca Journal* (London: Hudson's Bay Record Society Vol. 1, 1938), Biography, 471.
[535] Ruth Swan, *The Crucible: Pembina and the Origins of the Red River Valley Métis,* Doctor of Philosophy Thesis (Department of History, University of Manitoba, 2003), 15-17, 38. David H. Whiteley, *Manitoba History: Letters Home: Correspondence To and From the Red River Settlement 1812-1879,* Manitoba Historical Society, http://www.mhs.mb.ca/docs/mb_history/26/lettershome.shtml (accessed January 18, 2019).
Anne Farrar Hyde, *Empires, Nations, and Families: A History of the North American West, 1800-1860*, History of the American West (Lincoln: University of Nebraska Press, 2011), 101. Hughs, 519-520.
Bicentenary of the Red River Selkirk Settlement Committee, *Lord Selkirks's Settlers* (October 19, 2011), http://www.mhs.mb.ca/info/selkirk/settlers.shtml. (accessed January 18, 2019).

Ontario, which was also established for displaced highland Scots.[536] As with the case of Charles' father John Thomas many HBC employees wanted to remain in the country, keeping both their 'country wives' and half-breed children. The Company was concerned with how the family arrangements might alter power dynamics, as such structures would become competition for the Company.[537] Problems such as the fierce competition with the NWC and tumultuous trading relations with fur trade stakeholders plagued the Company, which fought back with harsh policies.

The first harsh policies began with Governor McDonnell's edict forbidding trading outside the region and banning buffalo hunting in the area.[538] Following the establishment of the Red River Settlement, there were food and supply shortages for the settlers creating the impetus for the ban, but the Métis were traders and provisioners of pemmican, and thus food supplies from pemmican (dried food buffalo) continued to provide sustenance.[539] Due to food-supply shortages, two Pemmican Proclamations made in 1814 and 1815 declaring that it was forbidden to export pemmican and other food supplies outside the colony set in motion economic attacks that "angered the Métis, who saw them as an assault on their independent way of life."[540] The Métis People had a reputation for being self-supporting peoples: *Nêhiýaw* relations described them as *Otipemisiwak*.[541] MacDonnell exacerbated the situation between the NWC and Métis by seizing pemmican from Métis hunters.[542] Eventually, McDonnell was replaced by Governor Semple,

[536] J. M. Bumsted, *Baldoon* (March 4, 2015), https://www.thecanadianencyclopedia.ca/en/article/baldoon (accessed January 23, 2019).
[537] John E. Foster, "Wintering, the Outsider Adult Male and the Ethnogenesis of the Western Plains Métis," *From Rupert's Land to Canada: Essays in Honour of John E. Foster*, Ens, Foster, Elgin, Macleod, and Binnema, (Edmonton: University of Alberta Press, 2001), 182.
[538] Hudson's Bay Company History Foundation, *The Northwest Company* (2016), http://www.hbcheritage.ca/history/acquisitions/the-north-west-company (accessed January 18, 2019).
[539] Brenda Macdougall and Nicole St. Onge, *Manitoba History: Rooted in Mobility: Metis Buffalo Hunting Brigades,* Manitoba Historical Society, http://www.mhs.mb.ca/docs/mb_history/71/metisbrigades.shtml (accessed July 4, 2019).
[540] Jennifer Hayter, *Racially "Indian", Legally "White": The Canadian State's Struggles to Categorize the Métis, 1850-1900*, Doctor of Philosophy Thesis (Department of History, University of Toronto, 2017), 38.
[541] Canada, Parliament, Senate Standing Committee on Aboriginal Peoples, *"The people who own themselves": recognition of Métis identity in Canada*, The Honourable Vernon White, Chair; the Honourable Lillian Eva Dyck, Deputy Chair, (2013), 5.
[542] Michael Hughes, "Within the Grasp of Company Law: Land, Legitimacy, and the Racialization of the Métis, 1815-1821," *Ethnohistory* 63, no. 3 (2016), 520.

who attempted to ban Métis hunting from around the Red River Settlement.[543] This was not a good way for Semple to improve relationships with Métis People.

The HBC directives combined with the immense competition between the two companies led to the Battle of Seven Oaks and the death of Semple.[544] During this time, and before Semple's death, the NWC formed a coalition with the Métis People as a reaction to HBC's control over activities in the area. The Métis-NWC coalition was the first outward Métis organized collective based on identity that openly challenged institutional constraints. The NWC-HBC rivalry contributed to the Métis coalescing as an independent Indigenous group, under the leadership of Cuthbert Grant.[545] Arguably, the organizational activism was a direct result of fur trading tensions, political alliances, and Company controls. What becomes evident, according to the available literature, is that the Métis engaged in the fur trade were unhappy with HBC policies restricting their livelihood.[546] Indeed, economics reinforced Métis nationhood as such struggles were the impetus to organize and oppose HBC ordinances and policies. The literature also documents official diplomatic exchanges and indicates that the Métis People well understood how colonial institutions worked.[547] The colonial structures reacted to and engaged with the Métis People based on their collective identity, which became the epicentre of the conversation.

A New Era – A New attack on Métis Lifestyle and a New Diplomacy

The merger between the HBC and NWC in 1821 created a monopoly that controlled the local economy through company policies, although there was a growing number of free traders who struggled for control. Through the initial Charter granted to the company by King Charles II in 1670, the Crown provided the newly merged Company, called HBC, with the power to enact laws and enforce laws and policies in Rupert's Land.[548] As food became scarce, anyone who hunted and traded goods outside the HBC company monopoly was considered a threat. Many

[543] John Foster, and Zach Parrott, "Pemmican Proclamation," *Canadian Encyclopedia*, Canadian Encyclopedia, (2019).
[544] Hudson's Bay Company History Foundation, *The Northwest Company* (2016). Hughs, 519.
[545] Hughs, 522.
[546] Auguste Henri De Trémaudan, *Hold High Your Heads: (history of the Métis Nation in Western Canada)* Barron Native Studies Collection (Winnipeg: Pemmican, (1982) 25.
[547] Hughs, 524.
[548] Hudson's Bay Company History Foundation, *Text of HBC's Royal Charter* (2016), http://www.hbcheritage.ca/things/artifacts/the-charter-and-text (accessed January 18, 2019).

Métis People refused to acknowledge the HBC monopoly and laws and therefore operated as free traders or freemen. According to Brenda Macdougall,

> When freemen moved beyond a role defined and supported by the HBC, they became free traders. Free traders were involved with commercial trading outfits that infringed on the Company's monopoly, taking profits away from the post of origin… The free traders' ability to work independently from the HBC and outside its jurisdictional control at Red River resulted in the trial of Pierre Guillaume Sayer in 1849.[549]

The Sayer trial, discussed later, was the first legal trial between the HBC and Métis People. As far as the HBC was concerned, free traders were operating outside Company laws. This position was an affront to Métis economics and lifestyle, and thus they began to assert their rights within the geopolitical space. The HBC monopoly fostered an active diplomatic era that commenced Métis engagement and assertions of identity and rights. HBC's legal jurisdiction became problematic when it came to who precisely the laws and policies applied to, particularly fur traders not employed by the Company. An important distinction, however, is the case of Cuthbert Grant (one of the first advocates of Métis nationhood during the Battle of Seven Oaks), a Métis man eventually made a Company man and enforcer of laws against his people.[550] The relationships to the HBC institution determined perceptions of Company policies, and generally speaking, only those under the employ of the company believed the laws applied to them.

In 1834, 14 years after the death of Lord Selkirk, the HBC started to arrange the purchase of the District of Assiniboia from his estate. This change further entrenched the colonial administration and associated policies in the territory. The first Council of Assiniboia, held on June 1813 in Fort Garry, handled administrative matters for the District, including the Red River Settlement. [551] For example, beginning in 1824, the Council started census-taking as an annual process.[552] As

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[549] Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010), 260.
[550] George Woodcock, *Cuthbert Grant,* Dictionary of Canadian Biography (University of Toronto/Université Laval), http://www.biographi.ca/en/bio/grant_cuthbert_1854_8E.html (accessed July 4, 2019).
[551] Government of Canada, Library and Archives Canada, *First Council of Assiniboia, Fort Garry, June 1813*, http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayEcopies&lang=eng&rec_nbr=2837263&rec_nbr_list=2837263%2C2896922&title=First+Council+of+Assiniboia%2C+Fort+Garry%2C+June+1813.+&ecopy=c013939k&back_url=%28%29 (accessed January 20, 2019).
[552] Canada's History Society, *"Transcript" Selkirk Settlers: A Rich Collections of Records*, Https://www.canadashistory.ca/explore/settlement-immigration/selkirk-settlers-a-rich-collection-of-records/transcript (Accessed July 4, 2019).

part of the preparation for the administrative transfer of the territory to the HBC in 1836, the company established a new Council of Assiniboia on February 12, 1835. According to Nelly Laudicina, "The state of Assiniboia can be accounted for starting the legal marginalization of the Métis in the 1830s, which marked the beginning of a long series of legal battles about ethnic identity and land rights."[553] Although the previous council had ties to the HBC, the new administrative arm for the territory consisted of HBC direct appointments, such as Sir George Simpson, Governor in Chief of Rupert's Land.[554]

Other changes to the Council, such as levied taxes, thrust the Métis People towards the black markets in St. Paul, Minnesota and Pembina, North Dakota, where they hoped to secure better prices and avoid the HBC monopoly.[555] This shift of trade practices was significant to the relationship between the colonial institutions and Indigenous Peoples. Economic policies that the Company believed should affect the territory and its trading partners constricted livelihood activities. As the HBC used the District of Assiniboia and Red River to infringe on the Métis, the people took it upon themselves to assert their rights.

Continually marginalized, in 1845 the Métis used administrative systems to organize trading economies and a political group to address concerns. The Métis collective initiated activities by submitting questions to Governor Christie about the status of their rights, followed by the submission of a French and English petition in 1846 directly to the company.[556] The petitions, which included demands for free trade and representative government, were drafted at a meeting held on February 26 in Andrew McDermott's house, a retired HBC employee. James Sinclair carried the petitions to England, where Alexander K. Isbister submitted them to the Imperial Government.[557] From the beginning, the Métis resisted interference to their livelihood from administrative restrictions such as the Pemmican Proclamations. Following the merger of the

[553] Nelly Laudicina, "The Rules of Red River: The Council of Assiniboia and Its Impact on the Colony, 1820-1869," *Past Imperfect* 15 (2009), 69.
[554] Archives of Manitoba, *Council of Assiniboia,* Council of Assiniboia fonds, Http://pam.minisisinc.com/scripts/mwimain.dll/144/PAM_AUTHORITY/AUTH_DESC_DET_REP/SISN%201725?sessionsearch.
[555] Irene M. Spry, "The Métis and Mixed-Bloods of Rupert's Land before 1870," *The New Peoples: Being and Becoming Métis in North America*, eds Jacqueline Peterson and Jennifer H.S. Brown (Winnipeg: University of Manitoba Press, 1985), 108-109.
[556] Spry, 108-109.
[557] Spry, 109.

NWC and the HBC, Métis People began to use diplomacy in their dealing with administrative processes. Following 'rules' established by the HBC illustrates that for the Métis, diplomacy encouraged a cordial relationship, but they nevertheless believed that the system should not apply to them: people who saw themselves as free. Going back at least two centuries, the Métis have historically addressed their concerns based on collective identity and the rights they believed were associated with this identity.

Policies Culminate with the Sayer Trial

Although the Métis People engaged diplomatically with HBC and the Crown regarding their rights, they continued to act like free traders, which resulted in the historically significant Sayer Trial.[558] Charged with illegally trading furs and acting outside declared ordinances of the Council of Assiniboia, Pierre Guillaume Sayer, André Goulet, Hector McGinnis, and Norbert Larond were brought before the General Quarterly Court of Assiniboia at Fort Garry on May 17, 1849.[559] In a protest outside the court proceedings, Louis Riel Sr. and Reverend George-Antione Bellecourt organized local Métis People, who publicly stated concerns over the Company monopoly as well as unequal representation on the Assiniboian council.[560] James Sinclair, the man who previously brought Métis grievances to England, arrived at trial to represent Sayer and present the grievances once more. Although Sayer was found guilty, he received mercy as the court ruled that he believed himself to be outside HBC jurisdiction. The case against the other three men was dismissed.[561] The decision resulting from the Sayer Trial became historically significant for the Métis, particularly for memories of the crowd chanting, "Le commerce est libre; vive la liberté" to mark the end of HBC monopoly.[562] Canadian historian Lawrence Barkwell remarks that "Sayer's trial was thus a landmark in the history of the Canadian west."[563] In later years, Métis People would go on staged hunts to trigger harvesting cases in the

[558] Lawrence Barkwell, *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*, Louis Riel Institute. (March 1, 2010), http://www.metismuseum.ca/resource.php/11978 (accessed January 22, 2019.
[559] Barkwell, *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*.
[560] W. L. Morton, *Sayer, Pierre-Guillaume,* Dictionary of Canadian Biography (University of Toronto/Université Laval)
http://www.biographi.ca/en/bio/sayer_pierre_guillaume_7E.html (accessed January 4, 2019).
[561] Barkwell, *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*.
[562] Barkwell, *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*.
[563] Morton, W. L. *Sayer, Pierre-Guillaume.*

advancement of their rights.[564] As the previous discussion has shown, when Métis People first faced opposition, they organized politically, asserted their self-governing position, made use of legal systems, and created ongoing traditions for engaging with the Canadian state.

A significant point about the Sayer trial is that it was the first time Métis People had used court proceedings as an avenue for addressing their rights as a collective group based on identity. The HBC released policies targeting Métis People as an oppositional collective, threatening their economic activities and thereby reinforcing the "us" and "them" relationship. During the 19th century, the Métis actively engaged the governance institution, as they continued to exercise their rights, demonstrate diplomacy, and activate identity-based rights. The judge's ruling in the Sayer trial indicates that Métis not employed by the HBC did not believe that the HBC laws applied to them. The Métis People's response to colonial institutions was to use the same institutions in the creation of a diplomatic space for the pursuit of Métis rights. Such responses to colonial power structures were appropriate exercises of self-determination based on the collective identity and worldview of people who owned themselves.

Diplomacy to Create Change

Manitoba Act, 1870[565]

Not long after the HBC establishment of the Red River Settlement, the territory became the site of ongoing struggles for Métis People. One of their first struggles began with HBC limitations on the exercise of their livelihood. Upon HBC's unsuccessful attempt to prosecute free traders, the Council of Assiniboia was restructured as a colonial administrative structure to manage the colony. As Nelly Laudicina indicates, this council "also introduced the law that natives were outside of the jurisdiction of the Council and were not on the same footing as British subjects."[566] When the HBC no longer wanted to administrate the Crown colony, the West opened for settlement, and Métis People found themselves resisting colonial systems once more. Initially, the British Crown gave administrative control over the Hudson's Bay drainage system,

[564] Métis Nation-Saskatchewan, "Harvesting," *Lands and Natural Resources,* https://metisnationsk.com/land/ (accessed December 2, 2019).
[565] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.).
[566] Laudicina, 63.

known as Rupert's Land, to the HBC through its original charter of 1670.[567] Although it proved to be unsuccessful, this Charter allowed the Company to prosecute Sayer and regulate free traders.

After the Sayer trial and loss of monopoly on Métis and traders, the HBC changed its governance of the region. Nelly Laudicina argues that the Colony went through three phases: first, the establishment of authority in the area; second, the changes of control with Lord Selkirk's passing; and third, the events surrounding the Sayer trial.[568] After the Sayer trial, the colony became a democratized state until the HBC decided it no longer wanted to be the governing structure and thus turned the land and responsibilities back to the British Crown.[569] With the HBC land transfer, the area entered a new era, the territory coming under Crown governance. When they realized that the territory was to change hands without consultation, the Métis took political action, continuing to use diplomatic traditions and administrative apparatuses to assert claims. This action led to the creation of the Province of Manitoba. Although Métis People also asserted control over their own lives through armed conflict, it was through the use of colonial institutions and instruments that the people were able to effect lasting change.

Since the Métis populations had arisen from the fur trade, the people were familiar with navigating administrative apparatuses. As A.H. de Trémaudan claims, “The Métis were so interested in public affairs from the start, that none dared ignore them in the distribution of administrative posts in the colony. They also show that the French language was at all times honoured at Red River.”[570] Métis People engaged the democratic processes to deal with their grievances and displeasure about political developments. As indicated by Darren O’Toole, people in the area made several attempts to establish provisional governments. One example was in Portage-la-Prairie in 1867, where, according to O’Toole, "The intention was not so much to overthrow the Governor and Council of Assiniboia, as to establish a government in Portage-la-Prairie, which was outside of the District of Assiniboia and therefore outside of the jurisdiction

[567] Hudson’s Bay Company History Foundation, *The Royal Charter* (2016), http://www.hbcheritage.ca/things/artifacts/the-royal-charter (accessed July 4, 2019).
[568] Laudicina, 37.
[569] Laudicina, 37.
[570] Trémaudan, 48.

of the Governor and Council."[571] Another example of a Métis provisional government was at Lac St. Anne under Father Lacombe in the 1860s.[572] These two examples—Portage-la-Prairie and Lac St. Anne—reflect the ongoing theme that the Métis organized in ways that the government would understand. This organization may have been a natural result of their response to colonialism and infringement on their rights based on identity and nationhood, developed through and despite colonial institutions like the fur trade administration. Historically, the Métis People were known for their resistance against the government in the 19th century, but these actions were a last resort because working with organized structures was always their first response.

Not to disregard the significance of the 1869–1870 Métis Resistance, the diplomatic achievements are critical too. For example, negotiations that led to the *Manitoba Act, 1870* became the legal foundation for the Métis People, as illustrated in the Manitoba Métis Federation (MMF) Supreme Court of Canada (SCC) case.[573] One reason the Company lost interest in governing the colony was that the land was not of interest to the new Company owners. In 1863, ownership of HBC was transferred from the then board of governors to the International Financial Society, whose preference was to sell off the landholdings.[574] Métis People and others at Red River were unhappy with the sale of the territory of Rupert's Land from the HBC to the Dominion of Canada without consultation of the people, as illustrated in their actions. At the time of the transfer, the colony was in legal limbo as the government was working to acquire the land. Section 146 of *the British North America Act, 1867* permitted the Crown to acquire colonies, including Rupert's Land, as part of the terms of the Canadian Confederation.[575] In

[571] Darren O'Toole, *The Red River Resistance of 1869--1870: The Machiavellian Moment of the Metis of Manitoba* 72, no. 08 (2012), 132.
[572] O'Toole, 130.
[573] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623
[574] John S. Galbraith, "The Hudson's Bay Land Controversy, 1863-1869," *The Mississippi Valley Historical Review* 36, no. 3 (1949), 459.
[575] It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. British North America Act, 1867, 30-31 Vict., c. 3. https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t15.html

1868, the *Rupert's Land Act* initiated the process under which Canada would acquire the territory.[576] In 1869, the Crown entered negotiations with the HBC for the terms of sale for the region. These actions created discontent and were the impetus for the Métis political organization leading to the *Manitoba Act*.

In the late 1860s, there was growing discord and division in the colony, heightened by Sir John Christian Schultz, an individual from Amherstburg Ontario who ran the newspaper the "Nor'Wester" and was not a keen follower of the law.[577] The HBC agreed to a sale involving £300,000 and the retention of several pieces of land, including some in the fertile belt. The problems with the purchase came when the government started sending out surveyors without seeking the consent of the people occupying the land.[578] The Métis People were angered and approached Louis Riel, son of Riel Sr., who was the organizer of the Métis People at the time of the Sayer trial.[579] As tensions grew, Schultz began advocating for an armed resistance against the Canadian government, but the Métis resisted armed conflict, and, instead, physically stopped the surveying by interfering with the work. During these activities, the English inhabitants of the area grew concerned about the Canadian government's lack of consultation and regard for the area people.[580] The Métis People responded by establishing a council to discuss and establish their position with regard to the takeover of Rupert's Land by the British Crown, and they named themselves "the National Committee of the Métis of Red River."[581] Subsequent meetings between the Métis Committee and the Council of Assiniboia were without resolution, and the

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[576] Article 5. It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of the Parliament of Canada, to declare that Rupert's Land shall, from a Date to be therein mentioned, be admitted into and become Part of the Dominion of Canada; and thereupon it shall be lawful for the Parliament of Canada from the Date aforesaid to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order, and good Government of Her Majesty's Subjects and others therein: Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting. Power to Her Majesty by Order in Council to admit Rupert's Land into and form Part of the Dominion of Canada, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p2t11.html, Rupert's Land Act, 1868 Enactment No.1,

[577] Trémaudan, 55.
D. Bruce Sealey, Antoine S. Lussier, and Manitoba Métis Federation, *The Métis: Canada's Forgotten People*, Irene M. Spry Collection of Western Canadian History (Winnipeg: Manitoba Métis Federation Press, 1975), 72.

[578] Sealey and Lussier, 76.

[579] Trémaudan, 59.

[580] Trémaudan, 60-61.

[581] Trémaudan, 63.

land surveys and transfers continued. As a way to delay the transfers, Métis People erected blockades to interrupt land surveys.[582] As the Métis were taking action, Schultz used his newspaper to increase tension and exaggerate the actions of Métis People.[583] This period in history illustrates Métis People using the colonial institutional apparatus and asserting their identity-based rights.

In a move to develop diplomacy for engaging institutional processes, Louis Riel Jr., secretary of the committee, proposed a joint council between the French and English inhabitants. The new council, with an equal number of French and English speaking representatives (12 of each), met to discuss plans to protect the colony for all citizens.[584] Several meetings took place, culminating on November 22, 1869 with Riel declaring a provisional government to negotiate with the Government of Canada.[585] During the land transfers, Riel and his council countered with proclamations made about desired rights and protections.[586] Initially, the date of transfer was October 1, 1869, but it was delayed until December 1 of the same year.[587]

During these challenging times, Riel took control of Fort Garry with little opposition. Governor McDougall, while waiting to enter the territory from Pembina, issued a forged proclamation asserting control of the territory as he was awaiting official documents from Ottawa. When the Métis People read it, they disregarded the orders, signifying their position by flying a provisional government flag.[588] Reviewing these events, one might conclude that the Métis were trying to forge diplomatic relations with the federal government, so they could negotiate the terms of Confederation. These actions created Constitutional space and land for the Métis People through Sections 31 and 32 of the *Manitoba Act 1870*, although not honoured until the Manitoba Métis Federation (MMF) took the Crown to court in the 20th century.[589] The efforts by Métis People created a strategic shift, causing the Crown to engage the Métis collective in the assertion of their identity-based rights.

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[582] Trémaudan, 66.
[583] Trémaudan, 62.
[584] Trémaudan, 68-69. Sealey and Lussier, 80-81.
[585] Trémaudan, 71-72.
[586] Trémaudan, 74.
[587] Sealey and Lussier, 80-82.
[588] Sealey and Lussier, 80-82.
[589] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), paragraph 206.

When denied access to the Red River settlement, Governor William MacDougall returned to Ottawa, and a new diplomatic approach developed. At the end of December 1869, the federal government sent Donald Smith to negotiate with the people of the colony.[590] In meetings held in January 1870, Riel called for a group of 40 representatives (20 English and 20 French) to create a new list of negotiating rights.[591] During negotiations, a militia force came west to take back Fort Garry, but the Métis captured and imprisoned some of them. After a trial in the colony, one of those captured and imprisoned and eventually executed was Thomas Scott. His execution was a significant event that led to Riel's exile prior to 1885.[592]

Following the battle over Fort Garry, the negotiations continued. On April 11, 1870, a Red River delegation composed of John Black (a judge at Red River), Alfred Scott (an English supporter of the Métis from Winnipeg), and Noel-Joseph Ritchot (a supportive Roman Catholic priest) arrived in Ottawa to negotiate with the federal government over the terms of the territory's entry into Confederation.[593] The *Manitoba Act, 1870*, was passed on May 12 and control transferred to the federal government.[594] As Jennifer Reid describes it, "The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*)."[595] It is because of the guarantees promised that the Manitoba Métis Federation (MMF) was successful in challenging the Canadian government in the judicial system. The Métis People created space in a constitutional agreement as they were written into the terms of Confederation for Manitoba, something no other Indigenous group in Canada had accomplished.

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[590] Sealey and Lussier, 83.
[591] Société historique de Saint-Boniface, *Louis Riel, Provisional Government,* Centre du Patrimoine (2010), http://shsb.mb.ca/en/node/1371 (accessed January 10, 2019).
[592] Jennifer Reid, *Louis Riel and the Creation of Modern Canada: Mythic Discourse and the Postcolonial State*, Religions of the Americas Series (Albuquerque: University of New Mexico Press, 2008), 10. Hans V. Hansen, *Riel's Defence: Perspectives on His Speeches,* Association of Canadian University Presses Issuing Body, and Scholars Portal (2014), 7.
[593] Reid, 11.
[594] Reid, 11.
[595] Manitoba Métis Federation Inc. v. Canada (Attorney General) 2013 SCC 14, [2013] 1 S.C.R. 623 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12888/index.do.

The long history of Métis political organization and institutional engagement contributed to the development of the province of Manitoba. What began with the *Rupert's Land Act* culminated in the *Manitoba Act, 1870*.[596] The development of the provisional government was significant as it demonstrated how Métis People chose to handle the land transfer. As a result of their engagements using institutional processes, the province of Manitoba was created through the Manitoba Act with guarantees for Métis People.[597] But this event was not the end of land history for the Métis People. Through the creation of the province of Manitoba, and the promises set out in Sections 31 and 32 of the 1870 *Manitoba Act*, Métis People challenged the Canadian government through the judiciary.[598] The land provisions in the Act were not followed, providing the case for a legal land claim over 100 years later. Recognized today as the founder of Manitoba and as a Métis hero, Louis Riel has never been exonerated for charges of 'high' treason.[599]

Batoche

After years of broken promises regarding the Manitoba land settlement, many Métis (especially the French-Métis) moved west because of persecution by settlers and soldiers.[600] Animosity grew in Red River as people wanted revenge for the murder of Thomas Scott during the 1869-1870 resistance.[601] As the situation deteriorated for Métis People, some of them held a meeting where it was decided to petition U.S. President Grant, requesting help and intervention for the persecuted Métis, but nothing came of it. Initially, Louis Riel believed that it was better to remain in Canada and work with the political system rather than flee to the United States.[602] However, Riel eventually fled to the United States in 1875 after the Canadian government exiled him for Thomas Scott's execution at Red River.[603] He remained in the United States until the

[596] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)
[597] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.), sections 31 and 32.
[598] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), para 206.
[599] Thomas, Lewis H. "RIEL, LOUIS (1844-85)," *Dictionary of Canadian Biography*, vol. 11. (University of Toronto/Université Laval, 2003), http://www.biographi.ca/en/bio/riel_louis_1844_85_11E.html. (accessed December 13, 2019).
[600] Sealey and Lussier, 92.
[601] Sealey and Lussier, 92.
[602] Sealey and Lussier, 92, 95.
[603] Trémaudan, 108.

events of 1885.[604] When Riel was gone, people remained engaged, and organized governance structures.

Métis People who moved west after 1870 as part of the Red River migration and lived on river lots desired to continue self-governing their lives. As they moved west, they joined others at wintering sites scattered throughout Saskatchewan, in Batoche, and further west.[605] Initially seasonal camps for Métis People, the wintering sites became permanent settlements as the buffalo disappeared.[606] There they once again set up their councils: Gabriel Dumont was the elected president for St. Laurent, a self-governing community.[607] The difference between the Batoche area and Red River councils was that now Batoche was located in a territory claimed by the government of Canada—the Northwest Territories. In 1869–1870, during the change in governance of the territory from the HBC to the Crown, the Manitoba area was in legal limbo, especially starting in 1870 when the Canadian government showed interest in settling the west and completing the transcontinental railroad.[608] These changes created different dynamics between the Métis and the government, and the Métis actions were now considered treasonous.

Through Métis People's involvement in the transfer of Rupert's Land to Canada, the creation of the Scrip process emerged for settling Métis title to land.[609] The Scrip process specified how the Canadian government intended to deal with outstanding land claims related to the *Manitoba Act, 1870*. Although Scrip was supposed to be a fair process for settling Métis land claims, the process included methods for extinguishing Métis title to land and the issuance of land certificates.[610] Although nothing substantial occurred with Métis land claims until the Scrip system, before the creation of Manitoba, the people were collectively using administrative processes to assert identity and rights. Scrip was not only a way to deal with land owed to Métis,

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[604] Sealey and Lussier, 114.
[605] Sealey and Lussier, 100.
[606] Sealey and Lussier, 92.
[607] Sealey and Lussier, 98, 99, 100.
[608] Kurt Boyer, "1885 – Aftermath," *Our Legacy,,* University of Saskatchewan Archives, University of Saskatchewan. (2008), http://digital.scaa.sk.ca/ourlegacy/exhibit_aftermath (accessed December 13, 2019).
[609] Cammie Augustus, "Métis Scrip," *Our Legacy*, University of Saskatchewan Archives. University of Saskatchewan (2008), http://digital.scaa.sk.ca/ourlegacy/exhibit_scrip (accessed December 13, 2019).
[610] Government of Canada, Library and Archives Canada, *Métis Scrip Records* (February 28, 2015), https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/metis/metis-scrip-records/Pages/introduction.aspx (accessed January 10, 2019).

but also an institutional process to further extinguish land title, so the government could clear more areas for settlement. Had the Métis People not engaged the colonial institution, the Scrip process would not have been established.

In comparison, First Nations Peoples negotiated rights to land and resources through treaties, although some excluded communities had to fight to enter into treaty negotiations, such as the Muskotew Sakahikan Enowuk (Lubicon Lake Indian Nation) and Whitchekan Lake First Nation.[611] During the settlement of the Robinson Treaties in Ontario in 1850, Métis People in the Great Lakes region of Ontario insisted on being recognized as Indigenous Peoples, but the government was not willing to settle Métis rights and claims to land in the mid 19th century.[612] Métis peoples managed to secure constitutionally protected rights through their inclusion in Treaty 3 through an adhesion.[613] This inclusion is significant because it positions Métis peoples from Treaty 3 territory in the *Constitution Act, 1982* in a separate category from other Métis peoples in the constitution with extra guarantees through treaty recognition. So, while some First Nations were excluded from the treaty process, some Métis peoples managed to secure treaty rights despite federal government resistance to Métis inclusion in treaties.

July 15, 1870 is considered the date when the government took effective control of the Métis People, as it marks the transfer of Rupert's Land from Britain to Canada and the establishment of the territory as the Northwest Territories.[614] This date is also significant as it marks the deadline to qualify for Scrip. As Frank Tough and Erin McGregor note, “According to government officials then and now, Métis scrip, officially known as "Halfbreed" scrip, was issued to Métis People with the intent of "extinguishing" Indian title by granting land (or money) to individual

[611] Lubicon Lake Nation, “Lubicon Lake Nation Responds to Premier Notley’s Settlement Announcement,” CISION (CNW – Canadian News Wire), https://www.newswire.ca/news-releases/lubicon-lake-nation-responds-to-premier-notleys-settlement-announcement-700904641.html (accessed July 4, 2019).
Brenda V. McLeod, *Treaty Land Entitlement in Saskatchewan: Conflicts in Land Use and Occupancy in the Witchekan Lake Area*, University of Saskatchewan, College of Graduate Studies Research. (2001).
[612] J. Taylor, "An Historical Introduction to Metis Claims in Canada," *Canadian Journal of Native Studies* 3, no. 1 (1983),153.
[613] *Treaty No. 3, Made October 3, 1873 and Adhesions, Report, etc.*, (Ottawa: Queen's Printer, 1966).
[614] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), paragraph 31.

Métis people."[615] The government did not issue Scrip in Manitoba until 1876, and even then, the process was not handled legally, thus becoming the basis for the Manitoba Métis Federation-initiated court action (discussed on p. 132). When Métis People applied for the Scrip, they were required to provide evidence of their location on the date of transfer. Often the documentation supporting their claim was an affidavit given by a Métis witness who could verify their location.[616] The Métis Scrip records held at the Library and Archives Canada include such affidavits in the stacks with family Scrip applications. Today, the date July 15, 1870 holds little significance in Canadian history; in fact, many Métis are unaware that the government viewed this date as an important marker of effective control. However, it remains an essential piece of history as the qualifier for Scrip holders and those who were excluded from the Scrip process because they were perhaps south of the border hunting. Indeed, those excluded were unable to access rights based on Métis culture and family connections.

Commitments made to Métis People in Sections 31 and 32 of the *Manitoba Act, 1870* were not honoured until 1876 when the government began issuing Scrip. Problems to settle the Scrip land dispersal persisted for several years.[617] With the migration west, more claims from settlers wanting land came before the government, and their demands necessitated the creation of a second Scrip process, the Northwest Territory Scrip.[618] Subsequently, applications revealed that many Métis entitled to land in Manitoba (approximately 10,000 people based on the 1870 census) had not received it and were now applying to the new Northwest Half-Breed Scrip.[619] Thus, according to Cammie Augustus, the Northwest Halfbreed (NWHB) Commissions "were on the surface a response to concerns expressed by resident Métis for land security." [620] In reality, however, there was more going on: Surveyors were following a formal process for subdividing the land—"a situation all too reminiscent of Manitoba in 1869."[621] Surveying lands without consultation caused concern for the Métis, who remembered their lands taken in

[615] Frank Tough, and Erin McGregor, ""The Rights to the Land May Be Transferred": Archival Records as Colonial Text-a Narrative of Métis Scrip," *Natives and Settlers Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada*, University of Alberta (2012), 37.
[616] Cammie Augustus, "Métis Scrip," *Our Legacy*.
[617] Camilla Augustus, *The Scrip Solution: The North West Metis Scrip Policy, 1885-1887*, University of Calgary, Faculty of Graduate Studies Research (2005), 31-32.
[618] Augustus, "Métis Scrip." *Our Legacy*.
[619] Augustus, 33, 34.
[620] Augustus, 34.
[621] Augustus, 34.

Manitoba while they were waiting for land allotment and compensation. Now the pattern was repeating itself in the Northwest Territories.

Before the battles of 1885, the Métis People of the Northwest Territories sent petitions to Ottawa regarding the administration and surveying of the land, but their communiques were virtually ignored.[622] Although the Métis People attempted diplomacy through the creation of self-governing councils, tensions mounted, culminating in the Northwest resistance. The difference between the success achieved by the Métis in 1870 and the failure to facilitate change in 1885 was the political position of the Métis: the government of Canada had secured the territory in 1870, and there was no institutional space from which the people could negotiate. The case of Métis engagement illustrates that although engagement with government through administrative processes can be successful in creating change, diplomacy does not always work. Had the diplomacy been successful, Métis People would not have taken up armed resistance. This period marked the end of Métis engagement at the federal institutional level for almost 100 years, when after more than five decades of institutional engagement, the Métis People created space and change based on identity.

Métis Settlements (Alberta)

In the first half of the 20th century, the Métis of Alberta successfully engaged the provincial institution using identity as the basis for these engagements. Alberta currently is the only province with an official Métis land base. The land base resulted from increasing political organization and pressure by Métis People in policy development, even before being federally recognized in 1982.[623] In the early part of the 20th century, many Métis People from Red River and Batoche moved west and became politically active in Alberta. Multiple organizations formed. At the forefront were political leaders who came to be known as the famous five: Peter Tomkins, Jim Brady, Malcolm Norris, Felix Calliou, and Joseph Dion.[624] The issues these leaders raised led to the Alberta legislative inquiry into the social and health concerns of Métis,

[622] Trémaudan, 115-116.
[623] Government of Alberta, Aboriginal Relations, *A Brief History of the Métis People,* Indigenous Relations, http://indigenous.alberta.ca/documents/BriefHistoryMetis.pdf?0.8097911507356912, 1.
[624] Government of Alberta, Aboriginal Relations, *A Brief History of the Métis People,* 1.

known as the Ewing Commission.[625] In 1938, the *Métis Population Betterment Act* was passed, which set aside land for the people, creating eight Métis settlements in response to the commission's findings.[626] The Métis' success in using institutional structures like the inquiry for their own benefit was extraordinary for that time. In comparison, 20th-century inquiries held at the federal level were not initiated by Indigenous institutional engagement and examined failures of assimilation policies.

Métis People historically have organized around a land base, as was the case in Red River and Batoche. After the creation of the Alberta Métis settlements, the communities became the basis for other political organizations as the communities formed the Alberta Federation of Métis Settlements Associations in 1975 for advancing settlement policies and concerns.[627] The recognized Métis settlements are as follows:

- Buffalo Lake Métis Settlement
- East Prairie Métis Settlement
- Elizabeth Métis Settlement
- Fishing Lake Métis Settlement
- Gift Lake Métis Settlement
- Kikino Métis Settlement
- Paddle Prairie Métis Settlement
- Peavine Métis Settlement[628]

Just as Métis People pursued lands in Manitoba and Saskatchewan, Métis People in Alberta wanted a land base. By politically engaging institutional structures in a way that led to an inquiry, the Métis advanced their agenda. Through the land base, Métis People organized to self-administer their communities and engage government.

The Alberta settlements were the result of political action by Métis People, and through these actions, 1.25 million acres of land were set aside for the Métis People living in Albertan communities in 1938.[629] This was the first land base created for Métis People within a provincial

[625] Government of Alberta, Aboriginal Relations, *A Brief History of the Métis People,* 1.
[626] Government of Alberta, Aboriginal Relations, *A Brief History of the Métis People*, 1.
[627] Government of Alberta, Aboriginal Relations, *A Brief History of the Métis People*, 2.
[628] Government of Alberta. *Métis Settlements locations* (2019), https://www.alberta.ca/metis-settlements-locations.aspx?utm_source=redirector (accessed July 4, 2019).
[629] Rene R. Gadacz, *Métis Settlements*, The Canadian Encyclopedia (October 27, 2015), https://www.thecanadianencyclopedia.ca/en/article/metis-settlements (accessed July 4, 2019).

jurisdiction in Canada.[630] The land base facilitated the growth of the political activity, as well as growing autonomy for the people of the colonies. In the 1980s, the province of Alberta began to shift responsibility to the people by first endorsing a land transfer in 1985, followed by an accord in 1989 that established a governance structure.[631] The advocacy from the communities through political organization became the way for the government to engage the people politically. Most recently, this trajectory created by Métis People includes a new federal agreement. On December 17, 2018, the Métis Settlements General Council (MSGC) signed a framework agreement that established their relationship with the federal government.[632] The council represents the eight communities that have chosen their path for self-determination: the agreement outlines specific funding arrangements for health, housing, and education.[633] Métis of Alberta's diplomatic engagement led to further involvement in policy and institutional processes. This work, which began and ended with Indigenous initiatives, guarantees Métis institutional inclusion.

Constitution Act, 1982

Towards the end of the 20th century, the affirmation of Indigenous identity and associated rights through engagement with institutional processes accelerated. Leading up to the patriation of the constitution, two dominant groups emerged to represent Indigenous Peoples in Canada. For federally recognized First Nations Peoples, the lobby organization was the National Indian Brotherhood (NIB), which later evolved into the Assembly of First Nations (AFN). The other organization was the Native Council of Canada (NCC), which represented non-status and off-reserve First Nations, Métis, and Inuit, later becoming the Congress of Aboriginal Peoples (CAP) to reflect the changing identity-rights agenda.[634] Before the *Constitution Act, 1982*, the only constitutional document that explicitly acknowledged Métis People was the *Manitoba Act, 1870*. The Alberta Métis Settlements are not a constitutional (federal) arrangement but are a legislative (provincial) arrangement. The inclusion of Métis in Section 35 rights in the *Constitution Act,*

[630] Government of Alberta, *Métis Settlements locations.*
[631] Government of Alberta, *About Métis Settlements* (2019), https://www.alberta.ca/about-metis-settlements.aspx?utm_source=redirector, (accessed July 4, 2019).
[632] APTN National News, "Alberta Métis settlements sign framework agreement with Canada," *National News* (December 17, 2018), https://aptnnews.ca/2018/12/17/alberta-metis-settlements-sign-framework-agreement-with-canada/ (accessed December 8, 2019).
[633] APTN National News, "Alberta Métis settlements sign framework agreement with Canada,"
[634] Chinook Multimedia, "1970 – The Native Council of Canada," *Canadianhistory.ca,* https://canadianhistory.ca/natives/timeline/1970s/1970-the-native-council-of-canada (accessed July 4, 2019).

1982 is an example of how Métis and non-status First Nations worked diplomatically to assert recognition of their rights. Until the Supreme Court of Canada Daniels case, the government excluded Métis People under Section 91(24), which claimed jurisdiction of the term 'Indian' in the *British North America Act, 1867*. Through the efforts of Harry Daniels and the Saskatchewan delegation engaged in constitutional processes, Métis People were successful in establishing a constitutionally recognized entity with associated rights.

For many years, Métis and non-status First Nations worked together to expand concepts of identity and associated Indigenous rights. In the 1970s, Pierre Trudeau announced that his government would patriate the Canadian Constitution to Canada.[635] Until this point, the British government had jurisdiction over Canada through the foundational *1867 British North America Act* (BNA Act). In the *BNA Act*, 'Indians' are recognized under Section 91 (division of powers), which creates a fiduciary duty (in the modern context).[636] In the years leading up to the patriation, the Inuit were already recognized through *R. v. Eskimo, 1939*, as were the status Indians (First Nations) through the *Indian Act*, but not Métis or non-status First Nation Peoples.[637] The incorporation of Métis People into Section 35 was an institutional change that altered who the institution (federal government) was responsible for: Indigenous Peoples had engaged institutions by asserting a rights-based identity.

The inclusion of Métis People as one of three recognized 'Aboriginal Peoples' of Canada was a significant move forward in the 20th century, owing much to the Métis People of Saskatchewan for establishing Section 35 rights. During the struggle for these rights, Saskatchewan Métis and non-Status First Nations People worked with the Native Council of Canada (NCC). Métis activist Peter Bishop, in an interview with Saskatchewan University Indigenous Studies professor Ron Laliberte, recounted how Métis and non-Status engagement created space for Métis inclusion in

[635] Robert Sheppard, (updated Stephen Azzi et. al.), *Patriation of the Constitution*, The Canadian Encyclopedia (September 3, 2012), https://www.thecanadianencyclopedia.ca/en/article/patriation-of-the-constitution (accessed July 4, 2019).
[636] Daniels *v.* Canada (Indian Affairs and Northern Development).
[637] Reference whether "Indians" includes "Eskimo", [1939] SCR 104, 1939 CanLII 22 (SCC), http://www.canlii.org/en/ca/scc/doc/1939/1939canlii22/1939canlii22.html (accessed April 15, 2016).

the *Constitution Act, 1982*.[638] Not only were the national representatives pushing the rights agenda at the national level, so too were the provincial organizations. In the interview with Laliberte, Bishop explains that representatives of the Association of Métis and Non-Status Indians of Saskatchewan (AMNSIS—Rod Bishop, Frank Tomkins, Wayne McKenzie, Jim Durocher, and Jim Sinclair) travelled to England to meet with the House of Lords, while the status First Nations Peoples sent their own delegation.[639] The Saskatchewan delegates were intent on ensuring that once sent back to Canada, the Constitution would entrench Métis rights.

When the Constitution arrived in Canada, conversations took place and spaces opened to include the Métis. During a speech at the February 2017 Métis Nation-Saskatchewan AGM, Tomkins historicized these times, including his time fighting for Section 35 rights in the *Constitution Act* and being part of the delegation that went to England.[640] Moving on to the history of Alberta's 'Famous Five,' he led listeners through the history of Métis People, demonstrating their strength as they asserted their rights and identity and engaged in political systems to influence policy change. The results of this political engagement were seats at the constitutional discussion for Métis and non-status First Nations Peoples.

At the national level, Métis People were represented by the NCC under the leadership of Harry Daniels, a Saskatchewan Métis political activist who began his career in politics in the 1960s in Alberta and ended as a widely recognized Métis rights and Section 91(24) rights-holders advocate.[641] Credit for the inclusion of Métis representation in the Constitution goes to Daniels, Chartier, Sinclair, Bishop, Tomkins, McKenzie and Durocher. Subsequently, the NCC received two seats at the constitutional discussions. Daniels gave one of the available seats to the Native Women's Association group that was fighting for gender equity and one to the Association of

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[638] Peter Bishop begins recount of events at the 8:30-minute mark. Gabriel Dumont Institute, *Nora Cummings, Peter Bishop, and Ron Laliberte Interview Part 2* (June 2, 2016), https://www.youtube.com/watch?v=DIK2rt4wGZg (accessed January 8, 2019).

[639] Peter Bishop begins recount of events at the 8:40-minute mark Gabriel Dumont Institute, *Nora Cummings, Peter Bishop, and Ron Laliberte Interview Part 2.*
At the 15:21 mark of the video, Mr. Tomkins begins the discussion of the constitutional talks. Frank Tomkins, *Mr. Frank Tomkins,* February 2017 Métis Nation-Saskatchewan Annual General Meeting (February 19, 2019), https://www.youtube.com/watch?v=qLRSnOgNBVc&t=6s (accessed July 4, 2019).

[640] Frank Tomkins, (15:21)

[641] Jean Taillet, "The Metis and Thirty Years of Section 35: How Constitutional Protection for Metis Rights Has Led to the Loss of the Rule of Law," *Supreme Court Law Review* 58 (2012), 335.

Métis and non-Status Indians group represented by Jim Sinclair.[642] Although Daniels remained active during the constitutional discussions, Sinclair became the principal spokesperson for Métis and non-status First Nations Peoples. In recounting these events, Métis lawyer Jean Taillet explains that when Daniels provided a seat to Sinclair, Clement Chartier, also involved in the advocacy of Métis inclusion in the Constitution, broke from the NCC to create the Métis National Council (MNC). The MNC, along with provincial affiliates, was one of two significant organizations with a Métis specific focus (the other organization was the Congress of Aboriginal Peoples).[643] There was, at the time, concerns that the 'Indian' and 'non-Status' agenda would overshadow the Métis rights agenda. Due to political commitments and the enduring work of people like Harry Daniels, Jim Sinclair, Clement Chartier, and many others, the *Constitution Act, 1982* includes Métis People.

Cases Changing Institutions and Policies

Negotiations are an important way to create institutional change, but at times governments lack political interest in negotiations. In these cases, Indigenous Peoples resort to court action. Three significant Supreme Court of Canada (SCC) cases distinctively advance Métis and non-status constitutional identity-based rights through institutional processes. The first Supreme Court of Canada Métis rights case is Powley, which advanced Métis harvesting rights and became the impetus for the creation of provincial harvesting agreements with the Métis People.[644] Powley moved the relationship and provincial policies associated with those relationships towards a Métis specific rights case because of the language used in the written decision.[645] The second significant SCC Métis case was the MMF land claim, which upheld the constitutional space that the Métis occupy as a result of the creation of the province of Manitoba.[646] In the MMF case, the federal government entered a relationship process to settle the outstanding claim.[647] What is significant about this case is its inclusion of a substantial agreement for policy relationships. The third and most significant case to date is the Daniels case, initiated by the Daniels with the

[642] Métis National Council, *Harry Daniels*, MNC, https://www.metisnation.ca/index.php/who-are-the-metis/order-of-the-metis-nation/harry-daniels (accessed December 4, 2019).
[643] Taillet, 336.
[644] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.
[645] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.
[646] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), para 98.
[647] Manitoba Métis Federation (MMF), *FAQ on MMF Land Claims,* MMF, http://www.mmf.mb.ca/land_claims_FAQ.php (accessed January 29, 2019).

Congress of Aboriginal Peoples and eventually supported by the Métis National Council.[648] The Daniels case positions Métis and non-status First Nations Peoples within the original constitutional order of Canada in Section 91 of the *British North America Act*, *1867* and, by extension, places responsibility for the Métis under the federal government.[649] This shift in responsibility to the federal government has forced developments of new relationships and new ways of engagement, advancing policy and legal considerations of Métis People based on assertions of Métis identity.

Powley

In the fall of 1993, Steve and Roddy Powley went hunting moose in the Sault. Ste. Marie region of Ontario and were charged with a violation of *The Fish and Game Act, 1990*.[650] According to the Supreme Court Decision, all lower courts agreed with Powley's claim that Métis People around Sault Ste. Marie have an 'Aboriginal' right to hunt and he was thus acquitted.[651] The Powley case is significant because it was the first at the Supreme Court level to address Métis rights specifically. The foundation of the case was Section 35 rights of the *Constitution Act, 1982*: the decision cited the Van der Peet test, which had developed as a legal instrument to determine pre-contact Indigenous identity and associated rights.[652] A new mechanism developed as the Métis were not a pre-contact collective. Because the Powleys believed that hunting was a Métis right under Section 35 of the *Constitution Act, 1982,* Steve and Roddy never denied they hunted a moose.[653] Significantly, this case became the measuring stick in Indigenous community recognition, demonstrated in the Mi'kmaq of Newfoundland band creation.

Following the previous court decisions, the SCC ruled that Steve and Roddy did have a right to hunt.[654] Arthur Ray, an expert Métis history witness, provided the historical context for Métis communities before 1850. Victor Lytwyn participated as an expert witness for the era following

[648] Daniels *v.* Canada (Indian Affairs and Northern Development).
[649] Daniels *v.* Canada (Indian Affairs and Northern Development).
[650] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43, para 5.
[651] R. *v.* Powley, para 7.
[652] R. *v.* Powley, paras 17, 18.
[653] R. *v.* Powley, para 53.
[654] R. *v.* Powley, para 1.

the 1850 Robinson Treaties (Ontario land treaties).[655] As a result of their testimony, the lower courts concluded that a distinctive Métis community had emerged in the area, and the Supreme Court decision upheld the conclusions.[656] Following Powley, Ray served as an expert witness in other Métis cases, and, in retrospect, describes Powley as a 'landmark case.'[657] This case expands understandings of Métis rights: it upholds Métis' collective rights through the community's worldview of identity, and, most significantly, positions hunting as an existing Métis right under Section 35 of the *Constitution Act, 1982*.

The courts were very clear about existing specific guidelines for Métis communities, identity, and associated rights. The Powley case explicitly states that the decision is not a catch-all for non-status Indigenous Peoples, that, as Arthur Ray puts it, "the term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; instead, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears."[658] According to Ray, the reason so many Métis hunting cases have come before the courts is that, historically, many provinces worked to limit Métis rights.[659] While Powley is a test case based on Section 35, today many others are testing other pieces of legislation, most notably the Prairie provinces' *Natural Resources Transfer Act, 1930.*[660] Post-Powley, harvesting rights became a point of discussion and negotiation for provinces that rest within areas that the MNC claims as the homeland.[661] Post-Powley, political will was awakened for negotiations because the government was repeatedly losing in court.[662] Negotiations, as part of institutional processes, acknowledge Indigenous rights based on identity.

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[655] Arthur J. Ray, "Ethnohistorical Geography and Aboriginal Rights Litigation in Canada: Memoir of an Expert Witness," *Canadian Geographer / Le Géographe Canadien* 55, no. 4 (2011), 402.
[656] R. *v.* Powley, para 21.
[657] Ray, 402-403.
[658] R. *v.* Powley. Preamble.
[659] Ray, 403.
[660] Métis National Council (MNC) President Clement Chartier, *Message from the President* (Jan/Feb 2019), MNC, http://www.metisnation.ca/wp-content/uploads/2019/02/Newsletter-Jan-Feb-2019.pdf (accessed July 4, 2019). R. v. Laviolette, 2005 SKPC 70 (CanLII). Tough and McGregor, 35.
[661] Métis Nation-Saskatchewan, "Harvesting," *Lands and Natural Resources,* https://metisnationsk.com/land/ (accessed December 2, 2019).
[662] Métis Nation-Saskatchewan.

The Powley case had many repercussions. First, it became critical to the MNC provincial affiliates, which rely on it to argue for harvesting rights.[663] Tony Belcourt, the founder of the Métis Nation of Ontario, explained that a joint statement released in Manitoba expressed that because of the SCC Powley decision, the provincial government and Manitoba Métis Federation (MMF) entered into a harvesting agreement.[664] Second, the Powley case changed the funding of the citizen registries of the MNC provincial bodies.[665] In Saskatchewan, the Métis Nation-Saskatchewan (MN-S) registry received funding set aside from the Powley decision, and the province entered into harvesting negotiations that were not complete due to political externalities.[666] In December 2019, the MN-S and the Saskatchewan government renewed the MOU and commitment to negotiate.[667] Third, at the constitutional level, Powley changed existing acknowledged Métis rights. Steve and Roddy Powley could have avoided the judicial penalty by pleading guilty for hunting moose, paying a fine, and walking away. Instead, the Powleys challenged the Court's laws to advance a test case through a legal process. The Powley case is a classic example of Indigenous Peoples using Indigenous concepts of identity to engage with government to advance their rights and policies that affect them.

MMF land claim

Although the *Manitoba Act, 1870* created the province of Manitoba and included provisions for the collective Métis identity, the several revisions to the Act in the years that followed proved to be problematic.[668] The government used delay tactics regarding Métis land rights. As a result,

[663] Tony Belcourt, "For The Record ... On Métis Identity and Citizenship Within the Métis Nation," *Aboriginal Policy Studies* 2, no. 2 (1969), 139.
[664] Government of Manitoba, "Province Partners with Manitoba Métis Federation to Uphold Métis Harvesting Rights, Natural Resource Conservation," *News Release* (September 29, 2012), https://news.gov.mb.ca/news/?item=15364&posted=2012-09-29 (accessed January 18, 2019).
[665] Belcourt, 133.
[666] Policy analyst, department of environment MN-S (April 2011-May 2012). I was then IGA policy analyst MN-S (November 2012-April 2013). Manager of IGA for MN-S (Summer 2015?) When first employed at the Métis Nation-Saskatchewan as an environmental policy analyst, I sat at the table as the principal researcher and analyst for the MN-S. The Province and the MN-S were engaged in interest-based mediation. When working on the file, we often worked with the registry department as it was understood that those were accessing harvesting rights, be registered through the MN-S.
[667] Amanda Short, "Province, Métis Nation-Saskatchewan reaffirm traditional harvesting MOU," *Saskatoon StarPheonix* (December 19, 2019), https://thestarphoenix.com/news/local-news/province-metis-nation-saskatchewan-reaffirm-traditional-harvesting-mou (accessed June 3, 2020).
[668] D. Sprague, "The Manitoba Land Question 1870-1882," *Journal of Canadian Studies/Revue D'Études Canadiennes* 15, no. 3 (1980).

many Métis relocated outside the Métis territory in Manitoba.[669] More than 100 years after the creation of Manitoba, the MMF took the government to court for unfulfilled negotiated commitments. The heart of the case was the following MMF declarations about Sections 31 and 32 of the *Manitoba Act*:

> (1) Canada and Manitoba failed to fulfill their obligations to the Métis that are set out in the Manitoba Act,
> (2) Manitoba's taxation of Métis lands granted pursuant to s. 31 of the Manitoba Act was unconstitutional, and
> (3) In 1870 Canada and the Métis reached a treaty.[670]

This case passed through all the channels of the Canadian judicial system, which led to a Supreme Court decision. The MMF land claim was the first SCC case in which the Métis challenged the Honour of the Crown.[671] This engagement is grounded in the long history of Métis diplomacy based on identity assertions.

The first time Métis People used diplomacy to negotiate at the constitutional level was during the creation of the province of Manitoba, when their participation involved presenting provisions for the "half-breed" People. Section 31 outlined that the Métis residents were entitled to 1.4 million acres.[672] Section 32 promised that land currently occupied would not be alienated.[673] D.N. Sprague claims that the *Manitoba Act* went through several unconstitutional changes to the promises made to the Métis People, which created delays for land settlement.[674] According to Sprague, a variety of responsive strategies were used, including encouraging settlers to squat on the land while awaiting land dispersals.[675] All unconstitutional changes and delays in settlements in the *Manitoba Act* are breaches to the Honour of the Crown. While negotiations of the

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[669] Gerhard Ens, "Homeland to Hinterland: The Dispersal of the Red River Metis after 1870," *Homeland to Hinterland: The Changing Worlds of the Red River Metis in the Nineteenth Century* (Toronto; Buffalo; London: University of Toronto Press, 2005), 139.
[670] Manitoba Métis Federation (MMF), *FAQ on MMF Land Claims.*
[671] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), para 86.
[672] Sprague, 75.
[673] Sprague, 75.
[674] Sprague, 79-81.
Taylor, 157. Manitoba Métis Federation (MMF), *Land Claim 2013: Our Time has Come*, MMF, http://www.mmf.mb.ca/docs/2013-09-23-MMF%20Land%20Claims%20Booklet-VFinal.pdf (accessed January 29, 2019), 10.
[675] Sprague, 75.

Manitoba Act may have developed in good faith, failures to fulfill promises convinced many Métis to migrate from the Red River region.

Almost 100 years later, in April 1981, the MMF (established in 1967) and the NCC (established in 1971) filed a land claim with the courts.[676] The following chronology is significant to the MMF land claim: The courts first heard the case in January 1987. The ruling came in February 1987 in favour of the Métis claimants, but the federal government appealed the decision.[677] According to Clement Chartier in the co-created Indigenous Peoples Atlas of Canada, "In 1990, the Supreme Court affirmed that the MMF had a right to seek a declaration that the federal and provincial governments had unconstitutionally undermined the Métis' rights conferred by Sections 31 and 32 of the *Manitoba Act, 1870*."[678] The MMF continued with the judicial process in 2006, appealing to the Court of Queen's Bench of Manitoba, losing in 2007, appealing this time to the Manitoba Court of Appeal in 2009, and losing again in 2010.[679] The MMF lost the appeal when the courts rejected the original fiduciary duty interpretation, rejected any claim against the Honour of the Crown, and ruled that the MMF had no standing.[680]

The case went to the SCC on December 13, 2011 and the decision came on March 8, 2013. The MMF won at the highest court, which ruled that the government "failed to implement the land grant provision set out in Section 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown."[681] According to the SCC decision, "Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis People of Manitoba, an Aboriginal People, and it engaged the honour of the Crown."[682] The MMF was granted standing and its costs were paid. Because of the SCC's determination, the Government of Canada and MMF agreed on further measures towards implementing a land claims agreement.

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[676] Manitoba Métis Federation (MMF), *Land Claim 2013: Our Time has Come.*
[677] Canadian Geographic, *Métis and the Constitution,* Indigenous Peoples Atlas of Canada, https://indigenouspeoplesatlasofcanada.ca/article/metis-and-the-constitution/ (accessed January 17, 2019).
[678] Canadian Geographic. *Métis and the Constitution.*
[679] Canadian Geographic. *Métis and the Constitution*. Manitoba Métis Federation (MMF), *Land Claim 2013: Our Time has Come*, 2. Manitoba Métis Federation (MMF), *FAQ on MMF Land Claims.*
[680] Jean Taillet, *Manitoba Métis Federation v. Canada (Attorney General),* Understanding the Supreme Court of Canada's Decision, http://www.pstlaw.ca/resources/PST-LLP-MMF-Case-Summary-Nov-2013-v02.pdf, 1.
[681] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), para 5.
[682] Manitoba Metis Federation Inc. *v.* Canada (Attorney General).

Following the SCC MMF decision, the 2015 federal election was called, and Canadians elected a new government and leadership under Justin Trudeau.[683] During his first few months in office, Trudeau committed to settling the land claim with MMF President David Chartrand, and as part of that commitment, Trudeau and Chartrand signed the *Memorandum of Understanding on Advancing Reconciliation* (MOU) on May 27, 2016.[684] The MOU provided the impetus for a discussion table about developing a framework agreement and creating a negotiation process for settling Métis land claims.[685] President Chartrand of MMF signed the *Framework Agreement* in November 2016, which to date continues to be a work in progress, specifically a Section 35 Framework Agreement.[686] Through institutional engagement, processes are created based on assertions of identity and rights; as well, the changes are grounded in the colonial legacy and historical endeavours—in this case a Métis land claim process initiated in a provincial territory.

Daniels

Over the past few decades, an organization commonly known as the previously cited Congress of Aboriginal Peoples (CAP) worked as a lobby group to advance the interests of Indigenous Peoples in policy and legal arenas. Harry Daniels was the head of the CAP and was a well-known Métis rights activist-political figure. In the last years of his political career, Daniels returned to the helm of CAP and became notable for the legal case he advanced prior to his death in 2004.[687] The Daniels case is ground-breaking for Métis and non-status First Nations Peoples for several reasons: First, it provides recognition that offers rights and protections by the Crown, such as the government's fiduciary duty; second, this recognition is based on collective identity and expands the individuals for whom the government is responsible; and, third, instead of being derived from colonial institutions, Indigenous identity is community-based and formed at least in part by Indigenous worldviews. The CAP lobby group provided the legal and financial support

[683] Elections Canada. *42nd General Election October 19, 2015*, https://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge&lang=e (accessed December 13, 2019).
[684] Manitoba Métis Federation (MMF), *Land Claim 2013: Our Time has Come*, 5.
[685] Manitoba Métis Federation (MMF), *Land Claim 2013: Our Time has Come*, 12.
[686] Manitoba Métis Federation (MMF), "President Chartrand presents signed Framework Agreement to Riel during ceremony," *News* (November 16, 2016), http://www.mmf.mb.ca/news_details.php?news_id=206 (accessed January 28, 2019).
[687] Lawrence Barkwell, *Harry Daniels, (1940-2004)*, Louis Riel Institute (August 15, 2012), http://www.metismuseum.ca/media/db/11902 (accessed July 28, 2019).

for the Daniels case. Although the CAP is an organization and not a governing Indigenous community, organizations like these support Indigenous Peoples to shift the Indigenous position in policy and institutions, without a supporting shift in Canadian social values. In other words, these changes have occurred because Indigenous Peoples have fought for them, not because Canadians attitudes toward them—and their rights—have changed.

In 1999, Harry Daniels, Leah Gardner, and Terry Joudrey launched the Daniels case against the federal government.[688] In their case, three declarations were sought: that Métis and non-status First Nations be defined by Section 91(24) of the *British North America Act, 1867* (BNA Act); that the Crown had both a responsibility and fiduciary duty for Métis and non-status First Nations; and that the Métis and non-status First Nations Peoples had 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."[689] Being recognized as 'Indian' in the BNA Act would have broader implications for older legislation and policy in which there were no distinctions made between 'Indian' (First Nations), Inuit, and Métis. This rights-based identity implies that other policies and legislation would apply to these populations when referred to as Indians. The exception of applicable legislation is the *Indian Act 1876*, as it explicitly states that it does not apply to Métis People.[690] At the time of the *BNA Act*, there were no legal distinctions in the language separating Métis People from Indians or status from non-status First Nations (Indians).

The Daniels case was heard at the federal trial level January 2013, and it was ruled that Métis and non-status First Nations Peoples were 'Indians' as per Section 91(24), and therefore a federal responsibility, implied through the Constitutional designation.[691] The federal government appealed the case in October 2013, and non-status First Nations were dropped from the definition in an appeal decision in April 2014.[692] Both the appellants and defendants appealed to

[688] Daniels *v.* Canada (Indian Affairs and Northern Development).
[689] Daniels *v.* Canada (Indian Affairs and Northern Development), background, and para 2.
[690] Government of Canada, Indigenous and Northern Affairs Canada, *What is Indian Status?* (June 9, 2018), https://www.aadnc-aandc.gc.ca/eng/1100100032463/1100100032464 (accessed July 4, 2019).
[691] Canadian Geographic, *Métis and the Constitution,* Indigenous Peoples Atlas of Canada, https://indigenouspeoplesatlasofcanada.ca/article/metis-and-the-constitution/ (accessed January 17, 2019).
[692] Canadian Geographic, *Métis and the Constitution*.

the Supreme Court of Canada (SCC). The SCC heard the case in October 2015, when parties that later joined the case, such as the Métis National Council, were granted intervenor status.[693] The SCC decision came on April 14, 2016: it specified agreement with the trial judge regarding the first declaration, dismissed the second and third declarations, and dismissed the cross-appeal by the federal government. The courts explained that there was no need to make a distinction regarding Métis and non-status First Nations identity as the group is regarded collectively as Indians under Section 91(24) *BNA Act*.[694] This decision was a vindication for Métis People as the case makes Indigenous groups in Canada equal. Métis and non-status First Nations Peoples had been in a 'jurisdictional wasteland,' fighting for recognition of jurisdiction and rights that were a given for status First Nations Peoples, registered First Nations, and Inuit (from the *R. v. Eskimo, 1939 case*).[695] The engagement of institutional processes by Indigenous Peoples vastly expanded identity-based rights, unsettling the government's goal of certainty and broadening responsibility.

Today, when they discuss identity and rights, Métis People in Canada describe the Daniels case as being critical and precedent-setting.[696] They also refer to the Powley case. Métis use varying signifiers for identity, depending on their cultural grounding. For example, many northern Métis People continue to hunt, fish, or trap, which is why Powley was one of the first significant cases for Métis and non-status First Nations Peoples.[697] Hunting, fishing, and trapping is also an important indicator for southern Métis who have participated many times in staged hunts as ways to advance their rights.[698] However, there are other ways that Métis formulate identify. For some, their identity is related to Scrip land that has remained in families for generations. For others, it is their connection to the road allowance communities.[699] For some, (like my family), it is the

[693] Congress of Aboriginal Peoples (CAP), *Daniels Legal Case.*
[694] Daniels *v.* Canada (Indian Affairs and Northern Development), preamble.
[695] Daniels *v.* Canada (Indian Affairs and Northern Development), preamble.
[696] Métis Nation of Ontario, "A significant victory for the Métis Nation," *News* (April 14, 2016.,Updated June 1, 2019), http://www.metisnation.org/news-media/news/a-significant-victory-for-the-metis-nation/ (accessed November 30, 2019).
[697] Mohan Kumar, et. al. Statistics Canada, "Harvesting activities among First Nations peoples living off reserve, Métis and Inuit: Time trends, barriers and associated factors," *Aboriginal Peoples' Survey* (April 16, 2019), https://www150.statcan.gc.ca/n1/pub/89-653-x/89-653-x2019001-eng.htm (accessed December 13, 2019).
[698] Former Métis Nations-Saskatchewan Area Director, Bob McLeod, upon leaving office, was arrested on a staged hunt in 2013. Bryan Favel handled the case in the Métis Nation-Saskatchewan. Since that time, Mr. McLeod passed away.
[699] Faye Maurice, November 23, 2019 Métis Nation Legislative Assembly, Métis Nation-Saskatchewan. Saskatoon.

simple daily activities that help us to recreate culture and identity, from land-based foods eaten in the home to meagre family possessions passed through the generations, some as simple as old rag-rugs scattered throughout the house, and community interaction. Through all this, connection to community is pivotal.

Policy and Institutional Impact and Implications

Indigenous Peoples have expanded the understanding of their identity and worldview through mobilization, not because the government offered new ideas under new policy development. In the 19th century the Métis People focused on diplomatic measures to advocate rights. In the 20th and 21st centuries, they have used the courts to enforce constitutional commitments, such as MMF, and constitutional relationships interpreted in the Daniels case. Indigenous Peoples'— in this case, the Métis and non-status First Nations Peoples—use of colonial institutions demonstrates organized initiatives and understanding of what needs to occur to create change. Using mechanisms provided by the colonial institutions, Indigenous People have created what Hall terms third order change, broad change associated with paradigm change.[700] These substantial policy and institutional changes, then, come from Indigenous interactions with institutions, not from social movements or social learning, which, normally, according to Hall, are the originators of change.[701] When the Métis left Red River, they moved to Batoche because of unfulfilled government promises and abuse from other colonists.[702] When the social values of the Métis and the other colonists diverged, the federal government chose to frame symbolic, but not real, change for the non-Métis colonists as a resolution. The gradual inclusion of the Métis in policy and institutional development leading up to the *Manitoba Act* came about not because the government reflected on policies and decided change was needed but because of the hard work of the Métis People.

As we have seen, negotiation and participation by Indigenous People in the court systems have led to their gradual inclusion in policy inquiry and change. Begun prior to the 2015 federal election, the *Isaac Report* inquiry concluded in 2016 that interaction with Métis People must

[700] Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics,* 25, no. 3 (1993), 280.
[701] Hall, 276.
[702] Trémaudan, 112.

involve substantial participation by the people themselves and not just the people that oversee programs, as was a response to recommendations from the *Hawthorn Report*.[703] Recommendations from the *Isaac Report* supported substantial Métis inclusion in policy development in areas like housing, child-care, and the environment.[704] Although not an Indigenous initiative grounded in Indigenous worldviews, the *Isaac Report* represents non-Indigenous research initiated and overseen by the federal government.

In the 19th and early 20th centuries, Indigenous policy change tended to be first order (gradual or incremental), and the government was path dependent. In other words, the status quo predominated because the government was resistant to change, and under the status quo, Indigenous Peoples had few rights. The government intended to remove the few rights Indigenous People had, as seen in its desire to extinguish Indigenous title of the land. It therefore devised the Scrip mechanism for that purpose—akin to the extinguishment through the treaty process. Failed assimilative policies was the catalyst for Indigenous People to initiate engagement and inquiries, but the government resisted them, except in Alberta, where Métis mobilization and political activism persuaded the government to hold an inquiry that secured benefits like the settlements.[705] This Alberta government inquiry produced different results from those commissioned by the federal government, which did not favour Indigenous People. When left to government decision making, Indigenous Peoples have enjoyed few secured benefits. However, in the mid 20th century, small changes occurred, which can be described using Hall's terms as second order change or policy punctuations. As Indigenous Peoples started challenging the policies and institutional definitions, the challenges contributed to a paradigm change (or third order change), which introduced doubt into the government's ideas about Indigenous identity and responsibility. This doubt made it less likely that the government would achieve its goal of certainty when it came to its responsibilities to Indigenous Peoples.

[703] Thomas Isaac and Canada, Indigenous Northern Affairs Canada, *A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision* (Gatineau, Qué.: Indigenous and Northern Affairs Canada, 2016).
[704] Isaac.
[705] Government of Alberta, *Métis Settlements locations.*

Conclusion

Indigenous Peoples have historically used institutional instruments to engage the colonial institutions and processes, but it was not until very recently that accumulated action created a third order paradigmatic shift in policy change. Paradigmatic shifts in policy change are distinct from other third order changes, which are brought about by social movements or social values that shift enough to convince the government that change is needed.[706] Although Indigenous Peoples have always been active politically, it has taken a long time for real change to occur. As we have seen in this chapter, the Métis have engaged institutions, asserting their position making an impact on the institution, and eventually securing institutional and policy inclusion. They used institutional mechanisms to direct their path and created change based on concepts of identity and community.

To hear Elders, the 'Old People,' speak of soldiers like Frank Tomkins, Harry Daniels, or Jim Durocher is to understand the many levels of storied interpretations. Many Métis Elders have indeed been through wars and war-like challenges battling for recognition of Métis rights. Stories of Roddy Powley, now told by Métis Elders, reflect narratives of collective identities of people whose lifestyles are governed by living a good and balanced life philosophy. This philosophical teaching is easy to forget some days, especially for young people who are full of fire and ready to take on the world. However, it is this Spirit that is important, as Spirit drives Indigenous initiatives. As I look back over my work and life, I remember that Elders' teachings confirm who we are and when we are ready to teach. I have watched some Elders walk into a room and say, "I'm gonna give them hell!" But instead of soldiering in with anger as I expect, a story is told to remind us who we are, where we came from, and what grounds us as people. As this chapter has revealed in discussions of Métis policy development, Indigenous initiative is grounded in colonial traditions and a worldview that is different from the government's.

[706] Hall, 289.

CHAPTER 6 – THE ALGONQUINS OF ONTARIO AND NON-STATUS FIRST NATIONS LAND CLAIMS

Introduction[707]

When people think about the Algonquin People, a common error they make is to confuse the language with the tribal origin of those who are within the Algonquian language group. Not the name the people chose for themselves, the word Algonquin comes from the eastern allies of the Malecite and Mi'kmaq Peoples and was later used by the French.[708] Increasingly, Indigenous Peoples are returning to their own language for identification rather than using the names others have used to describe them. For example, many people understood as Cree People, identify as *Nêhiýaw* (Cree). As a member of an Algonquin community, Lynn Gehl identifies as *Algonquin Anishinaabe-kew* and speaks explicitly to being part of a larger collective that is beyond status band members and, instead, includes several groups of people.[709] These shifts in words are significant because they mean that community members see 'community' as something more substantial than the narrowly defined definitions included in the *Indian Act, 1876*. As a result, understandings of membership in community is less narrow. Through the story of engagement between the Algonquin People and the Crown and later federal government, this chapter illustrates how First Nations peoples advance community-definitions of identity in pursuit of a land claims settlement.

One of the critical components for the federal government in settling Indigenous land claims is the concept of certainty. Within the specific claims policy, the federal government explains its preferences this way: "The Government of Canada prefers to resolve these claims by negotiating settlements with First Nations. Negotiations lead to 'win-win' solutions that bring closure, benefits and certainty for all Canadians."[710] This goal of certainty repeatedly surfaces in documents that detail the relationship between Indigenous Peoples and the federal government

[707] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[708] Lynn Gehl, *The Truth That Wampum Tells: My Debwewin on the Algonquin Land Claims Process* (Nova Scotia: Fernwood Publishing Co. Ltd.,2014), 14.
[709] Gehl, 8, 14.
[710] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada. *Specific Claims,* Government of Canada (January 12, 2014), https://www.aadnc-aandc.gc.ca/eng/1100100030291/1100100030292 (accessed July 7, 2019).

acting as the Crown. When comprehensive claims are examined, the federal government reiterates the goal: "Achieving more treaties remains a critical piece in achieving lasting certainty and true reconciliation. This goal includes certainty about the ownership, use and management of land and resources for all parties."[711] Christopher Alcantara argues in *Old Wine in New Bottles* that as long as certainty is the central goal of the federal government, there will be no real policy change in Canada.[712] I contend that the processes and events described in this chapter—initiated by community-based initiatives—have led to a paradigm shift. In making their argument for self-determination through the courts, Indigenous Peoples have taken away some of the government's power to determine whose Indigenous rights should be recognized, thereby eroding the government's certainty about these matters.

Certainty is also a key goal of Indigenous Peoples: they need to be certain about their membership to acquire Indigenous title to their land because the population count affects access to rights such as harvesting. When Algonquin communities pursued the negotiation of a land claim in Ontario, they needed to be certain about their membership, so they developed a new process to use in making claims. Expanding the land claims policy to include collectives of non-status First Nations communities, with the Algonquins Of Ontario (AOO) representing the collective of status and non-status communities leading the process, possibilities opened up for other non-status Indigenous collectives.

Background

In what is considered the Ottawa River Watershed, the territory of Algonquin People falls within Eastern Ontario and Quebec. The people are divided into two groups: *Omàmiwinini,* those living downriver, and *Weskarini, Matouweskarini, and Kichesipirini*, those living upriver, also known as the Big River People.[713] This watershed termed *Kiji Sibi* translates as the Big River.[714] Unlike

[711] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Comprehensive Claims,* Government of Canada (July 15, 2013), https://www.rcaanc-cirnac.gc.ca/eng/1100100030577/1551196153650 (access July 7, 2019).
[712] Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy / Analyse de Politiques* 35, no. 3 (2009), 335.
[713] Bonita Lawrence, *Fractured Homeland: Federal Recognition and Algonquin Identity in Ontario* (Vancouver: UBC Press, 2012), 19.
[714] Lawrence, 19.

their *Haudenausee* neighbours who were active cultivators, the Algonquin People relied on a hunting lifestyle and were more mobile.[715] Joan Holmes describes the territory of the Algonquin and Nipissing Peoples (the watershed of the Ottawa River) in more detail:

> [It] drains a wide swath of land from Lake Temiskaming in the north along both sides of the Quebec-Ontario boundary south to Long Sault or Carillon, a point in the Ottawa River just above Lake of Two Mountains. The Ottawa River's tributaries on the Ontario side include the Rideau, Mississippi, Madawaska, Bonnechere, Petawawa, and Mattawa rivers.[716]

After European contact, the Algonquin Peoples' landmarks were renamed, first by the French using translations from the Algonquin language and then by the British.[717] Along with the name changes to the territory came name changes for the people as well. Today, in Canada, there are two populations of Algonquin People: those recognized as status Indians under Section 6 of the *Indian Act, 1876*, and those of communities of unregistered peoples.

Prior to the solidification of non-Indigenous power on Turtle Island (North America) in the later part of the 18th century, First Nations communities interacted with European actors in a very different way. Contact with Europeans began with the French and Jacques Cartier in the 16th century.[718] As competition among European powers grew on the continent, the Algonquin People increasingly engaged with the British. Throughout colonial history, the only treaties made with Algonquin People were those of peace and friendship. Although historically the Algonquin People have been peace brokers, demonstrated in their roles in treaty-making and documented with Wampum belts, they regrettably negotiated no land treaties.[719] However, some communities did receive reserves and registered some people under the *Indian Act*. Algonquin and Nipissing Peoples sent petitions to the federal government for many years.[720] These actions demonstrated agency as their diplomatic position shifted through colonial history.

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[715] Lawrence, 25-26.
[716] Joan M. Holmes, "Hidden communities: Research difficulties encountered in researching non-status Algonquins in the Ottawa Valley," *30th Algonquian Conference, Boston, United States* (1998) retrieved from http://www.joanholmes.ca/Algonquin.com, 129.
[717] Lawrence, 21.
[718] Gehl, 26.
[719] Government of Canada, Indigenous and Northern Affairs Canada, *Treaty Texts, Upper Canada Land Surrenders*, Government of Canada (March 7, 2016), https://www.aadnc-aandc.gc.ca/eng/1370372152585/1370372222012#ucls20 (accessed July 7, 2019).
[720] Algonquins Of Ontario (AOO), *Our Proud History,* AOO, http://www.tanakiwin.com/algonquins-of-ontario/our-proud-history/ (accessed April 10, 2019).

The history of the AOO illustrates a determination that spans centuries and reveals the foundation of the modern claim. The story of this determination shows how a relationship based on diplomacy set the pattern of engagement and how the shift to petitions became a means of engaging the Crown institutionally. The AOO's history shapes the different interests of the collective communities involved. By inspecting the modern claim, we can understand how institutions are used as modern processes of engagement. Because of colonial impacts and the divergent history of Indigenous communities, the claims process to date has been rife with obstacles. However, the end result of working through the obstacles is a land claims agreement that impedes the government's goal of certainty about who is entitled to land claims.

Historical Engagement with Colonial Institutions

Comprehensive histories of the Algonquin and Nipissing Peoples have been written by Lynn Gehl, Bonita Lawrence, Marijke Huitema, Joan Holmes, and Robert Potts, to name a few of the leading scholars. Much of the research exists because of the communities' involvement in the AOO land claim, establishing the use and occupancy of this land. Gehl who, as mentioned earlier is an *Algonquin Anishinaabe-kew* woman, works extensively on issues of identity and recently successfully fought for her registered Indian status.[721] Lawrence, a *Mi'kmaq* academic, has also done research on federal recognition of Algonquin identity in the face of the AOO land claim.[722] Because of the well-documented history that exists, it is possible to analyze the Algonquin and Nipissing's use of institutional methods to engage the Crown. Demonstrating engagement in various ways, these interactions eventually led to the development of the first non-status/status First Nations land claim in Canada and what may be, one of the largest settlements.[723]

Historically, the Algonquin and Nipissing Peoples were discussed jointly in colonial documentation, and the two groups worked together, engaging the British Crown through petitions when addressing their grievances. As Joan Holmes points out, due to prolonged contact with the British at Lake of Two Mountains (Quebec), "Algonquin and Nipissing Peoples became

[721] Colin Perkel, "Woman wins 32-year fight for Indian status; argues rules were discriminatory," *CBC News* (April 20, 2017), https://www.cbc.ca/news/indigenous/woman-wins-32-year-fight-for-indian-status-1.4078317. (accessed July 7, 2019).
[722] Lawrence.
[723] Ontario, *Current Land Claims,* First Nations, Inuit and Métis (June 23, 2013, updated October 24, 2019), https://www.ontario.ca/page/current-land-claims (accessed November 28, 2019).

identified as Lake of Two Mountains or Oka Algonquin," even though most did not take up permanent residency in the area.[724] A long diplomatic history exists between the Algonquin and Nipissing Peoples and the colonizers following contact with the French in the 17th century. As the French and English fought for control of North America, the 18th century involved much peace brokering. The *Great Peace of Montreal, 1701,* involving 39 First Nations, ended a century-old war between the Haudenosaunee and the French.[725] In the agreement, which included the Algonquin and Nipissing Peoples, First Nations Peoples were treated as equal nations and allies.[726] Competition between the French and English continued throughout the 18th century, and Algonquin and Nipissing Peoples played a significant role in assisting with diplomacy and peace. In being part of the process, the peoples learned how European/colonial institutions functioned, enabling engagement between the nations.

Following the Great Peace of Montreal, a series of Peace treaties were signed on the east coast before treaties were negotiated in central Canada in the middle of the 18th century.[727] The Seven Years War precipitated the creation of an Indian Department headed by Sir William Johnson as Superintendent of the Northern District for the British Crown.[728] Johnson's contribution to the war was both military and diplomatic as he secured neutrality with French-allied First Nations groups.[729] He met representatives of the Seven Nations, negotiating Treaty terms.[730] The Seven Nations were an alliance of Haudenosaunee, Algonquin, Huron, Abenaki, and Nipissing Peoples along the St. Lawrence River, all of whom were allies of the French until the British conquest of New France. As Sandra Busatta indicates, "The Mohawks, who played a leading role in the inception [of the Seven Nations'], referred to it in their language as Tsiata Nihononwenstiake, or

[724] Holmes, 2.
[725] Canada, Indian Northern Affairs Canada Issuing Body, *Report on the Algonquins of Golden Lake Claim* (1993), vol 1, 3.
[726] Lawrence, 27.
[727] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaties of Peace and Neutrality (1701-1760)," https://www.rcaanc-cirnac.gc.ca/eng/1360866174787/1544619566736. (accessed July 7, 2019).
[728] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaties of Peace and Neutrality (1701-1760)."
[729] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaties of Peace and Neutrality (1701-1760)."
[730] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaties of Peace and Neutrality (1701-1760)."

the "Seven Lands."[731] Throughout the competition between France and England, the First Nations Peoples acted as allies to their respective trading partners, but as France was losing control in North America, the British Crown, understanding that certainty in its relationships with the First Nations Peoples was essential, initiated diplomacy.

As a colonial official who travelled to North America and built a substantial fortune during the fur trade, Sir William Johnson became a significant diplomatic player.[732] Aside from his relationship with the Seven Nations, he developed relations within the Six Nations Peoples, known at the time as the Iroquois Confederacy.[733] (Today the Iroquois Peoples use the traditional term Haudenosaunee to define themselves). Because of his experience and relationships, Johnson was asked to manage relations with the First Nations Peoples for the British Crown. As second in command during the Seven Years War (the French and Indian Wars), he was instrumental in a successful attack and capture of Fort Niagara.[734] In some documented sources, he is presented as sympathetic to First Nations interests in policy development, such as paying First Nations Peoples for their work and proposing land purchasing policies in line with First Nations interests, perhaps because he had First Nations children.[735] However, he only legally recognized one child in his last will and testament, a non-Indigenous child from his relationship with his first wife, Catherine Weissenberg. After Catherine's death, Johnson married Mary/Molly Brant, the sister of Thayendanegea (Joseph Brant), a Mohawk military leader.[736] Sir William Johnson is an influential figure in the history of the Algonquin land claim because in 1763, while acting on behalf of the Crown, he had issued a declaration deemed legitimate by the Ontario Superior Court and SCC in 1983.[737] The history of the Algonquin People documents the acceptance of this declaration in the context of the modern land claim.

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[731] Sandra Busatta, "From Adoption to Eviction: The Blood Quantum and the Mohawks," *Antrocom J. of Anthropology*, vol. 14, no. 2 (2018), 8.
[732] Julian Gwyn, *Johnson, Sir William,* Dictionary of Canadian Biography (University of Toronto/Université Laval), http://www.biographi.ca/en/bio/johnson_william_4E.html. (accessed July 7, 2019).
[733] Gwyn, *Johnson, Sir William.*
[734] Gwyn, *Johnson, Sir William.*
[735] Gwyn, *Johnson, Sir William.*
[736] Gwyn, *Johnson, Sir William.*
[737] Gwyn, *Johnson, Sir William.*
The Algonquin Golden Lake First Nation, *The Petition of the Chief, Council and People of the Algonquins of Golden Lake, on behalf of the Algonquin Golden Lake First Nation. To His Excellency Edward Schreyer, Governor General of Canada and Personal Representative of Her Majesty the Queen Elizabeth the Second* (March 1983).

In 1759, with the French surrender of established areas through negotiated articles of capitulation, the Seven Years War was winding down. One year later in 1760, Montreal, one of France's last strongholds in North America, fell to the British. As with previous surrenders, there was an agreement made with the Articles of *Capitulation of Montreal of 1760*.[738] The *Treaty of Paris of 1763* officially ended the war.[739] Upon the conclusion of the war, England issued the *Royal Proclamation of 1763*, a document that remains relevant to Indigenous policy today and is protected for Indigenous Peoples under Section 25 of the *Constitution Act, 1982*.[740] Sir William Johnson delivered news of the *Royal Proclamation* to the Algonquin and Nipissing Peoples, according to the petition submitted by the Algonquins of Pikwàkanagàn First Nation (Golden Lake), and a treaty of alliance and friendship was entered into with the Crown.[741] In the petition, they argued that the Crown was obligated to the First Nations Peoples, supported by the *Articles of Capitulation of Montreal*, *1760*. Article 40 states the following:

> The savages or Indian allies of his most Christian Majesty, shall be maintained in the lands they inhabit, if they chuse sicto remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. The actual Vicars General, and the Bishop, when the Episcopal See shall be filled, shall have leave to send to them new missionaries when they shall judge it necessary.
> —'Granted, except the last article, which has been already refused.'[742]

This declaration, further supported by the *Royal Proclamation of 1763*, continues to be part of the Canadian legal system.[743] In the petition, the Algonquin People explain that they had honoured all their commitments, including assisting and participating in the *Treaty of Niagara of 1764* and serving in the military when requested. The Algonquin People were indeed

[738] Articles of Capitulation between their excellencies Major General Amherst, Commander in Chief of His Britannic Majesty's troops and forces in North America, on the one part, and the Marquis de Vaudreuil &c. Governor and Lieutenant-General for the King in Canada, on the other. Montréal, September 8, 1760. (Articles of Capitulation of Montreal, 1760).
[739] *The Treaty of Paris* (1763).
[740] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[741] Gehl, 32.
The Algonquin Golden Lake First Nation, *The Petition of the Chief, Council and People of the Algonquins of Golden Lake, on behalf of the Algonquin Golden Lake First Nation.*
[742] Articles of Capitulation of Montreal, 1760.
[743] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

instrumental in the *Treaty of Niagara,* as they facilitated the meeting at the request of Sir W. Johnson, who visited 24 Nations to encourage them to participate in talks at Niagara.[744]

After the *Royal Proclamation* and the *Treaty of Niagara*, the government made no further agreements with Algonquin or Nipissing Peoples. Although the final peace agreements were on the east coast, the *Treaty of Niagara* was the last made in central Canada. This treaty was intended to formalize relationships between the settlers and Indigenous Peoples described in the *Royal Proclamation*.[745] Indeed, the First Nations People believed their lands were protected until they started dealing with the encroachment of settlers. Because the protections were difficult to enforce, the Algonquin and Nipissing Peoples used diplomacy to engage the British Crown by submitting numerous petitions, based on previous channels of communication. The petitions demonstrate diplomatic exchange in formal language, the engagement and discourse clearly shaped by the peace and neutrality treaties. Created in Lake of Two Mountains, the first petition on trespassing and liquor sales in the Algonquin's territory was sent to the British in 1772.[746] In response, "the British passed an ordinance prohibiting the taking of liquor into Indian villages."[747] However, this ordinance did not prevent others from encroaching on Algonquin and Nipissing lands. With no land agreement in place, there were no enforceable policies.

Algonquin and Nipissing Peoples understood their traditional territory and asserted their nationhood. As Bonita Lawrence points out, "We petitioned the government in 1772, and again in 1791 (the year that Upper and Lower Canada separated), clearly stating our occupation and use of the Ottawa River from Long Sault to Lake Nipissing."[748] In 1783, when the American Revolution ended, more encroachment occurred on Algonquin lands as Loyalists moved north into British territory.[749] Although the British Crown negotiated land for settlement, the Algonquin and Nipissing Peoples were not included in these negotiations.

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[744] Lawrence, 32.
[745] Marijke Huitema, *Historical Algonquin Occupancy Algonquin Park Report*, Prepared for 'Elders Without Borders' (Michael Swinwood), 19.
[746] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 7.
[747] Lawrence, 35.
[748] Kim Hanewich, *Omamiwinini: the Invisible People*, History of the Algonquins (2009), Omàmiwininì Pimàdjwowin – the Algonquin Way Cultural Centre.
[749] Bruce G. Wilson, *Colonial identities: Canada from 1760 to 1815*, vol. 3, National Archives of Canada, (1988), 56.

While requests by the Algonquin and Nipissing People for land agreements and protection went unanswered, other groups had better success. In 1783, the Mississauga People entered into an agreement with the Crown for, as Huitema describes, the "Crawford Purchase of 1783, providing areas of settlement for Loyalist settlers and Haudenosaunee (Iroquois) peoples loyal to the British Crown."[750] In 1784, the *Oswegatchie Purchase* followed, negotiated with the Mohawk People. Both these agreements encroached on Algonquin and Nipissing territory.[751] "Although the Crown was aware of the requirement to obtain a surrender of the land from the Indians before settlement could be established, it made three land purchases in order to settle soldiers, loyalists, new settlers, and a group of Mohawks under Brant on Indian land."[752] It appears, then, that the people directly associated with Sir William Johnson from his relationship with Molly Brant received settlements, while the Algonquin and Nipissing Peoples were afforded no such benefits.

At Lake of Two Mountains, the question of land title unsettled the people. They were told that the land was not, in fact, First Nations titled land, but land under the title of the Sulpician Order, a society of Catholic priests.[753] Having learned from experience, the people knew that petitions to the Crown for protection against encroachment would fail, so they took a new approach to engage colonial institutions. In 1787, a petition was sent to the Crown on behalf of Algonquin and Nipissing Peoples for a deed to the land in the Lake of Two Mountains area. This petition outlined previous promises to support the current petition, such as promises made in the *Royal Proclamation*.[754] It appears that some people had relocated to this region with the promise of a deed of land in 1721, but they were never provided with the deed. Assistance from Sir William Johnson was requested, but it seems the request went unanswered.[755] Without other institutional mechanisms for diplomacy, the people continued with petitions, altering the requests in the petitions based on changing circumstances.

[750] Huitema, *Historical Algonquin Occupancy Algonquin Park Report*, 7.
[751] Lawrence, 36.
[752] Hanewich, 2.
[753] Marijke E. Huitema, *Land of Which the Savages Stood in No Particular Need Dispossessing the Algonquins of South-Eastern Ontario of Their Lands, 1760-1930*, (2001), 77.
[754] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 8
[755] Huitema, *Historical Algonquin Occupancy Algonquin Park Report*, 8.

Diplomatic efforts based on historical relationships and methods used by Indigenous Peoples demonstrate that the Algonquin and Nipissing Peoples honoured their commitments made to the British Crown in maintaining a peaceful relationship. Compromises were continuously offered in the petitions. As mentioned previously, the Algonquin and Nipissing Peoples followed the 1772 petition with a subsequent one in 1791. At this time, the Algonquin and Nipissing Peoples met with the Lieutenant General of Indian Affairs for the Province of Quebec, Colonel John Campbell, but nothing came of the meeting.[756] In 1791, the *Constitution Act* divided Canada into Upper and Lower Canada. This Act changed the jurisdiction of the land within the colonial institution without consultations with the people. As Huitama indicates, "In August of 1795, the Algonquins and Nipissings again repeated their request for 'proper title' to the land they occupied at the Lake of Two Mountains."[757] Despite territory changes with the division of Upper and Lower Canada, they continued their diplomatic efforts.

According to the 1983 petition in the modern claim process, the Algonquin and Nipissing had frequently submitted petitions in the past. Beginning in July 14, 1791, the petitions became more frequent with follow-up petitions issued on August 27, 1794, July 26, 1795, and July 19, 1798*.[758] In this period, the British acknowledged that the title to land in the Ottawa Valley was yet to be settled.[759] Huitema reports that, in 1798, the Algonquin and Nipissing Peoples "repeated their offer to cede an area of forty arpents deep from the edge of the Ottawa River to ensure that they would retain the back lands for hunting."[760] The Algonquin and Nipissing Peoples were concerned with the *Crawford* and *Oswegatchie Purchases,* in which large parts of their land were sold off.[761] They continued petition submissions for southern lands in the Ottawa Valley, while encroachment continued in the northern parts as well.[762] Their continued submission of petitions illustrate that the Algonquin and Nipissing Peoples were attempting to address growing concerns through diplomacy.

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[756] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 8.
[757] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 9
[758] Based on the sequential order of petitions listed to the courts, it appears there is a typographic error, which is corrected in this text. The document states 1789 when placed later in the chronological list.
[759] Lawrence, 35
[760] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 9.
[761] The Crawford and Oswegatchie Purchases are the settlements previously discussed with respect to making from for settlers and loyalists.
[762] Lawrence*,* 36.

In the 19th century, Crown policies on Indigenous Peoples shifted. Initially, because the relationship was commercial, the British made efforts to build the relationship, but, once they had established control on the continent, their policies changed to assimilation.[763] After the War of 1812, the Indigenous Peoples became less important to the British as they were no longer needed to guard against invasions from the United States. During the battle at Beaver Dam, the Algonquin People supported the British with an army of 150 men, but after the war, while the British officers received land grants for their contribution, the Algonquin had to petition for land and received nothing.[764] Algonquin and Nipissing Peoples honoured their promises and commitments despite the Crown's failure to uphold its promises.

Beginning in the 19th century, the Algonquin and Nipissing Peoples rented some of their lands to squatters through their own arrangements.[765] The colonial Indian department assisted them, but problems developed from this arrangement. Meanwhile, the Mississauga People engaged the government in 1816 about intrusions on the land by surveyors. The Mississauga People claimed, "No other Indians than themselves have any claim," and "the claims of the Nipissing and Algonquin do not cross the Ottawa River."[766] A provisional agreement was reached in 1819 with the Mississauga peoples, ceding land that the Algonquin and Nipissing Peoples claimed.[767] This settlement came to be known as the *Rideau Purchase*. On May 31, 1819, Indian agent John Ferguson negotiated a *Provisional Agreement* (*Cession #27-The Rideau Purchase*) with the Mississauga People for a tract of land along the south shore of the Ottawa River between Pembroke and Ottawa, extending south and west.[768] The federal government was rushing to settle the title to land because settlement in the area was increasing.

Wanting to be certain about rights to land title and use, the Crown extinguished the title to land that was surrendered—the *Rideau Purchase* being one of these surrenders.[769] Significantly, this

[763] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 20.
[764] Gehl, 32.
[765] James Morrison, *Algonquin History in the Ottawa Watershed*, Cultural Heritage (November 28, 2005), 31.
[766] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 9.
[767] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 10.
[768] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 10.
[769] Government of Canada, Indigenous and Northern Affairs Canada, *Treaty Texts, Upper Canada Land Surrenders. Government of Canada* (March 7, 2016), https://www.aadnc-aandc.gc.ca/eng/1370372152585/1370372222012#ucls20 (accessed July 7, 2019).

extinguishment policy lasted until the 21st century, when there was a shift. Christopher Alcantara considers this late shift in claims policy to be instrumental within land claims research. In the broader scope of Indigenous policy change, it is part of the paradigm shift occurring in Indigenous policy.[770] As more Indigenous groups engage institutional structures and bring successful challenges before the Crown, government control of certainty about Indigenous identity and rights is eroding.

The Algonquin and Nipissing Peoples continued petitioning the Crown to retain a portion of their lands into the 19th century. In 1820, they petitioned for the title to land but were refused once again. The Governor-in-Chief of Canada responded in 1822, explaining that the Crown could not grant specific hunting lands for specific First Nations groups.[771] Another attempt to reach an agreement was offered in a 1824 petition to the Superintendent General of Indian Affairs, General Darling.[772] In the fall of 1827, Darling met with a council in Lake of Two Mountains to explain that the Crown could not stop people from hunting in their territory.[773] The British Crown did not respond to a land claim put forth by the Algonquin and Nipissing, so they sent another petition to Governor-in-Chief, Sir George Dalhousie, asking for an inquiry into their land claim.[774] Because trespassing continued to be an issue, the peoples returned to requesting protection for their lands in 1829.[775] Settlers and squatters were not the only problems; the Haudenosaunee and Abenaki Peoples were also encroaching.[776] In 1829, the British Crown "usurped legal jurisdiction over territory."[777] Through this jurisdictional change imposed by the Crown, those trying to evict squatters were threatened with legal means.[778] Without consultation, Algonquin and Nipissing Peoples were losing all rights to their territory despite historical relationships, their efforts at diplomacy, and commitments they had upheld.

[770] Gehl, 66.
[771] Hanewich, 2.
[772] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 11.
[773] Gehl, 33.
[774] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 12.
[775] Huitema, *Historical Algonquin Occupancy Algonquin Park Report,* 12.
[776] Holmes, 6.
[777] Lawrence, 36.
[778] Lawrence, 36.

Facing further intrusion, the Algonquin and Nipissing Peoples submitted another series of petitions: on March 1829, August 1835, April 1836, February 1837, September 1838, March 1840, September 1841, July 1842, February 1847, August 1849, February 1851, September 1857, and July 1863.[779] By the 1830s, requests in the petitions include compensation, transfer of title, and the removal of squatters. For example, in the 1835 petition to the Lieutenant Governor of Upper Canada, Major General Colborne, they outlined their traditional use of land and the promises made in the *Royal Proclamation*, while explaining that this document had not been honoured.[780] At this point, the peoples were aware that they could not secure the lands lost and therefore proposed a compensation settlement for what was already lost and asking for possession of the remaining hunting lands with the choice to sell later to the Crown. Finally, to secure a homeland, they wanted the squatters to leave their remaining hunting lands.[781] For the 1840 petition, the government did meet with the peoples, but because again no agreement was reached or support provided, they continued to submit petitions.[782] With no other avenues to engage the Crown, they remained on the path established in the relationship-building era. Engaging militarily or outside diplomatic means would have breached the agreements made with the Crown. While pursuing actions through institutional processes, they were relying on their record of promises kept.

Prior to 1791, the Algonquin People had operated as a collective entity, but the artificial boundary between Ontario and Quebec created jurisdictional division, as presented in the modern claim.[783] A minor victory came in 1851 when some lands were set aside on the Lower Canada side of the Ottawa Valley.[784]

> On several occasions, authorities acknowledged their claims but did not take action. Finally, in l851, legislation set land aside for the Algonquin and other tribes of the upper Ottawa valley in Lower Canada (now Quebec), at the confluence of the River Desert and the Gatineau River, and at Lake Temiskaming.[785]

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[779] The Algonquin Golden Lake First Nation, *The Petition of the Chief, Council and People of the Algonquins of Golden Lake, on behalf of the Algonquin Golden Lake First Nation.*
[780] Algonquins Of Ontario (AOO), *Our Proud History,* 1835 petition.
[781] Algonquins Of Ontario (AOO), *Our Proud History,* 1835 petition. Gehl, 34.
[782] Gehl, 34.
[783] Ontario, Commission on the Northern and Western Boundaries, David Mills. *Report on the Boundaries of the Province of Ontario* (1877), 226.
[784] Holmes, 130.
[785] Holmes, 130.

However, the Algonquin and Nipissing Peoples in Upper Canada made no gains, inspiring more petitions. As reported by the Algonquins of Pikwakanagan First Nation, "In 1873, after we petitioned several times for our own land, the 1745-acre Golden Lake Reserve was purchased from Ontario by Canada with our money. The reserve was vested with the Department of Indian Affairs in trust for us, allowing 'certificates of possession' and 'transference between members' rather than land ownership."[786] The Indian Department paid $156.10 for the original 1560 acres of reserve land at Golden Lake. What made this purchase unusual was that most reserves were created through treaties rather than by purchase.[787] Moving forward, future Algonquin and Nipissing claims were specific to the Upper Canada territory.

Assimilation policies diminished the nationhood powers of the Algonquin and Nipissing Peoples. In almost 100 years of petitions, the government created just three reserves—Timiskaming, Maniwaki, and Golden Lake—and the Algonquin and Nipissing could either relocate to them or find another way to survive.[788] Most that relocated to these communities were from Trois Rivière and Lake of Two Mountains, while many in Upper Canada remained in the Ottawa Valley along waterways with virtually no rights to the land as their communities were considered extinct.[789] There were 28 petitions submitted between 1772 and 1881.[790] The government disregarded the Algonquin and Nipissing Peoples until future generations ushered in a new era with different tactics for dealing with the now well-established Canadian federal institutions. The tenacity demonstrated by Algonquin and Nipissing Peoples and their efforts to retain nationhood based on their collective identities later became building blocks for this new era of diplomacy.

Modern Engagement with Colonial Institutions

Their 18th and 19th century engagements with the Crown did little for Algonquin and Nipissing Peoples in acknowledging territory and territorial rights. They did, however, lay the groundwork for the modern land claim. The Algonquin and Nipissing Peoples always honoured their

[786] Algonquins of Pikwàkanagàn First Nation, *History,* http://algonquinsofpikwakanagan.com/legacy/culture_history.php (accessed April 12, 2019).
Holmes, 130.
[787] Gehl, 36.
[788] Lawrence, 30.
[789] Lawrence, 30. Gehl, 35.
[790] Gehl, 42.

commitments in agreements, but, in contemporary treaties, they have access to new policy instruments to use along with the gains made by previous Indigenous Peoples. The modern claim process of the Ontario Algonquin People began with just one registered First Nations community, but, not long after, the claim was extended to include non-status Algonquin First Nations in Ontario. This collaboration created the first modern-day land claim that included non-status First Nations Peoples. It has not been a perfect process, especially concerning 'beneficiary status' for the claim, but it significantly shifts policy understandings of certainty surrounding land claims. Policy has shifted because communities—not governments—are determining entitlement decisions through an internal beneficiary-determining process. The government's diminishing control over identity determination means it is now less certain of who is Indigenous in this country. Through the tireless efforts of Indigenous Peoples, the definition of who is considered to be Indigenous—and, therefore who has entitlement rights—has expanded.

Claims Policy Implementation Background

The modern-day land claims process began in 1967 when Frank Calder and Elders from the Nisga'a Nation initiated a legal case against the province of British Columbia on behalf of the Nisga'a community, asserting its title to the land was never extinguished.[791] Although the case resulted in a split decision, the court action initiated serious consideration of Indigenous title to land and instigated the creation of a policy process to deal with the 'Aboriginal' title to land. In 1974, the federal government opened the Office of Native Claims (ONC) under the department of Indian and Northern Affairs (DIAND).[792] As the Specific Claims Tribunal points out, "In Calder, the Supreme Court affirmed the principle that the historic occupation of land by Indigenous Peoples gave rise to legal rights that survived European settlement."[793] Two forms of claims developed under this framework: specific and comprehensive claims.[794] This court action initiated by Indigenous community members led to the creation of a whole policy area for the federal government.

[791] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.
[792] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act," *History* (December 5, 2011), http://www.sct-trp.ca/hist/hist_e.htm. (accessed November 11, 2019).
[793] Specific Claims Tribunal.
[794] Specific Claims Tribunal.

There are two forms of claims process: the specific claims model and the comprehensive claims model. The specific claims model relates to Indigenous communities, specifically First Nations bands that have signed treaties and agreements with the federal government but that the government has failed to honour.[795] An example of a community claim that falls under the specific claims model is one for land that was owed because it was expropriated after the creation of a reserve or because the community did not receive the complete land parcel during reserve creation. In Saskatchewan, the process in place for settling outstanding land claims with First Nations communities is the Treaty Land Entitlement Framework.[796] Saskatchewan was the first province to establish an Office of the Treaty Commissioner, which came from the signing of the *Treaty Land Entitlement Framework Agreement, 1992*.[797] This process was created to assist in settling specific claims.

In other instances, a specific claim can arise for unfulfilled promises outlined in treaty commitments. In 1899, the Lac La Ronge Indian Band (LLRIB) signed an adhesion to Treaty 6 at Molanosa, near Montreal Lake. When the band signed the adhesion, it received all the commitments associated with the Treaty 6 promises.[798] Earlier in the 21st century, it was found that the community had never received twine promised to it by the federal government in Treaty 6. In response, the LLRIB launched a specific claim regarding the twine that it was owed. At one time, someone from the band pointed out at a public presentation that there was enough fishing twine owed to those in Treaty 6 territory that it could wrap around the world. Although it is unclear how true this statement is, since then bands have settled twine claims, demonstrating there was some substance to it.

The second form of claim—the comprehensive claims process—refers to claims that are made when there is no prior agreement. This type of process involves negotiations between the federal government, acting on behalf of the Crown, and Indigenous Peoples.[799] The comprehensive

[795] Specific Claims Tribunal.
[796] Government of Canada, Indigenous and Northern Affairs Canada, *Treaty Land Entitlement in Saskatchewan* (April 11, 2017), hjttps://www.aadnc-aandc.gc.ca/eng/1100100034825/1100100034826 (accessed July 7, 2019).
[797] Government of Canada, Indigenous and Northern Affairs Canada. *Treaty Land Entitlement in Saskatchewan.*
[798] John Leonard Taylor, *Treaty Research Report Treaty Six (1876)*, (1985), 26, https://www.aadnc-aandc.gc.ca/eng/1100100028706/1100100028708 (accessed July 7, 2019).
[799] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Specific Claims*

claims process has come about because Indigenous Peoples have been successful in the court system and the government has recognized that it requires a process for negotiating—what is understood today, as modern treaties. The first example of a major comprehensive claim is that settled by the People of James Bay after they took on the Québec government and the Office of Native Claims (a federal government department that deal with land claims) over the construction of a massive hydro-electric dam that was to flood their lands. After court action was initiated, the James Bay Cree, the Inuit of northern Québec, the federal government, and the Québec government negotiated the *James Bay and Northern Quebec Agreement*, *1975* (JBNQA).[800] Although it was litigated and not negotiated through the claims process in the Office of Native Claims, this agreement is seen as one of the original templates for the settlement of comprehensive claims.[801] Now in the 21st century, we observe various forms of comprehensive claims settlements for Inuit, First Nations, and Métis People.

The Modern Claim History of the Ontario Algonquin People

In the second half of the 20th century, a shift began in Indigenous policy. Michael Howlett discusses Sally Weaver's hypothesis that there was a paradigm shift occurring; however, Howlett also argued that at the time there was not yet enough evidence to make this point.[802] Today, we can see that Indigenous policy has shifted through a change in goals. For example, although assimilationist undertones endure in policies such as the *Indian Act*, the government no longer explicitly points to a long-term goal of assimilation. As well, there is now Indigenous participation in policy development, which did not occur before the latter part of the 20th century. Although the government's goal of certainty remains, it is becoming more challenging to meet as Indigenous Peoples engage institutional instruments to assert their identity and worldviews. Consequently, as Indigenous Peoples such as Calder engage the Crown through institutions, new settings and instruments are created for settling claims of 'Aboriginal' title. The introduction of doubt into the government's intention to be certain about who has Indigenous identity and to whom it owes responsibility, demonstrates a paradigm shift. The shift is the erosion of control

[800] JBNQA, 1975 – validated by *James Bay and Northern Quebec Native Claims Settlement Act S.C. 1976-77, c. 32.* Richardson, Boyce. *Strangers Devour The Land*. 1976.
[801] JBNQA, 1975.
[802] Michael Howlett, "Policy Paradigms and Policy Change: Lessons from the Old and New Canadian Policies Towards Aboriginal Peoples," *Policy Studies Journal* 22, no. 4 (1994), 635.

the government holds on determining Indigenous identity, connecting to loss of control of the goal of certainty. Engaging the institution as a partner in a status community, Algonquin People have changed the land claims landscape for non-status claims acceptance in the future.

Following the Calder decision, Indigenous Peoples started researching the history of their lands across the country. In the 1970s, the Algonquins of Pikwàkanagàn First Nation, previously known as the Golden Lake Algonquin, were interested in knowing what happened to their land rights and how they lost land to the railroad. This community is the only status Algonquin community in Ontario. Chief Dan Tennisco asked the Rights and Treaty Research Program of the Union of Ontario Indians to investigate the taking of 'rights of way' on the reserve in 1976. Finding no evidence of surrender of Indigenous title, the program determined that an inquiry should be held.[803] In 1978, the community decided to prepare for a land claim.[804]

After the patriation of the *Constitution Act, 1982*, Algonquin People engaged the modern treaty process, while the Nipissing People established their own modern process, resulting in the Nipissing First Nation Boundary Settlement agreement signed in 2013.[805] As we have seen, the Algonquin and Nipissing Peoples had been presented with the *Royal Proclamation, 1763* and were an integral part both of the *Treaty of Niagara, 1764* (documents now protected under the *Canadian Charter of Rights and Freedoms* (CCRF)) and the *Constitution Act, 1982*.[806] In 1983, the Algonquins of Pikwàkanagàn First Nation (Golden Lake at the time) formally submitted a petition with supporting research addressed to the Governor General of Canada Edward Schreyer and the Government of Canada, and, in 1985, to the Government of Ontario.[807] The province accepted the claim and agreed to negotiate in 1991, joined by the federal government in 1992.[808]

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[803] Lawrence, 83.
[804] Lawrence, 45.
[805] Nipissing First Nation, *Land Claims Settlement,* Nipissing First Nation Boundary Settlement Agreement (2013) https://www.nfn.ca/land-claim-settlement/ (accessed June 17, 2020).
[806] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[807] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations,* AOO, https://www.tanakiwin.com/our-treaty-negotiations/overview-of-treaty-negotiations/, (accessed April 12, 2019).
Lawrence, 85.
The Algonquin Golden Lake First Nation, *The Petition of the Chief, Council and People of the Algonquins of Golden Lake, on behalf of the Algonquin Golden Lake First Nation.*
[808] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations.*
Government of Ontario, *The Algonquin Land Claim* (May 3, 2019), https://www.ontario.ca/page/algonquin-land-claim#section-4 (accessed July 7, 2019).

For the first time in 200 years, Algonquin People were making progress towards recognition of 'Aboriginal' title. The new institutional mechanisms available explicitly provided for peoples with no prior land agreement in the comprehensive claims policy. This mechanism expanded who qualified by using the Indigenous worldview to determine a beneficiary.

An interim hunting agreement with the Algonquins of Pikwàkanagàn First Nation was developed during this initial engagement period with the Crown (1991).[809] Also during this period, the claim came to include those with Algonquin ancestry with no connection to the Pikwàkanagàn community. Including non-status Algonquin People in the claim accounts for families who were part of the historical process and then disenfranchised from their Indigenous rights because they refused to be part of the colonial order. Their inclusion also indicates that history had demonstrated that not all Algonquin People settled on reserve. In 1986, the Algonquins of Pikwàkanagàn First Nation first started searching for off-reserve and non-status Algonquin People as they believed that the land was a collective interest.[810] In 1990, meetings were held to form networks. Included in the meetings were people from Bancroft/Baptiste Lake, Mattawa/North Bay, Sharbot Lake/Calabogie, and Whitney/Lake St. Peter.[811] Not all Algonquin groups were invited to participate, such as those organized under the Ontario Métis and Non-Status Indian Association, and some non-status communities organized on their own, like the community of Ardoch.[812] The Antoine First Nation, Ardoch Algonquin First Nation, and the Bonnechere Algonquin community, along with some networked Algonquin families, were excluded.[813]

Initially, to be accepted in the claim, people were asked to abandon their community organization and join the Algonquin enrolment as individuals with the federally recognized community.[814] In 1994, this claim became the first of its kind when the Algonquins of Pikwàkanagàn First Nation passed a law to include non-status Algonquin communities in the

[809] Gehl, 47.
[810] Gehl, 23. Lawrence, 88.
[811] Lawrence, 88.
[812] Lawrence, 89.
[813] Lawrence, 89.
[814] Lawrence, 89.

land claim engagement.[815] However, problems existed when status and non-status communities worked together because each had different expectations of how the negotiations would unfold. Despite these internal struggles, processes were developed to move the land claim forward.

Another group that struggled for recognition was the Ontario Métis and Non-Status Indian Association for Madawaska, Whitney, and Sabine. Bob Lavalley, representative of the three communities, worked for many years on behalf of the group to have it included in the land claim.[816] When these communities joined the claim, Antoine, Ardoch, and Bonnechere were not yet included, as they resisted having to disband to join the Algonquins of Pikwàkanagàn First Nation. The people of Ardoch, for example, believed that their community was strong enough without requiring an affiliation with the Algonquins of Pikwàkanagàn First Nation to exist as Algonquin People.[817] The three communities not part of the Pikwàkanagàn claim could have potentially challenged the leadership of Pikwàkanagàn for speaking for and defining all Algonquin People in their relationship with the government.[818] Working as a collective would prove to be a struggle for the unified community of Algonquin, just as it was for the communities coming together in the first place.

There were several reasons to bring in non-status Algonquin People. First, their history predates the creation of the reserve at Golden Lake, and the land was used and shared by all Algonquin communities. Second, without coordination, there could have been delays because of overlapping territory, and it was thought that uniting as a group would expedite the process. Lastly, it was assumed that having more people involved would strengthen the claim.[819] As a response to non-status Algonquin communities that joined the land claim, the Algonquin People in 1993 developed the enrollment law, which was ratified in 1994, maintaining the exclusion of Antoine, Ardoch, and Bonnechere communities.[820] Under this enrollment policy, to be eligible, people needed 1/8th Algonquin blood and ties to a root ancestor.[821] The enrollment process was

[815] Mattawa/North Bay Algonquin First Nation, *Our History,* http://www.strikezonetackle.com/mattawanorthbayalgonquinfirstnation/AboutUs.html, (accessed May 1, 2019).
[816] Lawrence, 89.
[817] Lawrence, 90.
[818] Lawrence, 91.
[819] Lawrence, 88.
[820] Lawrence, 94. Gehl, 22.
[821] Lawrence, 96.

facilitated by area committees that were established.[822] Although the enrolment process had its own issues, it was still a community-driven initiative to identify as many Algonquin People as possible.[823] The blood quantum criteria was problematic because it applied only to non-status Algonquin People and was dropped because they created discord between groups over perceptions of identity.[824] (Incidentally, Blood quantum criteria did not apply in the *Indian Act*.) The root ancestry criterion was also a problem as some did not agree with this requirement. Robert Potts, a negotiator for Algonquin People, argues that participation in culture is a sign of resiliency and is as relevant as demonstrating that one's family had retained its culture for 200 years.[825] Despite the internal problems, what made this claim significant was the inclusion of non-status First Nations Peoples based on enrolment policies developed by the Algonquin nation, not determined by non-Algonquin Peoples.

As a collective of status and non-status Algonquin People, the communities agreed to engage the government of Ontario in a land claim. Under this new collective, a S*tatement of Shared Objectives and a Framework* to guide negotiations was signed.[826] The negotiations began in 1992, with four principal areas identified by Algonquin People as areas of interest:

1. Establishing an adequate Algonquin land base made up of unoccupied Crown land
2. Involving settling questions of natural resource use to reflect both Algonquin and non-Algonquin concerns in the territory
3. Recognizing and affirming the Algonquins' inherent right to complete jurisdiction over their land and people
4. Obtaining fair compensation for past, present, and future use of Algonquin territory and its natural resources.[827]

These areas of discussion addressed the concerns raised in the historic petitions, such as the lack of sustainable land and compensation. The discussion points on jurisdiction framed in the modern context would return the community to a self-governing nation. However, Algonquin

[822] Lawrence, 92.
[823] Gehl, 23.
[824] Ontario, First Nations, Inuit and Métis: Land Claims, *Executive Summary of the Algonquins of Ontario Proposed Agreement-in-Principle* (June 2015), Chapter 3.
[825] Jorge Barrera, "'Non-Aboriginals' on list of Ontario Algonquins set to vote on treaty deal covering Ottawa: report," *APTN National News* (February 11, 2016), https://aptnnews.ca/2016/02/11/non-aboriginals-on-list-of-ontario-algonquins-set-to-vote-on-treaty-deal-covering-ottawa-report/, (accessed May 1, 2019).
[826] Government of Ontario, *The Algonquin Land Claim*. Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations.*
[827] Lawrence, 87.

People would not be an equal of the Crown as they once were because the sovereignty of the Crown is viewed as supreme in law.

The aforementioned area committees were created in October 1995 by the Algonquin People. There were two: the Algonquin Nation Circle with representatives from each community for more significant issues, and the Algonquin Management Circle for more immediate issues.[828] These committees excluded the Antoine, Ardoch, and Bonnechere communities. On February 1995, the committees established guidelines for community negotiation and mutual advancement. [829] Algonquin People, who many years ago were a united collective and now representing different interests, were negotiating the space in a modern world. These committees were the vehicles for navigating the claims process. For example, in October 1995, the Algonquin Management Circle engaged in land consultations with Algonquin communities, leading in November 1995 to the first Algonquin land proposal.[830] People learned as they went along as the non-status communities were not all experienced in the institutional process.

Some communities, like the Algonquins of Pikwàkanagàn First Nation, already had reams of research and a firm understanding of their desired outcome, but others, lacking both research and community discussions, had to struggle to catch up. Bonita Lawrence observed that the skills of the leadership were at various places on the spectrum.[831] Despite tensions, working as a group was better for those with little experience because working in isolation would limit the claims to small pieces and exclude some communities, leaving them unsure of how to advance their claim.

As the work on the land claim proceeded, the non-status population considered their hunting rights, and negotiated their hunting agreement in 1995. However, the status and non-status communities disagreed about the hunting allotment, and these issues grew from 1998 to 2002, exacerbating the divisions between the two.[832] According to Lynn Gehl, this tension came to be known as "the 21st century Algonquin Moose Wars."[833] Some believed that non-status

[828] Lawrence, 93.
[829] Lawrence, 93.
[830] Lawrence, 97.
[831] Lawrence, 97.
[832] Gehl, 47, 48. Lawrence, 97.
[833] Gehl, 47.

Algonquin People should negotiate their own agreement and be denied access to the agreement negotiated by others.[834] Tensions were building in the land claim, and with this hunting discord, the communities reached a breaking point and went their separate ways for a time.[835] A shared culture was not enough, as the two colonial histories caused division within the group.

Before the cooperation dissolved, the negotiation process was moving along. In 1996, the Ontario Municipal Advisory Committee and the Committee of External Advisors were established.[836] Beginning with a survey in the summer of 1997, structural changes took place and a new enrolment law was being considered.[837] As a response to the growing concerns, in October 1997, the Algonquin Government Task Force was created, the purpose of which was to meet with Algonquin communities about "structures, mandates, and accountability of an Algonquin government."[838] As they were a registered band, the Algonquins of Pikwàkanagàn First Nation were bound by *Indian Act* governance, but the process agreed to by the task force outlined the negotiation structure of the non-status Algonquin communities. They established that a council of three members would govern each non-status community as a way to balance power in the community, representing seven regions within the Ontario Algonquin territory.[839] These communities would send one representative to the Algonquin National Council, and this structure would replace the Algonquin Nation Circle and Management Circle. However, the agreed-upon process was never implemented because of the legal challenges brought by Algonquin communities.[840] Part of the negotiation process was developing institutional structures that supported the process—ways for Indigenous Peoples to work within the colonial structures while advancing community worldviews.

At this time, different constitutionally understood Algonquin communities existed in Ontario. First, there was the federally recognized status community of the Algonquins of Pikwàkanagàn First Nation; second, there were non-status communities with various levels of community

[834] Lawrence, 97.
[835] Lawrence, 102.
[836] Government of Ontario, *The Algonquin Land Claim*.
[837] Lawrence, 97.
[838] Lawrence, 98.
[839] Lawrence, 98.
[840] Lawrence, 98.

organization; and third, there were the three organized independent non-status communities of Antoine, Ardoch, and Bonnechere. These three understandings underlie the differences in interests and needs in the land claim negotiation, differences which sometimes created conflict. When, in 1999, the Antoine, Ardoch, and Bonnechere communities mounted a legal challenge and were included in the Algonquin land claim, divisions and tensions increased between the status and non-status groups.[841] Because of their different relationship with the colonial government, their perspectives were diverse. As a status nation under the Indian Act, the Algonquins of Pikwàkanagàn First Nation had a different relationship with institutional mechanisms, as well as boundaries placed upon because they were part of those institutional structures. In contrast, the non-status communities had neither the same legacy of regulation nor the same experience with cultural and political interference. The denial of rights is not the same as the regulation of rights and leads to different experiences and needs.

In an attempt to create unity, the Algonquins of Pikwàkanagàn First Nation community held a National Assembly in 2000 that included both status and non-status Algonquin Ontario communities and Algonquin communities from Quebec. However, because the status and non-status First Nations Peoples were treated differently, this assembly only created more division, leading to a fracture in 2001.[842] At that point, the Algonquin Nation Negotiations Directorate (ANND) was founded as an organization to manage the legal and financial aspects of the land claim.[843] Unhappy with the loss of independent political status, the Algonquins of Pikwàkanagàn First Nation broke away and the non-status communities amalgamated under the Algonquin Nation Tribal Council (ANTC).[844] With the tensions already existing with the moose hunt, a petition was passed around within the Pikwàkanagàn community to re-examine Algonquin ancestry, attempting to reduce those recognized under the enrolment law.[845] According to Bonita Lawrence, the members of the Algonquins of Pikwàkanagàn First Nation considered themselves the only ones that could speak on behalf of Algonquin People in Ontario. The community represented by the council of Pikwàkanagàn First Nation directed its chief Lisa Ozawanimke and

[841] Lawrence, 98, 99.
[842] Lawrence, 99. Gehl, 48.
[843] Lawrence, 100.
[844] Gehl, 49.
[845] Lawrence, 101.

the alternate council to resign from ANND.[846] As cooperation between the communities had broken down, this action halted negotiations.[847] What began as an attempt at unity ended in the collapse of the relationship between the status and non-status Algonquin communities.

In 2002, ANND asserted itself as the official negotiator on the basis that it was created by both status and non-status Algonquin People and therefore "could not be 'unmade."[848] However, the ANTC had been created to represent non-status Algonquin communities. The federal and provincial government responded to the division by retaining an independent facilitator who recommended that both parties should retain a joint negotiator.[849] The resolution was to hire lawyer Robert Potts from Toronto, who was independently selected to be the new negotiator by the Pikwàkanagàn community.[850] The selection process created discord, but Gehl maintains that how Potts was selected was not a concern of the federal and provincial governments, and the process moved forward.[851] Although both the Algonquins of Pikwàkanagàn First Nation and the ANND/ANTC had the same negotiator for the land claim, they were seen as different collectives when exercising rights because the ANTC had secured its own hunting arrangements as a result of the dissolution of Algonquin Nation Circle.

After a pause of three years, talks resumed in 2004 between the Algonquin People and the federal and provincial governments.[852] After the negotiation breakdowns of 1995, 1998, and 2001, Chief Kirby Whiteduck proclaimed that this opportunity was the last attempt at negotiating the land claim settlement.[853] The Chief and Council of the Algonquins of Pikwàkanagàn First Nation and one representative from each of the nine non-status Algonquin communities signed a protocol agreement.[854] This agreement represented a new structure in which the Algonquins of Pikwàkanagàn First Nation outnumbered the signatories from ANND/ANTC and the non-status communities had not been consulted.[855]

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[846] Lawrence, 101
[847] Lawrence, 102.
[848] Lawrence, 103.
[849] Lawrence, 103.
[850] Lawrence, 103.
[851] Gehl, 25.
[852] Lawrence, 165.
[853] Gehl, 25.
[854] Algonquins Of Ontario (AOO), *Who are the Algonquins of Ontario?*
[855] Gehl, 49-50.

With the change in negotiator and negotiations progressing, the process and framework also changed. The collective reinstated the enrolment law of 1995, and negotiations now focused on individual communities rather than on the larger nation.[856] The language subsequently changed: the claimants were no longer addressed as citizens but as 'electors' and 'beneficiaries.'[857] Under this new framework, Algonquin Negotiation Representatives (ANRs) were established, bypassing the ANTC. The Algonquins of Pikwàkanagàn First Nation had seven representatives in this new institutional arrangement, while all other communities had one.[858] The 2005 Addendum, a Protocol for Electors, enabled the first AOO elections.[859] This addendum included the terms of reference and the responsibilities of the ANR elected peoples.[860] Lynn Gehl ran in this election to become an ANR but was unsuccessful.[861] Since putting this process in place, land claim negotiations proceeded regardless of discord between the communities.

Because they did not agree with the new processes and framework, non-status communities started pulling away. The first to withdraw was the Ardoch Algonquin First Nation (AAFNA), followed by Bob Lavalley of WHIMASAB, which represented the Whitney, Madawaska, and Sabine communities.[862] At the heart of the discord were majority rules decision-making processes, as opposed to consensus-based processes, and the disproportionate representation of the status Algonquin communities compared to non-status.[863] Eventually, the community of Bancroft walked away as well, but a problem existed because people from the communities that had withdrawn were still running in the elections to be representatives in the land claim as ANRs.[864] The election of the ANRs was an imperfect process with many internal problems in Algonquin communities, but the government reported successful elections.[865] Problems

[856] Lawrence, 104.
[857] Lawrence, 104.
[858] Lawrence, 104.
[859] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations*.
[860] Algonquins Of Ontario (AOO), *2017 Algonquin Negotiation Representative Elections,* http://www.tanakiwin.com/resources/algonquin-negotiation-representative-elections/2017-algonquin-negotiation-representative-elections/, (accessed May 4, 2019).
[861] Lawrence, 166.
[862] Gehl, 79. Lawrence, 239.
[863] Gehl, 79.
[864] Gehl, 80.
[865] Gehl, 82.

identified were treatment of people by the principal negotiator, candidates deliberately confusing their electorate, possible vote tampering with improper handling of election boxes, the personal expenses involved for the candidates to run, and criticisms of the appeals process.[866] Once the election for the ANRs had concluded, the communities cooperated with the land claim process, and the candidates from their communities won their respective positions.[867] The land claim election process kept the momentum of the claim progressing.

The current organization overseeing the land claim process, the Algonquins of Ontario (AOO), developed in 2006. This AOO decision-making body supports the ANR model consisting of the chief and six council members of the Algonquins of Pikwàkanagàn First Nation, along with the one elected Algonquin Negotiation Representative (ANR) for each of the non-status Algonquin communities involved in the land claim.[868] Since being reorganized under the AOO, the negotiation process continues under this model. The parties reaffirmed shared objectives in 2006, and the current phase of the negotiations began.[869] This progress is significant as many breakdowns in the past were due largely to disagreements about negotiating mechanisms. Since 2006, despite other internal disagreements, the process has continued. In 2008, another ANR election was held, maintaining the consistency of the new process.[870] Despite the internal conflicts and complications with elections within Algonquin parties, negotiations remained on track, and there were no more significant interruptions in the process.

A protocol agreement created institutional mechanisms to advance the negotiation process and initiated a *Consultation Process Interim Measures Agreement*, signed in July 2009 by the AOO, the Government of Canada, and the Province of Ontario.[871] According to the Algonquins of Ontario, "This Agreement sets out a one-window approach for Canada and Ontario to consult with the Algonquins of Ontario on proposed activities or projects in Algonquin Territory while our negotiations are ongoing."[872] As part of the mechanisms established, the Algonquins of

[866] Gehl, 82, 83.
[867] Gehl, 95.
[868] Gehl, 49.
[869] Government of Ontario, *The Algonquin Land Claim*.
[870] Lawrence, 166.
[871] Government of Ontario, *The Algonquin Land Claim*.
[872] Algonquins Of Ontario (AOO), *Strengthening the Algonquin Presence throughout our Traditional Territory,* http://www.tanakiwin.com/current-initiatives/overview-of-current-initiatives/, (accessed May 6, 2019).

Ontario Consultation Office opened in Pembroke in January 2010 with duties related to coordinating matters for the land claim negotiation. [873] Once all this was in place, the institutional structure, human capital, and land claims process was structured and consistent in development.

In 2011, the chief negotiator began providing regular updates on the negotiation process as the negotiators approached an *Agreement-in-Principle (AIP).* The first update provided by Potts explained multiple aspects of the negotiation. It addressed the initial voter enrolment process, as those registered were eligible to vote on the *AIP*. Upon review by the ratification committee established under the AOO, the preliminary voter list was posted in March 2011, followed by a supplemental list in April 2011.[874] Potts announced Joan Holmes as the enrolment officer.[875] Holmes is a respected researcher on the history of Algonquin People of Ontario, and much land claim research relies on her work, such as research conducted by Lawrence and Gehl. Upon verification by the enrolment officer, the next stage was the approval of a beneficiary by the ratification committee. As a means to address protests associated with the voter enrolment decisions, the negotiators created a review committee in 2011.[876] Included in an update report by Potts was notice of ongoing discussions for tentative land selections.[877] This update came when negotiators began talking about the *AIP*.[878] Although the claim was moving along, after the update, there were delays in the process. However, as progress bulletins illustrate, the institutional setting accommodated issues in a way that allowed for continued progress.

In the July 2012 update, Potts provided details of the delay in the claim processes. All levels of government involved in the land claim—Indigenous and non-Indigenous—underwent elections. Potts addressed reinstating the enrolment process, explaining there were benefits as the

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[873] Algonquins Of Ontario (AOO), *Strengthening the Algonquin Presence throughout our Traditional Territory.* Lawrence, 292.
[874] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations.*
[875] Mattawa/North Bay Algonquin First Nation, *Land Claim Updates,* http://www.mattawanorthbayalgonquinfirstnation.com/LandClaim.html, (accessed May 1, 2019).
[876] Laura Sarazin, *Algonquin Agreement-in-Principle Ratification Voter Enrolment Process*, Letter (December 13, 2010), http://www.bafn.ca/aipapplication.pdf.%20Accessed%20July%207,%202019. (accessed July 7, 2019). *Agreement-in-Principle among: the Algonquins of Ontario and Ontario and Canada* (AIP), (2015), http://www.tanakiwin.com/our-treaty-negotiations/proposed-agreement-in-principle-3/, (accessed March 12, 2019).
[877] Mattawa/North Bay Algonquin First Nation, *Land Claim Updates.*
[878] Lawrence, 167.

communities prepared to vote on a draft of the *AIP*.[879] In May 2012, the community posted an updated voter list, resulting in challenges by those with enrolment status and by those denied enrolments.[880] One judicial challenge was mounted by Lynne Hanley (my relation) and others to reinstate Hannah Mannell, a root ancestor removed in 2010 on the basis that Mannell may have been Cree rather than Algonquin.[881] Those bringing the challenge provided sufficient evidence that Mannell was in all probability Algonquin, and she was reinstated as a root ancestor in 2013.[882] By providing people with an apparatus for addressing issues of concern such as the beneficiary appeals process, the negotiations were able to progress without interruption.

The updates continued, and in July 2013, Potts announced the release of the *AIP* preliminary draft and informed voters of the next steps. Consultation efforts made throughout 2012 and 2013 involved nine tripartite information sessions. At this time, the AOO held meetings to review the preliminary draft with the voting members of the Algonquin land claim.[883] When the negotiators released the *Preliminary Draft Agreement-in-Principle* for public review and comment in 2012, they added a new element to this land claims process by indicating that "the public input at this stage of negotiation is unprecedented."[884] Although the *AIP* is not a legally binding agreement, it is part of the process for moving the claim forward.[885] This public consultation process is another form of growth in land claims development. It is not a formal policy process in claims but functions as policy learning as a way to incorporate new information.

Following the consultations, the AOO proposed *AIP* was made public in 2015.[886] After Algonquin communities voted on the *AIP*, the province of Ontario, the federal government, and the AOO signed it on October 18, 2016.[887] As understood by the AOO, “It opens the way for continued negotiations toward a Final Agreement that will define the ongoing rights of the

[879] Mattawa/North Bay Algonquin First Nation, *Land Claim Updates.*
[880] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations.*
[881] Lawrence, 122-123.
[882] The Honourable James B. Chadwick, Q.C., *Judicial Decision RE: Hannah Mannell,* http://www.greatergoldenlake.com/adob/HannahMannelDecisionMay14.pdf, (accessed April 13, 2019).
[883] Government of Ontario, *The Algonquin Land Claim*.
[884] Government of Ontario, *The Algonquin Land Claim*.
[885] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations.*
[886] Government of Ontario, *The Algonquin Land Claim*.
[887] Algonquins of Ontario (AOO), *Agreement-in-Principle* https://www.tanakiwin.com/our-treaty-negotiations/agreement-in-principle/, (accessed April 19, 2019).

Algonquins of Ontario to lands and natural resources within the Settlement Area in Eastern Ontario."[888] According to an update by Clifford Bastien Jr., the ANR of Mattawa/North Bay Algonquin First Nation, his community had a 51% voter turnout, and, of those that voted, 97% voted to accept the *AIP*.[889]

However, not all communities were ready to accept the *AIP* initially. The Chief and Council of the Algonquins of Pikwàkanagàn First Nation held a separate referendum vote regarding the *AIP*, and a majority of the members voted against the signing of the agreement, primarily due to concerns about the self-government component of the negotiations. As a result, the Chief and Council undertook discussions not only with their members but also with the governments of Ontario and Canada, seeking clarification on issues of concern to the First Nation's membership. Based on consultations and discussions, the Chief and Council decided to support the proposed *AIP* because it is a commitment to negotiate a final settlement as a modern treaty.[890] Since the signing of the *AIP*, there have only been select updates available. The most recent ANR election took place in 2017.[891] Another round of public consultations (about the evaluation of land and the environment) took place between August 28 and October 17, 2017.[892] In a 2018 communication with a hunting association, the Ontario government indicated that the final report would be released later in the negotiation process.[893] Currently, there is no other documentation available in the negotiation process.

Some Key Elements in the Agreement-in-Principle

The *AIP* land claim involves multiple components found in other comprehensive claims and agreements in Canada. Continuations of previous ideas include land settlement, self-government,

[888] Algonquins of Ontario (AOO), *Agreement-in-Principle.*
[889] Mattawa/North Bay Algonquin First Nation, *Land Claim Updates.*
[890] Algonquins of Ontario (AOO), *Agreement-in-Principle.* Mattawa/North Bay Algonquin First Nation, *Our History.*
[891] Algonquins of Pikwàkanagàn First Nation, *Land Claim,* https://algonquinsofpikwakanagan.com/feb2019/land-claim-negotiations-update/ (accessed July 7, 2019).
[892] Government of Ontario, *Archived: Algonquin Land Claim – Draft Environmental Evaluation Report* (June 20, 2019), https://www.ontario.ca/page/algonquin-land-claim-draft-environmental-evaluation-report, (accessed July 7, 2019).
[893] Sydney Conover Taggart, senior negotiator, Ministry of Indigenous relations and reconciliation, Ontario. *RE: Algonquin Land Claim update.* Letter to Mr. Lefebvre, Buckshot Lake Cottagers' Association. 2018 communication.

co-management, and cultural components.[894] One particular provision in the *AIP* relates to beneficiary status in the claim, based on amendments to the original criteria created by the Algonquins of Pikwàkanagàn First Nation.[895] Although contentious, the definition was derived from Algonquin People and used to admit the first non-status First Nation into land claims in Canada. One of the 'general provisions' of the *AIP* is certainty.[896] The goal of certainty is always present, and, in this case, certainty is beneficial for both the Indigenous Peoples and the Crown.

For Indigenous Peoples, certainty denotes the guarantee of rights previously ignored or overlooked. Canadian governments, federal and provincial, are also interested in certainty, as it is a central goal in policy and settlement agreements. They need to be certain about entitlement to eliminate future challenges to the claim. As mentioned previously, Alcantara views the shifts in land claims policies as instrumental as the government goal of certainty remains unchanged. However, in applying pressure to expand definitions by including their worldviews, Indigenous Peoples have disrupted the government's goal. By pushing items of inclusion in negotiations, Indigenous Peoples—and, in this case, non-status Algonquin People—have changed policy and expanded the understanding of those who can make claims. As the Algonquins of Pikwàkanagàn argue, "The land claim aims to include a just recognition of Algonquin rights, title, natural resources, governance, compensation and other matters."[897] This *AIP* and land claim is a way for the peoples to be certain of the lands they have claimed for generations.

Land

The Algonquin (and Nipissing) Peoples first engaged the Crown because they wanted control of their lands. This *AIP* with the AOO includes lands as the settlement with Algonquin People in Ontario and involves co-management on certain lands. The assertion of nine million acres that were never surrendered by Algonquin or Nipissing Peoples grounds the land claim.[898] As historic petitions for land were submitted, it was clear to people that retaining their full traditional lands

[894] AIP, i.
[895] AIP, chapter 3.
[896] AIP, 14
[897] Algonquins of Pikwàkanagàn First Nation, *History.*
[898] Keith Crowe, (updated Albers, Gretchen and Anne-marie Pederson), *Land Claims: Modern Treaties,* The Canadian Encyclopedia (March 2, 2015), https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties, (accessed May 6, 2019).

was not an option. The petitions included compensation for lost lands, and the *AIP* also included compensation relating to lost lands.[899] Under the *AIP*, all parties accept a settlement of $300,000,000 and a guarantee of 117,500 acres.[900] Specifically included in the land settlement are subsurface rights.[901] For independent Algonquin collectives, these rights provide an opportunity for self-sufficiency and opportunity to protect these lands and environments, depending on the collective wants and needs. Within the *AIP* are rights of first refusal to other parcels of land as well.[902] Land and compensation for the loss were always the ultimate goals when complete protection and total rights and guardianship were no longer an option.

Self-Government

The *AIP* includes self-government but pertains specifically to the Algonquins of Pikwàkanagàn First Nation—the one community registered under the *Indian Act*.[903] The other communities are not governed through a colonial institutional structure; the continuation of the traditional non-registered groups is evidence of resiliency as some communities survived as collectives. The organization structure currently under the AOO was developed for the land claim and is only used for such agreements and is not a community governance structure. The federal government has no jurisdiction in the governance of non-status First Nations communities and cannot apply a structure. As a means for the Algonquins of Pikwàkanagàn First Nation Peoples to change their relationship with the *Indian Act*, the community has inserted measures in the *AIP* but also engaged the *First Nations Land Management Act* (FNLMA).[904] The community explains that members have been working on developing a Land Code since 2013 as a separate process from the land claim process. According to the Algonquins of Pikwàkanagàn First Nation, this code provides "the opportunity to get out of the Indian Act with regards to how we manage our lands on the First Nation."[905] As the only government-regulated Algonquin First Nations in Ontario, the community is looking at all avenues to be self-determining, according to its worldview and governance institutions.

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[899] Algonquins Of Ontario (AOO), *Our Proud History,* 1835 petition
[900] Government of Ontario, *The Algonquin Land Claim*. AIP, 45.
[901] AIP, 28.
[902] AIP, 40-43.
[903] AIP, 86.
[904] Algonquins of Pikwàkanagàn First Nation, *Land Code,* http://algonquinsofpikwakanagan.com/legacy/land_code.php, (accessed May 7, 2019).
[905] Algonquins of Pikwàkanagàn First Nation. *Land Code.*

Co-Management

As part of the stewardship of the land, the *AIP* established co-management, which is common in comprehensive claims settlements. One of the earliest examples of co-management in modern claims agreements is the *James Bay and Northern Quebec Agreement (JBNQA).* The *JBNQA* uses a three-level system for the use of lands and decision-making powers.[906] In the Algonquin *AIP*, forest management is one of the areas involved in consultation and cooperation.[907] Also, within management plans are fisheries management and harvesting restrictions regarding certain lakes within the settlement.[908] Defined in the agreement is the Algonquin People's level of legal authority in fisheries management.[909] Outlined in the *AIP* is the same authority regarding wildlife harvest plans, which are designed to replace the interim harvesting agreements.[910]

Built into the *AIP* is participation in decision-making for protected areas, and, much like in the *JBNQA*, there are three levels of engagement, with level one being the most minimal and level three having the most Algonquin participation, as they work jointly with federal and provincial powers.[911] If the community is not satisfied with its level of participation, there is a process in place to review it.[912] Level three planning is built into the *AIP* for some of the specific protected areas as they are listed in the final agreement as matters of concern.[913] Some areas of negotiation, such as the settlement of the Rideau Canal National Historic Site, require that matters be settled before the final agreement can be negotiated.[914] In the *AIP*, possible land changes and future developments are considered, along with maintenance of land management practices already in place.

[906] JBNQA, 1975.
[907] AIP, 50.
[908] AIP, 53, 55.
[909] AIP, 56.
[910] AIP, 57, 60.
[911] AIP, 70, 72.
[912] AIP, 73.
[913] AIP, 75.
[914] AIP, 77.

Cultural Components

Included in the *AIP* are cultural and heritage components entitled "interests" held by Algonquin Peoples.[915] Throughout the development of the *AIP*, elements of culture were built into management, consultation, access to lands, as well as outlined in a separate section. The agreement addressed archeology and heritage sites, acknowledging the history of the land and associated impacts on the development of the land.[916] The handling of artifacts and artifact repatriation is designed to respect the integrity of the peoples' history, including the treatment of burial sites.[917] Culture and heritage are not silos in the agreement and are elements considered throughout the negotiated relationships, but there are elements specific to the peoples' history that require a section dedicated to respecting the historical use and occupancy of the land.

Beneficiary-Membership

By the time the parties agreed to the *AIP* in 2015, the enrolment policies no longer included blood quantum. This change is significant because blood quantum is a colonial way of understanding the community culture and is more limiting than the Section 6 rules of the *Indian Act*.[918] Because they are governed under the *Indian Act*, the peoples of the Algonquins of Pikwàkanagàn First Nation did not have to follow the enrolment policy, meaning that people who married into the community before 1985 had more rights than actual descendants of the land. Under the *AIP*, ties to a root ancestor persist and more cultural connections are required than in the *Indian Act*. Applicants must show a cultural connection between 1897 and 1991 and also, in the words of the *AIP*, a "present-day cultural or social connection with an Algonquin collective."[919] Since the inception of the land claim process, membership and beneficiary status has been problematic because of the dichotomy of collective/community understanding and self-determination. The end result was a more cultural view of community citizenry. With blood quantum removed, identity issues continued but did not affect the claim itself.

[915] AIP, 44, 80.
[916] AIP, 81.
[917] AIP, 82,83.
[918] Indian Act, RSC 1985, c I-5, section 6.
[919] AIP, 24.

The Membership Debate

In 2015, a debate in the public arena occurred on the beneficiaries of the claim due to discord over a wind farm. Chief Whiteduck of the Algonquins of Pikwàkanagàn First Nation spoke of comments he heard in his community in the spring of 2015 on how "the influx of new Algonquins could pose a threat to the deal unless the issue is sorted out."[920] At this time, the leadership from the Antoine Algonquins was displeased with the Algonquins of Pikwàkanagàn First Nation for partnering with a company to develop a wind farm.[921] The federally recognized Algonquin First Nation, Eagle Village also raised concerns, claiming some of the lands for the wind farm were on its their traditional territory. To address concerns, the Algonquins of Pikwàkanagàn revealed their communication with the company, but they excluded the non-status communities in these communications. Eagle Village and another federally recognized community in Quebec, Wolf Lake First Nation, took a hard line on defining the First Nation identity of Algonquin People.[922] As revealed in many public statements and media interviews, the Algonquin People's leadership in Quebec do not accept the non-status Algonquin People in Ontario.[923]

Despite complaints about qualifications for beneficiary status, especially with the removal of the blood quantum clause, the *AIP* was signed. A statement released by Algonquins People of Golden Lake reads, "In 2016 the Agreement in Principle (AIP) was signed allowing the Land Claim to proceed. We are now working on the beneficiary criteria that will define who will be beneficiaries of the Algonquin Land Claim."[924] Although those outside the community may criticize the membership qualifications, they must understand that these were determined by the Ontario Algonquian People using their worldviews.

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[920] Jorge Barrera, "Algonquins of Ontario claim facing internal tensions, accusations some involved not Indigenous," *APTN National News* (March 11, 2015), https://aptnnews.ca/2015/03/11/algonquins-ontario-claim-facing-internal-tensions-accusations-involved-indigenous/, (accessed July 7, 2019).
[921] Barrera, "Algonquins of Ontario claim facing internal tensions, accusations some involved not Indigenous."
[922] Barrera, "Algonquins of Ontario claim facing internal tensions, accusations some involved not Indigenous."
[923] I purposefully use the word leadership based on the public statements. I cannot assume that all peoples feel the same.
[924] Algonquins of Greater Golden Lake, *About Us,* https://algonquinsofgreatergoldenlakefirstnation.ca/about/, (accessed May 5, 2019).

Since the 1770s, the Algonquin and Nipissing Peoples have asserted that they are entitled to stewardship over their lands; later their claims included compensation for lands no longer available due to settlement. These claims stemmed from their need to maintain control and jurisdiction, so they could have a homeland and means to support themselves. Although the peoples never made much progress historically, their efforts are seen, and indeed provided evidence, in the modern claim. Under the *AIP* in the modern claim, the land settlement for Algonquin People encompasses no less than 117,500 acres.[925] As set out in an implementation plan, the federal Crown lands of interest to the AOO were selected and transferred into fee simple (transfer of title of land—not reserve status), and Algonquin People were granted surface and subsurface rights.[926] The lands, compensation, and jurisdictional decision-making outlined in the agreement reflect the historic petitions by Algonquin and Nipissing Peoples.

Conclusion

The 18th century began as a period of diplomacy in which Colonial representatives engaged Indigenous Peoples in relationship-building. The diplomatic patterns and channels of communication solidified in the institutional setting of a colonial relationship, continuing to strengthen through agreements. Algonquin and Nipissing Peoples honoured the agreements they entered even as they lost the sovereignty of their nationhood to colonial dominance. When the British Crown would not uphold promises made in peace agreements and the *Royal Proclamation*, Algonquin and Nipissing Peoples used instruments available to them to assert nationhood and the right to protect their territory. From 1772 to 1863, the Algonquin and Nipissing Peoples sent a series of petitions to colonial representatives of the British Crown,[927] asking the Crown for meetings and actions to deal with broken promises. Unfortunately, little came from the petitions except that three reserves were set aside (though not through a treaty). This history is important because it demonstrates the perseverance of a collective Nation asserting sovereignty through an understanding of territory and jurisdiction recognized in the *Royal Proclamation*. The petitions illustrate how the Algonquin and Nipissing Peoples continued honouring their agreements despite the Crown's lack of action and the diminishment of their

[925] AIP, 28.
[926] AIP, 28.
[927] Algonquins Of Ontario (AOO), *Our Proud History.*

sovereignty. The Nation continued to exist, with some groups governed by the *Indian Act*. This drive for acknowledgement, as well as perseverance, provided a lengthy paper trail for the modern land claim.

The modern claims process exists because of efforts made by Indigenous Peoples using instruments such as court systems to create new means to engage institutions. With the introduction of the ONC and the claims process, Algonquin People in Ontario had an opportunity to enter a new era of diplomacy with the Crown regarding their rights and traditional territory. Despite difficulties, the process evolved to the current structure organized under the AOO. One negotiator explicitly representing the interests of two parties, one of which is the collective of non-status First Nations communities, set a precedent. Legally acknowledging a collective of non-status First Nations groups provides an opportunity for claims to be put forward by other non-status collectives based on Indigenous definitions of citizens or 'beneficiaries.'

Land claims settlement policy focuses on certainty as a goal, as do all government policies and agreements. Historically, one of the ways the government could be assured of certainty is by extinguishing Indigenous Peoples' rights to land. The government abandoned the extinguishment policy in the 21st century but retains certainty as a goal within settlement agreements. Alcantara addresses incremental changes to the policy, arguing that this change does not represent a paradigm shift (or third order change) because the goal of certainty remained. According to Alcantara, for paradigm change to occur, the goal of the policy must shift. Hall concurs with Alcantara, arguing that goal change is central in third order change. For Hall, when settings or settings and instruments change but the goal remains the same, then the policy change that has occurred can be considered first or second order change.

Historically, the government was secure in its certainty that only communities with band membership could make claims. I argue that, unlike the first order change of the extinguishment policy, the inclusion of the non-status Algonquin People in the Algonquin land claim, particularly when seen as part of a larger pattern of Indigenous actions, disrupts and unsettles the government's goal of certainty. By asserting identity through collectives and by expanding the definition of who is considered to be Indigenous and, by extension, who has entitlement rights,

Indigenous Peoples have reduced the government's control of Indigenous identity. After generations of attempted diplomacy and years of corresponding government certainty, the Algonquin have thrown doubt into this goal of certainty.

It is clear from the historic engagement between Algonquin and Nipissing Peoples and the British Crown that First Nations Peoples had a distinct understanding of their territory, the meaning of sharing the land, and their identity as a collective concerning land. In this first phase of engagement, First Nations Peoples experienced a decline in power. Nations once treated as equals now faced marginalization as their claims to land were ignored. They used diplomacy through petitions and council meetings, while they upheld their obligations made in formal agreements. The result of this decline in power is the legacy of colonialism— a collective of non-status communities, a few government-recognized band communities, and no settlement on the title to the lands. Although the Algonquin and Nipissing Peoples engaged institutional processes to assert themselves, they never negotiated a treaty or settlement. This absence of treaties and settlements later allowed them access to the modern comprehensive claims process within the colonial institution.

CHAPTER 7 – INDIGENOUS WORLDVIEWS AND POLICY CHANGE

Introduction[928]

For at least the last two centuries, Indigenous political engagement with the federal government on behalf of the Crown has been built upon a colonial model that protects the interests of non-Indigenous Peoples and that requires court processes to address the unequal power of Indigenous communities in the colonial state. Indigenous knowledge systems are based on the belief that inherent rights exist because Indigenous Peoples were the first occupants of North American lands; the rights holders have a different worldview of inherent rights based on colonial knowledge systems.[929] The concept of identity, grounded in and informed by worldview, is used by Indigenous Peoples as an instrument for change through assertions made in negotiations and legal challenges. This chapter demonstrates how both identity and worldview are intertwined with and indispensable to community and to land, a relationship that is revealed when Indigenous Peoples engage colonial systems to claim their lands. In exploring connections of sovereignty and worldview, I note that Canadian case law explicitly connects cultural understandings and land, a connection that is centered in Indigenous worldviews. Although Indigenous worldviews are diverse, the inseparability of culture and land is common to all. In the context of policy and institutional change, Indigenous worldviews are the ideas that influence direction and change.

In the 2015 federal election, a record number of First Nations Peoples voted for some it was their first interaction with this exogenous political system.[930] In previous years, many First Nations Peoples chose not to vote because their relationship is not with an elected parliament but with the Crown through the *Royal Proclamation of 1763* and the *British North America Act of 1867*.[931] In this election, First Nations Peoples from different backgrounds voted, including those not covered under the treaties, because they were annoyed about government interference and

[928] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[929] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R
[930] Eric Grenier, "Liberals made big gains, but NDP still won the First Nations vote in 2015, data shows," *CBC Politics* (July 14, 2016), https://www.cbc.ca/news/politics/grenier-on-reserve-voting-2015-1.3677098 (accessed July 7, 2020).
[931] CBC News, "Perry Bellegarde says he will vote in the federal election after all," *CBC Politics* (September 9, 2015), https://www.cbc.ca/news/politics/canada-election-2015-bellegarde-voting-first-nations-1.3220841 (accessed June 28, 2019).

ignorance. Aside from the increase of status on-reserve First Nations voters observed, there was a particularly marked increase in off-reserve First Nations, Métis, and Inuit People.[932] In the leadup to this history-making election, Assembly of First Nations (AFN) national chief, Perry Bellegarde, became vocal in federal politics for the first time, and on election day some communities ran out of ballots an hour into voting.[933] Efforts to mobilize convinced Indigenous Peoples to vote, as did their exasperation with the status quo.[934] Elections are just one example of colonial institutions and processes with which Indigenous Peoples (First Nations, Métis, and Inuit) interact. As this chapter demonstrates, these interactions are shaped by their worldviews.

Although some Canadians may be unaware of the history of Indigenous rights, or discontent with constitutional protections of those rights, Indigenous Peoples themselves have fought hard for recognition of these rights by engaging institutions.[935] As a result of their efforts, there are now treaty kits and formal agreements with educational institutions to include Indigenous—First Nations, Inuit, and Métis—content in the curriculum.[936] Indigenous Knowledge Keepers say that education is our new buffalo, providing two reasons for its validity: first, education is how Indigenous Peoples provide for themselves; and second, education is how they deconstruct mythologies to establish new relationships and understandings.[937] To understand Indigenous incentives for challenging the justice system, particularly land claims and identity-based rights, it

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[932] Statistics Canada, Canada, *Study: Understanding the increase in voting rates between the 2011 and 2015 federal elections* (October 12, 2016), https://www150.statcan.gc.ca/n1/daily-quotidien/161012/dq161012a-eng.htm (accessed July 4, 2020).
[933] CBC News, "Some voting delayed amid ballot shortages, staff no-shows," *Politics,* CBC (October 19, 2015), https://www.cbc.ca/news/politics/canada-election-2015-polls-open-vote-1.3277587, (accessed November 1, 2018). CBC News, "Perry Bellegarde says he will vote in federal election after all," *Politics,* CBC (September 9, 2015), https://www.cbc.ca/news/politics/canada-election-2015-bellegarde-voting-first-nations-1.3220841, (accessed November 1, 2018).
[934] Emma McIntosh, "Why did so many Indigenous voters take part in the 2015 federal election?" *Calgary Harold* (June 4, 2016), https://calgaryherald.com/news/local-news/why-did-so-many-indigenous-voters-take-part-in-the-2015-federal-election (accessed July 4, 2020).
[935] Noted in a Saskatchewan study. Michael Atkinson, Loleen Berdahl, David McGrane, and Steve White, *Attitudes Towards Aboriginal Issues in Saskatchewan: A Research Brief*, Johnson-Shoyama Graduate School of Public Policy (Saskatoon, Canada 2012): 3.
[936] Canada's History Society, "Treaties in the Classroom," *Explore,* https://www.canadashistory.ca/explore/teaching/treaties-in-the-classroom, (accessed November 2, 2019). MBC News, "Agreement aims to strengthen Métis education in Saskatoon schools," *MNC Radio* (January 30, 2018), https://www.mbcradio.com/2018/01/agreement-aims-strengthen-metis-education-saskatoon-schools, (accessed November 3, 2019).
[937] Malinda S. Smith, *For Aboriginal people, education is the 'new buffalo,'"* Federation for the Humanities and Social Sciences (August 23, 2011), https://www.ideas-idees.ca/blog/aboriginal-people-education-new-buffalo, (accessed November 3, 2018).

is pivotal to explore worldviews and knowledge systems. It is also vital to analyze misconceptions based on inaccurate understandings of Indigenous Peoples, beginning with external constructions of identity. Critical reading of the available literature suggests that by resisting external identity constructions, Indigenous Peoples can forge new relations with non-Indigenous Peoples.

Identity and Worldview

The disciplines of psychology and sociology examine human behaviour at the individual level and at the societal and institutional levels, respectively.[938] Included in these areas of study is how humans are socialized to learn. According to these disciplines of knowledge, through socialization, humans learn how to understand their surroundings and themselves, and families and communities impact development at various life stages. Indeed, human knowledge is based on exposure to and experience of the world.[939] However, each culture maintains specific belief systems about how humans interact, how to understand the world, and how to contribute knowledge to the environment. Culturally specific Indigenous knowledge systems relate worldviews to interactions with all physical and meta-physical parts of life.[940] For Indigenous Peoples, identity and ways of knowing are multifaceted, not solely based on science. Eurocentric constructions of knowledge, identity development, and worldview are focused primarily on scientific methods, although much of the research on worldviews has been conducted within the discipline of religious studies. To adequately address Indigenous identity, a critical examination of Indigenous knowledge systems and worldviews is required.

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[938] **1:** the science of mind and behaviour
2a: the mental or behavioural characteristics of an individual or group
b: the study of mind and behaviour concerning a particular field of knowledge or activity – Webster, https://www.merriam-webster.com/dictionary/psychology, (accessed November 4, 2018).
1: the science of society, social institutions, and social relationships; *precisely***:** the systematic study of the development, structure, interaction, and collective behaviour of organized groups of human beings.
2: the scientific analysis of a social institution as a functioning whole and as it relates to the rest of society – Webster, https://www.merriam-webster.com/dictionary/sociology, (accessed November 4, 2018).

[939] Worldview**:** a comprehensive conception or apprehension of the world, especially from a specific standpoint — also called *weltanschauung* – Webster, https://www.merriam-webster.com/dictionary/worldview (accessed November 4, 2018).

[940] Herman Michell, Yvonne Vizina, Camie Augustus and Jason Sawyer, *Learning Indigenous Science from Place: Research Study Examining Indigenous-Based Science Perspectives in Saskatchewan First Nations and Métis Community Contexts* (November 2008), 27-30.

Margaret Kovach addresses some of the issues involved with understanding Indigenous ways of knowing in her work. Kovach points out that there are many Indigenous ways of knowing.[941] She argues that although it is important to acknowledge cultural differences among Indigenous Peoples, there are some universals, such as the relational understanding of the world, a concept that Creation is not people-centred.[942] John Ralston Saul claims that "Powerful societies, imperial societies and their outlying limitations find it very difficult to admit that there can be fundamentally different models," such as those included in Kovach's work. According to Ralston Saul, the imperial model has "universal assumptions, all of which have been defined in European or the Western tradition."[943] As the work of Kovach and Saul reveals, there are varying ideas of how societies understand themselves and these ideas contribute to identity and to ways of understanding the world.

To contrast from an Indigenous perspective, John Ralston Saul argues that from the European perspective, everything on the planet revolves around people.[944] Comparably, Indigenous Peoples see peoples' view of the self as a mere part of Creation, not the centre.[945] Saul uses Asian economic success to illustrate the shortcomings of the European perspective. Although many people believe that people in Asia have been successful because their economy is based on Western models of society and development, according to Saul, this success may have had more to do with the incorporation of Confucianism into their work and society.[946] The claim that Chinese success can be attributed only to Western models of society and development is part of the body of ethnocentric theory that ignores other non-Western explanations of success. When some Western individuals view non-Western models, they are unable to consider anything beyond their own worldview, which in the context of this discussion is described as mainstream and Eurocentric.

To date, groups of people, including Indigenous communities, have mostly been understood through a Western, Eurocentric lens. Through this lens, Liam Sutherland argues, "It is all too

[941] Kovach, 26.
[942] Kovach, 25.
[943] J.R. Saul, *The Comeback: How Aboriginals Are Reclaiming Power and Influence* (Penguin Canada, 2014), 24.
[944] Saul, 25.
[945] Saul, Location 26.
[946] Saul, Location 25.

easy to uncritically construct 'nationalism' in the form we expect to find without questioning whether this is empirically relevant or analytically useful.[947] The problem with the Eurocentric approach is that it places values and assumptions on other cultures. The study of nationalism or how people identify in groups is becoming an essential topic for critical examination. For example, there is interest from scholars and the news media in the political activity surrounding the election of Donald Trump, the presidential candidacy of Marine Le Pen in France, and Brexit. According to Sutherland, "Nationalism can refer to the broader ideological framework of 'nations' with structure and legitimate different political agendas, including but not limited to reactionary, xenophobic, anti-immigration (nativist) and religiously and exclusionary agendas."[948] As Sutherland also writes, understanding the analytical role of reflexivity is vital "because… a relatively unreflective and uncritical account of 'nationalism' will produce a partially unreflective and uncritical account of "religion."[949] This claim may be viewed as typifying a Eurocentric (Western) view of nationalism or how people identify.

Worldviews help inform our sense of self. For Indigenous Peoples, understanding of self is learned through relationships to the land, community, and family. In her work *Wahkootowin,* Brenda McDougall explores relations and kinship.[950] Wahkootowin is a framework for understanding a worldview that is derived from lived experience. It is a way of understanding the world through relationships, much as relationships and concepts are viewed with a Western lens by people raised with that worldview.[951] When considering an Indigenous lens in research, if we understand why the worldviews clash, according to Leroy Little Bear, we have a starting point for "understanding the paradoxes that colonialism poses for social control."[952] This control is discussed by Glen Coulthard his dissertation. Coulthard argues that ongoing effects of colonialism is dispossession, and "empirically [this dispossession is a] more accurate way to understand the structural dynamics that have shaped the relationship between Indigenous peoples

[947] Liam T. T. Sutherland, "Theorizing Religion and Nationalism: The Need for Critical Reflexivity in the Analysis of Overlapping Areas of Research," *Implicit Religion* 20, no. 1 (2017), 4.
[948] Sutherland, 5-6.
[949] Sutherland. Page 6.
[950] Brenda Macdougall, "Wahkootowin: Family and Cultural Identity in Northwestern Saskatchewan Metis Communities," *Canadian Historical Review* 87, no. 3 (2006), 432-33.
[951] Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010), 2, 3.
[952] Leroy Little Bear, "Jagged worldviews colliding," *Reclaiming indigenous voice and vision*, ed. M. Battiste (2000): 77.

and the Canadian state."[953] Although colonialism is ongoing and shapes the relationship, Indigenous Peoples continue to have a community-informed sense of self and lens when interacting with the state, illustrated in Indigenous-led engagement.

One practice in Indigenous research is reflexivity, a practice of understanding that can include relational knowledge.[954] Concepts introduced in Chapter 1, reflexive/relational learning is fundamentally different from a worldview. While a worldview is a philosophy of life, reflexivity, is a research practice in which researchers examine both themselves as researchers and their relationship with the subject being studied. [955] According to Margaret Kovach, Indigenous perspectives of reflexivity should reveal relational understandings. As a research practice, reflexivity is already a part of many Indigenous researchers' engagement with knowledge, meaning, the reflective process is how some Indigenous researchers conduct their data collection and analysis, using a cultural lens (worldview). As Kovach argues, "There is a fundamental epistemological difference between Western and Indigenous thought, and this difference causes philosophical, ideological, and methodological conflicts for Indigenous researchers."[956] However, for some Indigenous scholars like Kovach, "reflexivity is the researcher's own self-reflection in the meaning-making process."[957] In other words, Indigenous worldview is privileged in research and general understandings of the world when reflexivity is practised. As Kovach contends, "Indigenous methodologies prompt Western traditions to engage in reflexive self-study, to consider a research paradigm outside of Western tradition that offers a systematic approach to understanding the world."[958] Kovach's work is significant for understanding how Indigenous worldviews may be rooted in ideological contexts distinct from Eurocentric views, and it is critical to understanding Indigenous perspectives of identity.

[953] Glen Coulthard, "Subjects of Empire? Indigenous Peoples and the "politics of Recognition" in Canada," *PhD Dissertation* (University of Victoria, 2010), 215.
[954] Alison Gerlach, "Thinking and Researching Relationally: Enacting Decolonizing Methodologies With an Indigenous Early Childhood Program in Canada," *International Journal of Qualitative Methods* (December 2018), 4.
[955] Kovach, 112.
[956] Kovach, 29.
[957] Kovach, 32.
[958] Kovach, 29.

James Frideres explores how settler scholars dissect understandings of Indigenous identity, revealing how categories are created and centred around colonialism and its impact.[959] This is not to say that some Indigenous Peoples do not understand themselves in these categories, but those that do are influenced by colonial ideology. Frideres presented three categories of understanding. The first is the 'Psychiatric/Psychoanalytic Model,' which points to Franz Fanon's work on colonialism in Algeria and draws attention to racism that penetrates identity.[960] A resulting crisis of identity may develop because colonized peoples may not fit constructed stereotypes. In the Canadian colonial context, non-Indigenous peoples may struggle with understanding Indigenous worldviews and ways of knowing. The second category, the 'Primordialism Model,' presents concepts of understanding identity through "blood connections" and other observable markers such as a common land base, but this category does not account for relational understandings (how relational learning creates understanding).[961] The third category, the 'Symbolic Interaction Model,' addresses socialization theory but again does not address the transmission of relational understanding and ways of knowing.[962] People who are not entrenched in colonial thought would not approach their identity in this manner, as observed in the following story.

I was once at a Métis traditional harvesters' consultation meeting in 2011 when a Métis Knowledge Keeper stood up, slammed her fists on the table, and vehemently exclaimed, "I don't need the government to tell me I am a Métisse, I know I am a Métisse." That day is never far from my mind. The Knowledge Keeper's words were the language of self-determination and revealed the action of a woman with strength. I was a bureaucrat at the time, as well as a young mother, figuring out what my identity meant. The Knowledge Keeper who spoke with such conviction gave me the confidence to assert my own identity and to locate myself outside a colonial context, through community understandings. As a light-skinned Indigenous person, I often struggle with belonging— a state of being that is evident in research on urban Indigenous identity by Bonita Lawrence. However, when I encounter a strong person like the Métis

[959] James Frideres, "Aboriginal Identity In The Canadian Context," *The Canadian Journal of Native Studies* 28, no. 2 (2008), 315
[960] Frideres, 315.
[961] Frideres, 315-316.
[962] Frideres, 316.

Knowledge Keeper, I gain confidence in my work and my identity because of the strength, self-determination, and gender equity modelled for me. Indeed, such Knowledge Keepers are vital supports for contemporary scholars like me.

In her doctoral work on the mixed-blood identities of Indigenous Peoples in Toronto, Ontario, Bonita Lawrence explored how these people see themselves and how identity formation happens for different peoples. Lawrence argues that "individual identity is always being negotiated in relation to collective identity, and in the face of external, colonizing society."[963] What is significant about her work is the dynamic between lighter and darker-skinned Indigenous Peoples, tensions that exist because of external constructs of identity. While there are privileges associated with being a lighter-skinned Indigenous woman, there are also deep-rooted issues of identity legitimacy, which are all too often reinforced by other Indigenous Peoples.

An 'Elder' or, in community terms, another of the 'old people' who is part of my family always spoke about the old Métis men, the 'Famous Five,' and their desire to be self-determining and not reliant on government. Known for establishing the modern Métis Nation of Alberta, the Famous Five were pivotal in the creation of the Métis Settlements—the only Métis land base in the provinces of Canada.[964] The stories of these men are about independence: the goal of their political organization was to remain a free people. These men epitomized Métis as *Otipemisiwak*, "people who own themselves." [965] Freedom from the government sought by the Famous Five is grounded in Métis values and resistance to colonialism. When I listened to stories about these men told to me by family members, one of whom was the son of a member of the five, I understood that these stories illustrate the worldview of Métis People. These stories represent what Roger Maaka and Augie Fleras describe as ways of living together differently, respecting two (or more) worldviews equally.[966] The five attempted to live together differently, each with

[963] Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004), 1.
[964] Canadian Museum of History, *Métis "Famous Five,"* Canadian Museum of History (July 1, 2017), https://www.historymuseum.ca/blog/metis-famous-five/, (accessed July 5, 2019).
[965] Canada. Parliament, Senate, Standing Committee on Aboriginal Peoples, *"The people who own themselves": recognition of Métis identity in Canada,* The Honourable Vernon White, Chair; the Honourable Lillian Eva Dyck, Deputy Chair, 3.
[966] Roger Maaka, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand,* ed. Augie Fleras (Dunedin, New Zealand: University of Otago Press, 2005), Pages 274-275.

his own history, knowledge systems, and traditions through securing a land base. The concept of 'living together differently' allows space for each nation to define its relationship with other nations and to respect one another as equals.

Building on the concept of 'living together differently' as Indigenous Peoples can be considered relational, as can exploring how we as Indigenous Peoples know who we are. We develop an identity, which we solidify through community and connections to the land. Often dispossessed peoples or, as *Nêhiýaw* scholar Neal McLeod describes them, people who have been spatially exiled, feel disconnected from their identity.[967] Many spatially exiled urban Indigenous Peoples seek out the community when separated from their traditional territory because land informs identity, knowledge, culture, and worldviews. A little like the philosophical query about what came first, the chicken or the egg, spatially exiled Indigenous folks give us multiple ways to consider worldview and identity. Understanding the genesis of worldviews provides the impetus for scholars to consider why there are differences in understanding relationships with government and concepts of self as Indigenous Peoples.

When I was growing up, my grandmother often publicly embraced her husband's (my maternal grandfather) Scottish culture. Although she had no Scottish heritage herself, she was active in Scottish country dancing, helped me get into Highland dancing, and threw Robbie Burns parties. Her Métis culture, however, existed in her private practice. By that, I mean she made the rag rugs that became famous in Métis homes, she kept and used old Métis family recipes, and she conversed with me about a Métis life she wanted for me in teaching how we treat each other. In 2002, my grandfather (her husband) passed away. After he died, my conversation with my grandmother about our Métis heritage became more frequent, with her initiating the conversations. One day, she phoned me because her 2006 census registration had arrived: seemingly, out of nowhere, she asked me if she fit the definition of Métis (as she was finally prepared to declare herself a half-breed). No one needed to tell her who she was, but she felt it was important for the government to know she was here to be counted.

[967] Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary times*, Aboriginal Education Collection (Saskatoon, Sask.: Purich Pub., 2007), 56.

My grandmother, who had her own strong opinions, was always informed politically. She was not sure that she fit the government criteria for the Métis identification box, and she never used the government to understand herself. What is important about this revelation, for me, is that though she may have lived as a Métis privately, she was not looking for government approval of her identity. Instead, my grandmother wanted to ensure that she was appropriately counted. She said, "If we all came forward, the government wouldn't be able to ignore us." For my grandmother, this was a political move. Although not explicit in her language, my grandmother's conversations and teachings were grounded in a culture that supports the core of my identity. When I am in places of culture (gatherings, ceremonies, experiencing teachings from my Elders), I see reflections of my grandmother all around me, whether it is in material items or other subtle clues. Grandma did not see herself in terms of government categories; otherwise, she would not have questioned the census categories. Her worldview came from her mother and her lived experience interacting with her extended family (Métis and Algonquin).

Understanding self and how Indigenous Peoples perceive identity is at odds with the constructed view of Indigenous Peoples. We have always spoken openly at home around our son, so it came as no surprise when one day during a conversation about the Daniels' case, his first question was about his rights: "Does that mean I can hunt?" Although he had only just turned four years old, he was keenly aware of his cultural identity. That very same summer when we were talking about 'Indians,' he could not relate to that understanding because he did not fit the stereotype as he is 'pigment challenged'—a term we use colloquially in our home. Culturally, he relates through relationships, but when colonial labels are attached, he detaches from the 'identity.' As this account of my son's self-identity reveals, critical discussions of identity cannot be confused with colonial constructs. Connections to community and land, and sovereign rights to self-determination relate to Indigenous understandings of identity rather than to colonial constructs.

Land and Identity

Understandings—and misunderstandings—go beyond Indigenous identity to include conceptions of land. Fundamental understandings of land, according to European standards, were based upon

the doctrine of discovery and Christianity.[968] Indigenous concepts of land-based relationships are observable in the work of Paul Nadasdy, John Borrows, Boyce Richardson, and Keith Basso. It is the divergent views between the Crown and Indigenous Peoples that create obstacles in negotiations about land and rights. For example, the differences in understanding of land and title led to the *Paulette et. al. v. The Queen*. In this case, there was a dispute as to whether Denesuline People surrendered title to land when signing Treaties 8 and 10. The judge held that the parties had rights to the land, but the right to a caveat on land was lost at the Supreme Court of Canada level. [969] For Indigenous Peoples , the land represents more than usufructuary rights (right to use the land) and is more than a means of sustenance; it is part of how we know who we are—our identity constructed through relationships, including with the land. As illustrated in court decisions, cultural connections contribute to understandings of self in the context of identity.

Strongly associated with Western ideas about land is the 'Doctrine of Discovery.' Jennifer Reid argues that this doctrine can be traced back to Christian Crusades and the belief in 'God-given rights' over lands and peoples viewed as uncivilized.[970] According to Reid, "One of the most significant pronouncements on the subject came from Pope Innocent IV, who concluded in 1240 that despite the fact the infidels possessed natural rights, they could be legally deprived of these by virtue of the pope's obligation to oversee the spiritual needs of all peoples." [971] This concept was further entrenched by the Christian Catholic Church with the Papal Bull *Inter Caetra* by Pope Alexander VI.[972] When Spain sought validation for its 'discoveries' in North America, Pope Alexander released three papal bulls, but it was the Inter Caetra that outlined the doctrine of discovery.[973] These references to Papal Bulls and early Christian writings are essential to understanding concepts of international law, sovereign relations, land title, European claims, and authority over 'discovered lands.'[974] Accordingly, there were three ways a nation/monarch/state could make a claim: plant a flag, bury a coin, or read a decree. Spain and Portugal relied on the

[968] Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *Canadian Journal of Native Studies* 30, no. 2 (2010), 337.
[969] Paulette et al. v. The Queen [1977] 2 SCR 628.
[970] Reid, 337.
[971] Reid, 338.
[972] Baron Pineda, "Indigenous Pan-americanism: Contesting Settler Colonialism and the Doctrine of Discovery at the Un Permanent Forum on Indigenous Issues," *American Quarterly* 69, no. 4 (2017), 823.
[973] Reid, 338.
[974]Reid, 339.

doctrine of discovery and these practices for their establishment in the Americas, as did France and England, the colonial powers entrenched in Canada.[975] This practice of conquest *evolved* but remained the foundation for understanding title to land and the British Crown's sovereignty in Canada.

To entrench sovereignty in North America, the French and English established the notion of 'terra nullius.' This concept of empty land refers to use and occupancy, a Eurocentric concept based on the so-called 'proper use of the land.'[976] Based on European ideas about civilization—who was civilized and who was not—terra nullius contributed to Eurocentric concepts of identity.[977] Indigenous Peoples, specifically First Nations Peoples, were perceived as uncivilized and pagan and therefore became wards of the colonial government. Indigenous Peoples' status as wards of the colonial government and European perceptions that they did not use the land properly laid the foundation for the creation of the *Indian Act*, which decreed that First Nations Peoples required 'civilizing.'[978] The *Indian Act* reinforces the colonial concept of 'Indian' and distorts identity from what was originally and should be a self-determined definition to a created concept, reinforced through stereotypes. Indigenous Peoples whose ideas differ from the colonial model view themselves differently.

With Indigenous Peoples bringing land claims cases before the courts, terra nullius is a concept that no longer provides credible evidence of Crown sovereignty. In the legal decision of *Tsilhqot'in Nation v. British Columbia,* the Supreme Court of Canada (2014) declared: "The doctoring of terra nullius (that no one owned the land before European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763."[979] This case was a test of 'Aboriginal' title to land and to traditional Tsilhqot'in worldviews—the history of their connection to the land. The Tsilhqot'in used community history as evidence in the case to demonstrate long-term occupancy and use. The decision actively acknowledges the Tsilhqot'in's

[975] Reid, 339.
[976] Reid, 336, 340.
[977] Merete Borch, "Rethinking the Origins of Terra Nullius," *Australian Historical Studies* 32, no. 117 (2001), 225.
[978] Province of Canada Statutes, 20 Victoria, 3rd Session, 5th Parliament, (Toronto, l8S7), 84. Passage of this legislation was supported by John A Macdonald, G.-E. Cartier, A.A. Dorion W.B. Robinson and George Brown, all of whom approved the assimilation approach. See also, NAC, The Globe, 15 May 1857.
[979] Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256, para 69.

worldview, stating "The court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of translating pre-sovereignty Aboriginal interests onto equivalent modern legal rights."[980] Becoming mindful of Indigenous worldviews, courts exemplify why Indigenous Peoples view the judiciary as the best avenue to advocate their worldviews, most commonly through land claims cases.

Notably, in 2015 the *Truth and Reconciliation Commission* (TRC) released its *Calls to Action,* the report directly addressing concerns and recommendations about the doctrine of discovery. The *TRC* report suggested that the Crown should co-develop a new *Royal Proclamation of Reconciliation*, which in part, requests that the Crown "repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius."[981] Ideas about the Crown's sovereignty in Canada are also connected to how people perceive the land and their perceptions of identity as it relates to their relationship with the land.

As a young person, I spent many summers and school breaks in the bush with my father, and we made our living off the land. Through this lifestyle, he taught me to make connections with the land. He said if you can connect with the land, anywhere can be home. In the evening around the fire, he shared stories of his Mi'kmaq family and the teachings of his mother and father. My father was not only a bushman. He was also a survivor, largely due to the teachings and skills passed on by his Mi'kmaq mother who lived overtly as an Acadian wife and privately as a Mi'kmaq matriarch inside the home. Unfortunately, although she was a Mi'kmaq speaker, my grandmother never passed on her language. When speaking with my dad's 90-year-old sister about our family, I remember her saying, "of course I'm Indian, look at me, we just didn't talk about it." My father's childhood home was influenced heavily by Mi'kmaq matriarchy, as was my mother's childhood home by Métis self-determining women, just like her own mother and their mothers before them. Though perhaps not an act of resistance per se, my parents' cultural

[980] Tsilhqot'in Nation *v.* British Columbia, para 32.
[981] Truth and Reconciliation Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), Call to action 46 (1).

practices were passed on as knowledge and worldviews, acquired through social structure and experience—culminating in a relational worldview.

In 2007, my dad read *Strangers Devour the Land*, and it was an 'aha' moment for him. By that time, my dad had become more open about being Mi'kmaq, although still hiding from some because of their racist views. In fact, the 1999 Burnt Church incident seemed to be the impetus for my dad's openness about 'traditional knowledge,' which prior to this he had referred to as 'bush life' or 'his mother's teachings.'[982] Reading that book inspired him to talk about many cultural practices his Mi'kmaq mother taught him as a child. He spoke about his mother's teaching of using tree bows for tent bedding, making snowshoes, and building lobster traps. He told me stories of Sunday lunches, times when visitors came from Indian Island, N.B. to sell their wares. Dad recalled when he was about five years old that he heard his mom speaking another language, but he never thought twice about it until many years later: His mother, my mamère, was speaking Mi'kmaq.[983] I never knew my grandmother, but many of my cousins did, and they share stories and verify family history told by my father. Mamère taught my father how to connect to the land and through the land to connect with life.

Anthropologist Paul Nadasdy worked with the Kluane First Nation in the Yukon when researching Burwash Landing.[984] Through his work with the community, he became acquainted with the community's knowledge systems. Nadasdy's research subjects were involved with the Yukon Umbrella Agreement, a land claim and land management agreement.[985] As land claims now involve oral histories of the people (as was the case in the Tsilhqot'in), Nadasdy drew knowledge of the Kluane First Nations community and people from stories. He explains in *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon* that his most valuable learning happened not during formal interviews but when daily

[982] APTN National News, *Remembering the Mi'kmaq 'war' in the waters,* National News (June 19, 2013) https://www.aptnnews.ca/national-news/remembering-the-mikmaq-war-in-the-waters/ (accessed June 19, 2020). This period was the battle over the lobster fishery between Mi'kmaq peoples in New Brunswick and the federal government.

[983] Mamère is the term used for grandmother in my father's family, commonly used in New Brunswick.
[984] Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003).
[985] Council of the Yukon First Nations, *Umbrella Final Agreement* (2019), Council of the Yukon First Nations, https://cyfn.ca/agreements/umbrella-final-agreement/ (accessed July 5, 2019).

interactions were occurring.[986] Nadasdy observed, "They continue to use the very cultural meanings and practices they are trying to 'preserve' as a basis for interpreting and acting upon the world—including in their interactions with Euro-Canadian people and institutions."[987] This statement exemplifies the relational concepts at play in the community. Nadasdy built relationships with the Kluane First Nation and became an advocate in the negotiations for their claim; he did so with an understanding of the community knowledge systems, acknowledging that the systems were quite different from institutionally derived colonial perspectives.

Just as Indigenous knowledge systems (worldviews) come from relational learning, identity and knowledge systems originated with connections to community and are exemplified in understanding land. Nadasdy maintains that "Kluane people are acutely aware of the culturally contingent nature of their knowledge about animals."[988] He goes on to relate an experience he had at a conference on traditional knowledge, where "a wildlife biologist ask a member of the Kluane First Nation, 'What exactly is traditional knowledge?' She responded, 'Well, it's not really knowledge at all; it's more a way of life.'"[989] Knowledge and understanding of the land also surfaced in Nadasdy's time with the Kluane First Nation People. A former chief told Nadasdy a story about being in the bush with his mother and walking maps for the negotiation of a land claim. The chief's mother presented her worldview—knowing her community and relationship to the land. She spoke too about the absurdity of the idea that someone would think that they could claim ownership of the land.[990] The relationship to the land for many Indigenous Peoples is one of cooperation, not of human dominance over the land. According to Nadasdy, in the Kluane relationship to land, lifestyle plays a role in identity constructions and worldview:

> As a rule, Kluane people prefer wild meat to store-bought food. This preference is not merely because they like the taste better (though to be sure, most of them claim this to be the case); instead, the consumption of wild meat is in itself a fundamental part of Kluane people's conception of themselves as

[986] Nadasdy. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon*, 22-23.
[987] Nadasdy. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon*, 3.
[988] Nadasdy. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon*, 63.
[989] Nadasdy. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon*, 63
[990] Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations," *American Anthropologist* 104, no. 1 (2002), 247.

> Indian people. Significantly, they tend to refer to wild meat and fish as "Indian food" and store-bought food as "Whiteman food." Moreover, their attitudes towards these different types of food are equally telling.[991]

Relevant here is not only the way the Kluane provide for themselves but also how they define themselves, through the land.

Other scholars have explored the relationship of Indigenous communities with the land. John Burrows, an Anishinaabe professor of law, explores land and citizenship in his work. When discussing what it means to be 'Aboriginal,' he argues that "the formation of culture and identity is contingent on our interactions with others."[992] Like Nadasdy, Burrows points to the relational understandings of identity constructs. Burrows connects understanding, identity, and land. In *'Landed' Citizenship: Narratives of Aboriginal Political Participation*, he provides insight into his cultural teachings and does so in the context of the natural history of and lessons from the land.[993] He identifies calls for change made by Harold Cardinal and points out how gaps identified in knowledge systems continue to be missing, according to the *Royal Commission on Aboriginal Peoples, 1996*.[994] Notions of citizenship for Indigenous Peoples, according to Burrows, are based on community values and worldviews that are viewed as subservient to the settler notions of citizenship. Land continues to be the foundation of knowledge in tandem with community relationships.[995] Thus, although there are many different cultures and communities in Canada, there are common Indigenous worldviews about knowledge, self-identity, and relational being—through land and community.

Although land and traditional values are core to their worldview and identity, Indigenous Peoples do not eschew the modern world. In following the developments of the 1975 *James Bay and Northern Quebec Agreement* (JBNQA), the case that helped create the Comprehensive Land Claims settlement model, Boyce Richardson pointed out that the Cree did not view modern

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[991] Nadasdy. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-state Relations in the Southwest Yukon*, 75
[992] John Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation," In *Citizenship in Diverse Societies*, 326-42. (2000), 334.
[993] Burrows.
[994] Burrows, XX.
[995] Burrows.

technology as an impediment to traditional knowledge and practices, nor to the way they used the land to continue their lifestyle.[996] Although they continued their lifestyle of hunting, fishing, and trapping, they did so with modern implements such as Skidoos. Richardson's work *Strangers Devour the Land* enriched with the views of community members, provides a window into the relationship the James Bay Indigenous Peoples had with their land as they fought against the hydroelectric project in the 1970s.

Keith Basso is an anthropologist known for understanding Indigenous concepts of space and ways of knowing in connection to the land. His *Wisdom Sits in Places* is an account of Apache Peoples and their understanding of place names in their traditional territory. According to the Grand Council of the Crees, "What people make of their places is closely connected to what they make of themselves as members of society and inhabitants of the earth, and while the two activities may be separable in principle, they are deeply joined in practice."[997] This explanation is important because in Basso's work, he saw that people identified themselves based upon the land on which they were situated—land with names people associated with the place. As Basso describes it, "You see, their names for themselves are the names of their places. That is how they were known, to others and to themselves."[998] Often in Indigenous cultures, people identify themselves by their land, their community and their family. For example, in Northwestern Saskatchewan, people identify themselves by their family name (e.g., Morin) and home community, either by a traditional place name or the current name such as Ile a la Crosse.

For myself, if I am communicating my Métis identity, I say that I am of the Thomas Line of Ontario and that I originate from one of the seven original Métis communities, specifically Golden Lake in the Ottawa Valley relocated to Nipissing with origins in Moose Factory. For my Mi'kmaq identity, I say that I am a Boucher from New Brunswick, Rough Waters area near Bathurst, I am Nepisiguit Mi'kmaq, and I am from the Salmon Clan. Our ancestry is more complicated in connecting to land as my grandmother's family was enfranchised, and we are part of a collective of landless people. Until 1951, Indian Affairs recorded our community as one of

[996] Boyce Richardson, *Strangers Devour the Land* (1976), Chapters 1 and 2.
[997] Keith H. Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (University of New Mexico Press, 1996), 7.
[998] Basso, 21.

the unorganized bands of New Brunswick.[999] Nevertheless, we still know we are of the Salmon clan, and many of my family still speak our language and practice our culture through interacting with each other and spending time on the land. What is interesting is that the specifics of identity with connection to land and community happen in discussion with other Indigenous Peoples. When speaking with a non-Indigenous person, the depth of identity is not as descriptive. For example, I will say I am an Ontario Métis and New Brunswick Mi'kmaq, raised mostly in Saskatchewan. We understand how we know each other but do not expect Canadian society to understand this, and, at times, we do not feel the need to qualify ourselves in knowledge systems that are not our own.

By not considering the Indigenous and Western worldviews as equals, the policy system used to justify the expropriation of Indigenous lands perpetuates the marginalization of Indigenous ideas and values. As we have seen, Indigenous concepts of culture and identity are grounded in land and perpetuated as worldviews. Making a worldview fit into an exogenous system, forces Indigenous perspectives into subservient positions and a framework that marginalizes Indigeneity. As Toby Rollo points out, "Modern European political institutions are used to define sovereignty … and so to dispossess the Indigenous nations of their equal status."[1000] Relationships are how many Indigenous nations conceive of their identity, culture, and connection to the land. As a way to guard their relationships, some nations have entered into agreements, as did the Kluane in the Yukon. These agreements are important for those working to protect the Indigenous relationship to the land, to understand the worldviews, and to perceive how people connect. This connection to the land and the relationship of cooperation exists in various parts of North America, as demonstrated in the works of Paul Nadasdy, John Burrows, Boyce Richardson, and Keith Basso. The work of these individuals illustrates the deep roots in the relationship of Indigenous identity with the land.

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[999] Jula Hughs, Stewart, Roy and Plummer Anthea, *Non-Status and Off-Reserve Aboriginal Representation in New Brunswick Speaking for Treaty and Claims Beneficiary,* Urban Aboriginal Network: Atlantic Research Centre (June 2015), 36.

[1000] Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims. (Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide)," *Canadian Journal of Law and Jurisprudence* 27, no. 1 (2014), 233.

Sovereignty and Worldview

When governments negotiate Indigenous identity or land claims, the basis for sovereignty and the associated worldview of the Crown form the basis of the negotiation. Because government systems do not incorporate different worldviews and fundamental issues of Indigenous sovereignty are non-negotiable, Indigenous sovereignty over lands is circumvented. Systems external to Indigenous Peoples place them and their worldviews into a subservient position. Indigenous Peoples are asserting changes to concepts of sovereignty in areas of negotiation and other legal apparatuses through shifting concepts of identity seen in the cases brought forward by the Mi'kmaq of Newfoundland, the Algonquins of Ontario, and the Métis and non-status First Nations Peoples. These assertions play a subtle role in changing the foundations of certainty as the Crown's absolute jurisdiction is eroded through advancements in models of self-government associated with land claims. The courts continue to evolve, especially in consideration of Indigenous worldviews and the way they consider oral evidence.[1001] Although Indigenous worldviews continue to be unequal in the justice system, there has been a gradual shift to incorporating worldviews, but the shift is limited to the colonial parameters of the institutions.

Government policy regards Indigenous Peoples as nations within a nation and assumes a paternal role for the government in its relationship with Indigenous Peoples. The St. Catherine's Milling case identifies this as a guardianship relationship.[1002] This guardianship between the government and First Nations Peoples is also expressed in the Numbered Treaties. For example, in Treaty 6, with certain promises of protection by the Crown, the signatories of the Treaty agree to obey the government's laws and "to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen."[1003] The paternal role was so entrenched that many First Nations Peoples became legislated wards of the state, placed on the Indian Registry, and therefore under the *Indian Act, 1876*. In Canada, Indigenous Peoples are the only Peoples with a legislated identity

[1001] John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016), 34.
[1002] "[T]he subsequent words "and lands reserved for Indians," by which word "Indians," standing alone, it must have been intended to assign to the Dominion the tutelage or guardianship of the Indians and the right to regulate their relations with the crown generally, a duty which could not be properly performed by the Dominion if the tribes were liable to be beset by the Provinces seeking surrenders of their lands. St. Catharines Milling and Lumber Co. v. R, (1887) 13 S.C.R. 577.
[1003] Treaty 6, 1964, *Treaty No. 6 Between Her Majesty the Queen and the Plain and Wood Cree Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer and Controller of Stationary, 1964).

determined by non-Indigenous measures and means.[1004] The *Royal Proclamation of 1763* established this parental role as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds…. 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.[1005]

Often cited in land claims and rights challenges, the *Royal Proclamation of 1763* outlines the acquisition of Indigenous lands procedurally and declares the Crown's duty to protect Indigenous Peoples.[1006] Prior to the *Royal Proclamation,* the treaties in Eastern Canada were negotiated on a nation-to-nation basis. An example is the *Great Peace of Montreal of 1701*, in which 39 nations participated equally and agreed to a peace treaty.[1007] Although a historically significant foundational document, the *Royal Proclamation* shifted the relationship between Indigenous nations and the Crown, placing Indigenous Peoples under the Crown in the global context of sovereignty, further entrenched with legislation and treaties.

As Canada formed its union, Indigenous Peoples came under legislative control, and the new nation circumvented Indigenous sovereignty, assuming a leading role in the territory.[1008] The circumstances surrounding the sale of Rupert's Land by the Hudson's Bay Company (HBC) to the Dominion of Canada demonstrates that Indigenous rights to land would require settlement as

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[1004] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11. Section 35. Indian Act, RSC 1985, c I-5.
[1005] King George III. *Royal Proclamation, 1763*.
[1006] As identified by Senator Yvonne Boyer, the early treaties and the Royal Proclamation of 1763 establishes the fiduciary relationship through the language of "Protection" in the relationship agreements. Yvonne Boyer, *First Nations, Métis and Inuit Health Care: The Crown's Fiduciary Obligation*, Discussion Paper, Series in Aboriginal Health No. 2. (University of Saskatchewan, Native Law Centre, 2004): 18, 19.
[1007] *The Great Peace of Montreal of 1701: French-native diplomacy in the seventeenth century*. Montreal: McGill-Queen's University Press.
[1008] British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)

set out procedurally in the *Royal Proclamation*. Thus, the *Numbered Treaty* process began, included in the *Rupert's Land Deed of Surrender*.[1009] Although the treaties should have signalled a continuation of a nation-to-nation relationship in which the sovereignty of Indigenous Peoples over title was understood, the government perceived the agreements as land surrenders.[1010]

As Indigenous Peoples signed treaties, they came under the protection of the Crown once more, thereby strengthening the parental role of the government and abrogating Indigenous sovereignty. Upon taking treaty, many people were registered on band lists, which eventually made up the *Indian Registry* under the *Indian Act*.[1011] For the government, this registry created certainty about the population it would be responsible for in its role of protector of Indigenous Peoples. Through the *Indian Act*, the government made it clear that it was not responsible for the Métis People.[1012] In places where there was no land treaty, enumeration happened, locating people on reserves.[1013] Later, through the Supreme Court of Canada Daniels decision, the federal government became responsible for Métis and non-Status First Nations Peoples, the way they are for Inuit People as a result of *R. v. Eskimo*.[1014] The Crown is currently negotiating this relationship through bilateral agreements.[1015] However, unlike with First Nations, the rights and claims to land of the Métis and Inuit are not regulated through the *Indian Act*.

When Indigenous and Crown representatives negotiate, Indigenous sovereignty is never assumed or acknowledged. However, as some Indigenous leaders like Chief Bill Montour of the Six Nations of the Grand River maintain, "Our future as Indigenous Nations compels us to reassert

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[1009] *Canada (Rupert's Land) were Indigenous interests to land. Copy or Extracts of Correspondence between the Colonial Office, the Government of the Canadian Dominion, and the Hudson's Bay Company, Relating to the Surrender of Rupert's Land by the Hudson's Bay Company, and for the Admission Thereof into the Dominion of Canada.* XLIII (1868), 373 (Image 6 of 82)
[1010] The first land agreements with the Crown are described as land surrenders by the federal government. Indigenous Crown Relations and Northern Affairs, Canada, *Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923),* https://www.rcaanc-cirnac.gc.ca/eng/1360941656761/1544619778887#uc (accessed July 4, 2020).
[1011] INAC, Canada, *Discussion Paper on Needed Changes to the Indian Act Affecting Indian Registration and Band Membership McIvor v. Canada* (2009),1-2.
[1012] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99, paras 31-34.
[1013] John Leonard Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Premises and Necessary Innovations," *Sweet Promises*, *A Reader on Indian-White Relations in Canada,* ed. J.R. Miller (Toronto: University of Toronto Press. 1999), 207.
[1014] Daniels *v.* Canada (Indian Affairs and Northern Development). Re Eskimos, 1939 CanLII 22 (SCC)
[1015] Daniels *v.* Canada (Indian Affairs and Northern Development).

our sovereignty and go back to our laws and traditions to make citizenship determinations work for our nations."[1016] In some cases, variations of sovereignty can be negotiated but still on the Crown's terms. For example, the James Bay Cree People have a variation of sovereignty over their 'category one' lands in the *James Bay and Northern Quebec Agreement (JBNQA), 1975* and subsequent agreements.[1017] (The JBNQA involves land categories that are associated with jurisdictional oversight creating levels of management). However, debates of sovereignty continue. Lawyer and academic Chelsea Vowel argues, "If it were exceedingly clear to everyone that Aboriginal law is all about a colonial nation retaining its claim to sovereignty—dedicated to shoring up its claim to title in lands throughout Canada—then that understanding alone would be a great improvement."[1018] Her words remind readers of the ongoing tension between settler worldviews and foundations of sovereignty.

For Indigenous Peoples, land and sovereignty over lands are connected and impact Indigenous ways of knowing. Once the Crown asserted its claims to land and sovereignty, Indigenous Peoples had to use the judicial system to reassert their claims to land, as illustrated below. However, when they are successful, sovereignty is not returned in the same capacity as it once existed, leaving partners that are still unequal. In *Calder v. British Columbia (Attorney General) (1973)* the plaintiffs preferred a blanket declaration as an open concept with sovereignty to be negotiated later, thus leaving room for sovereignty discussions.[1019]

The ruling in the Calder case, based on principles of the *Royal Proclamation of 1763*, stated that no treaty existed with either the Crown or the Hudson's Bay Company (HBC).[1020] In this case, the plaintiffs challenged policies and legislation stating "any right or title the Indians possess as occupants of the land from time immemorial has been extinguished. They ask for a declaration that there has been no extinguishment."[1021] The claimants maintained that if the land title had not

[1016] Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon, SK.: Purich Publishing Inc. 2011), 7.
[1017] Government of Quebec, *Act Respecting the Land Regine in the James Bay and New Quebec Territories* (June 1979).
[1018] Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis & Inuit Issues in Canada*, Debwe Series (2016), 252.
[1019] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.
[1020] Calder et al. v. Attorney-General of British Columbia, [1973], 4.
[1021] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313. Page 21.

been extinguished, neither had tribal sovereignty.[1022] Part of this ruling considered the Treaties of Western Canada.[1023] Reinforced in the decision was the fact that treaties were negotiated and settled and, therefore, an acknowledgement of 'Aboriginal' title to land.[1024] Accordingly, the ruling stated, "Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests." And, as mentioned previously, it is an important document that lays out the terms of surrender of 'Aboriginal' title and protections (removal of sovereignty) by the Crown.[1025]

The appellants in the Calder case sought a declaration from the courts, one stating that 'Aboriginal' title was never extinguished.[1026] This was a broad declaration sought because the definition of 'Aboriginal' title to the land had not yet been thoroughly tested in the courts and may include an element of sovereignty specific to that title.[1027] The decision acknowledges that "The appellants rely on the presumption that the British Crown intended to respect [N]ative rights; therefore, when the Nishga people came under British sovereignty … they were entitled to assert, as a legal right, their Indian title."[1028] Not seeking a revision of sovereignty during the court case, or when the Nisga'a sent representatives to London, England in 1887, the appellants demanded recognition of title long before the SCC ruling estimated the establishment of crown sovereignty around 1903.[1029]

> In the present case, the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British

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[1022] A series of proclamations by Governor Douglas between 1858 and 1863, followed by four ordinances enacted between 1865 and 1870, revealed a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title". Page 2 of Calder. Referred to in the Convention as the "Stoney Mountains" in 1818, a Convention of Commerce between His Majesty and the United States of America, the British Crown and the United States settled the boundary to the height of land in the Rockies, establishment of British sovereignty in British Columbia. The boundary was the 49th parallel of latitude. The Convention provided for joint occupancy of the lands to the west of that point for a ten-year term. This Convention was extended indefinitely by a further Convention in 1827." Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 7-8.
[1023] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 43-44.
[1024] Pa Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 48.
[1025] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 48.
[1026] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 1.
[1027] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.
[1028] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 52.
[1029] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 59-60.
Union of BC Indian Chiefs, *Historical Timeline 1700s to Present,* Union of British Columbia Indian Chiefs, https://www.ubcic.bc.ca/timeline (accessed July 5, 2019).

> Crown. The appellants are not challenging an Act of State. They are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people, a title which has its origin in antiquity, not in a grant from a previous Sovereign.[1030]

The declaration was important in this matter because it left enough room for broader negotiations.[1031] Although the Nisga'a did not win, the case, along with claims made in the Yukon and James Bay, prompted the Federal government to develop a claims department and policy—the Office of Native Claims.[1032]

In 1976, the negotiations with the Nisga'a People began, concluding 22 years later. As part of this land claim settlement, the Nisga'a People negotiated rights to resources as well as a self-government arrangement.[1033] During negotiations, the First Nations community did not have equal sovereignty as Crown sovereignty was seen as inalienable; however, the Nisga'a achieved a high level of self-determination and assisted in moving the bar for sovereignty claims by Indigenous Peoples in Canada.[1034] This comprehensive claim 'allowed' for governance based on traditional culture and values.[1035] Significantly, the Supreme Court of Canada affirmed the principles that historic occupation of land by Indigenous Peoples gave rise to legal rights that survived European settlement. The Crown builds cases based on inalienable sovereignty. As a result, Indigenous sovereignty remains secondary to Crown sovereignty.

With the results from the Calder decision, the James Bay court actions, and the Yukon Indian Brotherhood claim, the government pointed out that these actions led to a development in claims policy, and, accordingly, were successful cases that resulted in various forms of self-

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[1030] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, 54.
[1031] *Edward Allen* Letter From British Columbia of the *Calder* decision. "When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign--i.e. acquisition by Act of State." Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R., 313
[1032] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act," *History* (December 5, 2011), http://www.sct-trp.ca/hist/hist_e.htm (accessed November 11, 2019).
[1033] Nisga'a Final Agreement Act [SBC 1999], Chapter 2, Chapter 11.
[1034] Nisga'a Final Agreement Act [SBC 1999].
[1035] Nisga'a Lisims Government, *Governance,* Nisga'a Lisims Government, www.nisgaanation.ca/governance, (accessed November 8, 2018).

government.[1036] Moreover, such court cases created space for quasi-Indigenous sovereignty, quasi because the Crown still maintains absolute sovereignty. These developments and changes evolved within a Western liberal-democratic understanding of sovereignty and thus limited rights for Indigenous Peoples.

When the Crown assumed sovereign control over Indigenous lands and its peoples, the people and lands came under the protection of the *Royal Proclamation of 1763* and the *BNA Act of 1867*. These people who were later understood as 'Indians' (within a contemporary framework, those entitled to registration were known as First Nations persons) were governed under the *Indian Act, 1876*, which consolidated legislation that previously existed in some provincial jurisdictions.[1037] In the relationship with registered First Nations, this institutional structure created a 'parental role' that laid out federal responsibility for acting in the best interests of the people they claimed to protect through Crown sovereignty. Protection, as Section 18 of the *Indian Act* outlines, refers to how the Crown holds First Nations land.[1038] This act of holding land in trust is not only an assertion over the people, but it also demonstrates the Crown's assumption of sovereignty of the land.

In *Guerin v. the Queen, SCC, 1984*, the ruling established that the Crown must act in the best interests of a First Nation, especially one that has surrendered its interests or had them unilaterally removed.[1039] According to the ruling, "In obtaining without consultation a much less valuable lease than that promised, the Crown breached its fiduciary obligation it owed to the Band and it must make good the loss suffered in consequence."[1040] This land case held the federal government responsible for actions related to its legislated responsibility through the assumption of sovereignty over the land. Significant to this discussion, the case reveals First Nations Peoples' assertions that the Crown's inalienable sovereignty over lands cannot be used absolutely and that the federal government, representing the Crown, must consider responsibility to others over its self-interest.

[1036] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act."
[1037] An Act to amend and consolidate the laws respecting Indians, S.C. 1876, c. 18.
[1038] Indian Act, RSC 1985, c I-5.
[1039] Guerin v. The Queen, [1984] 2 S.C.R. 335, 336.
[1040] Guerin v. The Queen, [1984] 2 S.C.R. 335., 337.

The Case of *Delgamuukw v. British Columbia, 1997* is considered ground-breaking as it was the longest-running Indigenous land claims case in Canadian history.[1041] It is also significant and relevant for this discussion because the trial judge described the pre-colonial life of the peoples as "nasty, brutish, and short"—a grave misjudgement of Indigenous Peoples' existence in pre-colonial Canada and a tone reminiscent of colonial assumptions of superiority.[1042] This misconception of Indigenous life illustrates why the trial judge would also dismiss the oral testimony presented to the court. As the language and tone reveal, he did not respect Indigenous worldviews, and, as a result, the claim for land and jurisdiction over it was not equitably considered. In the original case, the judge dismissed the claim, but "granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land, subject to the general law of the province."[1043] When the case went to appeal, it deviated from the original case in two ways: First, the claims of ownership and title were replaced with title and self-government, connecting sovereignty to the land.[1044] Second, the claim's plaintiffs were originally a collective of Gitksan and Wet'suwet'en heredity leadership.

The plaintiffs in the appeal were two communal claims.[1045] Because of the court's treatment of the evidence presented by Indigenous Peoples, the ruling specified the following:

> Appellate intervention is warranted; however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting evidence before it … factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in Van der Peet.[1046]

The court's dismissal of Indigenous oral testimony demonstrates that Indigenous worldviews were disregarded in the discussion of land and jurisdiction, and evidence for this is in the declaration by the trial judge in the limited decision. The case established a test for Indigenous title to land, which included a cultural relationship to the land, and documented that Indigenous

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[1041] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.
[1042] Gitxsan, *The Delgamuukw Court Action* (2013), http://www.gitxsan.com/community/news/the-delgamuukw-court-action (accessed July 9, 2019).
[1043] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.
[1044] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.
[1045] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.
[1046] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010.

worldview must be "on an equal footing with the types of historical evidence" familiar to courts.[1047]

Cultural connections, such as connections to the land, are how many Indigenous Peoples know history and lived cultural practices. The worldviews that connect to these ways of understanding also bridge sovereign relationships to the land. The judge stated, “Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.”[1048] The role of concepts and relationships to the land impact conceptions of sovereignty as Indigenous Peoples' natural law incorporates relationship to the land, including the sovereignty to make decisions over it. Judge Lamer made the following point:

> McEachern C.J. interpreted the appellants' claim for "jurisdiction" as a claim to govern the territories in question. This claim would include the right to enforce existing aboriginal law, as well as make and enforce new laws, as required for the governance of the people and their land. Most notably, this would also include a right to supersede the laws of British Columbia if the two were in conflict.[1049]

This is a significant development in Indigenous sovereignty development, although this sovereignty’s subservience to the Crown (federal government) remains.

Variation in ways of thinking and beliefs creates spaces for disagreements in communication between groups. For example, the worldviews and perspectives on sovereignty of the Crown and Indigenous Peoples position them in a power dynamic. For the Crown, sovereignty is considered absolute. For Indigenous leaders, sovereignty is part of the body of rights.[1050] However, judicial processes have been an essential tool for advancing Indigenous worldviews of sovereignty and understandings of land and jurisdiction. Some Indigenous relationships to the land (and for others the water) create responsibilities exercised when jurisdictions of sovereignty exist with

[1047] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R.
[1048] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010, para 128.
[1049] Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010, para 20.
[1050] John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-government," *Osgoode Hall Law Journal* 30, no. 2 (1992): 295.

Indigenous Peoples. That jurisdiction requires negotiation demonstrates a power imbalance between the two parties. The Crown's conception of sovereignty does not provide absolute control of all lands without proper consultation, as illustrated in the case of Guerin. The judicial system has been instrumental in promoting Indigenous worldviews and moving the standard of Indigenous sovereignty and worldviews, but, as we have seen, these worldviews are not on equal footing with Western worldviews in either negotiations or court actions. The test in Delgamuukw, which includes Indigenous worldviews and connections to lands, illustrates that Indigenous knowledge systems and rights are not a given and that communities must continue to prove their rights within colonial institutions.

Conclusion

Indigenous identities and ways of knowing are extremely complex topics. It is especially difficult to communicate these concepts to non-Indigenous thinkers. For many Indigenous People, concepts of identity and worldview come from the framework of a relational knowledge system. When discussing identity and worldview, how one understands oneself relates to community and family influences. However, as previously stated, some contemporary Indigenous People have been disconnected from community and family, resulting in crises of identity.

People grounded in either community or land, or both, continue to understand and pass on culturally specific world views and relationships. The self-perceptions of people who continue to revitalize, recreate, and revision culture, worldviews, and knowledge do not rely on external definitions. There are many enduring examples (beyond those examined in this paper) of Indigenous Peoples constructing their own identity through land and relations. We see this regularly when we meet and introduce ourselves by beginning with the words, "where are you from, who is your family, and did you bring any fish?" Through understanding that Indigenous Peoples have different worldviews based on the transmission of knowledge systems, space can be created for understanding concepts of sovereignty that are distinct from the Crown's. Those differences create divisions when negotiating how to "live together differently" in this modern era, and those differences necessitate that further work is required to establish equality in knowledge systems.

When the program in which I taught, the Northern Teacher Education Program (NORTEP) in Northern Saskatchewan, closed in 2017, I began interviewing for other academic positions.[1051] By this point in my academic career, it was clear that I thought differently than most of my non-Indigenous colleagues in the discipline. This awareness first came during my Ph.D. readings class and when my instructors began pointing out such differences. Because of my own culturally specific experience, beliefs, and worldviews, I could step outside of the Western canons on policy and draw on observations not connected to Eastern/Asian thinking. This became clear when a fellow student asked me one day why I frame ideas about government and freedom in a way that is contrary to the way others do. Some students in the class argued that their freedom derives from the government, whereas I see freedom as a break from the government – indeed a break from the colonial model. During my interviews for employment, my philosophy became clear when I communicated what I was studying and was conceptually understood by the interviewers. As I reflected on how my approach to academic topics was different from that of others, I thought about how I understood the world and these thoughts brought back family and community teachings. I was reminded that I perceive identity as fluid: one does not have to deny one heritage to value another. When I was growing up, I was taught to be proud of and to respect all cultures, and my dad told people he was a 'Heinz 57' (a mix of many things). His satirical self-declaration has encouraged me to not let others define me. His informal and colloquial representation of himself as Heinz 57 taught me, as well, to let experiences and understanding of the world inform my sense of self and place.

General knowledge of Indigenous Peoples in Canada is based on colonial determinations. When relationships between Indigenous Peoples and settlers began centuries ago, they appeared less complicated. The colonial peoples only saw one type of Indigenous person, the constructed identity they called an uncivilized and unchristian red man.[1052] On the other hand, many Indigenous Peoples viewed themselves through interactions with community and land, while their understandings of the world developed simultaneously. Thus, individuals disconnected

[1051] Alicia Bridges, "'Sad for the North': Mixed emotions as 40 years of NORTEP end with last student graduation," *CBC News* (April 30, 2017), https://www.cbc.ca/news/canada/saskatoon/last-graduation-nortep-closing-la-ronge-sask-1.4092730 (accessed December 10, 2019).
[1052] Robert F. Berkhofer, *The White Man's Indian: Images of the American Indian, from Columbus to the Present*, 1st Vintage Books ed., Aboriginal Education Collection (New York: Vintage Books, 1979), 4-5, 9.

from their communities and place-based learning, a disconnection that led to crises of identities.[1053] In my experience, identity is formed through worldview and taught by community and land. Explaining ways of knowing is not always easy, so I grounded this conversation with what has helped me understand who I am in a way that is outside the colonial constructs. As a young person, I struggled with legitimacy as my light-skinned appearance did not fit the dark-skinned stereotypic representation of an Indigenous person, although my upbringing and experiences have taught me who I am.

The discussion of worldview and how it is understood is pertinent to this dissertation because worldview is an idea that is advanced to create change. Communities communicate their ideas about identity, which are informed by their worldview or philosophy of life. Through the work by different researchers, the similarities of alternative worldviews are identifiable, as well as the differences based on cultures. In case law, worldview connects to identity and to land. Some struggle with identity, finding that being disconnected from land and community contributes to that struggle. In policy and institutional change, concepts of identity are advanced through Indigenous-led challenges, as we have seen in this dissertation.

[1053] Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, 135, 136, 150.

CHAPTER 8 – INDIGENOUS IDENTITY AND A NEW THIRD ORDER CHANGE

Introduction[1054]

Indigenous Peoples' situation is unique in Canada because they are the only population with a legislated identity for which the government determines and controls access to constitutionally protected "Aboriginal" rights.[1055] My research indicates that Indigenous Peoples impact Indigenous policy in Canada through their identity (based on Indigenous worldviews), which they use to influence and expand policy. For years, the government maintained complete control of determining who is Indigenous and how associated policies determine identity. Groups or individuals intending to advance Indigenous policy have had to work within the institutional processes and constitutional setting in which all the rules of the Crown-Indigenous relations are grounded in colonialism. Although colonization is not only the context for advancing policy change, it has motivated Indigenous Peoples to engage the federal government in asserting their identity and reclaiming lost lands. This chapter argues that Indigenous Peoples have led policy and institutional change rooted in identity and demonstrates these achievements in three case studies—the Newfoundland Mi'kmaq People, Métis and non-status First Nations, and the Algonquin of Ontario. Building on generations of engagement by Indigenous Peoples with colonial institutions, the efforts of those described in these cases, as well as others, have brought about a paradigm shift in policy, a shift that indicates that government no longer has complete control of Indigenous identity and policy.

This paradigm shift —both in terms of policy and Indigenous participation—does not fit standard models of policy and institutional change. A standard model discussed in other chapters of this dissertation is Peter Hall's framework for considering change in policy. According to Hall, first order change is incremental and gradual; second order change disrupts established understandings through what Hall terms "punctuations"; third order change is sweeping paradigm change commonly originating outside government, rooted in social change and societal

[1054] In the final stages of this dissertation, the federal government departments started changing web addresses and as such, not all websites may be current.
[1055] Section 35, Canada Act 1982 (UK), 1982, c.11.

revolution.[1056] If Hall's framework for policy change is applied to the paradigm shift discussed above, this shift would be considered third order change within historical institutionalism. However, this paradigm shift differs from typical third order change because it does not arise from larger civil society. According to Hall, third order change occurs when the goal of the policy is altered, changed, or abandoned.[1057] I argue that Indigenous policy reflects third order change because while the government's goal of certainty—its need to be certain about who is Indigenous— is still present, the actions of Indigenous Peoples have disrupted it. By asserting their right to determine who has and has not Indigenous identity, they have diminished the government's control over certainty about Indigenous identity. Neither Hall's framework nor other models for policy and institutional change account for the colonial setting as the motivation for Indigenous Peoples to engage institutions or for how Indigenous worldviews are asserted in identity and rights as Indigenous Peoples. When the role of ideas in historical institutionalism is integrated, it becomes clear that Indigenous Peoples' ideas, together with colonial settings, are what make Indigenous change a different kind of third order change.[1058] The current study advances research into Indigenous policy and institutional change, addresses areas that require attention, and argues that Indigenous third order change has made an impact on government institutions and policy by disrupting the government's goal of certainty.

This discussion illustrates the importance or reimagining Indigenous policy development in Canada and the role Indigenous Peoples play. When the individual stories of Indigenous efforts to make change, as well as the outcomes of these efforts, are seen together they form a picture of third order policy and institutional change. By using a historical institutional lens to investigate the paths taken by the various groups and to attribute behaviour to the engagement methods chosen, a story emerges of worldview and identity and their role as instruments of change. Moving forward, inclusions of Indigenous motivations, worldviews in policy ideas, and the setting of colonization must be central in Indigenous policy research in Canada.

[1056] Peter A. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," *Comparative Politics,* 25, no. 3 (1993), 289.
[1057] Hall, 278.
[1058] Daniel Béland, "Ideas and Social Policy: An Institutionalist Perspective," *Social Policy & Administration* 39, no. 1 (2005/02/01 2005), 2.

Background

Indigenous identity was institutionalized in the *British North American Act*, 1867, in Section 91(24) and in the *Constitution Act*, 1982, in Section 35.[1059] In some cases of Indigenous identity, people are regulated by the *Indian Act*, 1876 and managed through the ministry responsible for Indigenous Peoples.[1060] This ministry (federal department) has changed names over the years and recently split into two departments: the Ministry of Indigenous Crown Relations and the Ministry of Indigenous Services Canada.[1061] No matter the name of the department, all government institutions use colonial definitions of Indigeneity, and these definitions are different from the way Indigenous People understand themselves. According to Roger Maaka and Augie Fleras, "Identities are pigeonholed (essentialised) by superimposing structures as the sole vehicle of affiliation at the expense of personal choices or situational circumstances."[1062] To be an Indigenous person, then, is to be a legislated entity within the colonial context.[1063] Identity must be included in the study of Indigenous policy and institutional changes, as the political definitions of Indigenous Peoples are altering how Indigenous Peoples are accessing constitutionally recognized Indigenous rights.

It is an Indigenous lens informing ideas and identity that is at the centre of the paradigm shift, broadly affecting government policies, institutions, and responsibility—and unsettling the government's goal of certainty, which it has made explicit over the years.[1064] Writing about gaps in historical institutionalism Béland argues that incorporating ideas (especially identity) into policy learning enriches understandings, an important element to consider because identity

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[1059] British North America Act, 1867, 30-31 Vict., c. 3. Canada Act 1982 (UK), 1982, c.11.
[1060] Indian Act, RSC 1985, c I-5.
[1061] Prime Minister's Office, Trudeau, Justin, *New Ministers to support the renewed relationship with Indigenous Peoples.* Prime Minister's Office (August 28, 2018) https://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples (accessed July 7, 2019).
[1062] Roger Maaka, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand,* ed. Augie Fleras (Dunedin, New Zealand: University of Otago Press, 2005), 85.
[1063] Taiaiake Alfred and Jeff Corntassel, "Politics of Identity - Ix: Being Indigenous: Resurgences against Contemporary Colonialism," *Government and Opposition* 40, no. 4 (2005), 598.
[1064] Government of Canada, Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: AANDC, September 2014), 11. "Canada seeks to achieve certainty over unresolved Aboriginal rights claims, concerning land and resources and other rights addressed in the treaty by negotiating agreements that provide for a respectful reconciliation of the rights of the Aboriginal people with the rights of other Canadians. The better the job that negotiators do in comprehensively setting out the terms of a new relationship based on the clearly defined rights and obligations of each party, the greater the certainty for future generations."

assertion grounds Indigenous institutional relationships and policy.[1065] Identity—as well as the associated worldviews—influences legislative power, and, until now, has been the missing piece in Indigenous policy and institutional change analysis.

Policy learning is a way of understanding how policy changes occur. According to Colin Bennett and Michael Howlett, "We may only know learning is taking place because policy change is taking place."[1066] Policy makers learn through feedback loops and reflection and through lesson-drawing within closed policy communities or government. They also learn through broader society, commonly associated with influences outside government.[1067] This type of learning is known as social learning. As Hall points out, policy learning occurs in first, second, and third order change.[1068] According to Hall, first and second order change originates from within the state, whereas third order change originates in the broader civil society.[1069] As discussed, Indigenous policy does not fit into the framework for third order change: its origins do not come from the broader civil society but from Indigenous Peoples pushing for change.

This paradigm shift has been identified in previous work on Indigenous policy change in Canada. Sally Weaver claims that this shift began with the development of the *White Paper*, according to the government employees interviewed in Weaver's work.[1070] Although Weaver attributes this paradigm shift in part to the work by Indigenous organizations, and largely to changes in government attitudes, she does not conduct an in-depth examination of Indigenous involvement.[1071] In excluding Indigenous perspectives and considerations, Weaver has reduced Indigenous agency. Also missing in Weaver's work is an analysis of the root causes of change or an acknowledgement of the uniqueness in Indigenous policy paradigmatic change. Michael

[1065] Daniel Béland, "Identity, Politics, and Public Policy," *Critical Policy Studies* 11, no. 1 (2017), 12.
[1066] Colin J. Bennett, and Michael Howlett, "The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change," *Policy Sciences* 25, no. 3 (1992/08/01 1992), 290.
[1067] Bennet and Howlett, 291. Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 288.
[1068] In first order change; incrementalism is a series of small changes grounded in government power and associated with instrumental change. Second order change; punctuations, are changes through government power involving alterations to settings and instruments. Third order change is understood as a change that comes because society has shifted and is grounded in the power of the people, and goals are altered
[1069] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 288.
[1070] Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981), 101.
[1071] Weaver.

Howlett agrees that patterns of a paradigm shift may exist in policy development, although until more research and case studies are available, he argues, it is difficult to be definitive about this shift.[1072] Several cases, including ones examined in the current work, contribute to the scholarship by analyzing changes to institutional definitions and associated policies.

Within Indigenous policy and institutional change, the root of change is identity grounded in worldview. Although all Indigenous policies and legislation are based on identity—the government's idea of identity—it is the Indigenous worldview and identity that are creating change by using institutional instruments, observable in the case studies presented below. Previous work did not account for how worldviews are at the root of change or how colonization contextualizes Indigenous perspectives. Indigenous Peoples are involved in all three types of changes in policy and institutional arrangements. Examining significant changes to policy, using the *Indian Act* as an example, demonstrates Indigenous action progressing through both incremental changes and punctuations to create a more substantial paradigm shift.

Research Focus – Cases and Their Impact

This paradigm shift in Indigenous policy and institutional understandings has occurred because of the culmination of efforts by Indigenous Peoples in Canada. As we have seen, ordinarily, policy change is the result of government making incremental changes with some punctuations based on study and feedback loops creating a form of policy or institutional learning.[1073] Since the 1970s, Indigenous Peoples have been the root cause of incremental and punctuated changes, laying the groundwork for the paradigm shift by challenging the Crown. Indigenous Peoples tried to advance change for generations, but it was only in the latter part of the 20th century that the impact becomes visible. Although support from lobby groups exists, it is the people and the communities driving the change. Indigenous Peoples have used judicial systems for diplomatic engagement and colonial institutional systems to establish their worldview in policy and institutions, expanding Indigenous rights based on Indigenous ideas. Institutional systems include negotiation processes, formal petitions to the Crown, and court actions; thus, Indigenous

[1072] Michael Howlett, "Policy Paradigms and Policy Change: Lessons from the Old and New Canadian Policies Towards Aboriginal Peoples," *Policy Studies Journal* 22, no. 4 (1994), 640, 643.
[1073] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 279.

third order change comes from Indigenous positionality, which is distinct from any other form in Canada. Rooted in the colonial experience, Indigenous Peoples' engagement is a reaction to marginalized sovereignty.

Engaging colonial institutions to create change is not new, but due to the efforts of Indigenous Peoples, new instruments are available for Indigenous Peoples to create change. An example of new instruments developed as a reaction to Indigenous challenge was the creation of the Office of Native Claims (ONC). The apparatus responded to the judicial acknowledgement of 'Aboriginal' land title.[1074] Many negotiations in the modern era started because of Indigenous Peoples-initiated court action. The policy shift for Indigenous Peoples is slow, but it exists because they have been tenacious. All the smaller, incremental changes led, eventually, to a broader shift in government control of Indigenous policy.

The Newfoundland Mi'kmaq People

When Newfoundland and Labrador joined Confederation in 1949, Indigenous Peoples and communities were denied their rights. The first Indigenous Peoples to receive services were the people of Labrador in 1954, but it was not until 1973 that the Mi'kmaq of Newfoundland received attention.[1075] The Mi'kmaq's colonial experience of being denied their Indigenous rights created the impetus for action and the cause for engagement. The Mi'kmaq People of Newfoundland used the available judicial instruments—court action, followed by negotiations. Indigenous lobby groups, who often help rights bearers who lack resources, initially assisted with the engagements with the government.[1076] For registered status recognition, the Mi'kmaq People of Newfoundland used legal instruments as a collective pursuing their rights as protected in Section 35 of the *Constitution Act*, 1982. The first registered Mi'kmaq community with a negotiated membership was the Miawpukek First Nation in 1984.[1077] The community finalized

[1074] Specific Claims Tribunal, "A Brief History of Specific claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act," *History* (December 5, 2011), https://www.sct-trp.ca/hist/hist_e.htm (accessed November 11, 2019).
[1075] Adrian Tanner, Canada, Privy Council Office issuing, and body Canada, Royal Commission on Aboriginal Peoples issuing, *Aboriginal Peoples and Governance in Newfoundland and Labrador: A Report for the Governance Project, Royal Commission on Aboriginal Peoples* (1994), 31.
[1076] Government of Newfoundland, Heritage Newfoundland, *Mi'kmaq Organizations and Land Claims,* http://www.heritage.nf.ca/articles/aboriginal/mikmaq-land-claims.php (accessed December 19, 2017).
[1077] Order in Council P.C. 1984-2273. Replaced by Miawpukek Band Order SOR/89-533.

an agreement following a break from the Federation of Newfoundland Indians (FNI).[1078] The FNI continued to have a role in establishing the Mi'kmaq existence of other Indigenous Peoples entitled to registration as a federally recognized community under the *Indian Act*.[1079] These agreements illustrate that Indigenous initiatives were a catalyst for a formal recognition process for rights holders who had been previously denied.

The federal government/Crown has a legal responsibility to Indigenous Peoples in Canada and uses instruments like the *Indian Act* to limit its responsibility.[1080] As Bonita Lawrence points out, no formal mechanisms or instruments exist for creating a registered community from an unrecognized Indigenous collective.[1081] In Newfoundland, a negotiated process followed legal challenges initiated by the Mi'kmaq People and noted by the federal government. The Mi'kmaq were the first new bands acknowledged and created as a group from unrecognized peoples through Governor in Council.[1082] The FNI was conducive to creating the second Newfoundland Mi'kmaq band, the Qalipu Mi'kmaq First Nation.[1083] By altering concepts of band membership and expanding mechanisms of recognition in Canada, the Qalipu Mi'kmaq First Nation (QMFN) disrupted the government's policy goal of certainty.

When the community-based definition was limited through an amended agreement in the band creation process, potential band members used judicial processes to expand the definition. The first agreement with the Qalipu Mi'kmaq People involved a community-based definition. When the QMFN was negotiating its accepted membership, over 100,000 people qualified. The government amended the agreement because it did not want to take responsibility for that many

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[1078] Tanner, 35.
[1079] Government of Canada, Indigenous and Northern Affairs Canada, *Agreement for the Recognition of the Qalipu Mi'kmaq Band,* Government of Canada (November 30, 2007). (2011 Agreement in Principal). Government of Canada, Indigenous and Northern Affairs Canada, *Supplemental Agreement,* Government of Canada (2013). (Including Annex A to Supplement Agreement).
[1080] John Giokas, Canada, Privy Council Office Issuing Body, *The Indian Act: Evolution, Overview and Options for Amendment and Transition*. (1995), 1-2.
[1081] Bonita Lawrence, *Fractured Homeland: Federal Recognition and Algonquin Identity in Ontario* (Vancouver: UBC Press, 2012), 111.
[1082] Government of Canada, Indigenous and Northern Affairs Canada, *How to create a band?* https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470 (accessed June 22, 2019).
[1083] Qalipu Mi'kmaq First Nation Act S.C. 2014, c. 18. FNI entered into the agreement with the federal government to create the band.

people.[1084] After the government interfered with definitions of community—the determined eligibility—community people asserted self-determination and cultural worldviews, which expanded policy possibilities using legal means. One case that created an amendment to the enrolment policy was the Wells decision.[1085] In the Wells case, two potential members were denied an appeal process with the new Supplemental Agreement with the Qalipu People. The new process was deemed unfair in a judicial challenge, and, as a result, the government reassessed denied claimants. What began with Confederation as an institutional denial of identity was redefined through mechanisms used to create new policy structures in band creation with previously unrecognized First Nations Peoples in Canada. This process introduced doubt into the government's goal of being certain about who is entitled to be registered as an Indigenous person and who is not. Through mechanisms available to potential band members, such as the judiciary, the community continues today to expand the registration process based on rights, equity and fairness.[1086]

Métis and Non-Status Institutional Impact

Throughout history, Métis People resisted colonial institutions and policies that discriminated against them. In the 19th century, the Métis People in Rupert's Land experienced an era of diplomacy when the Hudson's Bay Company (HBC) established a year-round settlement at Red River and executed policies over Métis economic activities.[1087] The Métis People organized to resist these policies in a collective fashion. People who asserted themselves in Confederation as a collective in the *Manitoba Act* were then virtually ignored until the modern era.[1088] Institutional

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[1084] Tristan Hopper,"Ottawa rushes to tighten up entry rules before 70,000 Canadians are declared Mi'kmaq," *National Post – Canada: Politics* (May 6, 2013), http://news.nationalpost.com/news/canada/swamped-with-a-st-johns-worth-of-newfoundland-mikmaq-applicants-feds-look-to-tighten-up-entry-rules (accessed April 18, 2016). House of Commons Hansard #231 of the 41st Parliament, 1st Session. Greg Rickford (March 28, 2013), https://openparliament.ca/debates/2013/3/28/greg-rickford-2/. (accessed September 28, 2019).

[1085] Government of Canada, Indigenous and Northern Affairs, *Have you applied to join the Qalipu Mi'kmaq First Nation?* Indian Status (May 21, 2019), https://www.aadnc-aandc.gc.ca/eng/1319805325971/1319805372507. (accessed June 1, 2019).

[1086] Benoit v. Federation of Newfoundland Indians, 2018 NLSC 141. Wells v. Canada, 2018 FC 483. Brake v. Canada and Federation of Newfoundland Indians, 2018 FC 484. Doucette v. FNI and Canada, 2018 FC 497. Howse v Attorney General of Canada, 2015 FC 1063.

[1087] Ruth Swan, *The Crucible: Pembina and the Origins of the Red River Valley Métis***,** Doctor of Philosophy Thesis, Department of History, University of Manitoba, (2003),15-17, and 38.

[1088] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.).

processes were used to position Indigenous Peoples under section 91(24) of the *British North America Act*, *1867* and under associated policies. As it had for the Mi'kmaq People, the resulting policy change disrupted the government's goal of certainty for whom they owed a legal responsibility for.

Beginning with Hudson's Bay Company (HBC) policies executed in Red River, the Métis used diplomacy to engage with institutional instruments such as ordinances used against them. They did not believe that the colonial institutions and ordinances applied to them because they were not HBC employees.[1089] Asserting themselves as a collective based on the worldview of their identity, Métis People maintained this position when they engaged with HBC through judicial processes in the *Sayer Trial, 1849,* a Métis hunting case in Red River.[1090] In this case, it was impossible for the HBC to enforce their laws and the accused were set free. Even when directly confronted with violence, they used diplomacy to negotiate political challenges. An example of their diplomacy is the insertion of Métis People into the 1870 *Manitoba Act* as a result of negotiations and assertions of nationhood.[1091] In Batoche, the Métis attempted diplomacy, but this time the federal government representing the British Crown had jurisdiction over the territory. The Crown claimed effective control over the territory on July 15, 1870. Such control mechanisms had been absent in 1869-1870 when the Métis negotiated the *Manitoba Act*, 1870.[1092]

For most of the 20th century, very little changed for Métis People in the colonial institution and associated policy until the patriation of the constitution in 1982.[1093] They had one major victory, and this was with the province of Alberta, not over the federal government. In 1938, the province

[1089] As indicated in the Sayer trial. Lawrence Barkwell, *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*, Louis Riel Institute (March 1, 2010) http://www.metismuseum.ca/resource.php/11978 (accessed January 22, 2019).
[1090] Barkwell. *The Sayer Trial at Red River 1849: Establishing the Métis Free Trade*.
[1091] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.).
[1092] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623.
[1093] Senator Nora Cummings begins the interview explaining this point. Gabriel Dumont Institute, *Nora Cummings, Peter Bishop, and Ron Laliberte Interview Part 2,* https://www.youtube.com/watch?v=DIK2rt4wGZg (Accessed February 12, 2020). At the 15:21 mark of the video, Mr. Tomkins begins the discussion of the constitutional talks. Frank Tomkins, *Mr. Frank Tomkins.* February 2017 Métis Nation-Saskatchewan Annual General Meeting (February 19, 2019), https://www.youtube.com/watch?v=qLRSnOgNBVc&t=6s (accessed July 4, 2019)

of Alberta established the *Métis Population Betterment Act*, which resulted in the creation of Métis settlements, the only land the Métis had (and still have) in any of the Canadian provinces.[1094] The settlements developed in a coordinated effort between the province and the Métis. After the creation of the settlements, Métis People in the 1970s mobilize nationally and provincially. Nationally, the Métis and non-status First Nations Peoples organized under the Native Council of Canada (NCC), which later split, becoming the Congress of Aboriginal Peoples (CAP) and the Métis National Council (MNC).[1095] The last successful attempt for Métis People to achieve diplomacy was in the *Constitution Act, 1982*, an attempt that were channelled through Indigenous organizations at the federal and provincial levels.[1096] Provincially, Métis People organized under the Association of Métis and non-status Indians of Saskatchewan (AMNSIS): members of the Métis organization were instrumental in including Métis People in Section 35 of the *Constitution Act, 1982,* as one of the three recognized groups of 'Aboriginal' Peoples in Canada.[1097] Although the assertion of the Métis in Section 35 did not provide the Métis with the same rights as other Indigenous Peoples in Canada with registered status, it provided them with an acknowledged Constitutional standing and thus was a step forward.

Over 100 years after the establishment of the province of Manitoba, there was a resurgence in Métis engagement with colonial institutions, and they worked, at times, with other non-status First Nations Peoples to advance their collective rights. First, there was the work of Métis and non-status First Nations Peoples securing the inclusion of Métis People in the *Constitution Act, 1982*. Then through *Daniels v. Canada*, Métis and non-status First Nations Peoples, the Métis used institutional mechanisms to assert nationhood and to change the government's definitions and concept of rights found in section 91(24) of the *British North America Act, 1867*.[1098] The first landmark Métis legal case (preceding Daniels) was the Powley case, which has become a measuring stick for community definitions of identity and associated rights, such as

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[1094] *Metis Population Betterment Act*, S.A. 1938, 2nd Sess., c. 6, s. 2(*a*) "Metis".
[1095] Jean Taillet, "The Metis and Thirty Years of Section 35: How Constitutional Protection for Metis Rights Has Led to the Loss of the Rule of Law," *Supreme Court Law Review* 58 (2012), 336.
[1096] Senator Nora Cummings discusses the importance of the constitutional recognition at the beginning of the interview. Gabriel Dumont Institute. *Nora Cummings, Peter Bishop, and Ron Laliberte, Interview Part 2.*
Frank Tomkins. *Mr. Frank Tomkins.*
[1097] Peter Bishop begins recount of events at the 8:40-minute mark. Gabriel Dumont Institute. *Nora Cummings, Peter Bishop, and Ron Laliberte, Interview Part 2.*
Frank Tomkins. *Mr. Frank Tomkins.*
[1098] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99

harvesting.[1099] The land case brought by the Manitoba Métis Federation is the first modern Métis land case in provincial lands in which the origins of the case lie with the promises of land made to Métis People in sections 31 and 32 of the *Manitoba Act, 1870* that had never been honoured.[1100] These cases are examples of Métis People using instruments to engage the federal government. With the assertion of identity in the Daniels case, changes of who is included in the definition of Section 91(24) of the *British North America Act, 1867* affect policies tied to the institutional setting and expand those able to access rights. Just as the Mi'kmaq had done, by changing definitions and bases for rights in both the Powley and Daniels cases, the Métis took away the government's control of the definition of a rights-bearing person or community, thereby unsettling the government's goal of certainty about who is and who is not Indigenous. In the late 20th and early 21st centuries, Métis and non-status First Nations Peoples used court processes to disrupt the government's understanding of the certainty of its fiduciary duty and identity definitions with associated rights.

Algonquin People of Present-Day Ontario

Algonquin People have experienced over 400 years of colonization, the initial relationship beginning with representatives of the French Crown.[1101] These relationships changed when the British gained control of the continent, stabilizing upheaval with the *Treaty of Paris, 1763*, marking an end to the Seven Years War.[1102] Following the signing of this treaty, the British Crown issued the *Royal Proclamation of 1763*, which included provisions and protections for 'Indians.'[1103] Throughout colonial history, the Algonquin People of Ontario were not able to secure a land base through diplomacy with the British Crown despite their best efforts. They honoured the commitments they had made in the peace treaties while they lost sovereignty over their land.[1104] Because the peoples maintained a distinct self-identity and territory, the Algonquin People were able to endure throughout the colonial period. In a colonial setting, the Algonquin

[1099] R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.
[1100] An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.). Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14.
[1101] Lawrence, 21.
[1102] *The Treaty of Paris* (1763).
[1103] King George III. *Royal Proclamation, 1763*.
[1104] Algonquins Of Ontario (AOO), *Our Proud History,* AOO, http://www.tanakiwin.com/algonquins-of-ontario/our-proud-history/ (accessed April 10, 2019). 1983 modern petition.

used diplomacy as a vehicle to assert their concerns, but this method proved to be ineffective.[1105] In the modern era, because of the new institutional setting of the *Constitution Act, 1982* and instruments used in land claims policies, the Ontario Algonquin People have been able to expand the criteria for who is entitled to negotiate a land claim and how those criteria are defined as an Indigenous collective.

Relationship agreements that incorporated Indigenous governance created diplomacy. In the *Great Peace of Montreal of 1701*, Algonquin People were one of many nations present to establish peace. Later, the British Crown used the relationship they built to establish the *Peace of Niagara in 1764.*[1106] Algonquin People assisted because they believed the commitments made by the Crown in the *Royal Proclamation of 1763*. Through this setting, Algonquin and Nipissing Peoples asserted their nationhood and rights to the territory through petitions and diplomacy, but to no avail other than the creation of a few small reserves and the qualification of a few people as registered Indians if they were willing to relocate to the reserves (though many did not).[1107] But the Algonquin's tenacity had not been for nothing; their almost 100 years of petitions provided the context for the claims process in the modern treaty era.[1108] By engaging in the modern claims process, Algonquin People in Ontario have widened the scope of land claims to include non-status First Nations communities. In so doing, they have introduced doubt into the government's goal of certainty about 'Aboriginal' title to land, as acknowledged in Section 35 of the *Constitution Act.*

The modern treaty era exists as a result of efforts made by Indigenous communities challenging the government over land that was not surrendered or involved in land treaties. With the creation of the Office of Native Claims (ONC) and the comprehensive claims process, the Algonquins of Pikwàkanagàn First Nation (Golden Lake) submitted a land claim.[1109] As part of that process, they worked to include the non-status Algonquin communities by meeting with them and

[1105] Algonquins Of Ontario (AOO), *Overview of Treaty Negotiations,* AOO, https://www.tanakiwin.com/our-treaty-negotiations/overview-of-treaty-negotiations/ (accessed April 12, 2019).
[1106] Lawrence, 35.
[1107] Lawrence, 40, 88.
[1108] Lawrence, 85.
[1109] Lawrence, 85.

establishing a beneficiary policy internally.[1110] Although there were problems between the status and non-status communities with representative decision-making and beneficiary status, the claim continued with some brief interruptions.[1111] The process of beneficiary status was created to advance the claim, but this became problematic because of conflicting colonial legacies.[1112] The Algonquin land claim involves two distinct peoples with interests based on their collective experiences, status and non-status Algonquin People, and the government acknowledges the different histories that impact the negotiations.[1113] Previous comprehensive claims settled with First Nations communities had pre-established accepted membership. In the Algonquin land claim negotiation, membership is an ongoing contentious issue. This settlement is changing the modern claims process by using community definitions of membership to advance a claim that involved non-status First Nations collectives.

The involvement of non-status Algonquin People in the land claim process predates non-status First Nations Peoples gaining 91(24) recognition through the Daniels case. This claim alters both the institutional setting by including non-status First Nations in claims and altering the goal of certainty. As a consequence, the government could face more challenges to Indigenous title and jurisdiction by non-status communities. Instruments are altered through the mechanisms put in place as part of the negotiation process. The government can no longer be certain because it cannot rely on its federal database of entitled registered First Nations for whom they are responsible. Certainty over who establishes membership is also thrown into doubt, making it difficult for the government to predict who will submit a claim or what could be involved in the settlement. Thus, who participates in Indigenous rights claims is no longer wholly determined by the federal government.

Discussion

To teach or understand Indigenous institutional and policy change, historical institutionalism—including methods of interaction and institutional constraints—best explains change in a non-

[1110] Lawrence, 86.
[1111] Lynn Gehl, *The Truth That Wampum Tells: My Debwewin on the Algonquin Land Claims Process* (Nova Scotia: Fernwood Publishing Co. Ltd.,2014), 95. Since 2006, continuity of claim process exists.
[1112] Ontario, First Nations, Inuit and Métis: Land Claims, *Executive Summary of the Algonquins of Ontario Proposed Agreement-in-Principle* (June 2015), Chapter 3.
[1113] Lawrence, 103.

Indigenous framework.[1114] Within Indigenous policy networks, much development happens through community-based engagement, and most funding is dependent on federal government policies and agreements. Where this model is most useful is in understanding Indigenous interactions with non-Indigenous institutions. Indigenous institutional and policy change has not originated from the political arena of government; rather it is the result of Indigenous Peoples and their long history of engagement, culminating in a paradigm shift. Exploring Hall's policy learning model, historical institutionalism grounds the model, the engagement, and the behaviour of how parties interact with institutions. As stated above, in Hall's model, there are six stages to a paradigm shift: Paradigm Stability, Accumulation of Anomalies, Experimentation, Fragmentation of Authority, Contestation, and Institutionalization of a New Paradigm.[1115] The model is useful for understanding Indigenous policy change, but it neither precisely explains nor fits the change. For example, although Indigenous-led challenges can be considered to be an accumulation of anomalies, in Indigenous policy change the experimentation is lacking, at least in the traditional sense. Although Indigenous institutional and policy change demonstrates fragmentation of authority (the government has lost absolute control of Indigenous policy to the courts), the contestation stage appears to be absent, as there is no competition among different paradigms.

In addition to Hall's model, Weaver's work is also useful for understanding Indigenous institutional and policy change. However, although she demonstrates Indigenous participation in policy development, Weaver approaches policy from a state-centric perspective, accounting neither for Indigenous worldviews nor for the use of identity to create large-scale change.[1116] Alcantara provides examples of how government-controlled change produces incremental changes. However, the work does not position the origins of land claims policy as a third order change, nor does it discuss changes at the macro level that contribute to overall third order change. These are critical omissions because Indigenous third order changes to institutions are

[1114] Historical Institutionalism – a framework for studying how institutions shape behaviour and engagement between parties.
[1115] Peter Hall, "Policy Paradigms, Experts, and the State: The Case of Macroeconomic Policy-Making in Britain," *Social Scientists, Policy, and the State,* ed Brooks, Stephen, Alain-G Gagnon, Conway, Thomas, Hall, Peter, Lindquist, Evert, Pal, Leslie, Weiss, Carol, Wagner, Peter, and Wittrock, Bjorn. (1990), 68.
[1116] Weaver, "A New Paradigm in Canadian Indian Policy for the 1990s."

grounded in the colonial context and take place through assertions of identity based on Indigenous worldviews and associated rights.

As this dissertation has demonstrated, Indigenous Peoples have impacted institutional and policy change through the accumulation of legal challenges and negotiations, which eventually created a paradigm shift constituting third order policy and institutional change. The paradigm shift can be seen in the altering of policy goals.[1117] In government-created Indigenous policy and institutional arrangements certainty is the goal. As Hall argues, "We can define social learning as a deliberate attempt to adjust the goals or techniques of policy in response to past experiences and new information. Learning is indicated when policy changes as the result of such a process."[1118] Through Indigenous agency in challenging institutions and policies, the government's goal pertaining to certainty has been unsettled. This goal was to know the exact number of Indigenous rights-bearing peoples for whom the government was responsible and to control the method for determining this number. Disrupting this goal were new definitions of Indigenous rights-bearers based on Indigenous worldviews. These new definitions have made it difficult for the government to control the number of people they are responsible for, causing uncertainty.

The outcomes of this uncertainty—and the expansion of those entitled to Indigenous rights—require further research and development. It is not the role of this dissertation to determine what or who is an Indigenous rights-bearing community or person but to study how policies and institutions are expanded as government loses control over determining who is an Indigenous rights-bearer because of Indigenous-led engagement. That being said, future work is needed to determine what happens to policy as government loses control of Indigenous identity-determination. As the government enters and settles agreements with different rights-bearing communities, or engages in community recognition, how will negotiations change? The government needs to determine whether it will continue to spend time and money in courts as Indigenous Peoples force the issues or work with Indigenous rights-bearing communities to develop true nation-to-nation relationships.

[1117] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 278.
[1118] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 278.

Components of Hall's policy learning theorizing apply to the Indigenous context in policy and institutional change but with deviations from the standard model. In a paradigm shift, power shifts are part of the process, but, despite clear policy gains and the diminishment of government control over the determination of Indigenous identity, this is not true in Indigenous policy change as the Crown retains sovereignty and power in a nation-state context.[1119] Power in the Crown–Indigenous relationship is not a fair competition because the international sovereignty of the Crown is non-negotiable, whereas Indigenous sovereignty must exist within the context of the colonial institution. One paradigm replacing another is considered a positional advantage of power, but Indigenous Peoples who impose their ideas originating from worldviews are without power advantages.[1120]

Another component of the process of paradigm shift, according to Hall, is that politicians determine which theories or theorists hold authority when there are conflicting ideas.[1121] With Indigenous change, authority (who speaks for the community) is determined by Indigenous communities and by the judicial system when it agrees to hear a case. Hall further argues that a paradigm shift can occur because of policy failure, but, again, in Indigenous contexts of change, it is Indigenous Peoples who affect policy through institutions and challenging processes.[1122] When Indigenous Peoples use the courts, they highlight failures or injustices to create change. For example, the Daniels case demonstrates a failure to properly recognize Métis People and non-status First Nations Peoples. All the judicial challenges and negotiations can be seen as anomalies, not the culmination of policy failures found through government policy feedback and assessment. Thus, as we have seen, the accumulation of anomalies is part of the paradigm shift in Indigenous change.[1123] As the above discussion indicates, Indigenous policy change shows a pattern, but the pattern does not precisely fit the model of third order change.

[1119] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 289.
[1120] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 280.
[1121] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 280.
[1122] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 280.
[1123] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 280.

Another space that does not accommodate Indigenous policy and institutional learning in third order change is the source of influence on policy and institutional learning from outside government. As Grey and colleagues argue, these sources are typically organized into groups or communities, which take the form of interest groups, lobby groups, non-government organizations, and non-profits groups.[1124] In all these groups membership is optional. Although Indigenous-led engagement comes from outside government, it is not organized in the traditional sense because it comes from a place where membership is tied to legislated identity through blood and community connections, not from volunteer membership in social or political organizations.[1125] Granted, lobby groups are involved with Indigenous policy change, but history shows that these groups are mainly involved at the beginning of the process.

Another external source of third order policy change is social movements. Social movements are defined by Charles Tilly as a political complex that involves the following elements:

1) "Campaigns of collective claims on target authorities;
2) An array of claim-making performances including special-purpose associations, public meetings, media statements, and demonstrations;
3) Public representations of the cause's worthiness, unity, numbers, and commitment."[1126]

Further, Tilly notes the definition of social movement can be confused by the following:

1) When the term is extended and used loosely for all popular collective action;
2) When the collective actions of a movement are confused with the networks and organizations that support the actions, and when the organization and networks are assumed to constitute the movement:
3) When the movement is considered to be a single actor, "thus obscuring both a) the incessant jockeying and realignment that always go on within social movements and b) the interaction among activists, constituents, targets, authorities, allies, rivals, enemies, and audiences that make up the changing texture of social movements."[1127]

[1124] Grey, 413.
[1125] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 290.
[1126] Charles Tilly, *Social Movements, 1768-2004* (Boulder: Paradigm Publishers, 2004), 7.
[1127] Tilly, 6, 7.

Again, in Canada, social movements have not played a major role in Indigenous policy change because the Indigenous-led challenges were supported by lobby organizations and were not part of a social movement. For one thing, according to Rima Wilkes, unlike the American Indian Movement, in Canada, organizing has never been about becoming a collective identity.[1128] Organizing in Canada has been mainly a support system through individual lobby groups rather than a pan-Indian nationalism. For another, social movements that produce third order change are typically very large, geographically distributed, loosely organized groups. A timely example is the current 'Black Lives Matter' movement—a social movement not limited to those of African descent and supported by many in society—demanding equality and fair treatment. This kind of broad social movement has never underpinned Indigenous policy change in Canada. Indigenous Peoples represent only 4.9% of the Canadian population, and Indigenous interests in Canada, besides being disparate, have never been shared broadly enough to be considered as public opinion or to form the basis of a social movement.[1129] Although Indigenous Peoples in this country have worked to advance their interests, expand rights, strengthen identities and clarify meanings, the broader population has not heeded their calls to action. An exception may be the Idle No More protest in the 21st century, Indigenous mobilization that occurred as a reaction to proposed and then passed federal legislation.[1130] Although this movement did not change policy, it created a modern collectivity of support networks observed most recently in the Indigenous support for Wet'suwet'en in the winter of 2020.[1131] Typically, though, the source of Indigenous policy change in Canada has been neither broad social movements nor organized lobby groups with voluntary membership. Although lobby groups have played a role, the source of the change has been Indigenous rights-bearing communities and people. Since this source can be considered atypical, the change it engenders does not fit third order change as described in Hall's framework.

[1128] Rima Wilkes, *The Protest Actions of Indigenous Peoples a Canadian-U.S. Comparison of Social Movement Emergence* vol. 50, (2006), 514.
[1129] Government of Canada, Statistics Canada, *Aboriginal peoples in Canada: Key results from the 2016 Census* (July 2, 2019), https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm (accessed July 7, 2019).
[1130] Ken Coates, *#IdleNoMore: And the Remaking of Canada* (University Authors Collection. Regina, Saskatchewan: University of Regina Press, 2015), 1.
[1131] The Canadian Press, "Timeline of Wet'suwet'en solidarity protests and the dispute that sparked them," *Global News Canada* (February 17, 2020, updated February 24, 2020), https://globalnews.ca/news/6560125/timeline-wetsuweten-pipeline-protests/ (accessed June 11, 2020).

The change in policy and institutions, is an expansion of ideas to influence legal principles (constitutionally protected "Aboriginal" rights) based on assertions of Indigenous worldviews. The change includes land claims expanding to include new groups, extensions for admitting newly recognized groups to the *Indian Act,* and changing institutional definitions to include new peoples. As we have seen, this change neither originates from within government, nor from society at large, nor from special interest groups advancing issues of equality. The Indigenous-led engagement is most often led by Indigenous communities such as the Mi'kmaq case and the Algonquin case, or a collective of individuals supported (mostly legal costs) by lobby groups observed in the Powley case, the Daniels case, and the Descheneaux case.

The Research and Objectives

To understand Indigenous institutional and policy change, research needs to be approached from an Indigenous perspective. *My research question is "How do Indigenous assertions of identity demonstrate efforts to control policy development in Canada?"* Through addressing this question, I have found that by using both their connections to community and land and colonial institutional instruments, Indigenous Peoples in Canada have made gains based on identity asserted through Indigenous worldviews. These gains include expanded policy and institutional understandings: changes in land claims, changes in constitutional recognition, and changes in understanding the registered status community. Understanding these changes as unique third order change is vital because it explains the place from which the change comes—Indigenous action motivated by colonization. These changes based on worldview trickle down to affect other policies. For example, the Métis declared 'Indians' in Section 91(24) of the *British North America Act, 1867*, through the Daniels case in 2016, provided access to other rules pertaining to Indians, such as federal funding for political organization.[1132] In other words, Indigenous Peoples have used the courts to reinforce Indigenous rights, such as harvesting rights, to assert their Indigenous perspectives, and to demonstrate models of community belonging.

[1132] The Métis Nation-Saskatchewan is now wholly funded through INAC, where previously funding mostly through the provinces during my time as a Métis bureaucrat. The majority of our funding came from the Saskatchewan government, through workplans and contribution agreements.

In most circumstances, policy learning occurs in a normative process, and change is the reaction to this learning.[1133] However, standard explanations of change such as this do not apply to what has been happening in Indigenous policy in Canada. An example is the change in the definition of Indians in Section 91(24) of the *British North America Act*, 1867. The Supreme Court of Canada Daniels decision extended the fiduciary duty related to this definition to the Métis and non-status First Nations.[1134] Until then, the government only explicitly owed a responsibility to registered First Nations Peoples under the *Indian Act* and to Inuit People.[1135] To initiate the change in institutional and policy understandings, the Métis and non-status First Nation Peoples enforced their idea of who they are—their Indigenous worldview of identity.

Contributions – How We Study Indigenous Policy and Change

This dissertation contributes to the research on Indigenous policy and institutional change in Canada by exploring Indigenous-led change, in which inroads are made by advancing ideas of identity based on community worldview. Several studies have examined the sources of and reasons for policy change, but few have studied Indigenous policy change in Canada. Central to studying Indigenous-led policy and institutional change is the role of colonization as both a setting and a motivating factor. Sally Weaver's work explores the possibility of a paradigm shift in Indigenous policy, but her work incorporates neither this context of colonialism nor the active role Indigenous Peoples play. As discussed in Chapter 3, Peter Hall and Daniel Béland emphasize the importance of the role of ideas behind change, and in the current research, community worldviews of identity take that role, an approach not previously explored in Indigenous policy. When the approach and the elements involved in Indigenous-led challenges to policies and institutions are understood, stronger policy that reflects the needs of Indigenous Peoples is possible. Understanding how change happens accounts for Indigenous roles of change and removes people from the margins.

[1133] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 279.
[1134] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99.
[1135] Hall, "Policy Paradigms, Experts, and the State: The Case of Macroeconomic Policy-Making in Britain," 59.

Before formal Indigenous intervention in the modern era, Indigenous public policy and institutional arrangements were path dependent.[1136] Institutional arrangements include but are not limited to the *Royal Proclamation, 1763*, the *BNA Act, 1867*, and the *Constitution Act, 1982*. Policies upholding institutional arrangements, such as the *Indian Act, 1876*, were incremental with some punctuations, the result of the institutional framework and the government's policy learning methods. Incremental changes are seen in the *Indian Act* until 1951 when there were punctuations to the policy based on changing social values of Canadians in the post-World War II era.[1137] The change in these cases were government directed. In the 21st century, the normative explanations of Indigenous policy change and institutional arrangements no longer work. Indigenous policy change in Canada is understood as a unique form of third order change—Indigenous-led and grounded in the colonial setting and the absolute sovereign power of the Crown. Changes to institutional arrangements and policies are the direct result of Indigenous Peoples asserting identity rights through worldview.

Institutions that govern policy can create policy change, or the institutions themselves can change. According to Lucie Cerna of the OECD, "Institutional change is not necessarily the same as policy change, [although] there are some instances when the two overlap."[1138] In *Beyond Continuity*, Streeck and Thelen explain policies as "institutions in the sense that they constitute rules for actors other than for policymakers themselves, rules that can and need to be implemented and are legitimate in that they will, if necessary, be enforced by agents acting on behalf of society as a whole."[1139] The *Indian Act* is an example of a policy that is an institution, as the Act governs many aspects of registered First Nations lives and governance.[1140] The *Indian Act*, enforced by the federal government, is a control mechanism for First Nations band government responsibility. Canadian legislation also is an institution as it sets out rules and protections for Indigenous Peoples. As Indigenous Peoples and groups bring challenges, the

[1136] Campbell, 26, 70. J. Crossley "The Making of Canadian Indian Policy to 1946," *PhD Dissertation* (University of Toronto, 1987).
[1137] Indian Act, S.C. 1951, chapter 29.
[1138] Lucie Cerna, OECD, *The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches,* OECD (2013), 10.
[1139] Wolfgang Streeck, and Kathleen Ann Thelen, *Beyond Continuity Institutional Change in Advanced Political Economies* (Oxford: Oxford University Press, 2005), 12.
[1140] Indian Act, RSC 1985, c I-5.

institutional definitions of identity are altered and affect policy. The policy change is a reaction to institutional change by Indigenous Peoples.

The cases in this dissertation demonstrate how Indigenous Peoples continue to expand policy and institutions by using institutional mechanisms. In land claims, Indigenous Peoples have established 'Aboriginal' title as a legal concept through the courts with the Calder decision.[1141] The Calder decision altered land claim policy by asserting the persistence of Indigenous title to land, and the government responded, creating the instruments of specific and comprehensive claims under the Office of Native Claims and the department of Indian and Northern Affairs Canada. Christopher Alcantara describes these changes as typically incremental, adding that whether or not they are incremental depends on the scope of the study.[1142] Within the context of Indigenous land claims, there may not be a paradigm shift of Indigenous institutional and policy change. However, when changes in land claims are just one part of a much broader claim, they contribute to the paradigm shift, with government goals of certainty disrupted. Indigenous participation in policy illustrates the change, participation that was non-existent before the White Paper.[1143] For institutional understandings of identity, Indigenous Peoples challenge the definition based on worldview.

Indigenous efforts to change policy practices are exemplified with the court action initiated by the Mi'kmaq People of Newfoundland. The actions of Métis and non-status First Nations Peoples have influenced the constitutional content and relationships within the institutional structure of the federal government. Because of the Algonquin land claim, other non-status First Nations communities have an opportunity to advance land claims. With all the inroads made, policy development is more inclusionary of Indigenous Peoples than in previous eras because the policy setting has shifted through institutional engagement. As we have seen in this dissertation, institutional engagement by Indigenous Peoples has also challenged and disrupted the government's goal of certainty. Although changes and participation by Indigenous Peoples are

[1141] Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.
[1142] Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy / Analyse de Politiques* 35, no. 3 (2009), 326.
[1143] Weaver, *Making Canadian Indian Policy*, 182.

visible in the modern context, both are the result of a long colonial history of engagement. The prolonged persistence of institutional processes created the institutional space for change, which is grounded in identity and worldview.

Previous studies examining Indigenous policy in Canada have shortcomings. As Béland points out, the role of ideas is an essential consideration when examining policy change and is equally applicable to institutional change when examining Canadian Indigenous policy and institutional change.[1144] Previous research is problematic because when considering the role of ideas in contributing to change, it omits Indigenous perspectives. Also left out are considerations of how the actions taken are a direct reaction to colonial settings, instruments, and goals. Weaver for example, fail to consider the roots of change and how Indigenous worldviews and identities respond to colonial policies and institutional systems. Weaver's research also fails to address the uniqueness of change, which, as we have seen, neither follows typical policy learning nor reflects on the success or failures of previous policies. To effect change, Indigenous Peoples engaged the colonial institutions through mechanisms exogenous to the Indigenous worldview. The colonial setting created both the need and desire for Indigenous Peoples to assert their worldview. Explanation of gaps in previous research is addressed when incorporating Indigenous worldviews or ideas, as well as the embeddedness of colonialism in the relationship between Indigenous Peoples and the Crown. The relationship is unique because it is grounded in colonial policy and legislated identity—no other group of people in Canada is racially legislated.

At the macro level, Indigenous inclusion of policy development is the result of a paradigm shift created by Indigenous Peoples. Indigenous Peoples are now part of policy development, but the substance and quality of their involvement are not always optimal. As illustrated by Toby Rollo, there are three patterns that reflect the internal exclusion of Indigenous Peoples in policy development and agreement negotiations. The first pattern is the dismissal of Indigenous accounts by state institutions, an ongoing practice that views Indigenous perspectives as subservient to Western knowledge. [1145] The second pattern of internal exclusion occurs when

[1144] Béland, "Ideas, Institutions, and Policy Change," 712.
[1145] Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims. (Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide)," *Canadian Journal of Law and Jurisprudence* 27, no. 1 (2014), 228.

Indigenous knowledge systems fit within the setting of "state territorial sovereignty."[1146] In Canada, this happens in two ways: first, by framing Indigenous knowledge to make it intelligible to others, which privileges one knowledge system over another; second, by using knowledge to meet court standards for strategic gains by Indigenous Peoples. Often these 'gains' are owed to an Indigenous person or group. However, in the modern context, limitations surround the settlement of Indigenous rights. The third pattern is the limitation and internalization of non-Indigenous norms that deform Indigenous self-understandings.[1147] This internalization is seen when there are collisions in communities between traditional leaders and Indigenous and Northern Affairs Canada-elected band councils.[1148] These patterns exist as asymmetrical inclusion of Indigenous Peoples and perspectives.

Regardless of the negotiation or judicial action taken by Indigenous Peoples, the worldview is subservient to the Crown in the broader context because of state sovereignty and the colonial setting of the "Doctrine of Discovery." It is essential to acknowledge this because until there is a complete overhaul of the institutional setting, changes by Indigenous Peoples are limited. What is clear is that the recent changes are the result of Indigenous Peoples asserting identity and worldview. Previous research focusing on Indigenous policy and institutional change discounted, perhaps unintentionally, the role of colonization and the motivations for Indigenous engagement. This research positions these elements as central to the collection and analysis of data. As Margaret Kovach argues, ethical research must include these colonial relationship considerations.[1149]

Policy Recommendations

Deriving from the research of this dissertation, policy recommendations become evident when accounting for Indigenous motivations for engaging the government through institutions. Below

[1146] Rollo, 231.
[1147] Rollo, 232.
[1148] Colin Cote-Paulette, CBC, "Six Nations elected council files injunction against demonstrators at administration building," *CBC News*, Hamilton, ON (July 17, 2019), https://www.cbc.ca/news/canada/hamilton/six-nations-injunction-admin-building-1.5214811. (accessed December 14, 2019). The Six Nations case illustrates the existing tensions in leadership.
[1149] Kovach, 30.

are four recommendations highlighting consideration that are integral to moving Indigenous policy forward in a respectful way.

1. Role of Colonization – When studying Indigenous policy, the impact of colonization and the diversity of it's effects must be included as part of the development. Colonization impacts different Indigenous communities in a variety of ways. For example, within the AOO, there are clear differences in the needs and experiences of status First Nations collectives and those of their non-status counterparts. The result of different colonial histories, these differences demonstrate that colonialism had uneven effects and unique histories that must be considered when assessing policy change. Another reason to consider colonialism is that it is at the heart of most scholarship and policy development. Margaret Kovach (discussed in Chapters 2 and 7) argues that research concerning Indigenous People and communities has an ethical requirement to include colonization because colonization had such a deep impact on Indigenous communities.
2. Perceptions of history – By accepting both Indigenous and non-Indigenous accounts, a clearer understanding of the interests of both parties emerges, affording the stories of both equal attention and creating a more respectful conversation. Often struggles for communities last centuries, and it is important to the Indigenous-Crown relationship of Indigenous and non-Indigenous people for non-Indigenous parties to be able to acknowledge the struggle and the historic power imbalance that endures. Demonstrating empathy for the struggle could build better relationships by alleviating frustration. However, caution must be taken that this action is not tokenism.
3. Worldviews as ideas – By using Indigenous worldviews as ideas, the resulting change is better understood. When ideas, perspectives, and philosophies are understood, more appropriate policy decisions can be made. For example, understanding community membership rather than trying to fit membership into a non-Indigenous understanding can improve dialogue and move the conversation to matters at hand, such as land sharing agreements. Hall and Béland both call for a greater role of ideas in studying policy and institutions.[1150] In Indigenous-led policy and institutional change the ideas behind the change are the worldviews of the peoples leading the engagement. Through considering

[1150] Hall, 292. Béland, "Ideas, Institutions, and Policy Change," 712.

these worldviews as critical ideas, a clearer understanding of the desired change is exposed.

4. Indigenous agency – Give credit where credit is due. The role Indigenous Peoples have in policy development should be acknowledged, as policy changes are the result of Indigenous-led engagement. Rather than omitting the efforts of Indigenous initiative, the efforts should be acknowledged. By acknowledging the work done by Indigenous Peoples and communities, we can move forward in a more respectful way.

Better Outcomes

By including the above recommendations (role of colonization, perceptions of history, worldviews as ideas, and Indigenous agency), policy and institutional change can better suit the needs of Indigenous Peoples and communities. Indigenous ideas, philosophies, and points of view can create new starting points in policy co-development. With true inclusion and participation, policies and institutions can better reflect the needs of Indigenous Peoples. We can teach how to make change that includes Indigenous ideas and how Indigenous change functions differently than change in the models. Most importantly, we must stop trying to model Indigenous policy after non-Indigenous policies, and instead have a collaborative approach.

Understanding how change happens accounts for Indigenous roles in change and removes people from the margins. The dissertation demonstrates that Indigenous Peoples are not simply bystanders in policy and institutions: they initiate and make change. Most notably, change has occurred because Indigenous Peoples have engaged colonial institutions over long periods, and, in doing so, have advocated for understanding of their identity and worldviews. The role Indigenous Peoples have in policy and institutional change is active, but the process is neither quick nor widely supported. It is for these reasons that these policy recommendations must be included in understanding Indigenous policy and institutional change in Canada. One case does not necessarily create change, but when cases are added together, a pattern emerges exposing the motives and roles of Indigenous Peoples.

Conclusion

The policy factors of goals, setting, and instruments indicate the type of policy or institutional change that is occurring: either incrementalism, punctuated equilibrium, or a paradigm shift.[1151] If a paradigm shift (third order change) is to occur, policy goals must be changed or altered.[1152] For Hall, third order change originates with the larger society.[1153] However, Indigenous policy and institutional third order change originates not with broad public support or organized groups, although lobby groups do play a role, but with Indigenous rights-bearing communities and people. No matter where the change originates, the government's goal is to be certain about Indigenous identity, policy, and institutions, and it uses this goal of certainty to limit rights. In pursuing this goal, the government is aided by policies such as the *Indian Act*, *1876,* which are used to set limits on the government's responsibilities for Indigenous People. Although the Crown maintains power through sovereignty, this power has been eroded by Indigenous Peoples. Thus, the government's goal of being certain about who is and who is not Indigenous has been disrupted.

This dissertation explores the role of Indigenous Peoples in Indigenous policy change. Indigenous Peoples are not able to approach negotiations and discussions with Canada from a position of political and legal equality with the federal government. As Indigenous Peoples engage government through institutions, the system remains secure because the government maintains formal and internationally-recognized sovereignty. A policy can change because of failure, but policy changes are not that simple and require a great deal of political and administrative work to achieve meaningful results. Efforts to create substantial Indigenous policy change illustrates the importance of policy learning and the value of clearly expressed ideas. Indigenous Peoples have different worldviews, expressed in their values, reflected in their institutions and informing all of their relationships with government. For Indigenous Peoples, the opportunity to define and shape their identity, to be part of the process of codifying and converting into legislation the Indigenous world view, is fundamental to any long-term reconciliation with the non-Indigenous people of Canada. That process is not easy and

[1151] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 278.
[1152] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 278.
[1153] Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain," 288.

ready solutions are rarely apparent. But the processes of mutual learning and policy learning demonstrate that efforts made at this foundation level will ultimately translate into better long-term relationships and greater accommodations between Indigenous peoples and the nation state.

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