

Land Claims and liberal modes of governance: An analysis of post-  
Comprehensive Land Claims Institutions in Canada

By

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## **Abstract**

This thesis applies a governmentality/Foucauldian lens to the Comprehensive Land Claims (CLC) regime of governance in Canada. More specifically, I engage an interpretative-empirical analysis of the Nunavut Land Claim and to a lesser extent the Algonquin Agreement in Principle. The object of my research is to add to literature critical of land claims. I look to unpack and explore an underdeveloped area of the CLC regime - the impact of colonial liberal institutions in post-CLC Indigenous community. I argue that a governmentality lens can call into question the normative expectations for Indigenous communities that flow from CLCs.

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# 1 Chapter: Land Claims and liberal modes of governance: an introduction

Contemporary Indigenous leaders, fueled by a changing legal, social and moral climate in Canada, have taken up many forms of resistance<sup>1</sup> to government-led colonial practices such as dispossession-by-treaty. While the exact forms of resistance vary, many Indigenous leaders choose to channel their resistive powers through the colonial legal system. In this way, a particular Indigenous community or nation can establish a legal claim on a particular territory through a process known as the land claim. Established in the 1970s by colonial governments, the land claim process was created to fulfill legal mandates imposed by Canada's highest court – The Supreme Court of Canada (“SCC”).<sup>2</sup> Through this process, both parties attempt to leverage their relative power (colonial law,

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<sup>1</sup> These types of resistance vary, but generally include practices that work against colonial practices. For an example of violent resistance see JR Miller's work on the Oka Crisis - “The Oka Controversy and the Federal-Land Claims Process” in *Aboriginal Land Claims in Canada: A Regional Perspective*, Eds Ken Coates (Mississauga: Copp Clark Pitman Ltd, 1992, 215-242). For examples of non-violent resistance, see Glen D Coulthard's *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014) or see Hamar Foster's “We Are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Eds Hamar Foster, Heather Raven & Jeremy Webber (Vancouver: UBC Press, 2007 61-85).

<sup>2</sup> The legal anthropology of CLC is complex, and includes a series of SCC decisions such as *Calder et al. v. Attorney-General of British Columbia*, 1969 8 DLR 59, *R v Sparrow*, 1990 1 SCR 1075, *Delgamuukw v. British Columbia*, 1997 3 SCR 1010, and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2 SCR 257. These decisions, and the resulting government response, generally emphasize increased Indigenous politico-economic autonomy through restoration of land, and decision-making powers framed around Section 35 of the *Canadian Constitution*. Section 35 frames the Indigenous /Federal relationship through the lens of a legal principle that can be described as a juridical imposed duty to consult with Indigenous communities when government policy would affect their peoples or lands. See Michael Asch's “From Calder to Van der Peet: Aboriginal Rights and Canadian Law 1973-96” in Paul Havermann, eds, *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford: Oxford University Press, 1999) 428 for a comprehensive review of law until 1996. See Sterling, Lori & Peter Landmann, “The Duty to Consult Aboriginal Peoples – Government Approaches to Unresolved Issue” (Ottawa: Canadian Bar Association) online: [http://www.cba.org/cba/cle/PDF/Constit09\\_Sterling\\_paper.pdf](http://www.cba.org/cba/cle/PDF/Constit09_Sterling_paper.pdf) for an excellent summary of the duty to consult framework.

resistance/decolonization) through negotiation to either constrain or maximize the impact and scope of these claims to a particular tract of land. In this thesis, I argue that because colonial legal institutions, themselves underpinned by colonial and liberal mentalities, frame concepts of land (and more importantly, land governance); outcomes tend to favor the settler-state governments.

In particular, this thesis seeks to add to critical discourse on a specific category of land claims known as Comprehensive Land Claims (“CLC(s)”)<sup>3</sup> A review of existing scholarly literature critical of CLCs suggests that such claims might actually further dispossess Indigenous communities and reproduce sets of exploitive practices targeting Indigenous land and labor.<sup>4</sup> For example, Colin Sampson, invoking David Harvey (a noted Marxist) argues that CLCs actually serve as a modern instrument of dispossession.

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<sup>3</sup> See Mary C Hurley’s *Settling Comprehensive Land Claims*, (Fact Sheet) (Ottawa: Library of Parliament Research Publications, 2009), online:< <http://www.lop.parl.gc.ca/content/lop/ResearchPublications/prb0916-e.htm>>, Minister of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services Canada, 1986), online:< [http://www.afn.ca/uploads/files/sc/comp\\_-\\_1987\\_comprehensive\\_land\\_claims\\_policy.pdf](http://www.afn.ca/uploads/files/sc/comp_-_1987_comprehensive_land_claims_policy.pdf)>. Minister of Indian Affairs and Northern Development, *Resolving Aboriginal Claims: A Practical Guide to Canadian Experience* (Ottawa: Minister of Public Works and Government Services Canada, 2003), online :< [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rul\\_1100100014175\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rul_1100100014175_eng.pdf)>. Minister of Aboriginal Affairs and Northern Development, *First Nations in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2013), online: <<https://www.aadnc-aandc.gc.ca/eng/1307460755710/1307460872523?=&wbdisable=true#chp>> for government documents related to the form and function of CLCs.

<sup>4</sup> For others critique of CLCs, see Colin Sampson’s “Canada’s Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims” (2016) 31:1 Canadian Journal of Law and Society 87 See also Lynn Gehl & Heather Majuary’s “First Nations finance their own demise through land claims process”, *Ricochet* (2015), online:< <https://ricochet.media/en/318/first-nations-finance-their-own-demise-through-land-claims-process>>, and Lynn Gehl’s “The Contemporary Land Claims and Self-Government Process Should be More Than the Crown Offloading Fiduciary Responsibility at Minimal Cost” Trent University, Accessed Online: <[http://ottawaalgonquins.com/index\\_files/economic%20development.pdf](http://ottawaalgonquins.com/index_files/economic%20development.pdf)> For historical reviews, see Bradford W Morse’s *Indian Land Claims in Canada*, Eds Bradford W Morse (Ottawa: Department of Indian and Northern Affairs). See also Ken Coates’s *Aboriginal Land Claims in Canada: A Regional Perspective*, eds Ken Coates (Mississauga: Copp Clark Pitman Ltd, 1992). Finally, see Douglas R Eyford’s *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Minister of Aboriginal Affairs and Northern Development, 2015), online: <[https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford\\_newDirection-report\\_april2015\\_1427810490332\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf)> for a thorough review of historical and contemporary issues.

He suggests that what he calls “a sociological interpretation” of the resulting agreements illuminates four key concepts that “operate to dispossess” Indigenous communities.<sup>5</sup> Drawing from Marxist theory, Sampson shows how a plethora of issues embedded within the institution of CLCs works to “facilitate commercial resource extraction” by creating a system that is intelligible to business interests, or as he says develops a form of “certainty”, itself a condition of “development.”<sup>6</sup> However, Sampson (and by extension Harvey’s) claim that CLCs are a form of dispossession ignores the reality that in all cases analyzed for this thesis, some land and some power was restored to those Indigenous communities who chose to engage in CLCs. That is not to say that Sampson’s critiques are not valid. The questions of how much land to restore, or how valuable the land restored might be are ably answered by Sampson. Nonetheless, it does not answer the question of *how* or *why* a state might want a form of land relations that mitigates or reverses the trend of dispossession of Indigenous peoples and Indigenous lands. I propose that a framework composed of Foucault’s conceptualizations of power, governance, and “governmentality”<sup>7</sup> provide a more complete set of conceptual tools to unpack elements of CLCs that contradict Sampson’s implicitly Marxist critique. I argue that this mode of analysis moves the scope of critical discourse beyond an account of the well-established history of exploitation that often accompanies colonization in lands claimed by Indigenous communities. In this way, this thesis adds to the growing discourse around land claims because it provides insight into *why* a state engages in this particular mode of what I term

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<sup>5</sup> Colin Sampson, “Canada’s Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims” (2016) 31:1 at 87, 90.

<sup>6</sup> Ibid at 99.

<sup>7</sup> This analytic of governance was first developed by Michel Foucault in his governmentality lectures in the late 1970’s, and subsequently built on by governmentality scholars such as Colin Gordon, and Mitchell Dean.

“land relations.” The term “land relations” is used to capture an important concept in this thesis, and refers both to land as a physical space that people occupy, but also the relationships that arise when two specific social groups in close physical proximity co-exist and must reconcile conflicts stemming from contrasting epistemologies of land and relationships built on land. I suggest that an analysis of this particular set of land relations, thus, provides potential answers to two important questions that arise out of the modern land claims regime – *how* and *why* a set of colonial liberal land relations dominates modern Canada, and *how* and *why* this mode of land relations produces results that benefit colonial governments.

My analysis works in two parts. The first establishes and characterizes key concepts drawn from Foucault and governmentality literature and maps those concepts onto a broad historical account of the processes, practices, and knowledge and power structures that constitute land relations following the colonization of North America by Europeans. This analysis demonstrates how, over time, land relations have transformed from two sovereign powers negotiating co-existence to the current modality of CLCs. The second breaks down the land claim Nunavut Land Claim Agreement (“NLCA”) that resulted in the Nunavut territories. I suggest that by moving past the obvious techniques of exploitation (which are all too common), one can turn a critical eye to an under-analyzed impact of a post-CLC lived “reality” (or a post-CLC social order) grounded in colonial liberal governmentality. In other words, I argue that a CLC regime represents more than a means to exploit Indigenous land through a process of accumulation by dispossession — in fact, it merely sets the stage for injecting a liberal-colonial mode of governance into Indigenous communities. This in turn brings with it everything that

constitutes colonial-liberal governmentality: liberalizing institutions, practices, knowledge and modes of ordering the social, political, and economic models. Thus, I conclude that the state ceding land and power to Indigenous communities actually represents a kind of legal “Trojan horse” because the consequences of CLCs - embedding liberal governance structures with consent – outweigh the small loss of practical control of land practices. In this way, post-CLC governance institutions work to alter or transform the form and conditions of Indigenous *life*, not just land governance, from a colonial model of governance (virtual slave-like conditions, existing outside of the population) to a colonial liberal model (internal to the state, and self-disciplining with a strong system of liberal governance, but still racialized.)

I conclude with a brief analysis of a second and on-going land claim known as the Algonquin Land Claim. This analysis centers on unpacking the most recent Agreement-in-Principle (“AIP”) to determine if current forms of CLCs follow a similar logic, and conclude that the AIP carries forward many of the conditions, characteristics, and conclusions that previous CLCs have included. Thus, I conclude that the AIP will produce many of the same conditions on display in post-CLC Indigenous communities such as Nunavut. Additionally, I offer a commentary, based on my argument, on the challenges of moving forward with Indigenous communities with a form of land relations dominated by euro-colonial law.

## **1.1 Notes on methodology**

This thesis takes a qualitative-interpretative approach, and links it with elements of Foucauldian philosophy and forms of analytics with the aim to examine, and call into

question, the nature, scope, and history of the CLC regime in Canada. This approach offers a means to explore the relationships, perspectives and meanings that inform CLCs in Canada, and attempts to balance the analysis by presenting the research in a dualistic fashion, keeping in mind that both settler-colonial and Indigenous experiences, motivations, interests and perspectives about land-dispute mechanisms do not necessarily align.

Common shortcomings of qualitative research include small sample sizes, and researcher bias, which I look to offset by drawing on the work of multiple scholars and individuals who have conducted empirical, quantitative studies, and offer differing, sometimes positive perspectives on land claims in Canada. Additionally, on the question of the empirical basis of this thesis, I have chosen to extrapolate directly from the terms of the land claim documents; consequently, the bulk of my empirical research will originate from the clauses contained in the documents related to territory, land and sovereignty. This does present some methodological problems, as relatively little information about the Indigenous negotiation strategies and plans is accessible, making it difficult to assess the experiences, demands, and points of contention of the Indigenous negotiators in the early stages of the land claims. To flesh out the historical accounts, I rely on supplementary sources such as government documents, news articles related to historical occupancy, economic output of land-based resources, and land surveys that, in combination with limited scholarly resources, effectively make up the body of extant land claims literature in Canada.

However, in doing so, one must acknowledge that older literature and source documents, such as the *Proclamation*, possess a significant colonial bias. To combat this,

I also consulted interpretations of these documents by modern scholars, and especially Indigenous scholars such as John Borrows, Bonita Lawrence, Lynn Gehl, and Glen Coulthard.

## 1.2 Notes on the theoretical framework

This thesis approaches the problem of land relations with the recognition that it is underpinned by multiple epistemologies: colonial on one hand; and Indigenous on the other. Thus, I include as much Indigenous-centric literature in my analysis as possible in an attempt to give voice to the different Indigenous communities. A review of Indigenous literature around land claims and land relations suggests a non-homogenous response across Canada. For example, the scope of the literature ranges from arguments made by Isobel M Findlay and Wanda Wuttunee, that Indigenous communities can work within the system to achieve prosperity<sup>8</sup> to scholar Glen Coulthard's suggestion that Indigenous responses to co-existence should be framed by radical opposition to colonization<sup>9</sup>, and finally to John Borrows who argues that a plural system of law and governance might be the best possible outcome.<sup>10</sup> Regardless of the differences, I suggest that many common themes prevail among Indigenous-centric literature. These themes include the basic need for a significant re-balancing of many key relationships, such as land relations, deeply

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<sup>8</sup> See Isobel M Findlay and Wanda Wuttunee's case studies in "Aboriginal Women's Community Economic Development: Measuring and Promoting Success (Report prepared for the Institute for Research on Public Policy) (Institute for Research on Public Policy, 2007) or Gus Hill's & Martin Cooke, "How do you build a community? Developing community capacity and social capital in an urban Aboriginal setting" (2014) Social Work Faculty Publication, 31.

<sup>9</sup> See Glen D Coulthard's *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014).

<sup>10</sup> See John Borrows's "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill Law Journal 820 for an example of how Indigenous epistemologies of law might work in the broader Canadian legal system.

affected by colonialism, and that current systems for resolving long-standing issues between the two parties, such as land claims remain problematic for some Indigenous peoples and communities.

Additionally, I make use of many of Foucault's conceptualizations and operational definitions. These include basic concepts such as power, the state, government and governance. Furthermore, a few higher-order concepts such as liberal modes of governance, and the idea of a government mentality or governmentality underpin much of the analysis. Finally, concepts drawn from post-Foucault governmentality literature, such as identity and visibility inform the analysis. I operationalize each concept in different chapters based on the theme of the chapter. I discuss the broader concepts of government, governance, and governmentality in the introduction, introduce a conceptualization of power, and subjectivity in the second chapter, and discuss liberal modes of government in the third chapter.

Traditional scholarly narratives around land relations in Canada are based on the acceptance that Canada is a sovereign state formed from a British colonial enterprise and that that networks of power within the state's social relations, institutions and practices are distributed unequally due in part to its historical status as a colonial occupier.<sup>11</sup> This

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<sup>11</sup> For a colonial perspective of the history of this relationship see Minister of Aboriginal Affairs and Northern Development, *First Nations in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2013), online: <<https://www.aadnc-aandc.gc.ca/eng/1307460755710/1307460872523?undefined&wbdisable=true#chp>>. For critical perspectives, see Gordon Christie's "Law, Theory, and Aboriginal Peoples" (2003) 2 *Indigenous Law Journal* 67 for a good discussion of Liberalism and the law in the Indigenous context. See also John Borrows's *Indigenous Legal Traditions in Canada* (Report prepared for the Law Commission of Canada) (Law Commission of Canada, 2006) for an excellent introduction to Indigenous perspectives on law, politics and social orders. See Shiri Pasternak et al, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims." (2013) 28:1 *Canadian Journal of Law and Society* 65 for a discussion of the impact of colonial modalities of law and property on Indigenous communities; See Sherene Razack, "'It Happened More Than Once': Freezing Deaths in Saskatchewan."

occupation, in turn, is underpinned and supported by a colonial or settler governmentality. This form of governmentality promotes what has been described as a “rationalized” strategy of governance in a colonial situation, devised to address the (perceived) condition of (in) security that colonial enterprises often associate with Indigenous land epistemologies or what Andrew Crosby and Jeffery Monaghan have termed “settler governmentality.”<sup>12</sup> They argue that this form of governmentality, (itself an interpretation of David Scott’s “colonial governmentality”) is “grounded” first and foremost in the “logic of elimination”<sup>13</sup> which suggests that all things Indigenous must eventually be eliminated through “various mechanisms of security” in order to achieve (economic) certainty for the state.<sup>14</sup> The range and scope of colonial practices of elimination vary over time.<sup>15</sup> These practices are often linked to pernicious notions about Indigenous peoples. These notions, such as the inherent biological inferiority (race) of Indigenous peoples, religious differences, or the type (or lack) of political sovereignty dominate much of the early Liberal philosophy developed in 18<sup>th</sup> Century Europe.<sup>16</sup> For example, consider that James Tully has noted that John Locke effectively argued against

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(2014) *Law 26:1 Canadian Journal of Women and the Law* 51 for other examples of consequences of a colonial modality of social relations.

<sup>12</sup> Andrew Crosby & Jeffrey Monaghan, “Settler governmentality in Canada and the Algonquins of Barriere Lake” (2012) 43:5 *Security Dialogue* 421 at 422.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> For example, David Scott argues generally that exact form of oppression colonialism embodies is effectively transitional, changing over time. This argument lines up with arguments from Coulthard, Samson, and many other critics of the CLC regime.

<sup>16</sup> For a general introduction to analysis of Enlightenment era Liberalism and its relationship with colonialism, see Anthony Anghie’s *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), James Tully’s *An Approach to Political Philosophy: Locke in Context* (Cambridge University Press, 1993) and David Scott’s, “Colonial Governmentality” (1995) 43 *Social Text* 191.

recognizing the sovereignty of Indigenous Nations. Tully argues that Locke suggested that Indigenous nations did not “qualify as a legitimate political society” and claimed that Indigenous land-use practices are “not a legitimate form of property” thereby leading Locke to argue for a form of (colonial) land management known as appropriation without consent.<sup>17</sup>

However, in the current time, I suggest that factors such as the interference of the courts and successful forms of resistance from Indigenous communities has made it difficult for the state to invoke any of these justifications to reach its logical end – the planned elimination of Indigeneity in Canada. I argue that, in order to understand why the state of Canada has developed and implemented a mode of land relations that returns land and political power to Indigenous leaders, the concept of “elimination” must necessarily be expanded. The scope of what it means to eliminate must also capture non-security, but still certainty, based processes of assimilation such as the one I argue plays out through the CLC regime. I argue that, because the modern Canadian government is a form of government underpinned by what Foucault would call a “liberal” rationality or a liberal approach to governance, actions of governance follow a particular script. In practice, this means that contemporary governmental action must be proportional to Indigenous action, except if Indigenous forms of resistance become overtly violent. If Indigenous people wish to negotiate, the state cannot deploy the military or police unilaterally, because the current governmentality (and in particular the courts) prohibits these extreme responses, except in a state of exception. I argue that, in these cases, other strategies are, from the

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<sup>17</sup> James Tully, *An Approach to Political Philosophy: Locke in Context* (Cambridge University Press, 1993) at 139, 146-47.

perspective of the state, often far more effective in terms of obtaining certainty for the state government.

In addition, the term ‘elimination’ as it used in Crosby and Monaghan’s argument becomes problematic in the context of land claims because standard frameworks typically necessitate inclusions of (select) Indigenous principles of governance. Thus, elimination of Indigeneity<sup>18</sup>, that is all things that are considered Indigenous, cannot be the final goal of the Canadian state. Instead, I argue that based on combination of constraining pressures, a colonial and liberal governmentality, and a need for non-violent interventions, the government has, over time, reworked the framework of land relations to act as a mode of assimilation. This modality is flexible enough to incorporate certain specific elements of Indigeneity, so long as they are tolerable to both colonial *and* liberal underpinning governmentality, something that becomes evident in later actions. This also means that a type of “elimination” as an end goal can be achieved, but that it must come from a process of convincing Indigenous people to understand and govern themselves in the scope of a colonial liberal governmentality.<sup>19</sup> A process, I suggest, that plays out through the CLC regime.

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<sup>18</sup> This term is used to describe the concept of Indigenesness or things that are Indigenous. These may include forms of governance or modes of ordering society, for example. See Roger Makaa and Augie Fleras, *The Politics of Indigeneity: Challenging The State in Canada And Aotearoa New Zealand* (University of Otago Press: New Zealand, 2005).

<sup>19</sup> I argue that this conclusion challenges the notion that settler or colonial governmentality alone, is at play in Canada because it influences the state to adopt a liberal approach to Indigenous governance. Thus, Indigenous peoples, over time, have been transformed into rights-bearing peoples who can engage colonial law to address long-standing injustices related to land. In other words, although state violence, carried out through a security lens, is sometimes visceral, and means that police or the military are called in to quell Indigenous resistance, there are equally many forms of “elimination” that are carried out without violence, or police or military intervention.

### **1.3 A brief introduction to Foucault’s Governmentality lectures: Governance, governments of the state, and liberal (economic) modes of governance**

Foucault’s analytic of governmentality and his theories of governance were born out of his attempts to understand and address the impacts of the decline of the feudal system of governance and the religious upheaval that followed.<sup>20</sup> Foucault tells us that, beginning in the sixteenth century; this collapse represented a significant political, social and economic transition period in Western social systems,<sup>21</sup> provoked the creation of the “great territorial, administrative and colonial” states, and undermined previous notions of how “one must be spiritually ruled.”<sup>22</sup> This, in turn, provoked a crisis of existing forms of knowledge around government and governance, and writers, scholars and advisors began to “articulate a kind of rationality” they claimed was “intrinsic to the art of governance,”<sup>23</sup> abandoning previous theological underpinnings.<sup>24</sup>

According to Foucault, this new conceptualization of the actions of governance as an art not only introduced the concept of rationality into governance, but also characterized that rationality as economic in nature,<sup>25</sup> and thus effectively linked “economy into political practice.”<sup>26</sup> This link and the consequences that flowed from it required governments to establish new goals of governance. On this point, Foucault notes that the goals of governance shifted from the edicts of a divinely empowered kings

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<sup>20</sup> Michel Foucault, “Governmentality” in *The Foucault Effect: Studies in Governmentality*, Eds Graham Burchell, Colin Gordon, & Peter Miller (Chicago: The University of Chicago Press, 1991, 87-104) at 87.

<sup>21</sup> *Ibid* at 87,88.

<sup>22</sup> *Ibid* at 88.

<sup>23</sup> *Ibid* at 89, 91.

<sup>24</sup> *Ibid* at 87.

<sup>25</sup> *Ibid* at 92.

<sup>26</sup> *Ibid* .

towards an economic mode of governance carried out by a (now) economic government. Economic governments, Foucault tells us, are animated by a need to fabricate and implement an “economic model”<sup>27</sup> that spans the totality of the state and all its constitutive components (e.g. the body and mind of the inhabitants, as well as territory). To do this, economic governments must conceptualize those that are governed (or subjects) as “things” similar to other things such as its territory. Additionally, this mode of governance expands the scope of what things should be governed to include not only individual subjects, but also the actors’ relationships with material and non-material things such as themselves.<sup>28</sup>

In other words, Foucault argues that, through specific forms of power, “governments of the state” (a term he uses to describe a form of government in a state) creates and implements a form of governance that works to establish the “right disposition of things, arranged so as to lead to a convenient end.”<sup>29</sup> The exact definition of a convenient end is not necessarily evident in Foucault’s governmentality lectures, but for Foucault, state governments are also economic governments, and therefore the convenient end will typically align with fabricating tolerable degrees of certainty and order through the establishment of a comprehensive ordering of society based on economic rationalities.<sup>30</sup> Thus, Foucault concludes that this transitive period in

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<sup>27</sup> *Ibid* at 92-93, 95, 99. For Foucault, the term economy has a temporally defined meaning. Between the 16<sup>th</sup> Century and 19<sup>th</sup> Century, this term signifies a model of governance based around principles found in the traditional family unit with a single patriarch at the head monitoring and keeping account of the totality of action taken place within all members of his family unit. However, in a more modern sense, economy has taken on new definition through what Foucault calls “the emergence of the problem of the population.” This new concept of the population subsumed the family management style of economic management.

<sup>28</sup> *Ibid* at 93, 94.

<sup>29</sup> *Ibid* at 93.

<sup>30</sup> *Ibid* at 95.

governance was marked most importantly by an ontological transition: the previous categories of being a subject or being governed, along with the daily-lived reality had shifted. Therefore, the intervention point of governmental actions must also shift. For Foucault, this shift is captured by a radical change in the object of governance, what he calls the “population.”<sup>31</sup> Simply put, Foucault theorizes that a population captures not only the common definition of the actual aggregate of individuals, but also their relationships, general characteristics, and behaviors. This re-casting of individual actors as objects of rational study, Foucault claims, led to a “new science” called political economy, which completed the transition from governance “dominated” by the sovereign and accompanying structures of power,<sup>32</sup> to modern governance — or the rule of each and all through governmental actions or practices of government known as techniques. In the hands of the government, the object of the population can be acted on through various “techniques” that make possible a certain type of response, or form of resistance without the full awareness of the individuals, who still possess agency and resistive capabilities, but who are nonetheless influenced by this careful manipulation.<sup>33</sup> Thus, for Foucault and governmentality scholars, modern governance and government are constituted by practices. These practices, when coupled with what Foucault calls “*saviors*” (translated

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<sup>31</sup> *Ibid* at 100. In the literature, “population” refers to the “ensemble” of individuals that are re-cast into an object of study, and taken as whole, a resource of the government. This resource must be cared for, and guided in order to insure the economic and social well-being of the state. See Colin Gordon’s “Governmental Rationality” in *The Foucault Effect: Studies in Governmentality*, Eds Graham Burchell, Colin Gordon, & Peter Miller (Chicago: The University of Chicago Press, 1991, 1-52) at 20 or Mitchell Dean’s *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999) at 19 for example.

<sup>32</sup> *Ibid* at 95 -101,102. It is important to note that, for Foucault and governmentality scholars, sovereignty, and powers that flow from sovereignty remain intact in modern governments of the state. However, these forms of power become “acutely” problematized by the notion of population and necessitate the rise of the disciplinary forms of power.

<sup>33</sup> *Supra* note 21.

into English as knowledge) are distinguished from non-governance practices because they are deliberate attempts by individuals who govern to shape conduct in certain ways in relation to governmental objectives.<sup>34</sup>

### 1.3.1 Foucault and the government of the state

Foucault claims that contemporary government, in the macro sense, possesses a “special and precise” form: the government of the state.<sup>35</sup> The concept of the state is a key component of this analysis, as the form of government studied in the analysis is predominately concerned with the actions of a government of the state.<sup>36</sup> Mitchell Dean’s research is useful here as he provides a clear and concise definition of a state:

[a] sovereign body that claims a monopoly of independent territorial power and means of violence that inheres in but lies behind the apparatuses or institutions of organized and formal political authority.<sup>37</sup>

Governmentality literature also makes plain the goals of governance for the perspective of the state. For example, Colin Gordon suggests that a ‘sovereign body’ or state government’s “raison d’être” is to fabricate a particular “economic model”, and establish it as the lived reality throughout what constitutes the boundaries of the territory. Ideally, this modality would be embraced and lived out by as many individuals as

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<sup>34</sup> *Ibid* at 102.

<sup>35</sup> *Ibid* at 91.

<sup>36</sup> While Foucault and earlier incarnations of governmentality initially attempted to move away from the notions of a totalizing power bloc known as the “state” or the government of the state, Bob Jessop’s reading of Foucault highlights his later attempts (namely in the *Birth of Biopolitics*) to deal with a form of power he had previously “bracketed.” He suggests that Foucault never intended for governmentality analysis to be confined to the microphysics of power; rather, the approach “is scalable, and thus can be applied equally to concepts of “state”, “state-craft”, and “state-economy” relations. Thus, the concept of a “state” and the force relations, and power structures it encompasses can be fruitfully analyzed using a governmentality approach. See Jessop’s “Another Foucault effect? Foucault on governmentality and statecraft” in *Governmentality: Current Issues and Future Challenges*, Eds. U. Bröckling, S. Krasmann & T. Lemke.

<sup>37</sup> See Mitchell Dean’s *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999) at 19.

possible. According to Gordon, this reality and the underpinning model is constructed to “hold out for an indefinite length of time” and, in effect, secures secular perpetuity.<sup>38</sup> Nickolas Rose, building off Foucault’s earlier work, argues that internal social order, a cornerstone of secular certainty, is achieved through techniques (practices and knowledges) that, as Rose suggests, act by “cutting” up the experiential life of individuals into manageable parts. Rose claims that in this way, the government effectively creates “governable spaces” or, as Foucault might say, “points of intervention”. For example, Rose suggests that liberal modes of (state) government often inscribe a particular form of time management onto the lives of the individuals through regimes composed of practices that encourage notions of self-discipline and self-control.<sup>39</sup> Moreover, Rose suggests governments of the state often present such regimes as an ideal way of living life, and thus these regimes take on a normative aspect. That is not to say the all normative regimes are problematic. Rather, the problem lays in that fact that this implies that government can both create and, later, encourage the population to adopt normalizing regime; even those that might be morally repugnant. In other words, for a governmentality scholar, these normative modes of life are ripe for analysis because they often go unchallenged by the general population.

Moreover, Foucault notes that this form of government possesses a particular characteristic: the ability to deliberately alter or shift the boundaries between things to be governed and things not to be governed. In this way, governments constantly re-align

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<sup>38</sup> Colin Gordon’s “Governmental Rationality” in *The Foucault Effect: Studies in Governmentality*, Eds Graham Burchell, Colin Gordon, & Peter Miller (Chicago: The University of Chicago Press, 1991, 1-52) at 8,9.

<sup>39</sup> Nikolas S Rose, *Powers of Freedom: reframing political thought*, (New York: Cambridge University Press, 1999) at 31, 32.

what things are or are not internal and external to the state, and thus define what is or is not a subject.<sup>40</sup>

Finally, Foucault also argues that the actions of a government of the state are based on what he would later call governmentality. In this thesis, Governmentality is understood to have two basic meanings. First, this term describes a government's mentality. Put simply, this understanding of governmentality characterizes it as both the means and rationale of diffusing a mode of governance throughout the general population. This logic or way of thinking is subsequently diffused through social orders by way of the individual's daily life. As individuals move through the "institutions [and] procedures" that constitute society, they both are influenced by and become subject to the "analyses, and reflections of these institutions and procedures."<sup>41</sup> In other words, as one moves through life, entering and exiting institution after institution, one becomes more deeply immersed, both as a subject and as a point of data, in a pre-established form of governmentality. But, as Dean explains, governmentality is also a critical mode of analysis. In this capacity, it serves as scalable mode of analysis that attempts to describe and explain the origin and composition of a government, and the organizational impulses and tendencies of managing communities of people bound together by "intense social relations."<sup>42</sup> It flows from Foucault's claim that individuals in Europe and the West tend to organize and order themselves through a government, which is a macro-level specialized institution and structure of power constituted by overlapping agencies or what

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<sup>40</sup> *Supra* note 9 at 103.

<sup>41</sup> *Ibid* at 102.

<sup>42</sup> John McMullan, "Social surveillance and the rise of the 'police machine'" (1998) 2:1 *Theoretical Criminology* 93 at 95.

Foucault might call “appendages”.<sup>43</sup> These agencies are themselves composed of a plurality of individuals charged with governing the affairs of a state.<sup>44</sup>

### **1.3.2 The Liberal connection: Liberalism, liberal governmentality and liberal modes of government**

Building on Foucault’s body of work, Dean, Rose and other governmentality scholars suggest that a contemporary state government such as Canada are characterized by a liberal mode of governance. They point to Foucault’s attempts to characterize a liberal mode of governance as an “each and all” approach to population, an exercise of power and rule through liberal modes of government and a compulsion to govern in the register of security, economy, and bio-politics. This conceptualization of a state government and its liberal mode of government is linked to, but not analogous to a political economic concept of Liberalism.<sup>45</sup> A liberal mode of governance, in a Foucauldian sense, is characterized by overlapping systems of governance that construct a lived reality that establishes most individuals as rights-bearing subjects that are granted broad political and social freedoms, and are free to participate in the internal economic order, typically a market form.

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<sup>43</sup> *Supra* note 27 at 19.

<sup>44</sup> *Ibid* at 9, *Supra* note 9 at 99 – 104 for a detailed unpacking of the relationship of population and the state.

<sup>45</sup> In this case, Liberalism is broadly defined within the framework established by Dean and Gordon’s work on Governmentality, and in the case of law, through Gordon Christie’s work. Generally, referring to a form of government of the population through bio-politics, with an emphasis on individualism, and securing key notions such as rights and liberty. See generally Chapter 8 of Mitchell Dean’s *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999), Colin Gordon’s “Governmental Rationality” in *The Foucault Effect: Studies in Governmentality*, Eds Graham Burchell, Colin Gordon, & Peter Miller (Chicago: The University of Chicago Press, 1991, 1-52). See also note 11 for additional sources that characterize Liberalism.

A second particularity of a liberal mode of governance is that government interventions are typically directed at the level of individual action, or as Gordon terms it “actions [taken] upon others action.”<sup>46</sup> This means that a liberal mode of government presupposes a relatively high degree of freedom among the subjects of governance. The government must allow individuals to choose (or think that they choose) to act in a particular way. On the other hand, this also allows individuals the freedom to choose to resist governmental intervention. Thus, if a government wishes to effectively disperse their underpinning “governmentality”, they must work to carefully and consistently encourage the internalization of a certain kind of subjectivity. By subjectivity, I mean that individuals, in the configuration of social order, partially exist as subjects. As a subject in a liberal mode of government, certain ways of being, acting, and exercising one’s freedoms and resistive capacities are considerably more beneficial to the government than others. These beneficial traits are inscribed onto individuals through a state of constant exposure in the individual’s daily life to specific, carefully organized sets of practices, regimes and techniques, coupled with their supporting institutions, which together forms the basis of a mode of subjectivity in a liberal mode of governance.<sup>47</sup> Put simply, modes of subjectivity in a liberal governmentality nudge those that are governed to produce or adopt a subjectivity imbued with rationally derived characteristics that mirror the governance priorities of the state.

Liberal modes of governance rule through broad strategies born of their particular governmentality. The term ‘strategy’ is used because interventions often involve the

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<sup>46</sup> *Supra* note 28 at 5.

<sup>47</sup> *Ibid* at 4.

careful intake, reflection and use of information to produce rational actions of government. These actions take the form of specific techniques, or bundles of techniques — what Foucault calls technologies of power. In a liberal mode of governance, these techniques are most often deployed to shape, and to some extent, control “what it is possible [for the governed] to do.”<sup>48</sup> Additionally, as Nikolas Rose points out these techniques must possess a degree of “intelligibility.”<sup>49</sup> Thus, these interventions/techniques are often given shape, meaning, and power discursively, or through language. In other words, intelligibility in liberal modes of governance is often a discursive process. Additionally, in a liberal mode of governance, these techniques are applied to both scales (micro and macro) of governance, and against all objects of governance. Thus, as Rose claims, to govern is to act “under a certain description” of which language “not only makes government describable, it also makes it possible.”<sup>50</sup> In the colonial – liberal example, the scope and impact of these (discursive) practices of governance also establish a stratified social order, distinguishing between liberal citizens, (the defacto and government-preferred form of subject) and the racialized and immature or savage subject.

#### **1.4 Notes on the structure**

This thesis comprises four chapters, including this chapter that serves as introduction to land relations in Canada, key framing concepts and theories, and arguments.

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<sup>48</sup> *Supra* note 27 at 31, 50.

<sup>49</sup> *Supra* note 29 at 28.

<sup>50</sup> *Ibid* at 28.

Chapter Two sketches the history of the various iterations of land relations, and how they have been gradually, to borrow from Foucault, “governmentalized.”<sup>51</sup> This refers to the claim by Foucault that administrative states, or economic governments of the state undergo a process that leads to the “formation of a whole series of specific governmental apparatuses, and...a whole complex of *saviors*” and the development of a new set of power relations based on what he calls governmental power. The account I provide begins in the era of first contact framed by “friendship treaties”, moves to the edicts of the *Proclamation of 1763*<sup>52</sup> issued by King George III, followed by the paternalistic, assimilative approaches to governance of the late 19<sup>th</sup> and early to mid-20<sup>th</sup> centuries.

Chapter Three moves the narrative into the modern or post-1970 era of land relations. It comprises a case study of the NLCA, and demonstrates the effects of liberalizing institutions of governance on post-CLC Indigenous communities.

Finally, Chapter Four concludes with a review of a second case that is still in progress. In the analysis, I unpack specific Articles that suggest the presence of liberalizing institutions will likely dominate the post-CLC social order within the newly-established Indigenous territories. Additionally, I comment on the impact of these conclusions about land relations, and the CLC regime in moving forward with land relations between the state government, and Indigenous leaders and communities in Canada.

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<sup>51</sup> *Supra* note 9 at 103.

<sup>52</sup> *Royal Proclamation, 1763*, RSC, 1985, App II, No 1.

## **2 Chapter: Power, Colonialism, and Liberal governance: A short history of land relations in Canada**

### **2.1 Introduction**

This chapter maps the evolution of power relations that inform land relations between Indigenous communities and colonial governments in Canada. Throughout this chapter, I demonstrate that the history of land relations in Canada is characterized by profound shifts in the type of underpinning Foucauldian mode of power<sup>53</sup> — moving from a sovereign-to-sovereign modality in the earliest years to a governmental modality exercised against a racialized subject in the contemporary era. Moreover, this shift in the modes of power relations has produced significant consequences for Indigenous communities who choose to engage in what has become a thoroughly colonial (and later colonial liberal) mode of land relations.

### **2.2 Foucault’s characterization of Power**

Because power relations and modes of power play an important role in this chapter, it is imperative to establish a clear conceptualization of power to guide the reader. A government of the state (described in Chapter 1) possesses a monopoly over particular forms of power, including sovereign, disciplinary and governmental power.<sup>54</sup>

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<sup>53</sup> See Richard A Lynch’s “Foucault’s theory of power” in *Michel Foucault: Key Concepts*, Eds Dianna Taylor, (Durham: Acumen Publishing Limited, 2011, 13 – 26) for an excellent introduction of Foucault’s body of work on power and power relations.

<sup>54</sup> *Supra* note 9 at 102, see also note 27 at 66.

In the context of governance, power represents how governments attempt to resolve “problems of government,” a term denoting actions taken by individuals or groups that erode or influence foundational elements of a state or its goals, or that produce undesirable or countervailing outcomes.<sup>55</sup>

Foucault elaborates on how these forms of power operate and interact with each other and with the objects of governance. He observes that these forms of power exist in tandem, and often overlap, though he and other governmentality scholars do distinguish governmental power from disciplinary and sovereign forms of power.<sup>56</sup> Disciplinary power involves the “exercise of power” over and through “the individual” and “the body,” exercised through practices woven into the lives of individuals, and supports regimes of governance centered on ordering the aggregate of the population at the level of the individual. Foucault famously describes this form of power in *Discipline and Punish* as evident in the rise of post-feudal European penal and medical institutions.<sup>57</sup> Sovereign power flows from executive and juridical mechanisms (e.g. legal systems, policing, military) that are claimed as constitutive elements of government of a nation-

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<sup>55</sup> Problem of government, in this case, refers to the ability of a government to engage in a process of problematization or questioning of practices or conduct that produce undesirable or countervailing outcomes. These problematizations are directed internally, or can be external. See note 28 at 7, and note 27 at 12, 27.

<sup>56</sup> *Supra* note 9 at 102.

<sup>57</sup> Michel Foucault, *Discipline & Punish: the Birth of the Prison*, translated by Alan Sheridan (New York, Random House, 1995). In part three of *Discipline and Punish*, Foucault sets out the characterizing aspects of disciplinary “training” including: “hierarchical observation, normalizing judgment and examination.” Dean, in his account of governmentality, notes that disciplinary power expanded with the rise of bureaucratic based governments and flowed primarily from the “administrative apparatus of the state.” Note that Dean’s articulation is used because Foucault’s body of work on differentiating the types of power would require a lengthy inquiry. See note 28 at 20. See also Todd May’s *The Philosophy of Foucault* (McGill – Montreal, QC: Queen’s University Press, 2006) at 74 for a solid summary.

state. Foucault suggests that sovereign power, in the context of governance, is useful to secure lawful “authority” over individual subjects and include regimes of taxation.<sup>58</sup>

Finally, Foucault posits that state governments also exercise governmental power, which is linked to both sovereign and disciplinary power and is generated in the unique relationship dynamic between those that are governed (subjects) and those that govern (government). Governmental power typically operates at a macro level by influencing the individuals that constitute the population; its range and effectiveness is thus closely linked to social aspects of the population. These include the health and productivity of a state’s population (its primary object of governance), the stability of the internal economic order (primary internal form of social order and control), and the degree of relative economic sovereignty (primary goal of a state) as compared to other nation-states.<sup>59</sup> Thus in a Foucauldian model, a state with a large, self-disciplining population ought to appear stable and predictable, and the internal economic model would appear robust because levels of production would also be high, thus ensuring economic prosperity, and consequently reinforcing claims of sovereignty among the international community.

Foucault also notes that networks of power underpinning the numerous and overlapping regimes of governance that constitute a state government operate on a “downward and upward” trajectory. Thus, he concludes, those involved in the institutions of state governance (e.g. politicians) must first master governing themselves and their lives before they can create practices of state governance capable of “transmitting”

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<sup>58</sup> *Supra* note 27 at 19.

<sup>59</sup> *Supra* note 28 at 10.

appropriate principles (typically through policy) to individuals that constitute the population.<sup>60</sup> Additionally, these channels of power flow relatively freely in each direction. Individuals may therefore resist, modify, or reject incorporating these downward transmissions, and censor or refuse to transmit information about themselves upward to state institutions. However, this resistance does not necessarily prevent the state from carrying out an agenda or intervening in the lives of individuals; resistive power is blunted, for example, through the state security apparatus and through special powers inherent to sovereign states, such as the monopoly on legitimate violence.<sup>61</sup> As a result, interventions (as Foucault terms governmental actions such as policy) by the state can nonetheless shape the field of action of individuals despite the resistive powers and personal freedoms that characterize subjectivity in liberal nation-states.<sup>62</sup>

### **2.3 Friendship treaties and Sovereign Power**

I now move into the analysis of the categories of power embedded in land relations between Indigenous communities and colonial governments in Canada. In the following section, I cover over 300 years of interactions to highlight events that have

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<sup>60</sup> *Supra* note 9 at 92.

<sup>61</sup> *Supra* note 9 at 91 – 92, 98 – 102.

<sup>62</sup> In general, power in governmentality, as in Foucault's philosophy is considered to be diffused through the social environment by networks of power that are embedded in daily practices, relationships and interactions. It is considered to be omnipresent and woven into the fabric of a social existence. It does not originate or end, and all actors or individuals have some of form of power at their disposal. Power, in other words, is a concept that has at least two analytical scales, macro forms of power, such as forms of power that are used by governments over its population and micro forms of power, or power in the actions and interactions of daily life. Governmentality, or the study of governance, suggests that some forms of power (usually macro-level) can be used to shape or conduct behaviors in individuals, in order to govern them. The nature and scope of this shaping of conduct is determined by the degree of liberty or freedom an individual has to resist these attempts at behaviour modification and how effectively the government can limit or channel resistance into channels of its own devising.

dramatically shifted power relations between the two groups. The first event is more precisely a period or era, what Christina Godlewska and Jeremy Webber call the era of “unsystematic” treaty making, which lasted from first contact with the French in the 17<sup>th</sup> century to the Numbered treaties in the late 19<sup>th</sup> century. This period saw a significant shift in power relations favoring the colonial governments,<sup>63</sup> which enabled them to introduce or advance forms of colonial knowledge, discourses, and practices that would eventually lead to a “governmentalized” set of land relations in Canada.

It may help the reader understand the process of governmentalization by thinking about the following example. Earlier I suggested that the current mode of land relations — land claims — is a governmentalized regime. By this, I mean that, over a long period, one group of people (Indigenous communities) were gradually convinced or coerced through regimes of governance, into becoming subjects of another, represented by the British Crown. Over time, this regime (and constitutive practices and knowledge) was increasingly the result of careful design and reflection, implemented as a policy instrument, by an apparatus of a liberal colonial government based on a specific, underpinning liberal-colonial mentality. Additionally, over time, the scope of colonial influence over the modes of governance and organizing daily life in Indigenous communities were gradually codified through colonial law. Thus, in the context of land relations, this process of governmentalization of land relations in Canada has produced two significant effects. First, it has changed the composition of land relations, framing them around a colonial-liberal understanding of governance, land, Indigeneity, and

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<sup>63</sup> See Christina Godlewska, & Jeremy Webber, “The Calder Decision, Aboriginal Title, Treaties, and the Nisga’a” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Eds Hamar Foster, Heather Raven & Jeremy Webber (Vancouver: UBC Press, 2007) 1-37 at 12.

relationships with Indigenous peoples. Second, it has allowed the state to claim that Indigenous peoples are a special kind of subject of the British Crown and, later, of the contemporary Canadian state.

Before these events, however, the power structures framing land relations between the two groups were rooted in contemporary international modalities of land sharing or occupation, and Indigenous peoples and their communities were generally approached as a distinct and separate sovereign power.<sup>64</sup> Negotiations for access to land and natural resources had many causes,<sup>65</sup> and were typically enshrined in treaties.<sup>66</sup> The early treaties, sometimes called “Friendship” treaties, were typically a hybrid of the written treaties favored by European negotiators and the oral traditions common in Indigenous modes of conflict resolution and treaty making.<sup>67</sup>

### **2.3.1 Friendship treaties: An Indigenous perspective**

Indigenous perspectives on early land relations are well-documented and perhaps best summarized by what a Cree Elder referred to as a form of land-sharing through

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<sup>64</sup> See Robert S Allen’s *His Majesty’s Indian Allies: British Indian Policy in The Defence of Canada, 1774-1815* (Toronto: Dundurn Press, 1992) for a detailed analysis of the political and social relationships prior to and during the colonial wars of the 17<sup>th</sup> and 18<sup>th</sup> century.

<sup>65</sup> These include notions that reflect the state of political sovereignty that Indigenous communities had in the pre-Proclamation era. They included self-interest, social harmony and avoiding conflict.

<sup>66</sup> This is using the word in a loose sense, as these treaties would not necessarily look like treaties that we might find today. It simply indicates a kind of contract between two more or less equal parties, such as we might find within the market, for example. Although in the case, it was merely a way of producing a kind of social order in the face of great political and social uncertainties that colonialism brought to North America in this time period. See J. Edward Chamberlin’s “Culture and Anarchy in Indian Country” in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) for a detailed conceptualization of treaties.

<sup>67</sup> See John Borrows’s “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) 155 at 161 for example, or see Sharon Venne’s “Understanding Treaty 6: An Indigenous Perspective” in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) 173.

treaties.<sup>68</sup> An analysis of this body of research suggests that Indigenous leaders would have had some degree of competency and knowledge about the concept of treaties as they understood them. Therefore, they would have recognized the value of key treaty practices used by Europeans. For example, Indigenous leaders understood that a negotiation with foreign nations was an effective means of avoiding violence, and that these treaties were supposed to impose obligations and expectations on both parties.<sup>69</sup>

In general, Indigenous peoples and their leaders would have had confidence in “their nationalis[t] and internationalis[t]” approaches, and that Indigenous leaders would have expected treaties to help their communities by codifying the scope and impact of colonization, and colonial modes of economic order, as they had done in past encounters with other non-European settlers.<sup>70</sup> Despite this conclusion, Sharon Venne’s research on Treaty 6 suggests that the Indigenous perspective of treaty making and land relations included its own practices and knowledge, such as oral tradition and collective memory.<sup>71</sup> This suggest that despite the similarities, two equally robust and epistemologically distinct treaty governmentalities were at play. Therefore, I consider it problematic to underestimate the role and influence of Indigenous actors and communities within the land relations narrative: as Chamberlain poignantly notes, Indigenous leaders at the time were not “powerless, victimized, or defrauded.”<sup>72</sup>

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<sup>68</sup> See Sharon Venne’s “Understanding Treaty 6: An Indigenous Perspective” in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) 173 at 192,193.

<sup>69</sup> *Supra* note 56.

<sup>70</sup> J. Edward Chamberlin, “Culture and Anarchy in Indian Country” in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) 3 at 15, 16.

<sup>71</sup> *Supra* note 58.

<sup>72</sup> *Supra* note 60 at 16.

In fact, intra-Indigenous forms of ‘statecraft’ pre-dated European contact and designed to resolve land disputes arising between different First Nations. Indigenous communities, and their Elders and Chiefs, would thus have been competent and knowledgeable with their own form of treaty making (and other alternatives).<sup>73</sup> Thus, Indigenous leaders engaged in treaty-making, in part, because experience and tradition suggested that they were the best non-violent means available to them when resolving conflicts resulting from settler encroachment, a problem that many Chiefs presciently perceived was already a significant existential threat.

These early treaties were, as Godlewska and Webber conclude, more of a “set of expectations and procedures for intercultural interaction” between two parties expressed in terms of governmental actions framed by sovereign power.<sup>74</sup> This is in contrast to the land relations that followed, which included dispossession, and later land claims with these later modalities of land relations, according to Indigenous scholar Glen Coulthard, better understood as “sub-state” modes of land relations.<sup>75</sup>

Thus, this early treaty regime also clearly demonstrates that the colonial governments were limited (to expressions or actions of government derived from sovereign power) in their ability to influence land relations because Indigenous nations were not yet subjects of the Crown. However, it is impossible to ignore the fact that, as the relative power of the British Crown increased in the 19<sup>th</sup> and 20<sup>th</sup> Centuries, Indigenous communities were increasingly, in Chamberlain’s words, “outmanoeuvred”

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<sup>73</sup> *Supra* note 58 at 184, see also note 56.

<sup>74</sup> *Supra* note 53 at 13.

<sup>75</sup> See Glen D Coulthard’s *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014) at 40.

by their European counterparts.<sup>76</sup> The relative equality of land relations in terms of two sovereign powers attempting co-existence notwithstanding, these informal friendship treaties effectively established a basic framework for future modalities of land relations explored in the next few sections.<sup>77</sup> It was not long before a variety of issues began to challenge the two groups' desires for peaceful co-existence through land sharing or friendship treaties.

The most significant challenge was the gradual expansion of colonial influence following the surrender of the French colonies in North America. Before the surrender of the French colonies through the Treaty of Paris in 1763, the principal problem of government facing the colonies, from the perspective of the British Crown, was securing Indigenous communities as military and economic allies in colonial wars. Following the French defeat, the British Crown faced new and different problems of governance such as state building and setting up cohesive forms of governance over colonial territories.<sup>78</sup> The Crown, no longer needing to convince Indigenous communities to stand as potential allies in colonial wars, shifted government priorities in order to grow and maintain the objects (settler population) of state governance, and moved to establish and secure an internal economic model. Contemporary British officials subsequently developed a regime of practices, institutions, and knowledge (or established a technology) that could effectively embed not only the existing treaty regime, but also Indigenous peoples

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<sup>76</sup> *Supra* note 60 at 15.

<sup>77</sup> *Supra* note 64.

<sup>78</sup> *Supra*.

themselves, within the structure of the colonial governance through one particular foundational governmental action: *The Royal Proclamation of 1763*.<sup>79</sup>

## **2.4 The *Proclamation* of 1763**

The period that followed the *Proclamation* represents the genesis of a regime intended to governmentalize (in the fashion of colonial understandings of government) Indigenous peoples, thus moving away from recognition of Indigenous sovereignty. It is at this point Indigenous governmentalities were effectively replaced, modified, or removed from land relations in favor of what I term a colonial-liberal governmentality. Thus, I argue this document signifies a new direction for colonial land acquisition strategies in North America, in stark contrast to previous modes of land relations.

In particular, the *Proclamation* represents a foundational liberal colonial technology of power built on colonial liberal language, exhibits colonial liberal forms of knowledge, and was claimed (at the time) to legitimize colonial expressions of power. The resulting regime of governance provided the colonial governments with a technical instrument to penetrate both resistive and compliant Indigenous social orders without resorting to war. Later, by building on the principles of this document, state governments engaged in land relations could use this regime to fundamentally alter constitutive aspects of Indigenous social, legal, and political orders across Canada.

### **2.4.1 The *Proclamation* of 1763: An Indigenous perspective**

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<sup>79</sup> *Supra* note 43.

As noted in a previous section, Indigenous leaders involved in the negotiation of the *Proclamation* would have been experienced with treaty outcomes and reluctant to engage in armed conflict with the British — particularly after the defeat of the French.<sup>80</sup> Thus, for many Indigenous leaders, this document represented the best possible non-violent means of dealing with pressing land-related issues. In particular, the language of the *Proclamation* alleviated Indigenous people’s fears that their established territories, or to use the pernicious contemporary language, “Hunting Grounds”, or the traditional land occupied by Indigenous nations would not be respected by settlers.

However, this document also represents the first of many negotiations in which Indigenous leaders were “outmaneuvered” by their British counterparts. John Borrows, for example, argues that British negotiators carefully designed, hid, or misrepresented much of the document and its contents to appeal to the contemporary Indigenous negotiators and representatives involved in the creating of the *Proclamation*.<sup>81</sup> This pattern of deliberate subterfuge to gain advantage in negotiations around land would become, as the following sections of the thesis illuminate, the new standard in Canada.

#### **2.4.2 Introducing a Governmentalized form of land relations: the *Proclamation* and Indigenous Peoples**

In his lectures on governmentality, Foucault suggests that a crucial element of the process of governmentalization is the ability of the state government to re-align what is and what is not within the ambit of governance.<sup>82</sup> In this case, the *Proclamation*

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<sup>80</sup> *Supra* note 57.

<sup>81</sup> *Ibid* at 160, 161.

<sup>82</sup> *Supra* note 8.

document represents the technical means of re-framing conceptualizations of how Indigenous peoples were to be seen by colonial governments. By invoking this document, the British Crown re-cast their perceptions of Indigenous peoples, now seeing them as internal (and thus subject to regimes of governance) to the colonial government rather than an equivalent of a sovereign nation(s) with their own customs, language and social order. In fact, as early as 1912, Duncan Campbell Scott, an experienced bureaucrat in what was then Indian Affairs recognized that: “From that date [1763] to the present there runs through the Indian administration a living and developing theory of government.”<sup>83</sup> This quote clearly demonstrates that contemporary and subsequent colonial governments have established that Indigenous peoples were now thought of as objects of governance.

Although this was the case, the transition of Indigenous subjectivity to an aggregate object of governance was not as simple as Foucault might have envisioned. As noted previously, the mentality that informed this regime was both colonial and liberal. In this case, the colonial logics at play position Indigenous subjectivity as something that was lesser than, or other than, a full colonial subject. Recalling back to the introduction, this is because colonial enterprise was framed by racial notions that white settlers brought civilization to non-whites, whom were themselves seen as savages lacking the supposedly sophisticated forms of government of their white counterparts. Thus, Foucault’s vision of the object of governance or the population cannot ever fully link with Indigenous subjects because they can never be at the same social level as colonists, and European settlers. Despite this tension, many Foucauldian strategies for managing populations were applied to Indigenous communities with increasing complexity. In particular, like the settler

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<sup>83</sup> *Supra* note 60 at 21.

population, Indigenous communities were inscribed as a unified collective that could be influenced by regimes of governance, both at the site of their daily individual lives, but also as an aggregate whole.

To an extent, this meant the colonial governments became aware that as subjects of the Crown, Indigenous communities were owed a duty of care. For example, consider the following passage taken from the Proclamation:

We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained <sup>84</sup>

Here the language of the document positions the British Crown, instead of colonial governors, as the sole entity able to receive or purchase Indigenous territories which suggests that the Crown wanted to prevent exploitation of Indigenous communities by local colonial governments.

The same passages establish the expectation that the Crown, despite claiming “Dominion” over all territories in British North America, would nonetheless consent to buy land occupied (but not owned, since they could not technically own land) by Indigenous communities. This passage, more than most, also reflects what Tully might call a Lockean “racialized” form of land ownership. Moreover, an analysis of the following passage is arguably the genesis of an obligation on colonial governments to

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<sup>84</sup> *Supra* note 43.

respect the contemporary legal concept of Aboriginal Title<sup>85</sup>, itself the basis for most land claims.<sup>86</sup>

several Nations or Tribes of Indians...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 Ground.<sup>87</sup>

However, analysis of these passages also suggests that they establish the juridico-discursive basis for many colonial practices of governance, including economic exploitation and discursively constructed conceptualizations of Indigenous peoples as wards (and thus subjects) of the Crown. For example, the Crown's ability to exploit Indigenous peoples via their subordinate status in the post-*Proclamation* mode of land relations is confirmed in the following passage:

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

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<sup>85</sup> See Kent McNeil's "The Meaning of Aboriginal Title" in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997, 135) for an excellent introduction. See also Brian Slattery's "A Taxonomy of Aboriginal Rights" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Eds Hamar Foster, Heather Raven & Jeremy Webber (Vancouver: UBC Press, 2007 111-129) for a more general introduction to the concepts and forms of Aboriginal rights. Finally, see, Michael Asch & Norman Zlotkin's "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in *Aboriginal and Treaty Rights in Canada*, Eds Michael Asch (Vancouver: UBC Press, 1997) 208 for analysis about this concept works in the modern CLC regime.

<sup>86</sup> The contemporary definition was defined only generally as the expectation of being "Unmolested" within their "Traditional Hunting Grounds." This obligation, now codified and legalized, is still recognized by the courts to this day. This is captured by the colonial legality known as "radical title." This form of *Supra* - authority is extended to the colonizing Europeans. Aboriginal Title is right to use land that is applied to Indigenous groups who suffered dispossession. See for example the decision of *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2 SCR 257 [Tsilhqot'in v British Columbia] which is a recent decision that builds and defines this colonial legality. For a critique of this decision see Russell Diabo's "SCC Tsilhqot'in Decision and Canada's First Nations Termination Policies" (2012) 12 First Nations Strategic Bulletin 6 or see Shiri Pasternak & Russell Diabo's "Canada Responds to Tsilhqot'in Supreme Court Case: Extinguishment or Nothing!" (2014) First Nations Strategic Bulletin 12, online:<<https://www.scribd.com/document/245461195/First-Nations-Strategic-Bulletin-August-Oct-14>>. Finally, see Jack Woodward, Pat Hutchings & Leigh Anne Baker's *Rejection of the Postage Stamp Approach to Aboriginal Title: The Tsilhqot'in Nation Decision* (Research Paper prepared for the Continuing Legal Education Society of British Columbia, 2008), online:<<https://www.cle.bc.ca/PracticePoints/REAL/01%2030%20Tsilhqotin.pdf>> for other forms of critiques leveled at the current regime of CLCs.

<sup>87</sup> *Ibid.*

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.<sup>88</sup>

Broken down, this passage and the choice of language suggests that, in the view of the British Crown, land in North America *belonged* to the British Crown. Consider that the Crown, through this document, claimed all territories that composed British North America as their “Dominion” since they had expelled all other European powers in the area. “Indians”, as they were known, were granted permission to *use* Crown-claimed land or lands that operated under a Crown charter, such as the Hudson’s Bay Company. Lands are reserved for “Indians” but only “under our [British] Sovereignty, Protection and Dominion.” This wording confirms the subordinate nature of Indigenous communities within the post-*Proclamation* form of land relations. This document and its entire technology rests on an uneasy straddling of colonial liberal governmentalities that manifest in, what looks to be, the empowerment of a particular, but subsumed form of Indigenous sovereignty and subjectivity.<sup>89</sup> The impact of these passages was to construct and formalize a specific narrative around land relations in North America, fabricated exclusively by the British, to advance the ability of the British Crown to carry out a territory-spanning project of establishing an internal liberal colonial economic model.

To conclude, the *Proclamation*’s legacy is the transformation of land relations from a *mélange* of social practices, and acceptance of two distinct treaty governmentalities, to a codified set of colonial practices and institutions, effectively

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<sup>88</sup> *Supra* note 43.

<sup>89</sup> *Supra* note 57 at 160, 161.

shifting the form of power relations from sovereign to governmental. The British negotiators were therefore successful in leveraging the prevailing political and social conditions to implement a land (and social) relations framework (the *Proclamation*) that effectively established “the Crown’s sovereignty and domination over the ““Indian [and his] Land.””<sup>90</sup>

Many of these early *Proclamation* principles are still the basis for much of the law relating to the current institution of land relations — land claims. Both the current government and the judiciary support many of its explicit and implicit claims, such as the passages that claim all territory as within the “Dominion” of the British Crown. In modern terms, the judiciary has interpreted this as a right of the state known as “radical title,” as recently as 2014.<sup>91</sup> Moreover, these passages also establish a *colonial* hierarchy within the social relationships between the two groups. Based on this, later governments were able to rationalize a social order wherein it is not possible for Indigenous communities to own land, even if they had traditionally occupied the land. This mentality would help foster the next stage of land relations based on the principle of dispossession in exchange for legal rights, itself a colonial interpretation of the principles in the *Proclamation*.

Of course, it is a mistake to say that transitions in the modality of land relation occurred rapidly or at once. Equally, it would be a mistake to suggest that colonial practices, such as forms of governance, were purged or replaced by liberal practices; instead, practices and supporting institutions of government *based on both mentalities*

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Supra* note 79.

slowly evolved in tandem, and continue to evolve to this day. Thus, many governmental actions or practices that make up land relations after the *Proclamation* often display a curious mix of subjugation, based on the perceived needs of emergent economic government of the state, but also a concern for both the material, and moral welfare of Indigenous subjects.<sup>92</sup>

## **2.5 The rise of the Indian subject: An analysis of modes of power in post – *Proclamation* treaty regimes**

Following the implementation of the *Proclamation*, and up to the early 19<sup>th</sup> Century, approximately twenty-seven land purchases were carried out in the territories known as Upper Canada.<sup>93</sup> The resulting treaties provide important insight into how land-relations practices based on the principles of the *Proclamation* continued to be governmentalized. For example, I argue that the impact of the Robinson treaties was: to develop and clarify the scope of many key *Proclamation* principles including the proto-legal concept of Aboriginal Title, establish an embryonic version of what is now known as the Aboriginal Rights regime, and establish a formal set of practices, supporting government institutions, and knowledge to frame a modality of land relations based on purchasing land from Indigenous communities.<sup>94</sup> Moreover, along with accelerating the process of governmentalization, it also marks an important shift in the underpinning

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<sup>92</sup> *Supra* note 57 at 28 – 30.

<sup>93</sup> Robert J Surtrees' *Treaty Research Report: The Robinson Treaties (1850)* (Research Paper prepared for Indian and Northern Affairs Canada) (Department of Indian and Northern Affairs, 1986) at 2.

<sup>94</sup> *Ibid.* At the time, these rights were expressed and characterized through provisions in treaties that provided for hunting, fishing and occupancy rights for Indigenous communities and individuals, as well as the creation of reserve lands meant to be exclusive living spaces for Indigenous communities dispossessed through treaty-making.

mode of power, and signifies that the governmentality informing the *Proclamation* would now be the operational framework for land relations in British North America.

However, in order to prepare the reader for the analysis in the following section, a few of Foucault's concepts related to governance and governmentality must be explored, namely the relationship of a visible population and the government, and the impact of identity in liberal modes of governance.

### 2.5.1 Visibility and governance

Throughout his lectures on governmentality, Foucault opens up the claim that one of the most effective means of maintaining perpetuity (a key goal of a government of the state) is securing the object of governance by accumulating knowledge of that object.<sup>95</sup> Dean and Gordon expand this argument and suggest that liberalized state governments ought to establish a condition of "visibility" among or over whatever it is to govern. These forms of "visibility" allow those that govern to develop a clear "picture" of who is to be governed, and therefore, allow the government to study and rationally devise actions that can influence or dispose the individuals that make up the aggregate to act or not act in particular ways.<sup>96</sup>

For Foucault and later scholars, in a liberal mode of government, this condition of "visibility" is achieved through the very act of living out one's daily life;<sup>97</sup> a political strategy that Foucault argues is common in liberal modes of government and termed bio-

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<sup>95</sup> The best example comes from his governmentality lectures, as recorded in both Chapter 4 and Chapter 5 of *Security, Territory, Population: Lectures at the College De France*, Michel Senellart, Francois Ewald & Alessandro Fontana, eds, Graham Burchell trans (Houndsmills: Palgrave MacMillian, 1977).

<sup>96</sup> *Supra* note 27 at 30, 118.

<sup>97</sup> Edward McGushin's "Foucault's theory and practice of subjectivity" in *Michel Foucault: Key Concepts*, eds Dianna Taylor (Durham: Acumen Publishing Limited, 2011, 127-142) at 132 .

politics.<sup>98</sup> In essence, bio-politics, or the exercise of bio-power, describes any actions a liberal government takes to administer, organize and detail life. In the case of the population, a state of visibility is built by influencing individuals to internalize specific practices or regimes of practices related to being a visible subject, and to engage and/or interact with supporting institutions. A simple illustration of this concept at the micro scale includes all those practices that make up the actions associated (normatively) with giving birth, such as registering a birth, giving birth in a hospital, and having the baby tested and immunized. At the macro scale, this might include practices of recording deaths and marriages among the population to carefully monitor and when necessary, intervene in a state's most significant asset.<sup>99</sup> What is important to note about this point is that in a liberal mode of governance, these knowledge-producing regimes (of practices) are typically carried out by and embedded in a wide range of *institutions* in a given society.<sup>100</sup>

### 2.5.2 Identity and governance

Just as it is important from the perspective of a liberal mode of government to know its population, so too is the ability to influence how individuals know and understand themselves in relation to other individuals. For governmentality scholarship, fabricating particular modes of understanding and influencing one's relationship to

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<sup>98</sup> Chloë Taylor's "Biopower" in *Michel Foucault: Key Concepts*, Eds Dianna Taylor (Durham: Acumen Publishing Limited, 2011 41-54) at 45 – 54 for an excellent summary.

<sup>99</sup> *Supra* note 86 at 46.

<sup>100</sup> *Supra* note 85 at 133 - Foucault, for example, talks about the post-16<sup>th</sup> century medical community has invested a considerable level of time and research into practices that encourage the form of life which broadly reflects underlying economic rationalities (which are said to influence liberal governments), including that of the "happy", "productive" individual, and will advise or counsel individuals to act or behave in a way that promotes those conditions.

oneself (also called an identity) is an essential part of governance. Foucault, writing in *Discipline and Punish*, articulates a simple example. He points to the fabrication of the expert/layman dynamic present in the medical field or correctional institutions.<sup>101</sup>

Building on Foucault's work, Dean suggests that a basic identity in a liberal mode of governance is constituted by particular elements. These include "capacities" (e.g. rational decision-making), "statuses" (e.g. having sexuality) or "qualities" (e.g. being a citizen).<sup>102</sup> Successful governments are thus defined, the literature suggests, by the number of individuals that choose to define themselves and experience reality through "capacities", "statuses", and "qualities" fabricated, modified or influenced by the government in their pursuit of a particular end.<sup>103</sup> Thus, to borrow from both Foucault and Rose, identity itself is subject to the processes of cutting up of daily life in order to make or create intervention points for a government to exercise influence on an individual. It follows that the more visible individuals are to the government, the greater the impact regimes of governance that target identity.

In the next section, I map these concepts onto a second event known as the Robinson Treaties, and explain how, as Foucault tells us, a (colonial) liberal governmentality rationalizes government actions designed to fabricate a specific type of internal economic model that spans all objects of governance. In this case, the chosen internal model was closely linked to the colonization of British North America. As the pace of expansion accelerated post Treaty of Paris, so too did official and unofficial

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<sup>101</sup> *Supra* note 53.

<sup>102</sup> *Supra* note 27 at 32.

<sup>103</sup> See note 27 at 32.

forms of encroachment on non-ceded Indigenous territory.<sup>104</sup> Robert Surtees, a noted Canadian researcher, highlights an incident in what is now Northern Ontario, where a prominent local Chief and British ally during the War of 1812 became exasperated with the number “of (non-Indigenous) men moving into his lands.” He subsequently petitioned for reimbursement, as was the practice of the time. This, and other incidents like this, would eventually force the colonial government to create a Special Commissioner whose mandate was to negotiate with Indigenous communities within a pre-established framework of standardized practices fabricated by the colonial government and based loosely on the principles of the *Proclamation*.<sup>105</sup>

## 2.6 The Robinson Treaties

The Robinson Treaties were a two-part treaty covering much of present day Ontario, negotiated between colonial governments and at least two major Indigenous leaders around the middle of the 19<sup>th</sup> Century. Similar to the Proclamation, the Robinson Treaties represent a second, more formal juridico-discursive technique that firmly establishes the re-casting of Indigenous peoples from allies — if not equals — to subjects known as wards. Unlike Friendship treaties, these negotiations were informed by the *Proclamation*. Consequently, new practices informed by the colonial liberal governmentality, absent in friendship treaties, were “added-in” to this modality, while others practices were modified or removed. Campbell Scott, writing in 1912, cogently sums up this process and timeframe, noting that:

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<sup>104</sup> *Supra* note 81 at 4.

<sup>105</sup> *Ibid.*

The year 1830 may be fixed as the limit of the first regime in Indian affairs. Before that date a purely military administration prevailed, the duty of the [British crown, and British North American colonial] government being restricted to maintaining the loyalty of the Indian Nations, with almost the sole object of preventing their hostility and of conserving the assistance as allies. About 1830, the government, with the disappearance of anxieties of the first [colonial war] period, began to perceive the larger humane duties which had arisen with the gradual settlement and pacification of the country. The civilization [sic] of the Indian became the [new] ideal...<sup>106</sup>

In contemporary terms, this race to civilize<sup>107</sup> (governmentalize or assimilate) Indigenous communities through liberal modes of governance included: the addition of new knowledge-production practices, evident in the creation of a formal, centralized “schedule of reserves;” the production of demographic statistics prior to formal negotiations; practices regulating Indigenous land use on Indigenous land, including how and where Indigenous communities could live and hunt; and new practices that delineate and establish a hierarchy of Indigeneity.<sup>108</sup> These treaties began to differentiate who is eligible to live on reserves, and which Indigenous people could claim to be “Indian,” as demonstrated in the language that excludes “half-breeds” (now referred to as the Métis) from the land relations regime.<sup>109</sup>

Additionally, the scope and nature of Aboriginal Right and Title introduced in the *Proclamation* era was increasingly formalized. In this regime, Indigenous peoples and communities were given defined territories (as opposed to the broader, ambiguous concept of “Hunting Grounds”), and granted limited rights to sub-surface resources. Moreover, formalization is evident in the restricting the exercise of Aboriginal Rights and

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<sup>106</sup> *Supra* note 60 at 21.

<sup>107</sup> The claimed processes of colonialism vary between scholars. For an example of the civilizing mission mode of colonization, see Anthony Anghie’s *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004). For other modes, see note, and see David Scott’s “Colonial Governmentality” (1995) 43 *Social Text* 191.

<sup>108</sup> *Supra* note 81 at 19.

<sup>109</sup> *Ibid.*

Title on lands considered “private”.<sup>110</sup> Finally, these treaties also established the framework for payments to Indigenous communities characterized by a one-time lump sum payment, followed by annuities in cash to Indigenous communities who had been dispossessed.<sup>111</sup> These payments represent a modification of the practice of customary “gift” giving common in the Friendship treaties and also suggest that the government had begun to perceive Indigenous people in a collective sense because these payments would decline if the band’s population declined.<sup>112</sup>

These treaties thus signify an important step in the transition to a governmental (as opposed to sovereign) mode of power between these two social groups. The regime of land relations that came out of the Robinson Treaties allowed the colonial government to first fabricate, and later, embed many conditions necessary for a governmentalized land relations regime, underpinned by a network of governmental power. Most importantly, it represents the point at which an embryonic liberalizing mode of governance was formally extended into a colonial form of land relations. By this I mean that, by including practices and institutions of knowledge production to achieve visibility among Indigenous communities, establishing Indigenous peoples as subjects of colonial government, and redefining what it means to be Indigenous, the Robinson Treaties were, like the *Proclamation*, a technical, rationalized action of governance or a juridico-discursive technique of power used to perpetuate a system of land relations that reflected contemporary colonial liberal governmentalities.

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<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at 21.

<sup>112</sup> *Ibid.*

## 2.7 The Numbered Treaties

Following the Robinson Treaties, the Numbered treaties were a series of eleven treaties negotiated across Canada, most prominently in Northern Ontario, the Prairies and much of the Northwest Territories<sup>113</sup> in the late 19<sup>th</sup> to the early 20<sup>th</sup> centuries.<sup>114</sup> These treaties represent a refined version of the Robinson Treaty modality of land relations framed by dispossession through treaties in exchange for payment and rights.<sup>115</sup> Indigenous communities and actors, for their part, had a complicated relationship with these treaties.<sup>116</sup>

I suggest that the Numbered treaties timeframe represents the coming-of-age of the colonial-liberal form of land relations framed through colonial-liberal law. Following these treaties, it was clear that formerly Indigenous sovereign rights were replaced with colonial legal rights. This form of land relations, as in the Robinson treaties, was animated mainly by the compulsions of an “economic (colonial) government”, but one underpinned by both liberal and colonial governmentalities.<sup>117</sup> For example, colonial governmentalities are demonstrated in the legal institutions’ use of Indigenous rights, as opposed to sovereign rights. Borrows argues that this transition is evident in the legal

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<sup>113</sup> *Supra* note 53 at 14.

<sup>114</sup> The last of these, Treaty 11, was signed in 1921 and was the last treaty negotiated for a period of almost 50 years.

<sup>115</sup> This modality of land relations was negotiated, for the most part, under the Robinson framework which established the practices of the exchange of compensation and formal legal rights described in the terms of the Treaties, for surrender of land and extinguishment of all title, thus allowing the colonial government to occupy and manage the land. For more discussion, see either Sharon Venne’s “Understanding Treaty 6: An Indigenous Perspective” in *Aboriginal and Treaty Rights in Canada*, eds Michael Asch (Vancouver: UBC Press, 1997) or Patrick Macklem’s “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in *Aboriginal and Treaty Rights in Canada*, eds Michael Asch (Vancouver: UBC Press, 1997).

<sup>116</sup> Patrick Macklem “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in *Aboriginal and Treaty Rights in Canada*, eds Michael Asch (Vancouver: UBC Press, 1997) 97 at 97.

<sup>117</sup> *Ibid* at 112, 113.

narrative at the time, and quotes Lord Watson, a member of the Privy Council, who wrote in 1888, that “the tenure of the Indians was a personal...right, dependant (sic) on the good will of the State.”<sup>118</sup> Similarly, he quotes another Privy Council document, this one from 1897, which describes treaty rights as “nothing more than personal obligations.”<sup>119</sup>

These assertions of Indigenous rights as flowing from the state, and as being embedded in one’s Indigenous status, effectively signified that land relations had evolved into a regime dominated by a refined, and formalized set of colonial practices, even when compared to the earlier Robinson treaty modality. Thus, colonial governmentalities influenced the networks of power between these two groups leading to a significant expansion of colonial power, and enabling the conditions that would lead to the re-framing of land relations from dispossession in exchange for rights, to a modality of land relations built on the notion of Indigenous claims of traditional ownership, or the land claims era.

Examples of liberal governmentalities are also evident in this era. A 1905 Indian Affairs policy paper quoted by Patrick Macklem notes that the dual motivation of the Numbered treaties was to avoid the “danger of complications or, worse still, conflict” with Indigenous communities, and to open up vast tracts of territory to settlement by colonists, allow the development of railroads — and thus, implement extractive modes of economic activity.<sup>120</sup> However, research by both Venne and Macklem suggest that liberal governmentalities, particularly those related to providing for the welfare of Indigenous

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<sup>118</sup> John Borrows “Let Obligations Be Done” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, eds Hamar Foster, Heather Raven & Jeremy Webber (Vancouver: UBC Press, 2007 201-215) at 202.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Supra* note 105 at 104.

actors and communities or ‘wards’ of the state were, at least in part, leveraged to secure Indigenous co-operation. Macklem also quotes key officials of the time that imply they had begun to recognize and, in some cases, “pity” Indigenous communities that faced increasingly unsustainable exploitation by settlers following railway construction. In what must be described as a perverse sense of responsibility, some officials even rationalized this mode of land relations (dispossession for rights) as a (preferred) means of ensuring the *survivability* of Indigenous communities.<sup>121</sup>

Moreover, the extent, and implementation of these supposed welfare concerns was highly variable across Canada. Venne, for example, describes a common theme wherein many provisions of these Numbered treaties simply were never carried out or were subsequently and unilaterally changed by the government if they found them to be inconvenient or impractical.<sup>122</sup> Thus, Venne demonstrates that not only did the government fail to abide by the terms of many of land-based terms of the treaties; many of the so-called “welfare” elements in these later Numbered treaties were simply ignored or abused by the then colonial government, and later, by its successor, the state government.<sup>123</sup>

This era of unsystematic treaty making has defined key relationships, structures and the scope of the regime of land rights in Canada to this day. These conditions in conjunction with the 1867 Indian Act<sup>124</sup>, set the tone for the period of overtly “paternalistic” actions by the colonial government, a suspension of state willingness to

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<sup>121</sup> *Supra* note 105 at 105.

<sup>122</sup> *Supra* note 58.

<sup>123</sup> *Ibid.* See page 197 for a list of examples.

<sup>124</sup> *Indian Act*, 1867 [*Indian Act*]. In general, see John F Leslie’s “The Indian Act: An Historical Perspective” (2002) 2 *Canadian Parliamentary Review* 25, for an excellent review of the history of the *Indian Act*.

negotiate any land claims, and the imposition of restrictions on Indigenous communities' abilities to exercise even those limited land rights that this new regime afforded them. Taken in totality, this timeframe is useful because it demonstrates the ambiguous character of a mode of land relations framed by colonial-liberal governmentality. While at the time the influence of colonial governmentalities was strong, this does not mean that liberal governmentalities were not present. In fact, both Macklem and Venne's research show that in many cases, contemporary colonial governments simply chose to devalue liberal governmentalities, in favor of colonial ones.<sup>125</sup> In other words, although many of the practices remained the same, the outcomes became less and less beneficial for the Indigenous communities.

This general trend in favouring colonial governmentalities continued following the conclusion of the Numbered treaties. This timeframe is characterized by the almost complete abandonment of the pretense of diplomacy, goodwill, or peaceful co-existence as framing land relations. In fact, in terms of land claims activity, between 1921, the year of the last of the so-called 'Numbered treaties' and 1973, most Indigenous land-claim petitions were simply ignored.<sup>126</sup> This increasingly unilateral, and almost entirely colonial modality of land relations, however, would actually produce unexpected results, provoking relentless Indigenous activism and resistance, particularly in the province of British Columbia, which resulted in a SCC legal decision that would, again, alter the dynamics of the liberal colonial governmentality informing land relations in Canada.

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<sup>125</sup> *Supra* note 58, 105.

<sup>126</sup> Douglas R Eyford's *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Minister of Aboriginal Affairs and Northern Development, 2015) at 16-17.

### 3 Chapter: The NLCA: A case study

This chapter, building on conceptual elements introduced in Chapter 1, and adding the research of Peter Kulchyski, Peter J. Tester, and Francis Abele, introduces a history of the conditions that led to the NLCA.<sup>127</sup> I demonstrate how the Inuit peoples in the North-West Territories were gradually introduced into colonial society, and separated or dispossessed from their traditional lands, and social, political, and economic orders. In contrast to the account in Chapter 2, I argue that the colonial processes responsible for reimagining Indigenous subjectivities (as they relate to colonial government) and the form of land relations based on a regime of dispossession did not emerge in Canada–Inuit relations until the 20<sup>th</sup> century.

Consequently, in the first section of this chapter, I examine two events that allowed colonial government to governmentalize land relations with Indigenous communities in the North. Following that, I provide analysis of two (of the many)

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<sup>127</sup> The Nunavut land claim document was chosen because it was presented as a land claim that encompassed many possible remedies for social and economic issues within Aboriginal communities. For example, in terms of economic development schemes this claim represented a land-based resource regime that included Inuit actors and the Inuit communities through representation. This would suggest that it would augment the Northern Inuit’s “nation” building capacities. If, as this analysis proposes, constraint-supporting state domination is occurring, then this case becomes an excellent comparator precisely because it is recognized as one of the more empowering land claims. The claims of success were analyzed based on conceptualizations grounded in markers extracted from the broader literature of Indigenous community development. The extant literature suggests several themes that are generally applied to gauge success of a particular Indigenous based development project and include high levels of community control and management over land, resources and structures and institutions, as well as strong Indigenous leadership that support the broader framing philosophies of Indigenous communities. These markers are highlighted as they are often lacking or deficient in the current schemes of Indigenous development, and may provide more deleterious effects than benefits, with the overall effect of hindering the Indigenous communities’ capacity building potential. See Brian Calliou & Cynthia C Wesley-Esquimaux. (2010) “Best Practices in Aboriginal Community Development: A Literature Review and Wise Practices Approach” *Banff Center* for a significant review of literature in this area.

problematic elements illuminated by a governmentality-style critique CLC: issues of implementation and the impacts of liberalizing institutions of governance.

### **3.1 The Nunavut Land Claim: A short comparative history of Northern Land relations before 1973**

A review of the literature of the historical relationships of colonial governments and Northern Indigenous communities suggests that colonial-led attempts to create formal, legalized regimes of governance in the North are, compared to other areas in Canada, a recent phenomenon.<sup>128</sup> Until two legal decisions in 1917 and later in 1939, regimes of governance directed at asserting colonial sovereignty and control over Inuit communities and other northern groups of Indigenous peoples were, by comparative standards, relatively simple and oriented around resource management. This was due in part to geographic and climate-related factors, as well as the limited impact of Inuit resource harvesting practices. It was also a jurisdictional issue: as opposed to the provinces, the federal apparatus of government was singularly responsible for all resources and land in the North.<sup>129</sup> As a result, many of the early and specific techniques of power that underpinned colonial modes of governance over Indigenous lives and ways of being, including the seminal *Royal Proclamation* framework, did not apply

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<sup>128</sup> See for example, Francis Abele's "Northern Development: Past, Present and Future." (2009) In *Northern Exposure: Peoples, Powers and Prospects in Canada's North*, Institute for Research on Public Policy, 19 for a history of development in the North. See Terry Fenge's "Inuit and the Nunavut: Land Claims Agreement: Supporting Canada's Arctic Sovereignty" (2007) *Policy Options* 85 for the role of the NLCA in northern security in the modern context. See Peter Kulchyski, & Frank James Tester's *Kiumajut (Talking Back)* (University of British Columbia Press, 2008) and Francis Lévesque's "Revisiting Inuit Qaujimajatuqangit: Inuit knowledge, culture, language, and values in Nunavut Institutions since 1999" (2014) 381:2 *Études/Inuit/Studies* 115. for an excellent review of Inuit history, and Inuit perspectives on the development in the north.

<sup>129</sup> Peter Kulchyski & Frank James Tester's *Kiumajut (Talking Back)* (University of British Columbia Press, 2008) at 27 – 32.

specifically to the Inuit communities. The process of governmentalizing land relations with Indigenous communities thus also fell behind the rest of the country.

In stark contrast to other areas of colonial Canada, colonial laws affecting Inuit communities were limited to a series of ordinances enacted between 1887 and 1917; as Kulchyski and Tester point out, 19<sup>th</sup> century formal legal regimes in northern territories did not effectively incorporate Inuit communities or actors except in a few basic wildlife management regulatory schemes.<sup>130</sup> These modes of management were by design, limited to specific policy measures informed by contemporaneous forms of colonial knowledge that falsely characterized Inuit hunting practices as posing a risk to the northern ecology rather than a complex of overlapping regimes of governance seen in later forms of land relations.

Nonetheless, like the early Friendship treaties, even this basic regime of management constituted an embryonic version of a broader colonial and increasingly governmentalized land relations regime at play in the provinces during that time. It established knowledge-based practices such as quotas, seasons, and the issuance of permits that were fundamentally informed by western modalities of wildlife conservation and governmentalities.

Thus, prior to 1917, the Inuit and other northern Indigenous communities, while recognized as Indigenous (or something that was not a settler-colonial) were not specifically considered “Indians” or ‘colonized’ Indigenous peoples, nor were they recognized as being “bona fide” inhabitants of the Northwest Territories such as settler

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<sup>130</sup> *Ibid* at 32. The ordinances were being established roughly around the same time when the principles of dispossession as enshrined in the Robinson Treaties, were now guiding an increasingly governmentalized modality of land negotiations underpinned by widening gap in the relative power of Indigenous communities to resist dispossession.

colonials, or private enterprises.<sup>131</sup> The transformational power of colonial law and the *Proclamation* regime of land claims, already at play in the provinces, did not extend into or over Indigenous communities in the north because the government lacked the claimed condition of legitimacy or juridico-discursive basis arising from a piece of framing legislation.

This perceived lack of legitimacy was addressed by the colonial government in 1917, when new legislation established that “Eskimo[s]” (separately from “Indians”) were, in fact, “bona fide” residents of the Northwest Territories, but not yet as “Indians” like many other Indigenous nations across Canada. This change extended an important process already at play in other colonial territories: the transition of what were formerly sovereign Indigenous understandings of rights into colonial legal rights and the extension of colonial governance over Indigenous communities.<sup>132</sup>

The post-1917 regime of governance provided the conditions and perceived legitimacy to challenge and modify Indigenous notions of land use and governance and replace them with a system that mirrored the preferred mode of internal social, economic and political ordering of the colonial state. Thus, this piece of legislation, like the *Proclamation*, significantly accelerated the process of governmentalization of northern Indigenous communities because it shifted governmental understandings of the place of Inuit peoples from independent communities to racialized subjects in a colonial society in North America.

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<sup>131</sup> *Ibid* at 32.

<sup>132</sup> *Ibid*.

Following this, and true to the evolutionary trajectory of land relations in the provinces, a decision by the SCC in 1939 represented the means of formalizing key colonial principles originating with the 1917 decision. Most importantly, it found that “Eskimos” did indeed fall under the definition of “Indian” as set out in s.91, ss.24 of the *British North America Act* of 1867 (“BNA Act, 1867”).<sup>133</sup> Prior to the 1939 *Re: Eskimos* decision, Inuit communities were not recognized as “Indians” and thus not a federal responsibility as they fell outside the mandate established in the s.91 of the BNA Act, 1867.<sup>134</sup> This shift in the colonial interpretation of what it meant to be Inuit also meant a complete reversal of previous modes of colonial governance over Northern Indigenous communities. With this decision, a more robust system of Indigenous governance framed around the Robinson Treaty modality was introduced into Northern land relations.<sup>135</sup> It included an imposed system of legal rights, delineating specific parcels of land to Indigenous communities, and limited forms of self-governance in exchange for extinguishment of Aboriginal Title. Consequently, the federal government was obligated to establish or import practices, institutions and knowledge to sort through questions of which First Nation or community had rightful claims to parcels of land in the North.<sup>136</sup>

### **3.2 Eskimos, Academics, and the *Calder* Decision: A short history of the modern land claim process**

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<sup>133</sup> *Reference whether “Indians” includes “Eskimos”*, 1939 SCR 104 [*Re: Eskimos*, 1939] at 124.

<sup>134</sup> *Supra* note 118 at 166.

<sup>135</sup> *Supra* note 120.

<sup>136</sup> *Supra* note 123.

Following the 1939 *Eskimos* decision, Inuit communities gradually began to experience their relationship with the apparatuses of colonial state governments in ways that largely mirrored their non-Inuit, Indigenous counterparts. This dominated land relations until the late 1960s and early 1970s, during which land relations, along with the dynamics of its informing governmentalities, were broadly re-assessed as part of an equally broad shift within the governmentality of the colonial state government. For example, in the mid to late 60s, academics at the University of British Columbia were recruited to provide analysis on the roots of Indigenous poverty, which was still an obvious problem throughout (or despite) previous modes of Indigenous governance and land relations.<sup>137</sup> The results were eventually synthesized, and would inform the policy paper known as the “White Paper,” commissioned by the Canadian government, and released by the then-minister of Indian Affairs in 1969.<sup>138</sup>

Despite the ostensibly admirable goal of these new forms of knowledge, these policies and their contents have been widely recognized as the pinnacle of the expression of policy informed by colonial liberal governmentalities.<sup>139</sup> For example, the paper called for an extension and refinement of a welfare approach to addressing the problems stemming from colonization and colonial practices. This included new, modified colonial liberal practices such as targeted social programs emphasizing assimilation, rather than addressing the effects of 200 years of targeted regimes of displacement, dispossession

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<sup>137</sup> *Supra* note 115.

<sup>138</sup> This paper outlined a new approach to land relations, that among other things, proposed an unrestricted level of participation for Indigenous individuals in Canadian civil, political and economic life, and the abolition of the legal distinction associated with being “Indigenous” as defined in legislation such as the *Indian Act*.

<sup>139</sup> See the “White Paper” fact sheet prepared by the First Nations and Indigenous Studies Program at the University of British Columbia for excellent review and resources about the resistance, and nature of the “White Paper.” Online at < [http://Indigenousfoundations.arts.ubc.ca/the\\_white\\_paper\\_1969/](http://Indigenousfoundations.arts.ubc.ca/the_white_paper_1969/)>.

and large-scale environmental damage resulting from the sale and development of Indigenous land for resource extraction on Indigenous communities. However, despite what some would call the failure of the White Paper and new forms of knowledge it produced, it nonetheless challenged the dominant narratives and understandings of how unilateral colonial practices common in the early to mid-20<sup>th</sup> Century were rationalized, carried out, and injected into land relations.

Building on the growing trend of calling into question the conditions of Indigenous-State relations, the Nisga'a Nation of British Columbia renewed its long-standing efforts to have their rights and Title claims to areas of British Columbia recognized. In doing so, this band would unknowingly alter the land claim regime.

Legal proceedings regarding the surrendering of Nisga'a claims to title commenced, and the case made its way to the SCC. Six of seven justices found that Aboriginal Title (the inherent right to occupy traditional land all First Nations possess) had never been extinguished. They nonetheless ruled against the Nisga'a, because at the time, no fiat existed that allowed the Nisga'a to sue the Crown.<sup>140</sup> In other words, the case was decided on the obviously unequal notion that the Crown would have to expressly consent to being sued in order for the Nisga'a to pursue legal action.

The impacts of this decision, now known as the *Calder* case,<sup>141</sup> would alter the landscape of power relations between the two groups. Borrows, for example, argues that this decision represents an event wherein the link between Indigenous rights and

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<sup>140</sup> *Supra* note 107 at 204.

<sup>141</sup> See Peter Kulchyski's "Calder," in *Unjust Relations: Aboriginal Rights in Canadian Courts*, eds, Peter Kulchyski (Don Mills: Oxford University Press, 61-126) for an excellent analysis of the decision.

governmental obligations, established almost three centuries earlier, was effectively recognized and enshrined in the dogma of colonial law.<sup>142</sup>

Thus, in the post-*Calder* landscape the standard legal approach to Indigenous governance was that “wherever and Indigenous or treaty right exists, a correlative governmental obligation can be found.”<sup>143</sup> As illustrated by Borrows’ claim, this case was where the post-Robinson treaty modality of land relations was formally governmentalized. For contemporary Indigenous peoples, this decision effectively meant an end to the “days when the Crown largely viewed itself as being above and beyond constraint” in establishing and dominating the forms of land relations with Indigenous communities.<sup>144</sup> However, it is also clear that despite this perception, contemporary colonial governments could now claim that a form of land relations framed exclusively by a colonial and now almost completely governmentalized regime of land relations was the best policy instrument to resolve land claims.

This governmentalized post-*Calder* modality of land relations, or the land claims form of land relations, is characterized as regime of governance designed to resolve Indigenous-led claims of wrongdoing or bad faith dealings with the Crown. These claims are to be proven by Indigenous peoples and their negotiators through a combination of evidentiary and discursive practices.<sup>145</sup> Following the completion of this process, an

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid* at 205.

Indigenous community could potentially gain a modicum of self-governance<sup>146</sup>, and the ability to manage land rights in a defined area.

I conclude that the *Calder* decision formally embeds an understanding of *how* and *why* land relations ought to be (and is) structured by a specific regime informed and structured by a colonial liberal governmentality. The regime also does not escape the legacy of ambiguity left by the *Proclamation*. To many Indigenous communities, it also still represents the best non-violent choice to channel their resistance to colonial land practices.

Indeed, some Indigenous leaders were quick to carry out this form of resistance; Northern Indigenous communities such as the Innu, Inuit, Cree and others, began to resist through this process, and pressed claims, ignored during the 19<sup>th</sup> and early 20<sup>th</sup> Centuries, to traditional lands.<sup>147</sup> For example, in 1973, shortly after the *Calder* decision, Northern Cree and Inuit communities outside of the North-West Territories successfully convinced a judge to halt a significant hydroelectric project in Northern Québec based on questions around the scope of Aboriginal Title and how it relates to Indigenous participation in projects on traditional Indigenous land.<sup>148</sup>

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<sup>146</sup> This concept is often described differently, depending on the perspective. For a colonial perspective, see Jill Wherret's *Aboriginal Self-Government*, (Fact Sheet) (Ottawa: Political and Social Affairs Division, Library of Parliament, 1999). For a critical legal perspective see Kent McNeil's *The Inherent Right of Self-Government: Emerging Directions For Legal Research* (Research Paper prepared for the First Nations Governance Center, 2004), online: <<http://portal.publicpolicy.utoronto.ca/en/ContentMap/AboriginalAffairsCanada/Aboriginal%20Policy%20and%20Governance%20Documents/Inherent%20Right%20to%20Self%20Government%20-%20Emerging%20Directions%20for%20Legal%20Research,%20McNeil,%202004.pdf>>.

<sup>147</sup> Francis Abele "Northern Development: Past, Present and Future." (2009) In *Northern Exposure: Peoples, Powers and Prospects in Canada's North*, Institute for Research on Public Policy, 19 at 20 – 24.

<sup>148</sup> This agreement was, in fact, the first so-called modern (post-*Calder*) Treaty to be signed. See Alastair Campbell, Terry Fenge & Udloriak Hanson. "Implementing the 1993 Nunavut Land Claims Agreement" (2011) 2:1 *Arctic Review on Law and Politics* 25 at 31.

This process of claiming and then securing the means to govern land through negotiation and legal actions pointedly demonstrated that contemporary Indigenous forms of resistance to colonial occupation had potential to create or add to existing governmental anxiety or problems of government in the northern territories. For example, looking back to Northern Cree example, if left unresolved, these land claims had the potential to negatively and significantly affect economic certainty and disrupt the internal economic order of the state, at least temporarily. Although yet untested, the process of land claims provided a relatively quick resolution for the 1973 claim, as a new agreement was reached in 1975.

Consequently, this post-*Calder* modality of land relations or the land claims process provided contemporary governments with a demonstrably effective governmental action that supported a growing interest in expanding the capacities of state to promote exploration and development of northern resources, which included significant oil, mineral, and ore deposits. As Francis Abele notes, these economic considerations were an important factor that influenced land claims in the North due in part to mounting internal and global economic pressures facing the Canadian state during the 1970s.<sup>149</sup>

Equally, this case study demonstrated to contemporary colonial governments that as potential response to resistive actions of Indigenous peoples, colonial governments could reasonable expect that a regime that worked through rights-based liberties (derived from the *Proclamation* and onward) of Indigenous peoples (rather than outright denying them based on colonial social hierarchies) to continue to produce advantageous results for colonial governments as well as meet the host of state-side legal obligations codified in

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<sup>149</sup> Alastair Campbell, Terry Fenge & Udloriak Hanson's "Implementing the 1993 Nunavut Land Claims Agreement" (2011) 2:1 Arctic Review on Law and Politics at 25 – 27, 28

the *Calder* decision. Thus, I suggest, that it quickly became evident to federal civil servants and policy makers that to pursue the colonial project and develop the North, they would need to actually resolve land claims, and do so within the CLC regime.

In sum, I argue that the newly created regime of land claims, and its instrument known as CLCs was developed and designed to “get ahead” of the emerging problem(s) of government posed by Indigenous political activism and practices of resistance to colonial occupation and dispossession.

### **3.3 Nunavut Land Claim**

The Nunavut land claim represents one of the largest CLCs negotiated between Indigenous communities and the Canadian state, as the land conflict centered on approximately 20% of all territory claimed by the Canadian government.<sup>150</sup> This land claim’s complexity is reflected in the final 282-page document of 42 articles and associated subsections that address a broad range of Inuit social, cultural, economic and political development matters. Not only is the document itself comprehensive and exhaustive, the underlying processes themselves comprised various institutional stages: initial petitions, research, negotiation, and finally resolution, that together spanned almost three decades.

The NLCA process began in 1976, shortly after the *Calder* decision, with a petition from the Inuit Tapirisat of Canada (“ITC”), an institution of governance created to represent Inuit communities in bargaining.<sup>151</sup> The ITC petition was based on proposal

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<sup>150</sup> *Ibid* at 25.

<sup>151</sup> *Ibid*. The ITC was a “national organization” that promoted Inuit interests and was founded in 1971 by Tagak Curley.

papers it had commissioned to establish a framework of principles designed to guide Inuit negotiators during the process of developing an agreement with the colonial government. Inuit negotiators, on behalf of their communities, were seeking particular concessions from the state based on what they considered the foundational principles of self-governance. For example, an excerpt of this original proposal paper includes the following passage which highlights some of the concessions the Inuit negotiators desired:

self-determination through creation of territory with its own government, ownership of the land, and involvement in land and wildlife management to support traditional economic practices involving wildlife and harvesting, and protection of the natural environment to create sustainable practices.<sup>152</sup>

The federal negotiators immediately rejected this claim because of a provision requiring the creation of a “public territory” in which Inuit would form the majority of the occupants.<sup>153</sup> In 1977, the ITC presented a modified version of the original claim, which altered the wording of “public territory” to “ethnic territory” and added the caveats that “only Inuit” could exercise political rights, own or manage land in this territory. This was also promptly rejected by the federal negotiators representing the colonial state government.<sup>154</sup>

Ultimately, the Inuit negotiators decided to abandon the “public territory” approach in favor of the land claim itself,<sup>155</sup> and in 1982, a new Inuit political institution was created with the “sole purpose of negotiating the Nunavut land claim.”<sup>156</sup> The Tunngavik Federation of Nunavut, (“TFN”) as it was named, first set out to create a

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<sup>152</sup> “A Proposal for the Settlement of Inuit Lands in the Northwest Territories”, Inuit Tapirisat of Canada, Ottawa 1976.

<sup>153</sup> Francis Lévesque, “Revisiting Inuit Qaujimajatuqangit: Inuit knowledge, culture, language, and values in Nunavut Institutions since 1999” (2014) 381:2 *Études/Inuit/Studies* 115at 117.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

bureaucratic, and institutional framework to allow “some degree of self-governance”<sup>157</sup> over “development and resource management” in the land claims area that would take effect immediately, and during the course of negotiations.<sup>158</sup>

Following this, the governance board of the TFN decided on conducting a general “plebiscite” of all eligible members of their respective communities to determine whether there was an appetite for creating a dual Indigenous/Canadian political entity in the Northwest Territories (“NWT”).<sup>159</sup> A small majority, 56.5% of eligible voters, voted in favour of this basic structure, and was enough for provide the TFN with a mandate to accelerate their formal land claim, and an Agreement-in-Principle between the TFN and the Canadian government of the state was soon concluded.<sup>160</sup> Federal negotiators, however, had only agreed to sign the Agreement-in-Principle if the TFN agreed that, in doing so, several state-side legal obligations were to be considered as satisfied. These included: the understanding that “all land claims [in the north] were considered settled”; the newly created boundaries had consensus “territory-wide”; and that there would be “distribution of responsibilities” between the “territorial, regional, and local” governments.<sup>161</sup>

Following ratification by consensus through another plebiscite in 1992, and a full 17 years after the initial claim by ITC, the *Nunavut Act*,<sup>162</sup> along with a companion piece,

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<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* at 118.

<sup>162</sup> *Nunavut Act*, SC 1993, c 28. [*Nunavut Act*].

the *Nunavut Land Claims Agreement Act*,<sup>163</sup> was signed into law by the colonial governments on June 10, 1993.<sup>164</sup> Ostensibly, these two acts were framed by key principles of both the colonial governments such as good governance, as well as principles of Inuit governance that ensured effective Inuit participation and influence in most aspects of governance of a new public institution of government known as the Government of Nunavut.<sup>165</sup> Finally, this document also provided the legal basis for the fabrication of a plethora of bureaucratic bodies jointly managed by Inuit and colonial governments. These institutions, I suggest, are an important element of CLC regimes, and the extension of the scope of governmental power into Indigenous communities.

From the perspective of the Inuit, this process and its consequences has been framed in mostly ambiguous terms. Their negotiating team succeeded in obtaining inclusion of the founding principles outlined in the 1976 position statement as a core framework for land claim agreement. More specifically, the Inuit collectively obtained rights to harvest wildlife throughout the territory, representation on the various boards and management structures, rights to water access, rights to about 356,000 km<sup>2</sup> of land and some of the subsurface, and in some cases, limited royalty rights to natural resources claimed previously claimed by the state government.<sup>166</sup>

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<sup>163</sup> *Nunavut Land Claims Agreement Act*, SC 1993, c 29. [*Nunavut Land Claims Act*].

<sup>164</sup> *Supra* note 140 at 118.

<sup>165</sup> *Ibid* at 118, 119. See Table 1 in the Agreement at 119 for a complete list of bodies.

<sup>166</sup> *Supra* note 136 at 28. Some research exists that suggests that private enterprises and Indigenous communities have had some success in utilizing the modern framework of land claims to establish mutually beneficial economic arrangements, at least in terms of commitments to respect key demands of the Indigenous groups that occupy the territory. See for example: Bob Weber, "Survey praises Canadian Arctic companies for respecting Indigenous rights", *CBC News* (10 February, 2017) online: <<http://www.cbc.ca/1.3975280>>.

Moreover as mandated by Article 4 of the claim document, Inuit communities also saw an expansion of political rights such as the rights to self-government and the right to self-determination. The Agreement also granted rights designed to ensure Indigenous representation in the governing structures and supporting institutions that managed social, political and economic interests in Canada's newest territory. Additionally, this Agreement included many initiatives designed to promote the self-governing capacities of the Inuit, such as schemes for the devolution of federal government operations in the territories to Inuit territorial government, and the adoption of Inuit "Quajimajatuqangit", or Inuit traditional knowledge, as both a guiding principle and a language of governance.<sup>167</sup>

However, many scholars also criticize the capacities, motivations, and consequences for Indigenous communities who choose this method of land conflict resolution. For example, Campbell, Fenge and Hanson have argue that issues of implementation continue to plague the process,<sup>168</sup> while for Lévesque, a trend of fabricating institutions that reflect their colonial counterparts are common and often penetrate many of the supposedly Indigenous-led institutions.<sup>169</sup> Finally, my own research also confirms that to a significant extent this claim has not produced a more equitable relationship between colonial governments and the Inuit. Articles released by the Aboriginal Persons Television Network ("APTN") and other sources of investigative journalism regularly highlight a constellation of inter-linking, and lingering social

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<sup>167</sup> *Supra* note 136 at 28.

<sup>168</sup> *Supra* note 136. For a specific example, see CBC News "NTI get first mine royalty payment of \$2.2M" *CBC News* (02 May, 2012) online :< <http://www.cbc.ca/news/canada/north/nti-gets-first-mine-royalty-payment-of-2-2m-1.1267622>>.

<sup>169</sup> *Supra* note 140.

problems in post-CLC Indigenous communities, including issues around Indigenous-centric, but colonially managed regimes of health care<sup>170</sup>, and housing<sup>171</sup> in areas covered by the NLCA. These issues have also been exposed or confirmed by review mechanisms built into the fabric of the NLCA regime of governance.<sup>172</sup> Thus, I draw the conclusion that CLCs are about more than preserving a mode of accumulation, or colonial oppression. Instead, I argue that one must look to the regime of governance, and its underpinning governmentality to explain how a state can shift what seems to be significant losses of territory and thus state control over certainty, into an ‘opportunity’ to engage in what I term a modern form of assimilation based on the aforementioned process of governmentalizing land relations. This form of assimilation, based on governmental power, is carried out through the structures, knowledge, practices and supporting institutions that are commonly presented as bedrocks of a CLC, and include post-CLC institutions of governance, for example.

The goal of the state in establishing this particular regime of practices and institutions, in the context of post-CLC institutions, I suggest, is that it allows the government to make it more likely than not that resistive Indigenous social orders will choose to express resistance through the CLC regime. Once Indigenous communities

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<sup>170</sup> For example, see Sarah Frizzell’s “Auditor general finds Nunavut’s support of health-care workers lacking”, CBC News (08 March, 2017) online: <http://www.cbc.ca/news/canada/north/auditor-general-nunavut-health-1.4014529>.

<sup>171</sup> For examples, see CBC News, “New Budget money to address ‘abysmal’ First Nations housing, says CHMC”, CBC News (04 April, 2016) online: <<http://www.cbc.ca/1.3520115>>; see also, Sara Minogue “‘Inadequate and unsafe’ Inuit housing need national fix, say senators”, CBC News (01 March, 2017) online: <<http://www.cbc.ca/1.4004487>>.

<sup>172</sup> See for example, Thomas R Berger’s *Conciliator’s Interim Report* (Report prepared for the Minister of Indian Affairs and Northern Development) (Vancouver: 2005), and Thomas R Berger’s *Conciliator’s Final Report* (Report prepared for the Minister of Indian Affairs and Northern Development) (Vancouver: 2006), online: <<http://www.tunngavik.com/documents/publications/2006-03-01%20Thomas%20Berger%20Final%20Report%20ENG.pdf>>.

agree to the terms of a CLC and accept the inevitable post-CLC institutions, liberal practices of governance, on both macro (community) and micro scales (individual) are either injected into post-CLC Indigenous social orders or existing Indigenous practices are modified to mirror those forms practiced by a settler-colonial government. Thus, they become intelligible to and in line with a colonial liberal governmentality. In this form of land relations, unlike post-Robinson Treaty forms of land relations, and similar to *Proclamation* era forms, the colonial project of assimilation is once again moved into the backdrop, and the underlying colonial violence of practices of assimilation are rendered hidden to both non-Indigenous and Indigenous actors, and most of all, to the judiciary. Consequently, the state can continue to claim that it is upholding its legal obligations with respect to Indigenous peoples, while undermining or shaping practices and institutions of governance within post-CLC communities, a fact that is expanded in the next section.

### **3.4 CLC mandated Institutions**

The creation of liberalizing institutions of governance in post-CLC Indigenous communities is a prominent feature of CLCs.<sup>173</sup> Recalling back to Chapter 1; I argue that these institutions often reflect a Lockean (that is to say – colonial liberal) liberal governmentality. This section of Chapter 3 builds on Foucault’s genealogy of government, and Euro-liberal forms of governance to show that CLCs expand, refine and/or create new visibility-producing elements carried over from the rudimentary system

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<sup>173</sup> For example, we see that the NLCA mandates no fewer than eight major institutions. See Government of Canada & the Tunngavik, *Agreement between the Inuit of The Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, (1993). In particular, see Articles 5, 10, 11, 12, 13, 31, 32, 37, 38, and 39, all of which contain clauses that create, characterize and delineate power to institutions.

of knowledge production evident in the practices of post-Robinson Treaties land relations in post-CLC Indigenous communities. Over time, this process has allowed the state to reconfigure its colonial perception of Indigenous peoples and communities, in order to develop Indigenous communities as an approximation of an object (population) of government similar to the liberalized, settler population. Consequently, in a post-CLC regime, the government of the state is seen to restore territory to Indigenous peoples as a judicially imposed remedy to past injustices, but, in doing so, also lays the framework for an expansion of the potential fields of governmental intervention by arranging or cutting up post-CLC Indigenous social orders and regimes of governance at both the macro and micro scale to reflect the settler-colonial equivalent.

The first section of analysis demonstrates how these institutions and practices work to establish a condition of Foucauldian visibility among the post-CLC communities. By visibility, I invoke Dean's characterization of Foucault's pre-condition of establishing an economic government of the state through a process of governmentalization. In this case, this involves the creation of CLC mandated institutions (and practices) to arrange the social, political and economic order in post-CLC communities in a way that allows a government of the state to gather information about the community at different scales, from the aggregate of a population, to the individual, and subsequently transmit key colonial-liberal governmentalities into the fabric of Indigenous social orders. Thus, I argue that the CLC regime carries out a project of assimilation through governmental power. This could allow the state to intervene in a post-CLC Indigenous community

through exercise of governmental power, rather than overtly sovereign, top-down interventions involving the state security apparatus, such as residential schooling.<sup>174</sup>

This is primarily because these post-CLC institutions create, establish or modify practices that transmit liberalizing modes of knowledge/power, as Foucault might say, downward into Indigenous communities, while simultaneously ensuring compliance with juridically imposed responsibilities and obligations. Through this process, which I suggest is the end-result of a process of governmentalization of land relations; Indigenous communities can be ‘opened up’ for assimilation. This process is thus similar to the way their traditional lands were “opened up” for settlement and railroad construction in the era of the Robinson and Numbered Treaties. Yet in this case, this version of the project is focused on aligning the body and mind of the Indigenous actor with liberal modes of governance, culture, and most importantly, liberal modes of agency and self-determination described in Chapter 1. This ultimately furthers the colonial project by producing a new aggregate that constitutes an object of governance similar to a population, in that it becomes the object of governance complete with all the constitutive social phenomena associated with a Foucauldian conceptualization of population. And moreover, it establishes a second, less overtly violent or objectionable means of fabricating a condition of relative certainty for the state through a form of land relations that is, in effect, a process of assimilation rather than dispossession.

Turning to the case study, it is clear that institutions play a significant role in both pre and post-CLC stages and at both the macro and micro levels scales. At the macro

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<sup>174</sup> David Scott’s “Colonial Governmentality” (1995) 43 *Social Text* 191 is useful here because his research outlines this process in the context of India, and he establishes that, to borrow from Trevelyan, the state must “set the natives on a process of European improvement, to which they are already sufficiently inclined. They will then cease to desire and aim at independence *on the old Indian footing*” at 215.

scale, the most important central institution is known originally as the Tunngavik Federation of Nunavut and currently known as Nunavut Tunngavik Incorporated. It was established with a mandate to govern the pre and post-CLC needs of the affected Indigenous communities. This institution led the initial negotiations on behalf of the Inuit communities, and following ratification, worked to ensure the delivery and implementation of the terms of the NLCA. In terms of power and responsibility, NTI is on par with a second, but equally significant economic institution called Nunavut Trust, created to manage the funds delegated through the NLCA and mandated to receive and manage any transferred lands, and capital, on behalf of the community.<sup>175</sup> In the post-CLC regime, these institutions, therefore, represent the primary Indigenous-side governing bodies charged with managing the Inuit, and their resources, as well as ensuring compliance from the government of the state following ratification of negotiations, and the eventual legislative companion documents.

Organizationally, the NTI comprises five main departments: Executive Services, Corporate Services, Implementation, Social and Cultural Development, and Wildlife and Environment, and each of these main departments are composed of smaller units such as boards, associations, or committees.<sup>176</sup> Additionally, aside from the NTI and Nunavut Trust, the NLCA mandates the creation of a “Public Government” and supporting institutions, which work in tandem with the NTI to govern the settlement area. These institutions include: the Nunavut Impact Review Board, Nunavut Planning Commission, Nunavut Water Board, Nunavut Wildlife Management Board, and the Nunavut Marine

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<sup>175</sup> *Supra* note 140 at 118.

<sup>176</sup> *Ibid.*

Council.<sup>177</sup> These public institutions include ones specific to Nunavut, such as the Nunavut Impact Review Board, Nunavut Planning Commission, Nunavut Water Board, Nunavut Wildlife Management Board, and the Nunavut Marine Council, in addition to those commonly found in other provinces including institutions of health, taxation, and education, for example.<sup>178</sup>

Pre-existing research, coupled with research presented in this thesis suggests that when it comes to praxis, this attempt at a plural approach to governance generally follows the letter of the law but is, nonetheless, of questionable value for Indigenous communities. I argue that this is a function of imported underpinning governmentalities and the unequal networks of power despite the presence of the NTI and its mandate. For example, Lévesque claims that, through his research on the day-to-day operation of the plural modality of governance, a tension is evident between the NTI-based institutions and those that fall under the umbrella of public government,<sup>179</sup> a conclusion supported by additional research conducted by Tester and Irniq. For example, they suggest that NTI institutions tended to view their role as creating and implementing practices that incorporate traditional and modern Inuit values into the actions of government, while public government institutions tended to create practices that mirrored “the bureaucratic structures” of the former Northwest Territories. This has led Lévesque to suggest that these public institutions fabricate internal modes of order constituted by “formal hierarchies”, and “fixed rules” that “employed people” based on “technical skills”<sup>180</sup>

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<sup>177</sup> *Supra* note 140 at 118 – 119, see also Peter James Tester & Peter Irniq’s “Inuit Qaujimagatunqangit: Social History, Politics and the Practice of Resistance” (2008) 61:1 Arctic 48 at 57.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Supra* note 140 at 122.

<sup>180</sup> *Ibid* at 127.

which reflect what Peter J. Tester and Peter Irniq call a “Euro-Canadian” form of governance.<sup>181</sup>

Furthermore, Lévesque argues that NTI institutions and practices are informed by a mentality based on traditional modes of Inuit leadership that includes a strong emphasis on the role of social bonds, and that different leaders emerge in different situations, drastically different from the from the fixed, and merit based public institutions that dominated the post-CLC landscape.<sup>182</sup> Lévesque, Tester and Irniq rightly conclude that the differentiation in institutional mentalities has effectively created a situation where Inuit-led regimes of governance are subsumed by their public counterparts. Thus, to borrow from Lévesque, Inuit governance practices and institutions are fundamentally “limited by the forms of bureaucracy” native to governments of the state underpinned by colonial liberal governmentality.<sup>183</sup>

Additionally, Lévesque suggests that even those forms of leadership or governance informed by Inuit modalities present within this plural governmental institution are, effectively and significantly, modified to fit the “mould” of the public institutions of governance, such that these positions of leadership lose the very characteristics that would have signaled them as representing the traditional modalities of Inuit culture. Thus, although Inuit values can be incorporated into the actions of government in Nunavut, they must do so by devaluing their meaning to be “broad enough

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<sup>181</sup> Peter James Tester & Peter Irniq’s “Inuit Qaujimagatuqangit: Social History, Politics and the Practice of Resistance” (2008) 61:1 Arctic 48 at 57.

<sup>182</sup> *Supra* note 167.

<sup>183</sup> *Ibid.*

that they also make sense” within the broader institutions of public governance in Nunavut.<sup>184</sup>

One significant example of this positioning of public, and thus, colonial modes of governance as the overarching and decisive form of governance in the North is evidenced in how Inuit values are incorporated in the context of resource management. The Inuit concept of “*Papattiniq*” informs Inuit understandings of the relationship between person and animal. It teaches that nature is not a commodity to be extracted and commoditized.<sup>185</sup> This principle, which clearly conflicts with a western, extractive mode of economy is one example of Inuit-led forms of governance that is incorporated or, at least, tolerated by the colonial governments. According to Tester and Irniq, the reason it is tolerated or incorporated is because the Inuit actually follow this principle, and thus the government of the state often considers their actual economic practices to be a form of peripheral economic activity. Thus, this principle of Inuit governance does not affect or alter the economic logics of a colonial liberal governmentality because it does not upset the ability of the government of the state to maintain economic certainty. Governments of the state are therefore amenable to allowing traditional Inuit practices such as these, despite the governmentalities of colonialism, because the scale of this form of authentic Inuit economic activity has a negligible effect on the ability of the State to exploit these resources.<sup>186</sup> Thus, the institutions of the NTI and public government appear to interact in a manner consistent with the unequal networks of power that is on display throughout the

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<sup>184</sup> *Supra* note 162.

<sup>185</sup> *Supra* note 168 at 51.

<sup>186</sup> *Ibid.* Here Tester and Irniq provide the example of Inuit hunting and note that if carried out within the framework of governance native to the Inuit, this activity would be on “the periphery of modern industrial activity.”

Indigenous/colonial relationship. For example, the colonial underpinnings are evident, in the interplay between these two institutions in which Inuit forms of governance are consistently devalued, or allowed if they do not create forms of uncertainty for the state government, and lack methods of resolving dominative tactics used by the state. Building on the conclusions of the previous section, it is also clear that in a post-CLC regime, liberal governmentalities inform and frame the inclusion of plural form of governance. For example, this is evident in the series of regimes of practices that produce a range of knowledge about the Indigenous body, individual and community such as those related to health, education, and labor. This has the effect of replacing or fabricating a myriad of life practices, such as a merit based hiring system, which introduce or modify existing forms of disciplinary power and mirror those of the colonial, disciplinary society.

As Foucault suggests, these public institutions, therefore, facilitate the process of expanding governmental visibility, establishing networks of transmission that are receptive to the uptake of bio-information from the Indigenous population, and allow the state government to begin to or continue the process of cutting up daily life to create points of intervention through governmental power. Thus, by using the CLC as a means of injecting a liberal mode of governance, the state can mimic the process already at play within the broader settler-colonial population, expanding the available fields for governmental intervention, and shaping through governmentalities, the lives and orders of Indigenous communities, leaders, and actors.

I suggest that post-CLC institutions of governance represent a technical means to fabricate the condition of Foucauldian visibility within post-CLC Indigenous communities, and thus allow the colonial government to re-frame post-CLC communities

as a population. Recalling the historical analysis in Chapter 2, it has been demonstrated that prior to the CLC regime, the government of the state had limited access to knowledge producing institutions and practices in and around Indigenous communities and actors. Thus, until this modern era of land relations there has never been any stateside motivation to develop any nation building projects or institutions in Indigenous communities. This was primarily because Indigenous resistance was either to be encouraged and directed against colonial rivals or assumed to be a temporally fixed variable as the colonial project worked to fully assimilate Indigenous communities and thus end the “problem of the Indian.”

This theme of establishing specific institutions of knowledge production targeting specific problems of government is also reflected, for example, in the body of literature around Indigenous policing arrangements in Canada. Research by Nicholas Jones and Rick Ruddell suggest that many early colonial policing arrangements targeting Indigenous groups lacked knowledge-production practices typically found in similar policing arrangements targeting settler populations.<sup>187</sup> This fact suggests that Indigenous criminality and crime prevention regimes were limited to reactionary regimes designed to discipline Indigenous actors only if their actions targeted colonized spaces, populations, or interfered with the ability of the government to exploit Indigenous land. This practice of reactively and narrowly construing the scale of visibility needed to govern Indigenous communities is also reflected in the case of early census taking evident in the Robinson

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<sup>187</sup> For example, this indicates that knowledge producing institutions that target Aboriginal communities have not produced the same level of information that is seen with the other groups of social relationships. See for example, Nicholas Jones & Rick Ruddell, Rob Nestor, Katilan Quinn, Breanna Phillips. (2014) “*First Nations Policing: A Review of the Literature.*” Collaborative Center for Justice and Safety, Regina: University of Regina.

Treaties and the policies of resource management that were directed at the Inuit communities during the 19<sup>th</sup> Century in what is now Nunavut. These cases, I suggest, demonstrate visibility in the pre-CLC regime was fundamentally different from a condition of Foucauldian visibility because these forms of knowledge production were isolated, and relative to specific governmental goals. For example, census taking during the Robinson treaties was evidently more about leveraging information to ensure bargaining power of the British, as it established a firm count of Indigenous occupants in order to allow the British to limit annuity payments tied into headcounts.

In other words, the scope of these earlier approaches to knowledge production lacked the underlying implication that knowledge generated by these regimes would then be used to establish rational regimes of governance evident in modern land claims. Instead, these examples suggest that government of the state at the time had little interest in using forms of bio-power to attempt to discipline Indigenous communities as they would with the settler-colonial population.

Thus, prior to the modern era of CLCs, the scope of colonial visibility in Indigenous communities was limited to specific and narrowly defined sets of problems, more in line with ensuring a colonial economic order, and nothing to do with disciplining a population to achieve a particular end. This form of visibility was never meant to possess the multi-directional transmission capacities of Foucault's apparatus of government. Instead, it appears that the goal was to establish a uni-directional transmission of knowledge, with limited forms of knowledge being channeled upward to agents of the state, established for specific purposes such as land negotiations or law and order. However, as previously noted, previous colonial governments have not attempted

to improve the narrow application of the technical means of producing visibility among Indigenous communities because an expansion of the scope of Indigenous visibility produces a tension within the logics of colonialism. Recalling Chapter 1, it has been widely suggested that colonial mentalities establish Indigenous groups as “sub-state” groups, or group that exist within the “territorial and jurisdictional” boundaries of the settler state.<sup>188</sup> Previously, this has meant that the technical mechanisms of producing visibility within these communities was limited to specific incidents, such as when Indigenous actions contravene the government’s ability to exploit their relative value based on land, labor or resources over which they may claim ownership.<sup>189</sup> To re-frame it in governmentality terms, previous governments have situated Indigenous communities as outside the ambit of the primary object of governance — the population — and thus, were limited in the types of power that could be deploy against incidents of Indigenous resistance.<sup>190</sup>

This also suggests that the governmental desire to carefully conduct conduct of Indigenous actors through liberal modes of governance — that is, through bio power and a subtle push to embody key statuses or capacities — that characterize the governed in the settler populations is a modern phenomenon derived from a specific configuration of history, knowledge, power relations and practices of government. From the perspective of the modern colonial government, the relationship with Indigenous communities has changed significantly from the earlier forms of land relations. In particular, the state

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<sup>188</sup> *Supra* note 9 and 16.

<sup>189</sup> *Supra* note 65 at 40.

<sup>190</sup> To clarify, this does not mean that colonial government has not established regimes of governance over Indigenous actors and communities, only that such regimes have typically been limited in scope, essentially unilateral in the transmission of knowledge, and characterized by violent, and direct forms of corrective intervention by the apparatuses of government.

government has seen a narrowing of the scope of its power relative to Indigenous actors and communities. To combat this imposed narrowing of power, the government of the state used CLCs to open up new modes of governmental intervention that comply with the modern framework of land relations in Canada. In recognition of this transition, I suggest, the government has developed a host of techniques, including the CLC regime. In this case, this regime of governance uses the necessary requirement of liberalized institutions of governance to expand the conditions of visibility in Indigenous communities. Thus, in post-CLC communities, visibility moves from a mode framed in specific and relative terms, such as resource management, or keeping colonial spaces free of Indigenous crime, to one that mimics the Foucauldian understanding of visibility, which is to say, a scalable means to receive and transmit knowledge in order to conduct the conduct of an aggregate of individuals.

CLCs, however, act as multi-directional transmitters of knowledge/power. Thus, the government of the state can fabricate or re-align the totality of an Indigenous social group as an approximation of the object of governance known as a population, and thus render them as governable datum, similar to the aggregate of the settler population. However, unlike Foucault, Dean and Gordon's notion of 'population', this conceptualization of Indigenous communities and actors as a population must respect that a colonial modality of governance characterizes traditional Indigenous notions of subjectivity, governance, self-determination and culture as incompatible with their colonial counterparts. The natural conclusion of the colonial project is the absence of

Indigeneity.<sup>191</sup> Given that the state is no longer able to exercise unchecked power to maintain domination over the conditions of land relations, and since the extinguishment of Indigeneity in Canada suggests either genocide or complete assimilation, the government of the state must be content with a process that favors assimilation. Thus, for a modern colonial government of the state looking to establish certainty, and ensure its privileged power networks in perpetuity within land relations with Indigenous groups, the most obvious path of least resistance is one that, to borrow from David Scott's work of colonial governmentalities, establishes a process that fabricates and embeds "institutions so that, following only their own self-interest, natives would do what they ought [to do]." <sup>192</sup> And, that is precisely what the CLC regime sets out to accomplish.

In this case, getting the "natives to do what they ought [to do]", includes setting up networks of power relations to conduct conduct through both sovereign notions of security, such as policing and the military, but also through disciplinary governance regimes in the bio-power register, or as Foucault would call it, establishing a system that combines all three elements and forms the basis for governmental power.<sup>193</sup>

However, in the case of colonial government, this process cannot be a seamless one, and is subject to many outside forces that Foucault and other governmentality scholars could not have foreseen, based on the inherent devaluation of Indigeneity that corresponds with a colonial liberal governmentality. This is demonstrated in the NLCA example in which Inuit forms of governance are present, but are restricted to regimes of

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<sup>191</sup> *Supra* note 65. In particular, see Chapter 1 for a great overview of related literature, or refer to note 344 generally.

<sup>192</sup> David Scott "Colonial Governmentality" (1995) 43 *Social Text* 191 at 214.

<sup>193</sup> *Supra* note 8 at 102, 103.

governance that would not significantly impact extraction and exploration of key resources or the production and transmission of knowledge.

I suggest that the net effect of these institutions, and the apparatus of governance necessitated by CLCs, serve the vast and complex networks of disciplinary practices that mirror those found embedded in the general ensemble of population in Canada, and reflect a more liberal orientation, but because of the colonial influence, can never be fully realized outside of complete assimilation by Indigenous actors, leaders and communities. In other words, the creation, composition and characteristics of the institutions in CLCs demonstrate a significant capacity to shape emergent practices and the regimes of governance they constitute within the framework of a liberal governmentality, but sufficiently narrow in scope that the colonial networks of power are maintained.

The only reasonable conclusion is that in its present form, the current mode of land relations and the instrument of land claims that frame it, is still uneven. The underlying power relations still favor the government of the state. This challenges the notion that CLCs can act as a form of obtaining justice, and questions the value of this form of land relations.

#### **4 Chapter: Moving forward - the Algonquin Land Claim**

This chapter moves the discussion to an analysis of as-of-yet uncompleted Algonquin land claim. In this chapter, I outline a second land claim known as the

Algonquin Land Claim.<sup>194</sup> I offer a basic introductory analysis of this claim. Moreover, I build the argument that based on analysis of the current AIP, the outcome of the claim will likely reflect the thesis of analysis – that liberalizing institutions of governance will make up the bulk of post-CLC governance institutions in the Algonquin communities involved in the claim, thus providing the state government with chance to continue a modern, colonial liberal form of assimilation.

#### **4.1 Land Relations between the Algonquian/Algonquin and Colonial**

##### **Governments: A brief history**

Unlike the Inuit case study, the web of interlinking relationships between colonial iterations of government and the Algonquian peoples has a relatively long, well-documented, and complex history.<sup>195</sup> This relationship, according to research by Daniel Clément, began with the arrival of Samuel de Champlain in the Ottawa River system — what the Indigenous peoples called “Kiji Sibi” — located in what is now Ontario and Québec in 1603.<sup>196</sup> During subsequent explorations, Champlain’s party encountered a

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<sup>194</sup> For critical analysis of the Algonquin AIP, see Lynn Gehl’s “Why I’m hoping the Algonquin Land Claim Proposal is Voted Down”, *Ricochet* (2016), online: <<https://ricochet.media/en/970/why-im-hoping-the-algonquin-land-claim-proposal-is-voted-down>>. See also Lynn Gehl’s *The Rebuilding of a Nation: A Grassroots Analysis of the Aboriginal Nation-Building Process in Canada*, online: <[http://www3.brandonu.ca/library/cjns/23.1/cjnsv23no1\\_pg57-82.pdf](http://www3.brandonu.ca/library/cjns/23.1/cjnsv23no1_pg57-82.pdf)> and “The Contemporary Land Claims and Self-Government Process Should be More Than the Crown Offloading Fiduciary Responsibility at Minimal Cost” Trent University, Accessed Online: <[http://ottawaalgonquins.com/index\\_files/economic%20development.pdf](http://ottawaalgonquins.com/index_files/economic%20development.pdf)>.

<sup>195</sup> For clarification, this analysis deploys the term Algonquin most often in the *colonial* sense of the word. This definition captures the groups that are involved in the CLC. These include that include the federally recognized Algonquin bands in Ontario such as the Algonquins of Pikwakanagan First Nation, or the Algonquin of Golden Lake, as well as the non-status Algonquin Anishinaabeg. This understanding does not always reflect the Indigenous understanding of what Algonquin or “Anichinabe” means, and this point will be explicated later in this section. For operational clarity, the term Algonquin, unless otherwise specified refers to the Algonquin peoples as a nation which is divided by colonial, legal and geographic jurisdictions.

<sup>196</sup> See Daniel Clément’s “Introduction” in *The Algonquins*, Eds Daniel Clément (Hull: Canadian Museum of Civilization, 1993, 1-5) at 1. For an introduction to Indigenous understandings of the Algonquin, and the

multitude of seemingly disparate Indigenous groups and communities that occupied significant territories within the Ottawa River system. At the time, Champlain and his party thought these groups comprised a singular nation composed of small and relatively unsophisticated hunter-gatherer bands. This conclusion was based on observations about shared customs, such as how these groups painted “themselves red”<sup>197</sup>, and that they were thought to share a similar language.<sup>198</sup> This was, as Bonita Lawrence explains, true in a sense; there were many distinct communities within the area that constitutes the Ottawa River system, loosely joined together as part of a broader social order called the “Algonquian” peoples.<sup>199</sup> According to Clement, this supra-social unit was characterized by similar ethno-linguistic characteristics, and his research confirms that this grouping traditionally occupied significant and geographically diverse tracts of land across North America.<sup>200</sup> Therefore, the archeological record tends to confirm Lawrence’s claim that the Algonquian nation, at the time of Champlain’s arrival, represented a polity that wielded considerable economic, social and military power over an area that stretched well beyond the Ottawa River valley, exerting influence over territories that stretched across North America and reaching the Gulf of Mexico.<sup>201</sup> Returning to the colonial understanding of Algonquin, Clement suggests that the term “Algonquin”, as understood by the colonial government represented a means of identifying the Indigenous inhabitants

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Algonquin AIP see Greg Sarazin’s, “220 Years of Broken Promises” in *Drum Beat: Anger and Renewal in Indian Country*.” Eds Boyce Richardson (Toronto: Summerhill Press Ltd, 1989). For a modern perspective, see Algonquins of Pikwakanaga, “The Algonquin Land Claim” (Fact Sheet), online: <[http://www.algonquinsofpikwakanagan.com/chief\\_council\\_land\\_claim.php](http://www.algonquinsofpikwakanagan.com/chief_council_land_claim.php)>.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> Bonita Lawrence, *Fractured Homelands: Federal Recognition and Algonquin Identity in Ontario* (Vancouver: University of British Columbia Press, 2012) at 24 – 25.

<sup>200</sup> *Supra* note 183.

<sup>201</sup> *Supra* note 184.

of the Ottawa River watershed, was coined sometime in the 17<sup>th</sup> Century and continues to inform governmental actions to the present day.<sup>202</sup> Following the initial encounter with Champlain, this set of social relations (colonial government/Algonquin nation) closely follows the broader core history of land relations outlined in Chapter 2. Land relations between the two groups exhibit the same patterns of influence based on a shifting, uneasy underlying colonial liberal governmentality. These include the gradual erosion of the practices of friendship treaties, and the dominance of formal treaty rights that completed the transformation of Indigenous sovereign rights into colonial legal rights, and ultimately provided the basis for the current governmentalized nature of land relations.

There is one notable exception, however, to this similarity in the history of land relations: the Algonquin people and communities never signed any treaty during the regime of informal, and later, formal treaty negotiations that took place during the 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> Centuries. For their part, Algonquin communities and their negotiators created and sent petition after petition to British authorities, only to have them ignored, summarily dismissed, or in one case that Lawrence highlights, “flatly” refused through an order issued by the colonial government of Upper Canada.<sup>203</sup> Thus, a regime of colonial dispossession targeting Algonquin peoples in the Ottawa River system was carried out without Algonquin consent, and in the absence of a treaty. This fact is even more problematic in light of the negotiations outlined in Chapter 2, including the Robinson Treaties, were carried out in and around what is traditionally considered to be Algonquin territory. Despite this, the colonial governments nonetheless concluded that Algonquin

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<sup>202</sup> *Supra* note 185.

<sup>203</sup> *Supra* note 184 at 36 – 39.

communities in Ontario, especially those in the Ottawa River watershed, had extinguished their title at some point in the 19<sup>th</sup> Century and began to act accordingly.

Moreover, Algonquin forms of resistance were weakened by a long-term consequence of this deceptive technique of conflating the territories of the Algonquin with other First Nations. For example, the earlier denials of Algonquin Aboriginal Title by the colonial government meant that contemporary members of the Golden Lake Algonquin community were classified by modern colonial governments as “remnants of itinerant bands who had no treaty rights at all” and thus saw their earliest petitions dismissed outright.<sup>204</sup> The colonial government thus invested considerable time into establishing a false narrative of Algonquin title extinguishment over the course of the 19<sup>th</sup> Century, working to distort the networks of power in its favor. These actions were rationalized based on a mixture of colonial and liberal governmentalities and had both short-term and long-term consequences for both parties. Notwithstanding this narrative, the colonial governments were, nonetheless, forced to the negotiation table in the late 90s.

## **4.2 The AIP**

From the point of view of the colonial government the Algonquin claim is based on a position articulated both in the AIP and on a government fact sheet. Both these documents note: “The Algonquin of Ontario assert that they have Aboriginal rights and title that have never been extinguished, and have continuing ownership of the Ontario portions of the Ottawa and Mattawa River watersheds and their natural resources. The

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<sup>204</sup> *Ibid* at 36.

boundaries of the claim are based largely on the watershed, which was historically used and occupied by the Algonquin people”<sup>205</sup> and “if successful, the negotiations will produce the province’s first modern-day constitutionally protected treaty.”<sup>206</sup>

For the Algonquin peoples, however, the claim is the logical consequence of the (re)discovery of the 1857 petition that established that the Algonquin had grounds to press their claims. Thus, representatives of the Algonquin community drafted an updated version of the original petition and sent it to the Federal government in 1983.<sup>207</sup> This petition outlined multiple outstanding issues around the land claims themselves, but also around how colonial governments had carried out land-use and land management regimes that within Algonquin communities and territories since at least 1857.<sup>208</sup> For example, it confirms that past and present governments had violated land relations principles governing land relations by purchasing or appropriating land from “Indians who never lived on them and claimed no title to them,” a clear violation of the doctrine of Aboriginal Title.<sup>209</sup> Additionally, it outlined at least twenty-three different petitions that had been presented up until that point, of which, none had been developed.<sup>210</sup> Despite this, the negotiators representing Indigenous communities encountered significant resistance from all levels of colonial governments.

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<sup>205</sup> Government of Ontario, *The Algonquin Land Claim*, (Fact Sheet), online:<  
<http://www.ontario.ca/page/algonquin-land-claim>>.

<sup>206</sup> *Ibid.*

<sup>207</sup> Lynn Gehl, *the truth that wampum tells: my debwewin on the Algonquin land claims process* (Black Point: Fernwood Publishing, 2014) at 15.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Supra* note 184 at 86.

A comparison of the two case studies presented in this thesis suggests some basic similarities, and a few crucial differences. For example, both cases are examples of a complex CLC negotiated between colonial governments and Indigenous communities. Additionally, the form and process the claim takes is similar to the NLCA. The current version of the Algonquin AIP is a 197-page document composed of 16 Chapters, Appendices, Maps, and 15 schedules that, like the NLCA, deal with Algonquin social, cultural, economic and political development.

Additionally, like the Nunavut claim, it also outlines the legal framework for the processes, terms and conditions of land restoration to a selection of Algonquin peoples. Finally, during this process, and similar to the NLCA, delays by government representatives were common. The contemporary CLC policy in place at the time indicated that land claim petitioners would receive a response to the first steps of a land claim within one year, but it was not until the Algonquin community began to engage in open protest and resistance in the late 1980s, notably outside Algonquin Provincial Park in the fall of 1988, that the Government finally responded.<sup>211</sup> That winter, in a meeting at the Golden Lake First Nations community, and five years after the initial petition, the federal and provincial governments promised a substantive response to the land claim petition of 1983 by January 1989.<sup>212</sup> In addition, Algonquin representatives were instructed to begin a formal land claim application, such as preparing a “Land Use Report.”<sup>213</sup> Finally, the province also agreed to establish formalized interim measures to

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<sup>211</sup> *Supra* note 192 at 17.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

address some of the more pressing outstanding issues through an “interim agreement.”<sup>214</sup> The Algonquin representatives submitted the Land Use Report on April 25, 1989, which was immediately returned to the band with a request for more information.<sup>215</sup> Along with this request, the federal government indicated that it would not pursue this land claim because it was “likely to be rejected” at the preliminary stages of the CLC regime.<sup>216</sup> Around the same time, and in response to the decision of the CLC branch, the provincial government also declined to participate without the involvement of the federal government.<sup>217</sup>

For reasons that remain unclear, however, both levels of government would subsequently reverse this position. In 1991, the provincial government declared that it would commit to negotiations, as did the federal representatives in 1992.<sup>218</sup> According to Gehl, who cites a Negotiation Bulletin prepared by the then Ontario Native Affairs Secretariat, the provincial government was only willing to agree to this arrangement if it meant that Ontario did not have to admit to any “legal liability.”<sup>219</sup> Finally, in 1994, a “negotiation framework” was established, and subsequently signed by the Federal, Provincial, and Algonquin representatives.

This early framework was based around four negotiation principles that closely mirror those of the Nunavut land claim: the restoration of an adequate land base unfairly

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* at 18.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.* Gehl provides no elaboration on what the Province may have been liable for, but Gehl does make the argument that many transgressions, including the sale of land in bad faith, had been typical as far back as the first recorded petition by the Algonquin communities in 1774 into the early 1990’s. It is implied that these represent the potential sources of liability, as these would have been in violation of the tenets of the various incarnations of land claim based laws beginning with the *Royal Proclamation*.

acquired through dispossession, access to natural resources such as traditional hunting ground, recognition of inherent rights of Indigenous peoples, such as self-government, and fair compensation for usage of land that was traditionally considered to be Algonquin territory.<sup>220</sup> In concrete terms, the current AIP establishes provisions for the return of “approximately but not less than one hundred and seventeen thousand, five hundred (117,500) acres, as Settlement Lands”<sup>221</sup> along with a one-time payment, and rights like those found in the Nunavut claim. In exchange, the Algonquin communities agree to the acceptance of a package of “modified” Aboriginal rights and Aboriginal Title, and dissolve all other potential “claims, demands, actions or proceeding or whatever kind” against “Canada, Ontario and all other Persons.”<sup>222</sup>

The crucial differences are captured by the claims that negotiations were more extensive and involved because it was between the federal, provincial government of Ontario, affected municipal governments,<sup>223</sup> the Algonquin Anishinaabe First Nation, and affected third-party interests.<sup>224</sup> For example, according to the Government of Ontario, the Algonquin land claim “covers a territory of 36,000 square kilometers in eastern Ontario that is populated by more than 1.2 million people”<sup>225</sup> and includes parts of

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<sup>220</sup> *Supra* note 184 at 87.

<sup>221</sup> Government of Canada, Government of Ontario & the Algonquins of Ontario, *Proposed Agreement-In-Principle*, (2015), online: <http://www.ontario.ca/document/algonquins-ontario-proposed-agreement-principle>, online <[http://www.tanakiwin.com/wp-system/uploads/2016/10/PASSWORD-PROTECTED\\_ENGLISH-AIP\\_WITH-SIGNATURES\\_OCT-26-2016.pdf](http://www.tanakiwin.com/wp-system/uploads/2016/10/PASSWORD-PROTECTED_ENGLISH-AIP_WITH-SIGNATURES_OCT-26-2016.pdf)> or <[https://files.ontario.ca/algonquins\\_of\\_ontario\\_agreement\\_in\\_principle.pdf](https://files.ontario.ca/algonquins_of_ontario_agreement_in_principle.pdf)>.

<sup>222</sup> *Ibid.*

<sup>223</sup> Affected municipalities include Renfrew, Bancroft, Arnprior and others. Please see appendix for a map of all affected municipalities.

<sup>224</sup> All private property that is not covered under other forms of ownership. This includes most commercial industries, and non-profit, for example.

<sup>225</sup> *Supra* note 190.

Algonquin Provincial Park and Parliament Hill.<sup>226</sup> These conditions of multiple parties with interest and the high levels of privately owned land, are in stark contrast to the previously examined NLCA.<sup>227</sup> Moreover, it differs from the NLCA in that the requirement to extinguish of Aboriginal Title is replaced with the requirement of Title modification.<sup>228</sup>

The development and formalization of this claim, within the framework of the CLC, effectively signaled the beginning of a process that would span at least 23 years, suffer questions of legitimacy, provoke significant in-fighting among the Algonquin themselves, as well as with non-status “self-identifying” Algonquin, half-blood Algonquin, Métis peoples and other Algonquin communities.<sup>229</sup> Despite these issues, a Draft agreement was established in 2012, which served as the basis for an as-yet-unsigned AIP in May of 2015.<sup>230</sup> Similar to the Nunavut process, ratification votes were carried out among eligible members of the Algonquian Nation to determine the communities’ acceptance of the terms of the AIP in the early months of 2016. On October 18, 2016, the AIP was declared ratified as result of a positive vote, and was signed by both Indigenous and governmental negotiators, clearing the way for negotiations towards a final document and the subsequent legislation that will formalize

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<sup>226</sup> *Supra* note 192 at 18.

<sup>227</sup> *Ibid.* Gehl, for example, cites a 1992 report by the now-defunct Ontario Native Affairs Secretariat (“ONAS”) noting that the area under consideration was a composed of: “59 percent privately held patented land;” “16 percent” public land held by Ontario, or owned by provincial Crown corporations; and only “4 percent” federally owned land; and that the remaining “21 percent” was located within the confines of Algonquin Park.

<sup>228</sup> I suggest that this an institutional change brought about by persistent forms of Indigenous resistance during 21<sup>st</sup> Century. The actual effect of this shift in language, however, is more reflective of a difference in the social and political landscapes, rather than any meaningful acknowledgment of Indigenous sovereignty.

<sup>229</sup> See note 184 at 76 – 86, see also note 192 at Chapters 2, and 3.

<sup>230</sup> *Supra* note 206.

its contents and terms.<sup>231</sup> At the time of writing in early 2018, 246 years since the first land claim petition by the Algonquin community and 24 years since the negotiation framework was established, this land claim remains in progress. According to the most current government news releases, it is anticipated that the final stage relating to the implementation of the legislation will take an additional 10 years or more to complete.<sup>232</sup>

This case is useful because it acts as a test for the theoretical and conceptual claims of this thesis. This is primarily because it is still in progress. Based on the previous case study, I argue that it is more likely than not that the outcome of this CLC will include liberalizing institutions. Thus, I can make the prediction that, like the NLCA, liberalizing institutions and a liberal mode of governance will be injected into the (mostly colonially governed) First Nations communities involved in these negotiations. Through this, the state government can begin, or advance the fabrication of colonial liberal governmentality that will come to dominate the lives of Indigenous peoples. For example, consider that, in the current stage, while the Algonquin AIP has only one chapter dedicated to post-CLC Algonquin governance institutions, the finalized NLCA has approximately ten chapters. Additionally, although this AIP Chapter is composed of only seven points that include broad goals such as transparency, accountability, and equitably, consider that the NLCA started with little more than one page of guidelines submitted to the then Minister of Supply. In other words, I suggest that this Chapter, nonetheless, represents a basic outline of the form and modes of governance to be embedded in the post-CLC institutions. Moreover, and despite this relatively underdeveloped section, I

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<sup>231</sup> *Ibid.*

<sup>232</sup> See fact sheet – online at < <https://foca.on.ca/wp-content/uploads/2015/06/AlgonquinNegotiationsOct2016.pdf> >.

argue that two sub-clauses, included in this chapter, support my prediction. For example, one sub-clause requires that *all* institutions (of governance) created through this agreement are required to maintain a “public register”, and that the state government cannot be liable for the failure or lack of compliance with the basic principles guiding negotiations.<sup>233</sup> I argue that these clauses, along with a historical precedent of first establishing relatively underdeveloped regimes and slowly expanding them over time, represent a sort-of placeholder for a more complex, and “Euro-Canadian” system of governance that will eventually replace Chapter 7 in the final agreement, and companion legislation. Thus, as noted by Chamberlain, Indigenous communities engaged in negotiations, even those that appear to address historical injustices, continue to be “outmaneuvered.”

#### **4.3 Conclusion: Moving Forward with CLCs**

In preceding chapters, I have demonstrated that CLCs, from the perspective of a government of the state, represent a rationally derived policy response to a problem of government originating in the uncertainty produced by challenges to colonial notions of government, governance, and social orders by Indigenous communities. Typically, these challenges result from Indigenous leaders, scholars and others who question the narrative of colonial sovereignty, and seek justice or remedy for historic and on-going colonial practices, such as colonial modes of land relations.

I suggest, that the state government’s historic and current responses have, over time, established a technology of power that seeks to turn this potential for uncertainty

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<sup>233</sup> *Supra* note 206.

into a means of advancing liberal governmentalities such as economic and territorial certainty, and colonial governmentalities because it acts as modern form of assimilation through a governmentalization of land relations. In the modern context, this process of governmentalization, I argue, has allowed governments of the state to inject liberalized institutions of governance into Indigenous communities through the CLC regime. This, in turn, encourages the growth of a pervasive and encompassing state of governmentality within Indigenous communities through the mechanism of consent. Thus, this analysis helps understand how the state, through the modern land claim regime, constructs a desirable outcome from its own perspective by inculcating the practices and institutions of a (colonial) liberal social order into societies and nations that previously resisted them, thereby advancing the colonial project of assimilation.

The findings of this research, therefore, compels one to conclude that the promise of ‘nation-to-nation’ relationships promised by current federal Liberal government or the promise of authentic Indigenous nationhood through regimes such as the CLC remains a promise only. The situation is not hopeless; such a regime may become more equitable in future incarnations and ultimately provide substantive benefits for the negotiating parties — and may already be moving in that direction. For example, in the Algonquin AIP, gone are the politics of extinguishment common in older CLC negotiations, replaced by language, which defines Aboriginal Title as having been modified by the AIP, without the need for a clause explicitly articulating extinguishment. However, this regime and, indeed, the very notion of an authentic nationhood for Indigenous communities, directly contradict the supposedly irreducible logics that governmentality literature states are behind the art of governance: the perpetuity of the state. This suggests that notions of

Indigeneity and expressions of meaningful Indigenous governance necessarily create dissonance within the (colonial–liberal) governmentality of the Canadian government of the state. Thus, it is likely that this process of creating nation(s) within a nation will need to overcome significant theoretical and practical issues, and consequently, praxis will be difficult to achieve. If we consider the complexity of what goes into creating or re-organizing ‘legitimate’ state territory, after a war, for example, we can see that nationhood is often a product of a global or at least multi-national effort.

The process of plotting and designing a new approach is beyond the scope of this thesis, and is not what I intended to contribute. This analysis, instead, seeks to provide a tool to expose how CLCs are harnessed by the government of the state to carry out colonial projects such as assimilation without having to do anything other than convince Indigenous nations to continue to channel resistance through the CLC regime. It is my hope that this tool might help in providing a baseline for meaningful forms of praxis, and perhaps, contribute to the growing body of theory critical of the narrative that CLC’s are a useful tool to facilitate Indigenous governance and forms of nationhood. Finally, it is my hope that this analysis will both add to, and provide a new approach that can highlight crucial issues, not only around CLCs, but other colonial regimes of governance.

## Appendices

### Appendix A - Land claim maps

#### A.1 Algonquin Land Claim



Figure 1 – Areas impacted by the proposed Algonquin Land Claim

Source: Toronto Star - “Crown lands up for Grabs” (2012) Accessed Online:  
[http://www.thestar.com/content/dam/thestar/news/ontario/2012/06/01/historic\\_algonquin\\_claim\\_of\\_ottawa\\_area\\_nearly\\_done/naalgonquin25.jpeg.size.xxlarge.letterbox.jpeg](http://www.thestar.com/content/dam/thestar/news/ontario/2012/06/01/historic_algonquin_claim_of_ottawa_area_nearly_done/naalgonquin25.jpeg.size.xxlarge.letterbox.jpeg)

## A.2 Nunavut Land Claim



Figure 2. A map of the areas affected by the NLCA

Source: [http://nlca.tungavik.com/?page\\_id=206#ANCHOR256](http://nlca.tungavik.com/?page_id=206#ANCHOR256)

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*Reference whether "Indians" includes "Eskimos"*, 1939 SCR 104 [*Re: Eskimos*]

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

*Indian Act*, RSC 1927, c 98, s 141. [*Indian Act*]

*Nunavut Act*, SC 1993, c 28. [*Nunavut Act*]

*Nunavut Land Claims Agreement Act*, SC 1993, c 29. [*Nunavut Land Claims Act*]

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