

Examining the Regulatory Gap on *Indian Act* Reserve Lands:
A Comparative Case Study of Two Aboriginal Governance Regimes in Quebec

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Abstract

Governance of First Nations lands in Canada is a contentious and complicated subject, within which a phenomenon known as the regulatory gap on *Indian Act* reserve lands is frequently discussed. The generally accepted description of this regulatory gap is that while First Nations reserves fall under the jurisdiction of the federal government, provincial governments are largely responsible for land and environmental management; therefore, not only does the majority of legislation passed by the provinces not apply on reserve, but the federal equivalents of provincial land and environmental management regulations are extremely limited. This regulatory gap is frequently identified as a key contributing factor to major human and environmental health issues on reserve. However, a review of the literature on the regulatory gap reveals that examinations of the regulatory gap which go beyond jurisdictional explanations are lacking, as are provincially focused, comparative studies of the topic. This paper will seek to provide such an examination through a comparative case study of the two primary land and environmental regimes of the First Nations peoples of Quebec, one established in the *Indian Act* and the other operating outside of the Act through the *James Bay and Northern Quebec Agreement*. The similarities and the differences between these land regimes will be the empirical focus of this examination. Through this comparative analysis, the current, relatively narrow descriptions of the regulatory gap will be expanded through engagement with ongoing debates on the broader subject of aboriginal governance. This will provide greater context and nuance to the regulatory gap and to the varied and ongoing efforts to bridge the gap on *Indian Act* reserve lands in Quebec and across Canada.

Introduction

Government interactions with the Indigenous¹ peoples of what is now Canada have long been contentious and controversial. Perspectives on this relationship have shifted significantly over the decades, with the contemporary consensus being that paternalistic, colonialist policies of assimilation most notably codified in the *Indian Act* (1876) have caused serious harm to Indigenous communities. A government commission mandated to investigate some of the most egregious aspects of this history went so far as to describe the actions of the Canadian government as cultural genocide (Truth and Reconciliation Committee, 2015). The increased attention on this issue has led to significant recent changes, including the division of the longstanding Department of Indigenous and Northern Affairs into two separate departments, and a renewed focus on a mutual, nation-to-nation relationship (Prime Minister of Canada, 2016a; 2016b; 2017a, 2017b; 2017c; 2017d). In addition, although the original policies of the Government of Canada contained primarily in the *Indian Act* remain largely in place, numerous attempts have been made by the federal government and Indigenous peoples alike to alter or circumvent the Act in a variety of ways. This process has culminated in the recent announcement that a new "recognition and implementation of Indigenous rights framework" would be developed by the Government of Canada (Prime Minister of Canada, 2018). The federal government's seeming acceptance of a nation-to-nation framework based on principles which have been supported by Indigenous peoples for centuries could represent a major institutional sea-change.

One of the major reasons which is frequently cited in this effort to renew relations is the fact that First Nations communities tend to experience significantly lower standards of living than the rest of Canada. This includes higher rates of poverty and serious problems with mental

¹ Indigenous and Aboriginal are terms which are typically used synonymously which refer to First Nations, Metis, and Inuit peoples. Although this study will frequently utilise both terms, the empirical focus of the study is on First Nations peoples.

health, including depression, suicide, and addiction. Of additional concern are threats to environmental and human health such as a lack of adequate sewage infrastructure, the burning of refuse, and a lack of properly engineered landfills for the dumping of waste (Oyegunle 2015; Penner, 2016; Murphy, 2015). The resulting pollution of water, land and air have a wide variety of major implications for the health of First Nations peoples (Oyegunle, 2016). Furthermore, these threats undermine traditional food supplies, which is a serious concern given that hunting, fishing and gathering are a key component of life for many First Nations communities.

Engagement in these activities has been enshrined as an Indigenous right through court cases such as *R v. Sparrow* (Bharadwaj, 2008; R v Sparrow, 1990).

As focus on the major problems which many Indigenous communities face has increased, so too has debate over the factors which are responsible for these issues. Of these many factors, the regulatory gap on *Indian Act* reserve lands is frequently cited in connection with these issues. The Government of Canada in particular places a major focus on the regulatory gap (AANDC, 2014). However, discussions of the regulatory gap and its impacts are frequently based on a common, generally accepted explanation: while First Nations reserves are under the jurisdiction of the federal government, provincial governments are largely responsible for land and environmental management (Hykin, 2016a). As a result, not only does legislation passed by the provinces generally not apply on reserve, but the federal equivalents of provincial land and environmental management regulations are extremely limited. The consequence is a major regulatory gap, which in turn is responsible for many of the major issues which Indigenous communities face in Canada. However, this common explanation ignores important contextual information by framing the gap as an unintended consequence of Canada's jurisdictional divisions and nothing more.

Although *de facto* and *de jure* divisions of power in Canada may play an important part in the existence of the regulatory gap, expanding this explanation through engagement with the

significant body of work which has been developed on the subject of modern Aboriginal governance can provide major insights into the persistent existence of the regulatory gap on *Indian Act* reserve lands. In particular, debate surrounding the cross cutting themes of devolution and economic development in Aboriginal governance is highly relevant. This study will first present the commonly accepted explanation of the regulatory gap, and will outline the primary attempts which have been made to bridge the gap. This will be followed by an overview of modern Aboriginal governance. A comparative case study will then be carried out, focusing on the Aboriginal communities of the province of Quebec. This selection is based on the even distribution of communities governed by the *Indian Act* and the James Bay and Northern Quebec Agreement (JBNQA), considered to be the first modern treaty in Canadian history.

Several key findings emerge from this comparative case study. By contrasting the land and environmental regime established by the *Indian Act* over Quebec's Aboriginal peoples against the regime established by the JBNQA, it becomes clear that the JBNQA includes significant efforts to bridge the regulatory gap on paper. However, the implementation of this regime demonstrates that clearly defining responsibility over areas such as environmental management and land use is not enough to create major progress in effectively governing these areas. Specifically, the application of modern governance practices by the governments of both Quebec and Canada resulted in major responsibilities being devolved to James Bay Cree and a high priority being placed on opening traditional lands for economic development. The result was serious implementation issues and delays, which in turn resulted in the prolonged existence of the regulatory gap. For example, portions of the JBNQA's land and environmental management regime were only recently implemented, and only after major effort on the part of the James Bay Cree.

In addition, this comparative case study calls the commonly accepted jurisdictional explanation for the regulatory gap into question. A key finding of the study is that section 81 of

the *Indian Act* already provides the First Nations of Quebec with the jurisdiction to create their own environmental and land management regimes. However, significant use of these powers has not occurred in Quebec, with the most likely explanation being that the First Nations communities of the province lack the capacity to make effective use of these powers.

Chapter 1 - Literature Review of the Regulatory Gap on *Indian Act* Reserve Lands

Introduction

In order to carry out the comparative case study outlined above, the regulatory gap on *Indian Act* reserve lands must first be explained. Studying the gap is complicated due to many factors. First, as one of the oldest pieces of legislation in Canada, the Act has been in place since 1876, and has been revised and altered many times throughout its long lifespan. In addition, perspectives on the Act have shifted considerably across the last century and a half, with arguments in favour of civilizing the savage being replaced with accusations and acknowledgment of cultural genocide. Lastly, the geographic and cultural scope of the Act's application is enormous, as the legislation applies to over 600 First Nations across Canada; these communities vary widely in terms of both their traditions and their experiences with the Act. In order to better understand this topic, a review of the existing academic, government, and private sector literature will be carried out here. This review will first focus on how the regulatory gap is commonly defined, and what points of general consensus can be found in studies of subject. Then, an overview of how these understandings have been translated into policy and instruments of governance will occur, with a focus on the major efforts made to bridge the gap. After examining these topics, an additional review of the debate over modern Aboriginal governance will be presented. Together, these sections will provide the framework through which the JBNQA and the *Indian Act* in Quebec will be compared.

Explanations for the Existence of the Regulatory Gap

The first major point of consensus which emerges across the literature is that the jurisdictional environment within which reserves operate is enormously complex. There is considerable agreement across the literature that the main source of this complexity is that governance on *Indian Act* reserve lands is in large part defined by *de facto* divisions of power in Canada (AANDC, 2011; Auditor General of Canada, 2009; Ellison, 2012; Gailus, 2013; Government of British Columbia, 2012; Hykin, 2016a; Institute on Governance, 2004; McDiarmid, 2009; Murphy; 2015). This perspective holds true across academic, governmental, and media sources. The logic behind this common framing of the regulatory gap is that although constitutionally both the federal and provincial governments have responsibilities in regards to the environment, provincial governments hold jurisdiction over the management of provincial land and natural resources. Outside of the limited territories administered by Indigenous and Northern Affairs Canada, the majority of Canada's land and population therefore falls under the jurisdiction of the provinces. As a result of this jurisdictional division, Canada's provincial governments have almost exclusively developed legislation governing land and environmental management, and federal *Indian Act* reserve lands are without such legislation (Neimanis, 2013; Edgar and Graham, 2008).

Further complicating this situation, the broad consensus across the literature is that provincial land and environmental management laws do not apply on Crown controlled reserves of First Nation peoples (Hykin, 2016a; Neimanis, 2013; Edgar and Graham, 2008). This consensus is rooted in rulings of Canadian courts, which have decided that provincial laws found to regulate "Indians as Indians", or in other words, to affect the core values of First Nation society, are inapplicable on reserve (Dick v. The Queen, 1985; Gailus, 2013). However, the *Indian Act* states that subject to treaty, federal legislation, and First Nations by-laws, laws of general application created by provincial governments are enforceable on

Indian Act reserve lands; this includes, for example, traffic laws (Gailus, 2013). These provisions further complicate an already complex jurisdictional environment (Dick v. The Queen, 1985; Gailus, 2013). Environmental and land use legislation is not considered to be of general application, and as a result, it is generally accepted that the well-developed regimes created by both provincial and municipal regulations relating to the environment and to land use do not apply on reserve (Gailus, 2013; Edgar and Graham, 2008). This includes provincial legislation such as the *Environmental Management Act*, the *Strata Property Act*, the *Residential Tenancy Act*, and the *Land Title Act*, as well as land use controls and municipal zoning regulations (Gailus, 2013).

While the federal government cannot create laws related to environmental management which interfere with provincial jurisdiction, it has been found that the Crown can pass these laws on *Indian Act* reserve lands specifically, due to the fact that the Crown has the authority to mitigate major environmental and human health risks on reserve (Auditor General of Canada, 2009). However, a review of the literature confirms that much of the federal government's environmental authority is focused on national issues such as toxic substances (Edgar and Graham, 2008; Gailus, 2013; Hykin, 2016a). As such, despite holding this authority, the federal government has not replicated the environmental regulations found in extensive provincial regulatory regimes (Edgar and Graham, 2008; Gailus, 2013; Hykin, 2016a). As a result, federal legislation does not provide a comprehensive or effective set of environmental regulations that are applicable to First Nations lands across the country.

It is generally agreed that the result of this combination of *de jure* and *de facto* divisions of power and jurisdiction is that although First Nations reserves fall within the responsibilities of the federal government, no regime for environmental management or land use has been developed for use on reserve. The complexity of this jurisdictional environment has created significant uncertainty around the regulation of a broad spectrum of activities on

reserve. For example, many court cases have been litigated as a result of attempts by provincial governments to enforce provincial laws over First Nations peoples. Some of these cases will be examined further in the empirical sections below. As a result, in one meeting of the House of Commons Standing Committee on Indigenous and Northern Affairs, this jurisdictional environment was identified as possibly the most complicated in the world (INAN Meeting 57, Tuesday, May 16, 2017). The combination of the complex jurisdictional environment outlined above and the resulting hesitancy of the federal government to create a comprehensive land and environmental regulatory regime on reserve is commonly identified as the source of the regulatory gap on *Indian Act* reserve lands (AANDC, 2011; Auditor General of Canada, 2009; Ellison, 2012; Gailus, 2013; Government of British Columbia, 2012; Hykin, 2016b; Murphy; 2015).

A review of the literature on the regulatory gap confirms that the gap is a major issue for the Government of Canada and for First Nations peoples (Edgar and Graham, 2008; Gailus, 2013; Hykin, 2016a; Oyegunle, 2016). The regulatory gap is accepted as posing a serious risk to human health and wellbeing, and as a result, of having serious economic consequences as well (Edgar and Graham, 2008; Gailus, 2013; Hykin, 2016a; Oyegunle, 2015; Oyegunle, 2016). For example, studies of the regulatory gap frequently cite widespread and well documented instances of contaminated drinking water, environmentally degraded lands, and lost traditional food supplies; in addition, serious environmental problems have been connected to the drastically increased risks of illness and disease present on reserve (McDiarmid, 2009; Oyegunle, 2016; Gailus, 2013). Both environmental degradation and health problems undermine the ability of First Nations peoples to exercise traditional hunting and gathering rights by compromising traditional food supplies (Oyegunle, 2016, 78). Because of the serious impacts environmental and health problems pose to Indigenous communities, bridging this aspect of the regulatory gap has become a high priority for First Nations peoples

(Hykin, 2016a, 5).

These major issues and a continued lack of clear regulation have also created an atmosphere of uncertainty and mistrust which prevents First Nations peoples from working with business interests in pursuing economic development on reserve lands (INAC, 2012). The perspective from government literature on the regulatory gap is that economic development driven by partnerships between private industry and First Nations peoples is the primary solution to the major problems which have been present on reserves for generations (INAC, 2012; AANDC, 2012). This is an important factor in understanding the importance the Crown has increasingly placed on bridging the regulatory gap.

Across this broad body of literature, the regulatory gap is frequently linked to several missing or poorly designed regulatory regimes. First, and perhaps most importantly, is the lack of environmental regulations discussed at length above. Second, the *Indian Act*'s property rights system is often identified as exacerbating the regulatory gap (Alcantara, 2003; Sasseville, 1997). A property rights system is defined as a method by which the state governs the use and development of a given area of land (Sasseville, 1997, 1). For example, how individuals, groups, or other actors obtain land, and the type of ownership they exercise over said land, is determined by the property rights system in place. Closely associated with a property rights system is a land management system. A system of land management defines how land can be used, ensures that granted rights are consistent with government policy, and confirms the intentions of the state through acts and regulations (Sasseville, 1997, 1). Flaws in the existing land management system, closely associated with flaws in the property rights system, are frequently identified as contributing to the existence of the regulatory gap (Alcantara, 2003; Hykin, 2016b). As a result of the major focus placed on these three regulatory aspects in studies of the regulatory gap, the comparative case study carried out below will be heavily focused on these three areas.

Efforts to Bridge the Gap

A review of this body of work reveals that as a result of the major, ongoing issues associated with the regulatory gap, the phenomenon has developed into a subject of major concern for the Crown and its associated institutions (Hykin, 2016a, 5). There have been numerous internal investigations and several initiatives dating back decades seeking to bridge the regulatory gap and circumvent challenges inherent to creating stand-alone federal environmental regulations. These efforts vary widely, alternatively seeking to create new legislation, amend existing legislation, or circumvent legislation entirely.

As noted above, attempts have been made to amend the *Indian Act* with stronger regulations. A set of regulations pertaining to environmental management have been put in place through an amendment to the Act. These regulations are titled the *Indian Reserve Waste Disposal Regulations* (IRWDR). Implemented in 1978, the IRWDRs were intended to resolve the growing number of problems related to environmental management on reserve (Hykin, 2016, 6). In particular, the IRWDR were designed to address challenges surrounding waste disposal, the primary identified contributor to environmental contamination on reserve (Hykin, 2016, 6). In particular, the goal of the IRWDRs was to provide regulations to deal with garbage dumps. As such, the IRWDRs ban the use of burning to dispose of waste, put a permitting system in place for the operation of dumps, and put penalties in place to deal with violations of the regulations (Government of Canada, 2018b).

However, these regulations have remained unchanged since their introduction and have been heavily criticized for their extremely limited scope and their failure to successfully protect reserve lands from environmental degradation (Hykin, 2016, 6). Very few permits have been issued relative to the number of suspected dumps, and violations of the regulations are still subject to penalties established in 1978; a small fine and possibly limited jail time; for the First

Nations of Quebec, the result has been that in practice waste disposal is unregulated (Hykin, 2016, 6-7).

In addition, Comprehensive Land Claim and Self-Government Agreements seek to provide broad autonomy and greater funding to Indigenous communities through existing legislative tools (Hykin, 2016b; INAC, 2016). These agreements are often described as modern treaties, and are considered to be the single most comprehensive method of addressing Aboriginal rights and title (AANDC, 2015). Due to the complex and sensitive nature of these treaties, only 26 comprehensive land claims and 4 self-government agreements have been signed in Canada's modern history (AANDC, 2015). The James Bay and Northern Quebec Agreement, signed in 1975, is the first of these treaties, and will be examined in this case study.

Beyond amending the *Indian Act* itself or negotiating major treaties to complete remove Aboriginal peoples from the Acts jurisdiction, it has been strongly recommended that INAC work collaboratively with Environment and Climate Change Canada and First Nations peoples to solve major issues related to solid waste management, with a focus on increasing community capacity and further legislative and regulatory development (Standing Committee on Aboriginal Affairs and Northern Development, 2014). For example, the *First Nations Land Management Act* (1999) was designed to transfer control over reserve land from the Crown to First Nations, thus circumventing the need for the federal government to implement a new regime (INAC, A Regulatory Framework Plan for Reserve Lands South of 60). This Act lays out a process through which First Nations peoples can incrementally design their own land codes, ultimately implementing their new land regime and exiting the regime laid out by the *Indian Act*.

The FNLM process is supported through the Reserve Land and Environment Management Program (RLEMP), which provides funding to Indigenous communities who chose to engage in a program of capacity development (Reserve Land and Environment Management: Manual, 3). The RLEMP includes administrative training and educational initiatives. The short

term goal of the program is to develop Indigenous communities' capacity to voluntarily comply with, and enforce, the IRWDRs introduced into the *Indian Act* in 1978. The long term goal of the RLEMP is to develop community capacity to the point that First Nations Land Management (FNLM) Regime can be adopted (AANDC, 2011, 5). Once implemented, the FNLM removes a given community from the land regime established by the *Indian Act*, replacing it with a regime designed by the community. In theory, the Department's objective is to bridge the regulatory gap on individual reserves, while simultaneously lessening the fiduciary responsibilities of the Department (Reserve Land and Environment Management: Manual, 11). Since the introduction of the FNLM Act, 139 of the over 600 First Nations in Canada have opted to develop their own land management regimes (First Nations Land Management Resource Center, 2018). 80 have completed the process, and have removed themselves from the Indian Act's land management regime, while the remaining 59 are in the development process (First Nations Land Management Resource Center, 2018). Several other First Nations have sought federal approval to do the same (Boutilier, 2016).

The number of First Nations communities who have opted into the FNLM Act over the last 19 years and the Acts focus on Indigenous self-determination are frequently cited as major positives (Boutilier, 2016). However, one key issues exist with the FNLM Act. Although it may be a good option for wealthier, more developed First Nations, many Aboriginal communities may lack the capacity to develop their own land management regime. If addressing the consequences of the regulatory gap on Indian Act reserve lands proves too demanding for communities to engage in regime development, the rate of the FNLM Acts adoption may decline.

A more recent effort to bridge the regulatory gap can be found in the *First Nations Commercial and Industrial Development Act* (FNCIDA). Introduced in the House of Commons in 2005 and brought into force in 2006, the FNCIDA is specifically aimed at addressing regulatory uncertainty surrounding complex commercial and industrial development projects

(INAC, 2012). Under this act, First Nations peoples can request that provincial regulations that are compatible with those off-reserve be adopted on reserve (INAC, 2012). These regulations are developed to be project-specific, and are created in cooperation with the First Nation in question, as well as with the relevant province (INAC, 2012). In effect, FNCIDA allows the government to delegate monitoring and enforcement of the new regulatory regime to the province, through a tripartite agreement with the parties in question (INAC, 2012). However, this delegation is highly specific and limited, both temporally and geographically, because it is project-specific and engages only directly implicated First Nations and provinces.

In 2010, the FNCIDA was amended to allow First Nations peoples to request a property rights regime as well as regulatory regime (INAC, 2012). This would include a land title system which would be identical to the relevant provincial regime (INAC, 2012). The goal of this amendment, and of the FNCIDA in general, is to provide regulatory certainty to both Canadian business and First Nations peoples, with the objective of increasing the level of development taking place on reserves (INAC, 2012). In addition, the federal government and INAC hope that the FNCIDA will mitigate some of the major environmental and human health risks which the regulatory gap poses on reserve (INAC, 2012). To summarize, the objective of this Act is to allow provincial regulations to apply to commercial and industrial projects on *Indian Act* reserve lands upon the request of First Nations peoples.

In conclusion, this literature review reveals that the regulatory gap is extremely complex. Its contours are defined by a large number of complicated pieces of legislation, court decisions, and policies. Consequences of the regulatory gap have likewise been diverse, complex, and frequently detrimental in nature to First Nations communities. Finally, many attempts to bridge the regulatory gap have been made. These attempts have varied widely in their effectiveness, their scope, and the mechanisms by which they attempt to bridge the gap. Within this literature, the *Indian Act* emerges as both the most frequently discussed First Nations land regime and the

most frequently associated with the regulatory gap. This complexity is exacerbated due to the fact that the First Nations peoples it has affected are numerous and highly diverse in their individual cultures and characteristics.

This literature review also reveals that although several overarching studies of the regulatory gap and of the attempts to bridge it have been made, the primary explanation provided for the gaps existence is jurisdictional divisions within Canada. This framing presents the regulatory gap as a result of a combination of both *de facto* and *de jure* divisions of power and jurisdiction within Canada. For example, although environmental management is not solely the responsibility of either federal or provincial government, the provinces hold jurisdiction over the majority of Canada's land and natural resources. The common argument is that as a result of this *de jure* division of power, the federal government has avoided creating legislation which mirrors the land and environmental regimes of the Provinces, ceding responsibility over these areas in a *de facto* manner.

However, as a result of the broad acceptance of this theory, there has been a lack of engagement with major debates within academia over Aboriginal governance in Canada. This comparative case study will examine the regulatory gap through one of the frameworks which has emerged from these debates, with the objective of adding greater nuance to the current understanding of the regulatory gap on Indian Act reserve lands. In doing so, it is hoped that more effective strategies for bridging the gap can be identified.

Chapter 2 - Theoretical Framework: Modern Aboriginal Governance

Introduction

Discussions of the regulatory gap on *Indian Act* reserve lands generally fail to engage with the wider body of literature on Aboriginal governance. In particular, analysis of the gap has largely ignored debates surrounding modern government policy as it has been applied to

Aboriginal peoples. Such an exclusion is problematic, as these debates introduce concepts which contribute to alternative understandings of the regulatory gaps' existence. This chapter will first introduce the current state and debate around modern aboriginal governance, before examining the two key cross cutting themes of economically motivated governance and the devolution of state responsibility. It should be noted once again that although this comparative case study is focused purely on First Nations peoples, the debate over Aboriginal governance encompasses First Nations peoples, the Inuit, and the Métis.

As noted above, state interactions with the First Nations peoples of what is now Canada have been historically tumultuous. However, the realities of this relationship have shifted substantially over the decades. Today, it is largely accepted that paternalistic, colonialist policies of assimilation most notably codified in the *Indian Act* (1876) have caused serious harm to First Nations communities (Holmes, 2002; Alcantara, 2003). A government commission mandated to investigate some of the most egregious aspects of this history went so far as to describe the actions of the Canadian government as cultural genocide (Truth and Reconciliation Commission, 2015). The increased attention on this issue has led to significant recent changes, including the division of the longstanding Department of Indigenous and Northern Affairs into two separate institutions, and a renewed focus on developing a mutual, nation-to-nation relationship. Although the original policies of the Government of Canada, contained primarily in the *Indian Act*, remain largely in place and unchanged, the federal government and First Nations peoples alike have made numerous attempts to alter or circumvent the Act in a variety of ways. These attempts culminated in the recent announcement that the Government of Canada would begin work on the "recognition and implementation of [a new] Indigenous rights framework" (CBC, Feb 14, 2018). This represents a dynamic set of potential changes in Aboriginal governance which stands in stark contrast to the late 19th century, during which assimilationist policies were framed as being in the best interest of both Canada and First Nations peoples.

Discourse surrounding modern Aboriginal governance is based heavily on language of self-determination, treaty rights, and respect of Indigenous culture (AANDC, 2014). However, this language and the policy outcomes which result from it have been critiqued from a number of quarters. One notable criticism which has gained significant traction has been that the actions of the Government of Canada in regards to the Indigenous peoples of the country are not driven by altruism or a belief in the principles of a nation-to-nation relationship, but rather, are a result of pragmatic and self-interested government objectives (Altimirano-Jiménez, 2013; Rynard, 2001). These critiques have been counterbalanced by a number of studies which generally argue that examples of these objectives in actuality represent residual aspects of colonial governance. From this perspective, these issues are recast as deeply embedded trends in policy which have proven highly resistant to change, and which have only been altered due to great effort on the part of Indigenous peoples in Canada primarily, and sympathetic state actors secondarily. Studies which make this argument posit that recent actions by the Government of Canada, such as the endorsement of the nation-to-nation relationship, are positive attempts to improve the state of Indigenous governance and move into a postcolonial relationship with Canada's First Nations. For example, David Newhouse argues that "Canada has moved into a new era that has the potential to transform its relationship with Indigenous peoples" (Newhouse, 2016). Regardless, aboriginal governance is regarded as a form of governance which replaced or evolved from the colonial regime which preceded it, and several major crosscutting themes are present across the examination of these regimes.

From a review of the literature, modern Aboriginal governance is accepted to have developed in the second half of the 20th century, fully emerging in the 1990s, and continuing to the present day. Modern Aboriginal governance describes this approach as being characterized by a rhetoric of self-determination and self-government for Aboriginal peoples which is actualized through the negotiation of comprehensive land claims agreements and other treaties

which devolve state responsibilities to First Nations peoples (Rynard, 2001; Altimirano-Jiménez, 2013). These efforts are supported through the state's advocacy of privatization and First Nations driven economic development, most notably of natural resources. Economic development is prioritized, and argued to be the key to improving standards of living and supporting the self-determination of First Nations people. Whether this is a genuine approach, or a governance strategy designed to gain economic access to land and natural resources while minimizing state expenditures is a matter of major debate within the literature on modern Aboriginal governance.

Economic Development

One major crosscutting theme in examinations of modern Aboriginal governance is the economically oriented motivations of the federal and provincial governments of Canada. For example, Jenson argues that major reforms of governance in Canada which took place in the 1990s were not isolated events or simply budget reduction exercises. Rather, she writes that these reforms are representative of a long running effort by the state to reconfigure Canada's citizenship regime, driven by economic objectives (Jenson, 1996, 112). In Jenson's opinion, Canada as a nation state has continually restructured its economy, its relationship to the market, and as a result, its relationship to its citizens (Jenson, 1996, 112). The author argues that during and directly after the Second World War, a liberal regime was slowly constructed which acknowledged both individual and collective rights. This was a regime which was inspired in part by fears of American hegemony. As Jenson writes, "only a state actively pursuing an economic strategy to promote Canadian culture, Canadian ownership and Canadian distinctiveness, including its social programs, could fend off the threat to its cultural, economic and political autonomy" (Jenson, 1996, 117). Jenson places a strong emphasis on economic strategy and its connections to cultural and political autonomy on an international scale. In the author's opinion, the key element of this strategy was ensuring that citizens had access to

political power and the state, a strategy spilled over into Indigenous affairs (Jenson, 1996, 18). Jenson feels that Indigenous peoples alongside other minorities were provided with new access to discursive space as a result of this primarily liberal regime (Jenson, 1996, 119).

For Altimirano-Jiménez, modern Aboriginal governance is also strongly defined by its economic aspects, with actors at the global, state and local levels in a variety of ways. However, these interactions result from people's agency and are shaped by context in the author's opinion (2013, 5). The author defines modern Aboriginal governance as both an economic project and as a form of governance, involving practices, knowledge, and ways of living that focus on the market, rationality, and the responsibility of entrepreneurial subjects (Altimirano-Jiménez, 2013, 5). Altimirano-Jimenez notes that the use of land claims in this process are "particularly important if we consider the fact that Aboriginal peoples control 20 percent of Canada's land mass. This fact poses potential problems for developing, exploiting and transporting natural resources" (2004, 356). From such a perspective, Canada's position in the global economy dictates a certain set of state responses, which are reflected in modern Aboriginal governance. These state responses are problematic for Altimirano-Jimenez for two main reasons, and she is joined by Fiona MacDonald in flagging these issues. First, the high priority which the Government of Canada places on economic development is argued to result in the encouragement of self-government as a means by the state to gain access to natural resources instead of as a genuine attempt to support Aboriginal peoples and their independence. Second, it suggests to the authors that simply providing Indigenous peoples with self-governing powers will not necessarily result in the promised economic and social improvements if the capacity to make use of these powers does not exist. Most notably, if support for the development of new programs, policies, or initiatives is not provided, the same problems may persist (MacDonald, 2011, 268). This is an important point to note in relation to the regulatory gap on reserve lands, as it suggests that the problem may go beyond jurisdictional challenges.

Paul Rynard also engages with the theme of ulterior economic motives, and argues that regional capitalist interests have successfully lobbied provincial governments in order to develop public policies which serve their interests due to the decentralized nature of Canadian federalism (2001, 35). As he writes, the Government of Canada has been in “chronic subservience to the needs of powerful social interests and the exigencies of the market economy” (Rynard, 2001, 9). The author argues that the federal state has consistently supported the aligned interests of the provinces and industry, that the exploitation of land and natural resources by business interests goes largely unopposed, and as a result, the fulfillment of treaties is undermined (Rynard, 2001, 36). This connection between industry, First Nations peoples and the Canadian state is enormously important in Rynard’s opinion, and he goes so far as to state that this is a “central fact of the Canadian political economy: the much discussed financial dependency of the First Nations on the Canadian state is the direct result of the often over-looked dependency of capital on the resources of First Nations’ land” (Rynard, 2001, 38).

Devolution

The devolution of responsibilities from both federal and provincial governments to communities, businesses and individuals, is a second cross cutting theme of modern Aboriginal governance. This process can include outsourcing responsibilities to private businesses, deregulation of certain areas, or transferring responsibilities between levels of government. For example, Jenson argues that devolution of key responsibilities to Aboriginal peoples in the second half of the 20th century represents a major restructuring of government. For the author, this restructuring was largely defined by major cutbacks in government funding and access for civic interest groups of all types; in place of this access, a new and largely superficial rhetoric of consultation and partnership arose (Jenson, 1996, 127). In Jenson’s opinion, these partnerships are typically focused on service delivery and not advocacy, and are often contractual in nature,

with the state determining the conditions of collaboration (Jenson, 1996, 127). Writing in the midst of this regime change, Jenson argues that the federal government will continue to reduce its participation in the institutions which defined the postwar model, off-loading these responsibilities to the provinces, who in turn often further off-load these responsibilities to local communities (Jenson, 1996, 129). This new approach redefined a liberal regime which had slowly begun to provide Aboriginal peoples, alongside other minorities, with new access to discursive space in Jenson's opinion. For example, the author argues that groups which had begun to lobby government on behalf of minorities were increasingly dismissed in favor of input from the business community. (Jenson, 1996, 119). As such, for Jenson, modern Aboriginal governance has been exploitative in nature, and has led to the closure of the state from Aboriginal peoples and the devolution of a swath of responsibilities to them.

Altimirano-Jiménez also considers the devolution of responsibilities to be a major component of modern Aboriginal governance. Furthermore, she identifies a series of objectives within this approach, including the decentralization of state power, the reduction of state interventions in the market, and the development of civil society and business partnerships capable of taking on the state's social responsibilities. (Altimirano-Jiménez, 2013, 5). For the author, this combination of practices and goals allows modern Aboriginal governance to acknowledge Indigenous rights, while simultaneously institutionalizing governance practices that undermine these same rights; for example, from this perspective, natural resources are almost exclusively framed as objects of economic potential, which is at odds with the perception of many Indigenous cultures (Altimirano-Jiménez, 2013, 6).

For Altimirano-Jiménez, devolution of responsibilities and objectives of economic development are interlinked within modern Aboriginal governance. As she notes, the approach frames self-governance in a particular and narrow sense, centered on locally delivered services and economic development; this connects traditional activities to the free market and reduces

self-government to the devolution of a handful of responsibilities (Altimirano-Jiménez, 2013, 81). The author looks to Nunavut as an example of this process, arguing that it has “leveraged Inuit rights away from resource sovereignty and toward a state-mediated model of land claims centred on economic development and neoliberal self-government” (Altimirano-Jiménez, 2013, 120).

Academics such as Jack Hicks and Graham White see both advantages and disadvantages when examining the creation of Nunavut. The authors acknowledge that the government of Nunavut is a public one as a result of compromises reached with the federal government (Hicks and White, 2016). Hicks and White feel that the federal government placed a heavy prioritization on simply concluding a land claim agreement, and that as a result, discussions over the organization of Nunavut’s government were cursory at best (Hicks and White, 2016; CBC, 2015). The outcome has been that “people are disappointed with the quality of services and programs that they’re receiving” (Hicks, as quoted by CBC, 2015). Here, one of the central critiques of modern Aboriginal governance in regards to devolution is highlighted. Instead of taking the time and effort to work with Indigenous peoples in order to create regimes best suited for their needs, the creation of Nunavut was undermined by the federal government's focus on devolving responsibilities to Indigenous peoples. Similarly to the JBNQA examined below, these issues were exacerbated by major disagreements over implementation (Berger, 2006).

However, Hicks and White do argue that Nunavut represents a government which did not seek to replicate conventional governance institutions found in other regions of Canada, in large part by decentralizing government operations out of the capital and into communities (Hicks and White, 2016, 6). The authors feel that this was a deliberate, innovative and impactful decision on the part of the Inuit, and that the result has been a government whose structure and function reflects Inuit culture (Hicks and White, 2016). Nonetheless, they again emphasize that the attempt has been met with major criticism, not just from Altimirano-Jiménez, but from other

academics and from the Inuit of Nunavut themselves (Hicks and White, 2016, 17). Furthermore, the use of privatization as a means of pursuing this decentralization is acknowledged by the authors, but is framed as a means of providing a degree of independence to local communities (Hicks and White, 2016, 11). This point is important to consider in order to avoid dismissing the agency of Indigenous peoples. However, the nature of Nunavut's governance structure, with its focus on decentralization, does align with the governance practices identified above, as Altimirano-Jiménez notes.

Fiona MacDonald expands on the theme of devolution by arguing that this is one portion of a larger state strategy, which is not only about responding to the demands of Indigenous peoples, but also seeks to meet the demands of the contemporary governmental shift towards privatization (MacDonald, 2011, 257). She notes that the state objectives which guide this process undermine meaningful Indigenous autonomy (MacDonald, 2011, 257). For MacDonald, the key problem with this process is that although responsibility over these areas may be handed off to Aboriginal peoples, the actual decision making power which is necessary to affect meaningful change in these areas remains in control of the state (MacDonald, 2011, 257). As a result, MacDonald argues that the self-determination provided to these peoples is much narrower than the state rhetoric of self-determination and partnership would suggest.

MacDonald goes on to critique the privatization which often accompanies this devolution process, arguing that these processes typically lead to the contraction and altered regulation of the public sphere (Macdonald, 2011, 258). The author is in agreement with Altimirano-Jiménez in terms of her analysis of the resulting commodification of Indigenous culture in particular. However, she does acknowledge that some notable success stories do exist in which devolution and Indigenous self-determination movements have resulted in economic prosperity for First Nations peoples. In MacDonald's opinion, modern Aboriginal governance favors a system of policies and processes designed to assist the marketplace, and from this perspective First Nations

self-determination is preferred over First Nations being state dependent (MacDonald, 2011, 264). She cites Slowey in support of her argument, who writes that “globalization requires a stable investment environment to generate economic growth... the resolution of land claims form an important part of the neoliberal strategy” (Slowey, as quoted in MacDonald, 2011, 264). MacDonald ultimately concludes that Indigenous movements will have to constantly attempt to bring unresolved problems out of the “de-politicized spheres created through devolution” and instead challenge the modern state’s conception of these issues with that of their own (MacDonald, 2011, 270).

Rynard engages with the theme of devolution. However, for Rynard, that the state places a higher priority on economic prerogatives than on Indigenous rights to self-determination is not a modern development. Rather, it reflects a long, deeply embedded approach on the part of the Crown, with devolution of responsibilities attempted as early as 1912; as Rynard writes, the Crown consistently failed to protect Indigenous “interests and rights in the face of provincial and industrial expansion. Such a policy is consistent with the pattern established in the 1912 attempted transfer of responsibility”² (2001, 18). Aspects of this colonial approach stretch back to the establishment of reserves which removed First Nations peoples from arable land desired by settlers, and arguably earlier.

Rynard also notes that with the emergence of modern Aboriginal governance, agreements were increasingly ignored by government through the invocation of high costs of implementation, noting that this was true under both Conservative and Liberal Prime Ministers stretching back to the 1970s (Rynard, 2001, 25). He quotes the Ambassador of the Cree’s in making this point; “it is cheaper to pay civil servants to fight Indians than it is to meet treaty obligations” (Moses, as quoted in Rynard, 2001, 32). This aligns with the type of strategy

² This refers to the Quebec Boundaries Extension Act of 1912, which effectively appropriated the traditional lands of the province’s Aboriginal peoples while attempting to remove any fiduciary duty to these peoples.

described by MacDonald and Altimirano-Jiménez, in which devolution through privatization is a driving objective of the state's Aboriginal governance initiatives. In this context, governments are framed as undertaking a cost benefit analysis in which the long term costs of these responsibilities were weighed against the short term cost of 'buying out' through lump sum payments. Like the debate over modern Aboriginal governance in Nunavut, these arguments have major connotations for the study of the JBNQA in Quebec, an agreement whose implementation has been heavily critiqued and involved a major lump sum buy out.

This perspective is particularly interesting when contrasted with Jenson's writings on the subject of the broader devolution of government responsibility in Canada. Jenson's conclusion is that an increased focus on market solutions, the divestment of social responsibility, and the commodification of services restructured citizenship in Canada (Jenson, 1996). The author argues that while previously Aboriginal peoples and other minorities had begun to gain new access to discursive space, access was revoked through this restructuring (1996, 119). However, it is clear from Rynard's study that failures of treaty implementation had been present long before the emergence of modern Aboriginal governance in Canada. Furthermore, it is clear from Rynard's historically oriented examination of Aboriginal governance that First Nations peoples were never truly conceptualized as citizens of the Canadian state, but rather as an other whose presence was largely problematic. The Indigenous experience is further complicated by its diverse nature, with different communities interacting with Provincial and Federal Governments in a myriad of ways.

With these cross cutting themes in mind, many academics are highly critical of the rhetoric of Aboriginal self-determination which has risen to prominence in modern Aboriginal governance. For Rynard, the public endorsement of the inherent right to Aboriginal self-government by the Crown has not been supported in practice; instead, this right has been consistently denied. As he writes, "rights to self-determination – usually related to nationhood

and encompassing both self-governance and control over natural resources in traditional territories – are being denied by continuing with extinguishment” (2001, 31). Extinguishment in this sense refers to the state’s practice of only agreeing to Aboriginal self-government agreements if pre-existing Indigenous rights are forfeited. Once again, for Rynard this represents a historical pattern which has existed for decades. This argument is highly contested, but provides an interesting perspective in regards to considering the economic motivations of federal and provincial governments when pursuing land claim agreements. In addition, it is important to note that approaches which frame modern state actions as an extension of historical patterns of capital undermining the self-determination of Indigenous peoples are not necessarily incompatible with perspectives focused on new trends of Aboriginal governance. These governance strategies did not arise in a vacuum, but rather emerged from the same historical context in which the exploitation of Indigenous peoples took place.

The sampling of authors examined above provide a clear picture of the debate surrounding modern Aboriginal governance, the major cross cutting themes involved, and some key areas of disagreement. To summarize, the term defines an approach to Indigenous affairs which is generally regarded to have developed in the second half of the 20th century, coming to maturity in the 1990s. Modern Aboriginal governance defines this approach as being characterized by a rhetoric of self-determination and self-government for Aboriginal peoples which is actualized through the negotiation of comprehensive land claims agreements and other treaties which devolve state responsibilities to First Nations peoples. This is supported through the state’s advocacy of privatization and First Nations driven economic development, most notably of natural resources. The justification for this approach is that it is the path to wealth and prosperity for Aboriginal peoples, and that this economic development will allow First Nations to act with true self-determination, no longer reliant on the state.

However, many argue that while some success stories may emerge, the true goal of this approach is the divestment of the state's legal and financial obligations to these peoples, while simultaneously securing the economic assets of their communities, to be integrated into the national and international economy. From this perspective the approach generally entails major negative consequences for First Nations peoples; a lack of true self-governing powers, exploitation of land and natural resources by capital without adequate restitution, and ultimately the undermining, redefinition or destruction of Indigenous culture. Although some First Nations may be outliers who in fact prosper within this system, it is argued that the realities of Aboriginal peoples are diverse and varied, and that a homogenous approach is therefore highly problematic.

Chapter 3 - Research Methods

A review of the literature on the regulatory gap demonstrates that the issue is extremely complex, and that numerous efforts have been made to bridge this gap. However, this literature has largely failed to engage with ongoing academic debate on the subject of modern Aboriginal governance. In addition, much of this literature approaches the topic from a national perspective, despite the fact that these efforts have been implemented in very different ways from province to province. This suggests that a provincially focused approach to the subject would provide additional depth and clarity to the literature. For example, the *First Nations Land Management Act* is a commonly cited alternative for First Nations peoples who are unsatisfied with the *Indian Act*'s limited land management regime. However, in its original version, the *First Nations Land Management Act* did not apply in the province of Quebec, and as such was not an option for the First Nations of the province (section 2.1).

In addition, of the 614 First Nations communities recognized by Indigenous and Northern Affairs Canada, only a fraction have opted in to the FNLM Act, and many have not yet successfully navigated the entire process. For example, in Quebec, only one First Nations

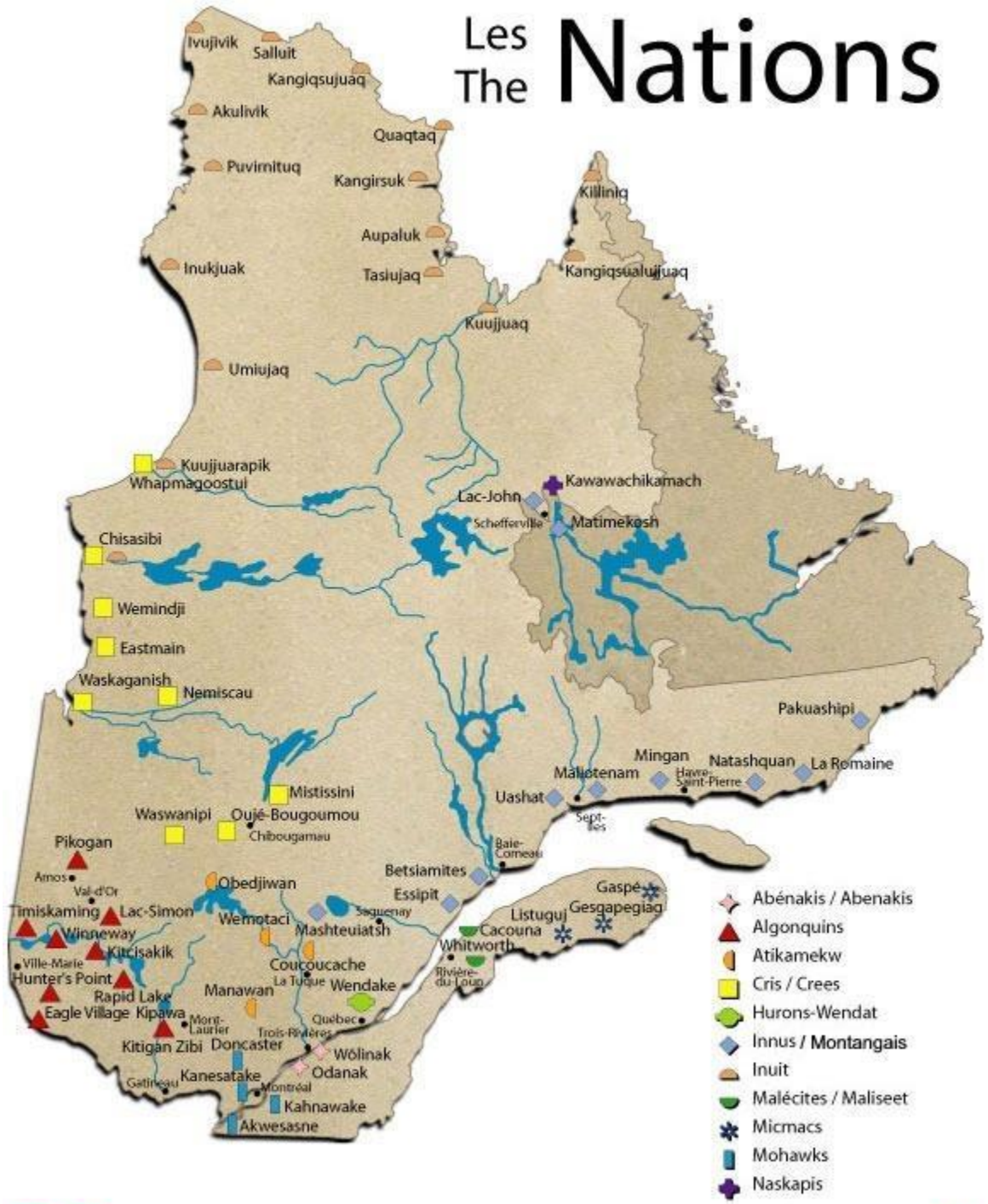
community has implemented their own land regime, an event which has only occurred in the last year (First Nations Land Management Resource Center, 2017). An additional three have recently opted into the FNLM Act and are going through the development process (First Nations Land Management Resource Center, 2017). In contrast, British Columbia boasts the majority of FNLM Act signatory First Nations, with 46 communities governing their own land regimes and 19 more in the development process (First Nations Land Management Resource Center, 2017). This is one example of how efforts to bridge the regulatory gap can vary widely from province to province.

Due to the heterogeneous nature of not just the FNLM Act's implementation, but the implementation of efforts to bridge the regulatory gap writ large, a provincially focused study would provide greater clarity to the ongoing debate surrounding the regulatory gap. This study will carry out just such an examination. In addition, this study will be focused on one major example of an attempt to bridge the regulatory gap, as opposed to the approach of many studies of the gap which attempt to examine the entire spectrum of these efforts. The downside of the holistic coverage which is found in many other studies of the regulatory gap is that it becomes difficult to perform a detailed analysis of legislation related to the gap when there are so many complex documents to examine. An approach which is focused on a single key piece of legislation will hopefully succeed in providing greater clarity in this area, and therefore to the debate surrounding the regulatory gap. Given these objectives, a qualitative study utilising a comparative analysis is appropriate, as it will allow for a comparison of the legislation most often cited as a cause of the regulatory gap with one piece of legislation which has taken a different approach to First Nations governance.

The province of Quebec represents an excellent subject for a study of this nature for several reasons. The First Nations of Quebec are almost exclusively governed by one of two documents: the *Indian Act* and the James Bay and Northern Quebec Agreement (JBNQA). 11

different Indigenous groups currently live in the province of Quebec, spread across 55 individual communities (INAC, 2015). Of these 55 communities, 24 are party to the JBNQA, a treaty signed in 1974 and is widely acknowledged as the first modern comprehensive land claim agreement in Canada (Government of Quebec, 1998, 2; AANDC, JBNQA Annual Report 2008-2009, 1). These communities belong to the Cree, Inuit and Naskapi Innu peoples (2005/2006 - 2006/2007 Annual Report, 6). Of the remaining 31 communities, all but one remain under the jurisdiction of the *Indian Act*; the outlier of this group, the Abénakis de Wôlinak, very recently ratified their community Land Code, thus opting out of 34 sections of the *Indian Act* (First Nations Lands Advisory Board, 2017). Figure 1 provides a visual breakdown of the Indigenous peoples of Quebec, including the Inuit peoples of the province. Notably, despite the title of the diagram below, the Inuit are not considered First Nations, and have never been governed by the *Indian Act*.

Figure 1 - The Nations of Quebec's (INAC, 2015)



Affaires Indiennes et du Nord Canada / Indian and Northern Affairs Canada



This distribution creates an excellent sample for a comparative case study whereby the regulatory gap on *Indian Act* reserve land can be compared to the JBNQA with the debate over modern Aboriginal governance in mind. The ability to make this comparison is important, because in literature on the regulatory gap, the *Indian Act* is always identified as a key piece of legislation, while a self-government agreement such as the JBNQA is presumed to provide a means to address the commonly identified jurisdictional source of the gap. Furthermore, the *Indian Act* remains the oldest piece of legislation in effect relating to the First Nations peoples of Canada, and reflects the specific context in which it was created. Conversely, the JBNQA rests on the opposite end of this spectrum, representing the first in what is now a long line of self-government agreements signed between the governments of Canada and the Indigenous peoples of the country.

My focus here makes two exclusions. First, as the Abénakis de Wôlinak have only recently adopted their own Land Code through the FNLM Act, the community occupies a position between these two documents, with many sections of the *Indian Act* still applying to the community, but with many other key sections now being replaced (First Nations Land Management Resource Center, 2017). However, the recent nature of the adoption of these new, community designed land codes by the Abénakis de Wôlinak means that a long period of implementation will likely follow. In addition, one of the objectives of this study is to maintain a tight empirical focus on a single piece of legislation which affects the regulatory gap, in this case, the JBNQA. As such, the land codes of the Abénakis de Wôlinak will not be examined here.

The second limitation in the scope of this study is the regime that pertains to the Inuit. It is important to emphasise that the Inuit of northern Quebec were never party to the *Indian Act*, and therefore never experienced the regulatory gap as it exists on *Indian Act* reserve lands. Furthermore, the JBNQA's application to the Inuit peoples of Quebec is significantly different

than its application to the James Bay Cree and Naskapi peoples. For example, the JBNQA contains separate sections for Inuit land selection, land regime, health and social services, education, justice, law enforcement, and economic and social development (JBNQA, i-ii). In addition, the Agreement makes a clear distinction between land and environmental governance north and south of the 55th parallel (JBNQA, i-ii). In many ways, sections of the Agreement which apply to the Inuit are significantly less complicated and less far reaching than those of which apply to the Cree. As such, although the role of Inuit in the creation of the JBNQA will be discussed in this comparative case study, the empirical focus will remain firmly on the Agreement's application to the James Bay Cree, and to a lesser extent, the Naskapi. Ongoing debates over both the regulatory gap and the nature of the Crown's relationship with First Nations peoples in general further complements the relatively even distribution of the First Nations of Quebec between two governing documents.

Based on the specific realities of First Nations in Quebec, this case study will be focused on the major similarities and differences between the Indian Act and the JBNQA, and will explore how those similarities and differences relate to the regulatory gap. In doing so, the cross cutting themes of devolution and economic development identified through a review of the literature on modern Aboriginal governance will be central in order to add greater depth to the current debate on the regulatory gap and how to close it. As noted above, these subjects are not generally explored in depth in the literature on the regulatory gap, and as such, the commonly accepted explanation has been that *de facto* and *de jure* divisions of power in Canada has led to this unintended regulatory gap. The goal of this comparative case study is to go beyond this explanation and examine two pieces of legislation in depth; this more focused analysis will hopefully result in a greater understanding of the direct legislative causes of the regulatory gap and the institutional objectives which inspired them.

In particular, environmental management, land, and property regimes will be the focus of the following empirical study, as these areas are most frequently identified as being central to the regulatory gaps existence. How these regimes were meant to function in theory and how they have functioned in practice will be explored. Notably, despite bridging the regulatory gap on paper when compared to the *Indian Act*, the Cree encountered major challenges during the JBNQA's implementation. In large part, these challenges were a result of the federal and provincial government devolving major responsibilities to the Cree without providing sufficient resources. This was compounded by the federal and provincial government's focus on economic development on Cree territory, rather than the creation of an effective land and environmental management regime.

Chapter 4 – The *Indian Act* in Quebec

Historical Background

The *Indian Act* is the primary document which structures how the Crown interacts with the First Nations of Canada³. The Act was originally introduced in 1876, a decade after the Constitution Act (1867), which assigned jurisdiction over “Indians, and Lands reserved for the Indians” to the federal government. The *Indian Act* effectively consolidated a variety of previous policies and ordinances into a single, overarching piece of legislation; the component pieces of the Act, and therefore the Act itself, promoted the assimilation of Indigenous peoples into Canadian society. For example, the approach to Aboriginal governance of the era considered Indian status and the occupation of reserves to be transitional, a temporary state which would protect First Nations peoples until they became settled and adapted to the practices of European society, most notably sedentary agriculture (Alcantara, 2003, 78). The Indian Act reflected this

³ Although the focus of this case study is the First Nations of Quebec, a historical background of the legislation must look beyond the province because the *Indian Act* was created by the federal government and applies nationally.

perspective by affording the government with a broad range of powers. This included powers over the cultural practices, education and day to day activities of first Nations communities.

Although the *Indian Act* has been revised many times throughout its history, many of the Act's core tenants remain in place today. Some revisions of the Act served to reinforce the original policies of assimilation which inspired the legislation. For example, in 1894, the Minister of Indian Affairs was given the power to direct residential schools, with heavy attendance policies and penalties. 11 of these schools operated in Quebec, some of which were open into the 1970s (Truth and Reconciliation Commission of Canada, 2015). Over a century later, the Truth and Reconciliation Commission would deem this system of schools to be a primary component of a strategy of cultural genocide carried out by the government of Canada (Truth and Reconciliation Commission of Canada, 2004).

In terms of the regulatory gap, two of these revisions are particularly important. The first is the introduction of the IRWDRs in 1978, examined above. The second is the 1951 revision of the *Indian Act*, the last major alteration of the Act which affected land regimes, environmental management, and property rights. This version of the *Indian Act* provided First Nations peoples with new opportunities to resist the policies of assimilation. Although several major recommendations were ignored by legislators - including the institution of a claims commission and the enfranchisement of First Nations peoples through the provision of federal vote - some key changes did occur (Leslie, 2002). Most notably, a longstanding prohibition on the pursuit of land claims was lifted. This played a major part in enabling the James Bay Cree of Quebec to successfully secure their comprehensive land claim and self-government agreement, beginning the modern treaty making process in Canada. In addition, the discretionary and punitive powers of the minister of Indian Affairs were reduced somewhat, and limited powers comparable to Canadian municipalities were provided to First Nations peoples. This included greater flexibility when it came to community spending, such as new definitions regarding who exactly qualified as

a status Indian, and the lifting of bans on First Nation cultural practices (Leslie, 2002). Although many of these changes were welcomed by First Nations peoples in particular, due to the lack of truly major changes, this revision has also been described as “an exercise in legislative house-keeping” (Leslie, 2002).

Although some important revisions in other areas have been made since the 1951 revisions, this version of the Act largely remains in force today, speaking to the resilience and deep entrenchment of this piece of legislation. However, before an analysis of sections of the Act relating to the regulatory gap can be carried out, one major institutional shift must be discussed. In 1969, Minister of Indian Affairs and Northern Development Jean Chrétien and Prime Minister Pierre Elliot Trudeau introduced the *White Paper* to Parliament. The White Paper was a policy piece which stated the government’s intent to abolish the *Indian Act*, eliminate the treaties signed between the Crown and First Nations peoples, and integrate these peoples into Canadian society (Government of Canada, 1969). The Crown’s perspective was that the *Indian Act* had been highly damaging to Indigenous peoples, and heavily critiqued by them. Eliminating the Act was proposed as a means of rectifying the colonial, assimilationist restrictions contained within the legislation. In pursuing this objective, the Government of Canada wished to treat First Nations peoples as any other cultural group within the Canadian mosaic (Turner, 2006). This, it was argued, would lead to the positive integration of First Nations peoples into Canadian society, corresponding with greater access to modern goods and services which would result in major improvements in living standards (Government of Canada, 1969).

For First Nations peoples, this approach caused alarm and outrage. Three reasons underpinned the reaction. First, despite the highly negative experience of First Nations peoples under the restrictions of the *Indian Act*, the legislation contained provisions pertaining to the recognition of Indian status and the rights which this status granted. Although First Nations peoples felt that these rights had frequently been ignored, a perspective which Canadian courts

would eventually validate, the idea of having those rights abolished along with what protections they entailed was considered to be unacceptable (Turner, 2006; Cardinal, 1969).

Second, First Nations peoples felt that this policy proposal had been created unilaterally, despite claims of extensive consultation by the federal government. Anger over this claim, which many felt merely paid lip service to the concept of including First Nations peoples in political decision making, led to demands that the Crown openly and widely consult with First Nations peoples before making such a drastic change (Turner, 2006; Cardinal, 1969).

Third, First Nations peoples rejected claims that the White Paper would result in major improvements in their lives. Rather, the objectives of the proposed policy were seen as a reframing of the original assimilationist policies which shaped the *Indian Act*, or as the final step in the process of assimilation which the Act had begun (Turner, 2006; Cardinal, 1969). The philosophy espoused by the Crown in the White Paper has been described as “White Paper Liberalism”, which considers the individual to be the fundamental moral unit in a theory justice; this is a perspective which fails to reconcile the unique rights and independent, pre-confederation existence of Indigenous peoples with the Crown’s unilateral assertion of sovereignty (Turner, 2006).

The linkages between this proposed change in Aboriginal governance and the cross cutting themes identified in the academic debate surrounding the subject are numerous. For the First Nations of both Quebec and Canada, the abolition of the *Indian Act* would represent a massive devolution of responsibilities. The federal government would no longer have any fiduciary responsibilities to these peoples. Instead, First Nations peoples would be re-regulated as Canadian citizens, and as such, some combination of the private sector and the provincial government of Quebec would likely take on the role of service provider. Such a change would likely result in major financial savings for the federal government, and perhaps more

importantly, would dissolve the reserve system, opening up vast swaths of traditional Aboriginal territory for economic development.

Following the publication of the White Paper, a massive backlash against the proposed policy rapidly arose. Numerous existing Indigenous groups quickly spoke out against the proposed abolition of the *Indian Act*, and several new organizations would be created in opposition to the Crown's position. Notably, Harold Cardinal, an Albertan Cree leader, wrote and released *Citizens Plus*, known colloquially as the *Red Paper*. The *Red Paper* proposed that the Act be overhauled based on the input of First Nations people rather than being abolished entirely (Holmes, 2002). The *Red Paper* also contained a series of scathing critiques on the subject of the relationship between the Crown and First Nations peoples. The document was immediately and widely lauded, and has become central to modern Indigenous activism; as Dale Turner writes, "Cardinal raised the Indian voice against the dominant culture's stranglehold on what counted as legitimate intellectual discourse" (Turner, 2006, 27). This movement, which would eventually be termed "Red Power", continues today, and has played a pivotal role in the major changes which have occurred in the realm of First Nations relations with the Government of Canada (Turner, 2006; Leslie, 2002).

As a result, Prime Minister Trudeau decided in 1970 that the White Paper would not be implemented, infamously stating that "we'll keep them in the ghetto as long as they want" (as quoted in Legace, 2015). Over the next decade, the relationship between Canadian governments and First Nations would shift dramatically, due in large part to a dramatic increase in organized activism on the part of Indigenous peoples. This change was so significant that the same Prime Minister Trudeau would officially entrench Aboriginal and treaty rights in the *Constitution Act* (Leslie, 2002). As a result of the politically sensitive nature of altering the *Indian Act*, subsequent attempts to improve the state of Aboriginal governance have largely been pursued through alternatives means. These efforts represent a major change, away from the policies of

assimilation which were embodied within the *Indian Act*, and towards a more partnership based approach to Indigenous governance. The highly influential James Bay and Northern Quebec Agreement represents one of these attempts, and will be examined as the second case study in this paper. However, many of the First Nations peoples of Canada continue to operate under the Act's jurisdiction, including 31 of the First Nations of Quebec.

The key areas which are most frequently identified as contributing to the regulatory gap will be examined in depth. These are: the Act's land regime, private property system, and environmental management regime. The cross cutting themes identified through a review of the debates surrounding modern Aboriginal governance will be integrated into this examination.

Land Regime

Two key objectives in particular must be examined in order to understand the land regime contained within the *Indian Act*. At the time of both the *Royal Proclamation* and the *Indian Act's* creation, it was felt that land could not be wholly and solely vested in First Nations peoples; although it was accepted by many that Indigenous peoples deserved basic rights and should be protected, the belief was that Indigenous communities existed in a state of inferior social and spiritual development (Holmes, 2002). As such, it was felt that providing these peoples with total control over their traditional territory would result in the mismanagement of the land and a lack of development. To combat these perceived issues, the adoption of Christian values, private property, and European agricultural practices were viewed as key to the civilization and advancement of Indigenous peoples (Holmes, 2002; Alcantara, 2003).

The second objective which informed land regime sections of the *Indian Act* was the goal of obtaining arable land for settlement and economic development. Originally a key goal of the British, this is also reflected by a major shift in treaty making towards land cession which occurred before the Act's creation (Holmes, 2002). From this perspective, exerting control over

traditional lands and unilaterally establishing reserves vested in the Crown were policy choices which allowed the government to move Indigenous peoples away from resource rich territory and onto isolated plots of lands away from settlers (Alcantara, 2003). In addition, this approach allowed the Crown to consolidate First Nations peoples onto land of the Crown's choosing, and ensure that they would remain there or lose their limited property and treaty rights. The perspective here was that this would allow the government to transform Indigenous societies by slowly introducing land ownership, farming practices, and religion (Holmes, 2002; Alcantara, 2003). The combination of agriculture and private property in particular was seen by government officials as central to the 'civilizing process' (Alcantara, 2003).

From this perspective, the land regime within the *Indian Act* is a central piece of the legislation. Most notably, the *Indian Act* establishes reserves. Reserve land is defined as "a tract of land, the legal title to which is vested in Her Majesty, which has been set apart by Her Majesty for the use and benefit of a band" (Government of Canada, 2018, section 2.1). The fact that legal title to these lands is held by the Crown is a key point of this section of the Act. This reflects the original Crown objective of asserting sovereignty over First Nations peoples and their lands, and situates authority over all final decisions with the Crown. However, First Nations are considered to have a recognized interest in these lands, and associated rights, including the right to exclusive occupation and land use (Holmes, 2002).

Outside of these rights, the impact of the *de facto* and *de jure* divisions of power in Canada became clear. Although federal laws of general application do apply on reserve lands, land management falls outside of these areas. Local matters such as building codes, land use and zoning are considered to be matters of civil or property right under the Constitution, and are therefore under the exclusive jurisdiction of the provinces of Canada (Hykin, 2016). For example, provincial acts dealing with these issues include the *Strata Property Act*, the *Residential Tenancy Act*, and the *Land Title Act*, as well as land use controls and municipal

zoning regulations, as noted above (Hykin, 2016a; Gailus, 2013). As such, the existence of the regulatory gap in relation to land categorization and management does reflect the jurisdictional division of power within Canada. However, it also reflects approaches to governance which informed the creation of the *Indian Act*, most notably the idea that the occupation of reserves by First Nations people would only be temporary, as these peoples would be quickly absorbed into broader Canadian culture (Holmes, 2002).

That being said, section 81 of the *Indian Act* provides First Nations communities on reserve with by law making authorities which could go beyond what Canadian municipalities have been granted. For example, as long as the proposed by-laws are “not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister”, band councils can take action to protect the health of reserve residents, to carry out zoning activities for reserve lands, to preserve, protect and manage traditional harvesting resources (Government of Canada, 2018, Section 81). This is a broad mandate, and notably covers many of the areas typically associated with the regulatory gap.

Historically, as in many areas of First Nations governance, by-laws required the approval of the Minister. In the past, this approval was rarely forthcoming, and if granted, came with the caveat that parts of the proposed by-law be altered or weakened (Leslie, 2002; Holmes, 2002). Furthermore, the approval of the Minister did not necessarily reflect the legality of the by-law in question, which could be challenged in court (Hykin, 2016). Overtime, ministerial oversight has nevertheless relaxed and by-law making powers have been increasingly utilized by First Nations peoples, including those of Quebec. This long process has continued into the 21st century, with an amendment to the *Indian Act* put in place in December of 2014, entirely removing the requirement of Ministerial approval from section 81. First Nations are now able to put in place by-laws autonomously, at no risk of having proposed by-laws denied by the Crown. This naturally has major connotations for understandings of the regulatory gap in both Canada and

Quebec, as the section can be used by First Nations peoples to enact wide reaching by-laws at will.

For the First Nations of Quebec who are governed by the *Indian Act*, usage of section 81 by-law making powers stretch back to the 1960s, and has been utilized with increasing frequency throughout the last half century. These by-laws demonstrate the limitations of framing the regulatory gap as purely jurisdictional issue. All by-laws created through the use of the section are posted in a publication known as the First Nations Gazette, just as new and proposed statutes and regulations are posted in the Canada Gazette by the Government of Canada. A review of the First Nations Gazette reveals that in total, 237 individual by-laws have been passed by 21 of the 31 *Indian Act* First Nations of the province (First Nations Gazette, 2016). In comparison, the First Nations of other the rest of Canada have made heavier use of section 81 by-law making powers. For example, excluding provinces and territories with much smaller First Nations presence such as Newfoundland and Labrador, New Brunswick, Nova Scotia, the Yukon, and the Northwest Territories, the First Nations communities of Quebec have passed the lowest number of by-laws under section 81 (First Nations Gazette, 2016). Manitoba's First Nations have passed approximately double the number of by-laws, with 481, as have the First Nations of Saskatchewan with 474 (First Nations Gazette, 2016). The First Nations of Alberta have passed 652 by-laws, closely led by Ontario's First Nations with 847 (First Nations Gazette, 2016). The First Nations of British Columbia lead by far, with an impressive 3,822 section 81 by-laws passed (First Nations Gazette, 2016).

However, it must be noted that British Columbia also contains the largest number of First Nations in Canada, with 198 bands (AANDC, 2010). Nonetheless, even without taking into account self-government agreements and FNLM Act communities in British Columbia, the province's First Nations have on average passed close to triple the section 81 bylaws⁴. By-laws

⁴ 19.3 by-laws per British Columbian First Nation versus 7.6 by-laws per Quebec First Nation

which have been passed by the First Nations of Quebec are often focused on filling the regulatory gap in regards to land use. For example, urban planning by-laws, residency by-laws and by-laws related to specific construction projects are two common results of the use of Section 81 powers (First Nations Gazette, 2016).

Section 81 by-laws passed in Quebec are typically much less thorough than their equivalent provincial legislation, which may undermine their effectiveness in bridging the regulatory gap. For example, the Mohawk Council of Kahnawake passed a section 81 by-law in 1987 addressing commercial activity within their territory. This by-law is four pages in total, including definitions, seven sections of one sentence each, and ratifying signatures. The central section of this by-law states that “no person may conduct or carry on a commercial venture on the territory” (Resolution #006/8788/006, 1987). The remaining sections lay out the penalties for violating the by-law, which is a fine not exceeding \$1,000, or imprisonment not exceeding six months, or both, as well as the possibility of seizing the property being used in the commercial venture in question (Resolution #006/8788/006, 1987).

The by-law making powers which have been exercised with increasing frequency by First Nations people is an example of the limitations of framing the regulatory gap as an accidental result of Canada’s jurisdictional divisions of power. Section 81 of the *Indian Act* is a powerful tool, and with the relaxation of Ministerial approval, followed by the more recent removal of the requirement altogether, can be used at the discretion of First Nations peoples. However, the encouragement of the section’s use by the government of Canada and the expanded number of passed by-laws has not bridged the regulatory gap as of yet. Based on the extremely limited nature of the by-laws passed by the First Nations of Quebec, it is possible that these communities lack the resources to develop land and environmental management regimes. Alternatively, it is possible that the restrictive nature of the Indian Act makes the use of the section difficult for the First Nations of Quebec. In either case, the push for the greater use of the section by the federal

government without the allocation of resources to support this activity is a major example of devolution, as the state passes these responsibilities directly to First Nations communities. This has major connotations for understandings of the regulatory gap, as the modern *Indian Act* arguably provides First Nations with the required jurisdiction to close the gap. Given that these communities continue to experience major negative consequences due to the gaps existence, it would appear that other factors may also play a role. Nonetheless, section 81 could potentially be utilized by the First Nations of Quebec to rectify the absence or inadequate nature of zoning and land use sections of the *Indian Act* if resources were provided to support this undertaking.

Property Rights

The *Indian Act's* property rights system also reflects the governance principles outlined above. The Crown's argument at the time of the Act's creation was that if restrictions on Indigenous property rights were not put in place, settlers would take advantage of these peoples (Holmes, 2002). It has been noted that Indigenous peoples typically had a different cultural understanding of private property than European settlers. For example, the idea that land could be owned as private, property by an individual in the European sense is not one which was held by Indigenous peoples (Holmes, 2002; Alcantara, 2003). These concerns contributed to characteristics of the *Indian Act's* system of private property. For example, the Act forbids the sale or granting of land until said land has been absolutely surrendered to the Crown by the band itself (Government of Canada, 2018, section 37.1). In addition, this absolute surrender is only valid if it is made to the Crown, if it is assented to by a majority of the electors of the band, and if it is accepted by the Governor in Council (Government of Canada, 2018, section 39.1). This places all control over the sale or granting of land almost exclusively in the hands of the Crown, which has the ability to reject any surrender as it sees fit. Once established, this framework remained virtually "impervious to substantive change", resulting in "inertia and lack of an

innovative approach to policy deliberations” (Leslie, as quoted in Holmes, 16). However, this set of assumptions and policies would begin to shift following the Second World War, as discussed above.

With the 1951 revision of the *Indian Act*; a broader and more thorough system of private property was introduced, placing the rudimentary and restrictive location ticket system. The revision reflects one of the major cross cutting themes of modern aboriginal governance, the opening of traditional lands for economic development (Alcantara, 2003). This is known as the Certificates of Possession System, which exists as a hybrid of the full ownership of land enjoyed by most Canadians and the temporary, conditional ownership which First Nations peoples were traditionally restricted to (Alcantara, 2003). Under the Certificates of Possession system, legal title to lands on reserve is still held by the Crown. However, with the consent of the Minister, a holder of a Certificate of Possession has several legal options over the more restrictive system previously in place. This includes the ability to build a residence on the land in question, to divide the territory up into smaller Certificates of Possession, to transfer interest in the land to other individuals, and to pass on land through a will (Alcantara, 2003, 405; Indian Act, Section 24). In addition, a holder of a Certificate of Possession can lease the territory in question.

Certificates of Possession are safe from legal seizure, and aside from taxes imposed by band councils, are exempt from taxation. Although this provides greater security to the holder of the Certificate and sometimes tax free income, the downside is that banks and other financial institutions are reticent to engage in business with holders of a Certificate without the ability to collect on potential defaults (Alcantara, 2003, 406). An additional issue is that due to the continued requirement of Ministerial approval, transactions involving Certificates of Possession are often slow; in one example, the length of time to conclude a transaction was eleven years (Alcantara, 2003, 410). This has serious implications for the regulatory gap, as the options

provided by Certificates of Possession system are constrained. As a result, decisions regarding land use and environmental management are likewise limited and subject to major delays.

In line with the cross cutting themes identified in modern Aboriginal governance, one of the major objectives of the Certificate of Possession system was to encourage economic development. In Quebec, this has succeeded to a certain degree, with several First Nations using the system to encourage the private ownership of homes on reserves, although it is difficult to ascertain how frequently. These communities have achieved this through the use of ministerial and band guarantees for loans from outside lending institutions (Flanagan and Alcantara, 2004, section C). The use of Certificates of Possession in such a way also engages with the cross cutting theme of devolution, as addressing the costly negative consequences of an insufficient land regime fell to the federal government. Flanagan and Alcantara note that a major effect of the system is a reduction in the reliance of bands on the federal government for housing (Flanagan and Alcantara, 2004, section C).

Although the First Nations of Quebec have made some innovative uses of the land management and property system found in the Indian Act, the regime's lack of clarity has led many First Nations peoples in Quebec to rely on courts when it comes to solving problems related to land use (Alcantara, 410). One such case was eventually appealed to the Supreme Court of Canada in 1996. Titled *R. v. Côté*, the case centered on a group of the Algonquin nation entering a controlled harvest zone in order to fish, in violation of provincial law (*R. v. Côté*, 1996). The Supreme Court ultimately ruled that the group were exercising their unextinguished right to fish on their traditional land (*R. v. Côté*, 1996). In this case, an unconstitutional attempt was made to apply provincial law to a First Nation of Quebec. This highlights the jurisdictional aspects of the regulatory gap, and how the lack of clarity in the *Indian Act's* land regime contribute to the issue. *R. v. Côté* is also an example of how the federal government's lack of initiative in creating comprehensive regimes around land and environmental management can

play out, with this responsibility essentially developed to the existing provincial regime despite the unconstitutional nature of this approach.

Environmental Management

There is no comprehensive environmental management regime to be found within the *Indian Act*. As noted above, the lack of such a regime has been frequently identified as a key problem in regards to the regulatory gap on *Indian Act* reserve lands, and is often linked to major issues with environmental and human health experienced on many reserves. Amendments to the Act which added waste regulations in the form of the IRWDRs (examined earlier) have proven to be largely ineffective. However, alternative approaches to bridging the gap have been identified.

For example, section 81 of the *Indian Act*, also discussed above, can be applied to the management of the environment; specifically, if the aim of a given by-law is to “preserve, protect and manage traditional harvesting resources” (Government of Canada, 2018, section 81). In addition to the broad by-law making abilities of the section, the *Indian Act* provides First Nations with the ability to impose fines of up to one thousand dollars (ten times the amount of the IRWDRs), and jail sentences of up to thirty days in the event of a conviction (Government of Canada, 2018, section 81). However, these by-law making powers have only been applied in a very limited manner to environmental management by First Nations peoples; it has been argued that a clarification of the precise authorities which First Nations possess in regard to environmental management would largely resolve this issue (Eamon and Boulton, 2015).

That being said, although the use of section 81 is relatively sparse in Quebec when compared to the rest of Canada, some environmental by-laws have been passed by the First Nations of Quebec in order to address the regulatory gap in respect to environmental

management. Most notably, by-laws regarding the preservation of particular species of animal, the disposal of waste, and the protection of sources of freshwater have been passed by several of Quebec's First Nations, and many of these by-laws have been in place for decades. For example, the First Nation of Kitigan Zibi Anishinabeg passed two separate by-laws regarding waste in 2014 alone (First Nations Gazette, 2018). This includes a by law regarding "waste disposal for environmental protection" (Kitigan Zibi Anishinabeg, 2014, 1). This by-law bans the dumping or burning of waste on the First Nations reserve, except in special circumstances, in which case a permit may be issued for the activity under strict conditions (Kitigan Zibi Anishinabeg, 2014, 1). Interestingly, this by-law mirrors the IRWDRs in terms of its brevity and its ban on burning waste, but empowers the Band Council and its representatives to ensure compliance with the by-law (Kitigan Zibi Anishinabeg, 2014, 2).

As the chief of the Kitigan Zibi community explained, bylaws of this nature were necessary due to the limitations of the *Indian Act*. In his words, "the Indian Act needs a major overhaul or new legislation must be enacted to replace this antiquated, paternalistic law. New legislation is required to protect our interests and allow our people to have full control over our lives and destiny" (Jean-Guy Whiteduck, as quoted in Kitigan Zibi Anishinabeg Economic Case Study – Part II, 1994). The additional by-law passed by the Band Council add additional options for the enforcement of the original by-law (Kitigan Zibi Anishinabeg, 2014, 2). These by-laws complement a third, passed in the same year, which blurs the boundary between environmental management and land regime by defining a protected aquifer zone with the goal of preserving the community's supply of fresh water (Kitigan Zibi Anishinabeg, 2014b).

Additional by-laws have been passed by the Kitigan Zibi Anishinabeg relating to animal preservation, hunting, fishing, and forest management. The first of these by-laws was established in 1955, but the bulk were passed in the 1980s. This makes the Kitigan Zibi Anishinabeg one of the most active by-law making First Nations people in Quebec. For context, 43 of the 236 by-

laws passed under Section 81 in Quebec are directly related to environmental management (First Nations Gazette, 2018). These by-laws have been passed by 12 individual First Nation communities, representing almost half of the First Nations of Quebec who remain under the jurisdiction of the *Indian Act* (First Nations Gazette, 2018). Additionally, one First Nation who has successfully implemented their own land regime under the FNLM Act, the Abénakis de Wôlinak, also passed by-laws under section 81 (First Nations Gazette, 2018). This suggests that for the Abénakis de Wôlinak, section 81 powers were not sufficient for their needs, and the structured and comprehensive FNLM development process offered a better option.

This has major connotations in regards to the regulatory gap, as the jurisdiction which First Nations peoples in Quebec have exercised over environmental management in particular is much broader than what is typically presented in the literature. However, the large number of First Nations in Quebec who have not passed any by-laws relating to environmental management also suggests that there remain significant barriers in regards to the passing of by-laws. This is particularly notable given the much more extensive use of section 81 powers by First Nations in other provinces, such as British Columbia. Challenges to the passing of by-laws likely include a lack of capacity on the part of First Nations peoples, a problem identified many times in recent discussions on Aboriginal governance. For example, in an INAC committee meeting on March 23rd of 2017, Harold Calla, the Executive Chair of the First Nations Land Management Board, argued that investment in capacity development was crucial to the self-determination of First Nations peoples, and was not currently prioritized (INAN Standing Committee, March 23, 2017). The sparse use of section 81 powers may also reflect a resistance to adhering to the *Indian Act* by these communities. Alternatively, it is possible that many communities are simply unaware of the possible reach of these by-law making powers.

Chapter 5 - The *James Bay and Northern Quebec Agreement*

Historical Background

The origins of the JBNQA are complicated, but the key event which led to the Agreement was the breaking of ground on the James Bay Hydroelectric Project by the Government of Quebec in 1971, on land which had not been ceded and was still in use by the region's Indigenous peoples (Government of Quebec, 1998; Peters, 1999). This land had been transferred to the Government of Quebec by the Government of Canada in 1912 through the Boundary Extension Act, under the condition that Indigenous interests must be surrendered before the territory could be developed (Government of Quebec, 1998; Peters, 1999, 395). The Cree and Inuit of Quebec viewed the construction of this hydroelectric project as both a violation of their traditional rights and as a major threat to their hunting, fishing and gathering territories (Government of Quebec, 1998; Peters, 1999, 395). When attempts to negotiate with Quebec proved unsatisfactory, the Cree and Inuit took legal action in 1972, and the Quebec Superior Court put an injunction in place against continued construction of the James Bay Hydroelectric Project (Government of Quebec, 1998; Peters, 1999, 395). Although this injunction would be overturned soon after, the uncertainty which this ruling created in regards to the Province's jurisdiction and legal right to develop Northern Quebec played a major role in the decisions of the Government of Quebec to negotiate a settlement. The James Bay and Northern Quebec Agreement was the result (Government of Quebec, 1998; Peters, 1999, 395).

It is important to note that these negotiations began in a unique context. The negative reaction to the federal government's *White Paper* (1969) and its subsequent retraction after large-scale organization and protest on the part of Indigenous peoples had occurred shortly before the James Bay Cree took the provincial government of Quebec to court. Like the federal government, the province of Quebec was forced to adapt to this new political environment. For example, the recognition of Indigenous title which occurred in *Calder v British Columbia* took

place just a year before the JBNQA was ratified. In addition, the growth of the nationalist movement in Quebec significantly raised the negotiations profile, as asserting control over northern Quebec and developing the resource rich territory were both central aims of the movement (Papillon, 2012, 8). However, although this negotiation resulted in a trilateral agreement, it must be noted that the James Bay Cree in particular were critical of many aspects of the JBNQA, and of its implementation. Isabel Altimirano-Jiménez sums up these criticisms, writing that “Indigenous ... politics are motivated by specific aspirations and are shaped by different colonial entanglements” (Altimirano-Jiménez, 2013, 4). In the case of the JBNQA, this case study argues that while the Cree aspired to a degree of self-government over their traditional lands, the provincial and federal government continued a long trend of seeking to devolve responsibility over key areas of governance while simultaneously opening territory for economic development.

The JBNQA was finalized in 1974, and was signed on November 11th, 1975, between the James Bay Cree in partnership with the Inuit people of Quebec, the province, and the Government of Canada (AANDC, 2014, 1). The agreement came into effect on January 27, 1977, and on June 30, 1977, the Government of Quebec ratified Bill 32, which provided provincial approval of the JBNQA (AANDC, 2014, 1). On June 23, 1978, the agreement was amended to include the Naskapi First Nations through the *Northeastern Quebec Agreement* (NEQA); this amendment came into effect on June 28, 1978 (AANDC, 2014, 2). The James Bay Energy Corporation, the James Bay Development Corporation and Hydro-Quebec were all included as signatories in this agreement (Government of Quebec, 1998, Philosophy of the Agreement). This was due to their central role in the James Bay Hydroelectric Project, and the anticipation of future hydroelectric development which would potentially have major impacts on the territory and livelihood of the Indigenous peoples who signed the Agreement (AANDC,

2014, 2). 9 Cree communities, 15 Inuit communities and 1 Naskapi community are included in the Agreement (AANDC, 2014, 11).

Study of the JBNQA is challenging for several reasons. First, the Agreement is quite comprehensive, and its length is significant. The Agreement covers a wide variety of topics over 400 pages, and many of these topics are highly technical in nature. In addition, the Agreement affects a substantial geographic area, spanning a large portion of Quebec (Government of Quebec, 1998, Philosophy of the Agreement). Finally, the implementation of the Agreement has proven to be challenging, and has resulted in a long, dynamic, and complex political process (AANDC, 2014, 3). An overview of this process will be laid out below.

A brief summary of the process illustrates the complexity of the JBNQA's implementation. In 1981, shortly after the Agreement's signing, the House of Commons Standing Committee on Indian Affairs and Northern Development highlighted several issues with the JBNQA's implementation process (AANDC, 2014, 12). For example, despite the JBNQA representing a significant departure from the governance structure of the Indian Act, the federal and provincial government only provided start-up funds for the administrative structures described at length below (Papillon, 2008, 14). As a result, these structures were not able to fulfill the responsibilities vested in them by the JBNQA. This led to a Department of Indian Affairs report, completed in 1982, which found that "Canada has not breached the agreement as a matter of law [but] the spirit of the JBNQA clearly called for a commitment beyond that of existing programs" (Department of Indian and Northern Development, 1982 9). In turn, a series of measures were put in place to address the problems exposed by the Standing Committee (AANDC, 2014, 12). Four years later, in 1986, the Government of Canada approved a new approach aimed at meeting government obligations under both the JBNQA and the supplementary NEQA, beginning a negotiation process which would last for four additional years (AANDC, 2014, 12). Eventually, in 1990, agreements were signed with the Inuit and the

Naskapi, releasing the federal Government of Canada from some of its obligations in return for a large settlement (AANDC, 2014, 12).

The 1990 agreements represent an important example of devolution on the part of the federal government, which chose a costly buyout in exchange for devolving responsibilities which could prove even more expensive over the long term. For example, the implementation agreement makes it clear that the responsibilities being devolved included “the federal share of capital costs, operations and maintenance (including insurance) and programs and services, as applicable” (Government of Canada, 1990, 3). In the same year, Indian and Northern Affairs Canada created the James Bay Implementation Office to spearhead further implementation activity with the James Bay Cree in particular; this would lead to many rounds of discussion and negotiation in the 1990s and into the 21st century (AANDC, 2014, 12).

Land Categorization

Two clarifications should be made before an in depth examination of the land categorization of the JBNQA advances. First, given the focus here on the regulatory gap on *Indian Act* reserve lands, which are occupied by First Nations peoples exclusively, the JBNQA’s application to the Inuit will not be examined here. Second, it is important to note that several conflicting figures can be found on the exact number of square kilometers included in the JBNQA, most likely due to the long time span over which the Agreement has been implemented. However, the figures utilized in this case study represent the most recent numbers, based on the final transfer of land from the Government of Quebec to the Government of Canada, which occurred in 1999 (AANDC, 2014, 8).

Figure 2: Land Area (square kilometers) for Category I and II Defined by the JBNQA and the NEQA in 1978, By Beneficiary Group (2005/2006 - 2006/2007 Annual Report, 8).

		Category I Lands	Category II Lands	Category III Lands
Cree	IA	3,295.39*		Cree, Inuit and Naskapi exercise Native harvesting rights in Category III Lands
	IB	1,992.98		
	IB special	252.96		
	5,541.33	68,790.39		
Inuit	I	8,152.01	81,596.58	
Naskapi	IA-N	41.92		
	IB-N	284.90	II-N 4 144.00	
		326.82		
Total		14,020.16	154,530.97	910,711**

* Following acceptance by the Government of Canada from the Government of Quebec, in 1999, of the final transfer of Category IA lands, the Cree IA lands cover 3,299.6 km².

** Ministère du Conseil exécutif, Secrétariat aux affaires autochtones.

The JBNQA divides Northern Quebec into three different categories of land. The first, Category I land, sets aside 14,020.16 square kilometers in and around Indigenous communities (AANDC, 2014, 8). The James Bay Cree received 5,541.33 square kilometers of Category I lands, while the Naskapi received 326.82 square kilometers (AANDC, 2014, 8). The Inuit of Northern Quebec received the remainder of the 14,020.16 square kilometers of Category I land, a total of 8,152.01 square kilometers (AANDC, 2014, 8).

For the Cree and Naskapi First Nations, Category I land is further subdivided into IA and IB land. In regards to IA land, the Government of Quebec transferred the control and management of 3,295.39 square kilometers of traditional Cree territory and 41.92 square kilometers of traditional Naskapi territory to the Government of Canada for the exclusive benefit and use of the local First Nations communities (AANDC, 2014, 8). Despite this transfer, Quebec maintained its bare ownership rights to this territory (AANDC, 2014, Section 5, paragraph

5.1.2). Bare ownership is a legal term in French property laws which indicates that although Quebec has no right to use or derive profits from this territory, they still legally own the land (Sasseville, 1997). Within the JBNQA, IA land is considered to fall under the jurisdiction of Canada, and the Crown therefore has specific responsibilities in regards to this category of land; this is true despite the bare ownership over the land which Quebec maintains (AANDC, 2014, 7; Sasseville, 2). However, Category IA lands are governed by local First Nations administrators (AANDC, 2014, 7). Technically, Naskapi land is categorized as IA-N to differentiate it from Cree IA land; however, these land categories are functionally identical (AANDC, 2014, 7).

In regards to Category IB land, the Government of Quebec transferred full ownership of 2,245.94 square kilometers of traditional Cree territory and 284.90 square kilometers of traditional Naskapi territory to landholding corporations formed by the respective Indigenous peoples (AANDC, 2014, 8). The only caveat to the full transfer of ownership and the rights associated with it over this territory was that the landholding corporations in question can only ever sell or otherwise transfer control over this territory to the province of Quebec (Sasseville, 1997, 2). In addition, within the JBNQA, IB land is considered to fall under the jurisdiction of Quebec, and the province therefore has specific responsibilities in regards to this category of land (AANDC, 2014, 8). Category IB land is governed by the corporations who hold the land; these corporations are composed exclusively of First Nations peoples (AANDC, 2014, 8). As with IA and IA-N land, technically, Naskapi IB land is categorized as IB-N land. However, these land categories are once again functionally identical.

The second category of land established by the JBNQA's land regime is Category II land. Whereas Category I land is generally land upon which First Nations peoples are living, Category II land is generally traditional hunting, fishing and gathering territory (AANDC, 2014, 8). As such, this land typically surrounds Category I land, and is significantly larger. In comparison to the 14,020.16 square kilometers of land placed in Category I by the JBNQA, 154,530.97 square

kilometers of land are classified as Category II (AANDC, 2014, 8). 68,790.39 square kilometers of this land is reserved for the Cree, 4,144.00 square kilometers are reserved for the Naskapi people, and the Inuit received the remaining 81,596.58 square kilometers of Category II land (AANDC, 2014, 8). The Cree and Naskapi First Nations have exclusive fishing, trapping, and hunting rights on their respective Category II lands (AANDC, 2014, 8). However, the Government of Quebec maintains its jurisdiction over this territory, and continues to exercise administrative control on this land (Sasseville, 1997, 2). Although the land falls under provincial jurisdiction, and like category I land is therefore also not owned by Indigenous peoples, communities do participate in the management of traditional activities on these lands through a number of boards which will be explored below (AANDC, 2014, 8).

Finally, 910,711.00 square kilometers of Quebec are classified as Category III lands (AANDC, 2014, 8). Category III lands are Quebec public lands where both First Nations peoples and non-First Nations peoples may hunt and fish (AANDC, 2014, 8). However, the Cree and Naskapi exercise certain exclusive rights on these lands under the JBNQA; most notably, they may exclusively harvest certain aquatic and fur-bearing animals (AANDC, 2014, 8). In addition, the Cree and Naskapi participate in the administration and development of the territory (AANDC, 2014, 8). Lastly, these peoples held a veto over applications for the establishment of new outfitting operations; this veto expired in 2015, however (AANDC, 2014, 8; Sasseville, 1997, 2).

The land regime laid out in the JBNQA is significantly more developed than that of the *Indian Act*, as are the powers provided to the First Nations peoples who are party to the Agreement. First, the JBNQA covers a much larger area of land, going far beyond the territorially limited reserves established in the *Indian Act*. Through this expanded geographical coverage, the JBNQA addresses not only the land on which the Indigenous communities of Northern Quebec are established, but also the traditional hunting, fishing and gathering territories

on which they rely for subsistence. These activities were identified by the chief negotiator of the JBNQA as the most crucial to the Cree people, and are further identified as being intimately connected to the land (Government of Quebec, 1998, 7). Due to this fact, the land regime established by the JBNQA is central to the agreement. As the chief negotiator writes, this is;

[...] an elaborate regime. It sounds as if we are going to great lengths to deal with special interests and problems. And we are. For while affirming the integrity of its territory, the Government of Quebec has sought to ensure that the native peoples can maintain their traditional way of life which is the basis of their economy, their culture, and their survival. And what's more, the Government has sought to ensure that this way of life is viable.

This represents a significant shift in Aboriginal governance not only for the government of Quebec, but also for the federal government who is party to the Agreement and participated in its negotiation. Notably, goals of assimilating First Nations peoples, strongly expressed only five years earlier in the White Paper of 1969, are entirely absent. Instead, the preservation of the traditional way of life of the James Bay Cree is given much greater consideration. This once again reflects a significant shift in governance practices, driven by the dramatic rise of organized Indigenous activism and the recognition of Indigenous title in the Calder case, which significantly challenged the longstanding approaches of the Crown and the Department of Indian Affairs in particular. For the government of Quebec, whose construction of the James Bay Hydroelectric Project had been temporarily halted by court injunction, these issues were of major concern (AANDC, 2014). The clarification and assertion of sovereignty therefore became a key objective, and was achieved through the negotiation of the JBNQA.

On paper, the land regime established by the JBNQA appears to bridge the regulatory gap that exists for the First Nations of Quebec under the *Indian Act*. The Agreement establishes clear cut boundaries in terms of both jurisdiction and geography, explicitly establishing the specific responsibilities of all parties involved and where they apply. If the

commonly accepted explanation for the regulatory gap is accurate, the gap should have been decisively closed by the Agreement.

Property Rights

Through the JBNQA, the Cree and Naskapi acquired a range of powers. Notably, band councils of the Cree and Naskapi maintained powers which they previously held through section 28 (2), 81 and 83 of the *Indian Act* (Government of Quebec, 1998, Section 9, c). On Category 1A and 1A-N lands, these powers are primarily related to use and habitation (Sasseville, 1997, 4). According to the JBNQA a Cree or Naskapi individual may make use of one lot of land for residential purposes, although municipal corporations may acquire property required for municipal purposes through a number of means (Government of Quebec, 1998, Section 12, schedule 2, 11).

In the case of Category I land occupied by third parties who are not members of the Cree or Naskapi First Nations, several unique stipulations apply. First, the land holder may continue to exercise their rights until the expiry of the term (Sasseville, 1997, 13). However, upon expiry of the term, these lands are considered to be Category III lands, despite their technical Category I nature (Sasseville, 1997, 13). As a result, land within Cree communities which are not directly occupied by the Cree essentially revert to public lands of Quebec, although the Cree continue to exercise traditional hunting and gathering rights. To balance the decreased Cree jurisdiction over these lands, the territory and its holders are subject to the Cree local authority, in the same way that they would be if they were on Category I lands (Sasseville, 1997, 13). In other words, despite being within the bounds of territory directly occupied by the Cree, this land would be considered to be public lands of Quebec, although Cree authority would still be exercised over it.

It must be noted once again that the Government of Canada, in right of Quebec, maintained bare ownership of Category IA and IA-N lands (in other words, both the Cree and

Naskapi IA lands). As such, the Cree and Naskapi are unable to grant full property rights to these lands. As such, the highest level of title which can be granted by band councils is a right of superficies (Sasseville, 1997, 15). This right allows a person or a corporation to construct buildings on a given parcel of land without technically owning the land; in this case, the person or corporation would exercise full ownership of the building or buildings only (Sasseville, 1997, 15). The right of superficies also grants a right to the use of the land in question (Sasseville, 1997, 15).

In comparison to the property rights system applied to the First Nations of Quebec under the Indian Act, the JBNQA does not make significant changes. The same right to pass by-laws under section 81 of the Indian Act is provided to the James Bay Cree. Furthermore, the Cree were not provided full ownership of the land they directly occupied. As for the First Nations under the Indian Act, full ownership of the land is still vested with either the province of Quebec or the federal government. In other words, the federal and provincial governments of Canada still exercise sovereignty over these lands, despite the devolution of many responsibilities to the Cree.

Environmental Management

The land regime laid out in the JBNQA in some ways reflects the objectives of the James Bay Cree of the province of Quebec. Arguably the most important of these objectives was the need to protect the land and guarantee that traditional harvesting rights would be preserved; these rights are central to the Cree way of life (Government of Quebec, 1998, Philosophy of the Agreement; Peters, 398). The environmental regime laid out in Section 22 also reflects this objective to an extent.⁵

One of the major objectives of the Indigenous peoples who negotiated the JBNQA was to secure meaningful participation in the management of their traditional lands (Government of

⁵ Due to this case studies focus on First Nations peoples, Section 22 (Environment and Future Development Below the 55th Parallel) will be the focus of this section of the case study.

Quebec, 1998, Philosophy of the Agreement; Peters, 395). This objective reflects the importance of traditional harvesting activities such as hunting and fishing to Indigenous peoples (Government of Quebec, 1998, Philosophy of the Agreement; Peters, 395). Several sections of the JBNQA reflect this objective, either implicitly or explicitly. Despite the lack of full ownership over the land, the James Bay Cree and Naskapi secured significant collective powers through the JBNQA. Band councils became incorporated through the Agreement, and received authorities similar in nature to that of a Canadian municipality (2005/2006 - 2006/2007 Annual Report, 10). This includes the ability to adopt by-laws concerning environmental protection, as well as local taxation, public order, transportation, business, and land and resource use (2005/2006 - 2006/2007 Annual Report, 11). However, it should be noted once again that many of these powers were already provided under section 81 of the *Indian Act*.

These by-law making powers were enhanced in 1984 by the Cree-Naskapi (of Quebec) Act, passed by the Parliament of Canada in order to fulfill provisions in the JBNQA related in large part to self-government for Indigenous communities (Implementation and Amendments of the Cree-Naskapi (of Quebec) Act, Introduction). With the passing of the Cree-Naskapi (of Quebec) Act, the JBNQA replaced the *Indian Act* for the signatory communities, and in the process, responsibilities and power of the federal government in the general administration of Indigenous communities and on Indigenous lands were curtailed (Implementation and Amendments, Intro; Peters, 135).

This act is of central importance to the implementation of the JBNQA, as it allows the JBNQA to supersede the *Indian Act* in all areas except in the designation of Indian status (Implementation and Amendments, Introduction; Peters, 399). In doing so, the Cree-Naskapi Act institutes a form of self-government which in principle goes beyond the municipal powers discussed above (Implementation and Amendments, Section F). However, these powers apply exclusively to Cree and Naskapi communities, which are located within the bounds of Category

IA and IA-N territory. As Category I lands are the most limited of the three categories of land, this means that the by-law making power of Cree and Naskapi bands is relatively limited in terms of geographic scope.

Environmental management goes hand in hand with the land categorization system outlined above. As the negotiated land regime entrenched traditional Indigenous rights to hunt, fish, and gather on their ancestral lands, the creation of a true environmental regime entrenched, in theory, their ability to do so in perpetuity (Peters, 397). Notably, communities were empowered to develop their own institutions of environmental management and their own by-laws in this area (Government of Quebec, 1998, Section 9). Furthermore, section 22 of the JBNQA develops a series of principles designed to limit the exercise of both federal and provincial government powers upon it (Government of Quebec, 1998, Section 22). As such, despite the continued legal ownership of these lands by the Governments of Canada and Quebec, their ability to assert control over Cree territory is limited by the JBNQA. In addition, the Cree ensured that their representatives would sit on consultative boards established to carry out environmental assessments and to evaluate proposed developments (Government of Quebec, 1998, Section 22). This measure allowed the Cree to participate in each stage of environmental assessment procedures, giving the people a means to halt future developments on their lands without having to resort to the Canadian court system.

In regards to Category II and III lands, Cree negotiators rejected an environmental regime which was solely based on impact assessments and procedural reviews, although both still play a major role in the final Agreement (Government of Quebec, 1998, Section 22; Peters, 396). Section 22 of the JBNQA also establishes the James Bay Advisory Committee on the Environment, a tripartite body made up of members appointed by the Cree, Canada and Quebec (Government of Quebec, 1998, Section 22.3). This Committee was established to review and

oversee the administration and management of the environmental and social protections regime laid out in the JBNQA (Government of Quebec, 1998, Section 22.3).

Of the thirteen committee members, four are appointed by each of the three parties, with the last member being the Chairman of the Hunting, Fishing and Trapping Coordinating Committee, an additional committee established in section 24 of the Agreement (Government of Quebec, 1998, Section 23.3.2). The voting power of these members is established in an interesting manner. If a matter of exclusive federal jurisdiction is the subject of a vote, Quebec's members are excluded from the voting process, and vice versa if the matter is of exclusive provincial jurisdiction (Government of Quebec, 1998, Section 22.3.4). If the matter is of mixed jurisdiction, all members can vote, but each member appointed by the Cree is given two votes to the other members one (Government of Quebec, 1998, Section 22.3.4). Votes made by the Committee require a simple majority to pass (Government of Quebec, 1998, Section 22.3.12).

This Committee is explicitly advisory in nature, a consultative body which both federal and provincial governments are expected to engage with when formulating laws and regulations relating to the environment (Government of Quebec, 1998, Section 22.3.24). The Committee is mandated to review existing regulations and can recommend legislation, regulations and related measures related to the environment. However, final decision making power remains in the hands of the Government of Canada or Quebec, depending on the recommendation (Government of Quebec, 1998, Section 22.3.25).

Regulatory power is also established by Section 22 of the Agreement, with Quebec and Canada maintaining regulatory jurisdiction over Category II and III lands; this includes jurisdiction over the administration of these lands and of regulatory enforcement (Government of Quebec, 1998, Section 22.4). As noted, local governments have jurisdiction over Category I lands (Government of Quebec, 1998, Section 22.4). In addition, any activities or developments

which occur on Category I lands must abide by environmental regulations established by all three parties, federal, provincial and local (Government of Quebec, 1998, Section 22.4.2).

Regardless of the administrator, all major proposed developments on JBNQA land are subject to an impact assessment or review (Government of Quebec, 1998, Section 22.5.1). An additional body, the Evaluating Committee of the James Bay Advisory Committee on the Environment, is established by the Agreement and given the responsibility of overseeing development proposals, and in particular, determining whether an impact assessment is required. Specifically, the body is responsible for assessing the necessity and creating guidelines for impact studies (Government of Quebec, 1998, Section 22.5.6). Like the larger committee, the Evaluating Committee is made up of an even mix of appointed members representing Quebec, Canada, and the James Bay Cree, with an identical voting mechanism (Government of Quebec, 1998, Section 22.5.6-7). Together, these two committees are in theory designed to ensure that all three signatory parties are given an equal voice when it comes to evaluating the environmental impact of development projects on JBNQA land.

The third and fourth bodies established as part of the JBNQA's environmental regime are the Review Committee and the Review Panel. In cases where they are required, these bodies are vested with the responsibility of reviewing impact statements and assessments submitted for potential development projects (Government of Quebec, 1998, Section 22.6). The Committee and Panel are responsible for activity on lands under the jurisdiction of Quebec and Canada respectively, and may recommend whether or not a project should proceed based on the submitted impact statements (Government of Quebec, 1998, Section 22.6). Once again, the membership and voting proportions of the Committee and Panel are identical to the two bodies discussed above (Government of Quebec, 1998, Section 22.6). Although the Administrator of the territory (the Government of Canada or Quebec) is required to consult with their respective Review body, the final decision of whether or not to go forward with a development project is

theirs (Government of Quebec, 1998, Section 22.6). However, development projects which are not defined as major are not subject to the requirements outlined above.

To summarize, Section 22 of the JBNQA is focused in large part on the assessment of industrial and commercial developments, and lays out the responsibilities of the governments of Quebec and Canada very clearly (Government of Quebec, 1998, Section 22). First, both orders of government must give due consideration to the key principles laid out in the section, namely, that the traditional hunting, fishing and trapping rights of the Indigenous peoples signatory to the treaty must be respected (Government of Quebec, 1998, Section 22). Building on this principle, the minimization of the impact of development on these peoples is identified as a major goal of this environmental regime (Government of Quebec, 1998, Section 22). This includes negative environmental impacts, but also negative social impacts; the Agreement explicitly links these two concepts in regime which reflects the cultural values of the Cree and Inuit peoples of Quebec (Government of Quebec, 1998, Section 22). The objective of this section is to ensure that the Governments of Canada and Quebec give proper consideration to Cree interests, as well as to provide a degree of legal recourse in case of the neglect or violation of commitments made in the Agreement (Government of Quebec, 1998, Section 22; Feit, 1980; as quoted in Peters, 398). In effect, the environmental regime established by the JBNQA is based on co-management. The regime is centered on consultation, impact assessment and cooperative environmental regulation (Government of Quebec, 1998, section 22-24; Peters, 398).

If the commonly accepted explanation for the existence of the regulatory gap is accurate, the JBNQA should bridge the gap by clearly defining the jurisdictional responsibilities of governing parties. However, it must be emphasised that although the bodies established to oversee this environmental regime have in theory had significant responsibility devolved to them, they are ultimately advisory, with the final authority over environmental decision making vested in the Government of Quebec or Canada depending on the body (Government of Quebec,

1998, Section 22). As such, even if the Cree reject an economic development proposal due to environmental concerns, the project can still be approved. In addition, the Government of Quebec obtained further rights to unilaterally approve of economic development projects on JBNQA lands in exchange for concessions to the Cree and Naskapi (Government of Quebec, 1998, Section 22).

The advisory nature of the boards and the veto power of the provincial and federal governments reflects both of the major cross cutting themes found in discussions of modern Aboriginal governance. Responsibility over environmental oversight has been devolved to the bodies established through the JBNQA, and although Canada and Quebec are represented on these boards, a major complaint of the James Bay Cree for many years was a major lack of support and resources for these bodies (Rynard, 2001). Despite this devolution, no actual decision making power has been provided to these boards. Rather, when it comes to economic development, Quebec and Canada maintain the right to unilaterally approve or deny a given project. In this respect, the central importance which the provincial and federal government placed on economic development when negotiating the JBNQA is clear. The boards are almost entirely oriented around commercial and industrial development projects, despite a total lack of actual decision making power in regards to whether or not these projects are ultimately approved. Indeed, although the state of the boards has improved over time, it has been noted that for many years after the signing of the JBNQA, “the role of native representatives ... [was] mostly symbolic and most of the time, governments [made] policy decisions without consultation” (Papillon, 2008, 13).

Conclusion

Through a comparative case study of the *Indian Act* and the James Bay and Northern Quebec Agreement, several key findings emerge. First, it is clear that although the *de facto* and *de jure* divisions of jurisdiction and power within Canada may play a role in the existence of the regulatory gap, studies of the gap have failed to engage with the larger debate on modern Aboriginal governance. This failure has led to key weaknesses in understanding the reasons for the gap's existence and the major challenges encountered in attempting to close it.

Most importantly, the cross cutting themes of devolution and economic development present in modern Aboriginal governance have not generally been considered in studies of the regulatory gap. When the *Indian Act* is compared to the JBNQA, it becomes clear that both of these concepts were heavily prioritized by the governments of Quebec and Canada. For example, environmental review boards established through the JBNQA in theory bridged the regulatory gap as it existed on Indian Act reserves in regards to environmental environment. However, the governments of Quebec and Canada reserved the right to unilaterally allow development projects in northern Quebec, regardless of the boards' recommendations. Both governments also failed to adequately finance the boards, hindering the bodies' ability to undertake environmental reviews and evaluations. In this case, costly responsibilities were devolved from both governments while final decision making power was maintained, ensuring that economic development would continue unhindered. Furthermore, despite divesting themselves of many responsibilities, the federal and provincial government nonetheless maintained actual ownership over the lands encompassed by the JBNQA. As Rynard notes, "the role and priorities of the state in Canadian capitalist society must be emphasized: treaty obligations which restrain capitalist development or which establish expensive precedents are chronically ignored" (Rynard, 2001, 8).

However, after a long period of push-back, many of these issues appear to have been overcome, with additional legislation such as the *Agreement on Cree Nation Governance*

emerging as recently as July of 2017. As Dr. Matthew Coon Come, Chairman of the Cree

Nation, writes:

The Agreement on Cree Nation Governance signed today recognizes the Cree Nation Government and the Cree First Nations as mature and responsible governments. It continues the work of implementing Cree self- governance under our treaty, the James Bay and Northern Québec Agreement. It will provide the Cree First Nations and the Cree Nation Government with greater autonomy in the governance of Category IA lands. It marks another advance in Cree Nation building and in our nation-to-nation relationship with Canada. (INAC, 2017)

From this comparative case study, it becomes clear that although the JBNQA is now lauded by the Cree, the major challenges encountered in implementing the agreement imply that self-government agreements of this type may not be a universal panacea for the regulatory gap. In addition, further study of the Agreement may be required before additional conclusions can be made. For example, it is possible that the lump sum payment made by the government of Canada to the James Bay Cree in exchange for the divestment of key responsibilities may have played a major role in supporting the land regime and environmental management established by the JBNQA. Although funding for the bodies established by the Agreement dried up shortly after their initial establishment, the federal and provincial government did eventually acknowledge that they had violated the spirit of the Agreement in failing to provide additional resources. The subsequent buy-out of government responsibilities can be seen as a major cost saving devolution, but it was also an undeniably significant infusion of funds into Cree communities.

This case study also demonstrates the heterogeneity of First Nations governance. Although the regulatory gap on Indian Act reserve lands is often discussed as a major issue facing all reserves it is clear that many have made major efforts to develop land and environmental regimes. These efforts range widely from province to province. For example, by-law making powers provided by section 81 of the *Indian Act* have a long history of use by the First Nations of Canada. The section has frequently been utilised by communities in order to pass by-laws related to environmental and land management, and thousands of these by-laws have

been passed in Canada in the post-war period. However, the section is frequently ignored or not examined in depth in studies of the regulatory gap. Greater analysis of these by-laws would be very interesting, as it is possible that the powers provided by the section provide a serious counterargument to the theory that the regulatory gap is jurisdictional in nature. However, from a review of the sections use in Quebec, it is clear that the by-laws passed under this authority are highly constrained in length and breadth.

From this perspective, efforts to bridge the regulatory gap which are focused on jurisdiction may be misguided, and as a result, a strong argument can be made in favour of greater support for capacity building. Increased capacity would allow First Nations communities to pursue existing avenues of self-government. The FNLM Act provides an example of just such an initiative. Developed in large part by First Nations themselves, the Act and its supporting Reserve Land and Environment Management Program place a heavy emphasis on capacity building, and as the name suggests, is highly focused on land and environmental management. Although the FNLM Act was only relatively recently expanded to Quebec, one First Nation has implemented their own land regime, with three more in the development process. Given the number of First Nations across Canada who have opted into the FNLM Act over its relatively short existence, the Act appears to have great promise.

This study sought to elaborate on the commonly accepted understandings of the regulatory gap in the context of a single province, and to contrast the regulatory gap on *Indian Act* reserve lands with an entirely separate piece of legislation related to First Nations self-governance. The objective of this approach was to provide greater depth and clarity to the ongoing discussion surrounding the regulatory gap. Although this objective has been met, it is clear that further study into this highly complicated, long running, and contentious subject is required.

Bibliography

- Aboriginal Affairs and Northern Development Canada. *Agreement Concerning a New Relationship Between the Government of Canada and the Cree of Eeyou Istchee*. 2010. <http://www.aadnc-aandc.gc.ca/eng/1100100031944/1100100031946>
- Aboriginal Affairs and Northern Development Canada. "Attempts to Reform or Repeal the Indian Act." 2013. <https://www.aadnc-aandc.gc.ca/eng/1323350306544/1323350388999>
- Aboriginal Affairs and Northern Development Canada. "Audit of Environmental and Contaminated Sites (including 2014 Follow-up Reports)." 2012. <https://www.aadnc-aandc.gc.ca/eng/1407176921265/140717698707>
- Aboriginal Affairs and Northern Development Canada. "Environmental Management and Stewardship: Seeking First Nations Perspectives on Waste Management on Reserves in British Columbia." 2012. http://www.sylx.org/wordpress/wp-content/uploads/2012/02/ENVIRONMENTAL_STEWARDSHIP_AND_WASTE_MANAGEMENT.PPT.pdf
- Aboriginal Affairs and Northern Development Canada. *The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement: Annual Reports 2008-2009/2009-2010*. 2014. https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_fagr_qc_jamesbay2008-2010_1407870740208_eng.pdf
- Aboriginal Affairs and Northern Development Canada. *Reserve Land and Environment Management: Manual*. 2011. <http://www.nalma.ca/wp-content/uploads/2016/01/RLEMP-Manual.pdf>
- Alcantara, Christopher. "Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession." *The Canadian Journal of Native Studies*, vol. 23, no. 2, 2003, pp. 391-424. http://www3.brandonu.ca/cjns/23.2/cjnsv23no2_pg391-424.pdf
- Altimirano-Jiménez, Isabel. *Indigenous Encounters with Neoliberalism: Place, Women, and the Environment in Canada and Mexico*. UBC Press, 2013.
- Auditor General of Canada. "Land Management and Environmental Protection on Reserve." *Fall Report of the Auditor General of Canada*. 2009. http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_e_33252.html
- Berger, Thomas R. "Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period." *Indigenous and Northern Affairs Canada*. 2006. <https://www.aadnc-aandc.gc.ca/eng/1100100030982/1100100030985>
- Bharadwaj, Lalita, *et al.* "Solid Waste Incineration in a Saskatchewan First Nation Community: A Community-Based Environmental Assessment of Dioxins and Furans" *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, vol. 6, no. 1, 2008, pp. 161-180. <http://www.pimatisiwin.com/uploads/1445063370.pdf>

- Boutilier, Sash. "An unsung success: The First Nations Land Management Act." *Policy Options*, 2016. <http://policyoptions.irpp.org/magazines/august-2016/an-unsung-success-the-first-nations-land-management-act/>
- Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. UBC Press, 1997. <https://www.sfu.ca/~palys/Borrows-WampumAtNiagara.pdf>
- Canadian Broadcasting Corporation. "Made in Nunavut offers behind-the-scenes look into the creation of a territory". *CBC News*. 2015. <https://www.cbc.ca/news/canada/north/made-in-nunavut-book-jack-hicks-graham-white-1.3354422>
- Cardinal, Harold. *The Unjust Society*. Douglas and McIntyre, 1969.
- The Council of the Six Nations Hereditary Chiefs. *Resolution #006/8788/006*. 1987. http://sp.fng.ca/fngweb/070_territory_by-law_1987.pdf
- Edgar, Laura; John Graham. "Environmental Protection: Challenges and Prospects for First Nations under the First Nations Land Management Act." *Institute on Governance*, 2008. https://iog.ca/docs/2008_April_fn_land_mgt_act.pdf
- Ellison, Michelle M. "Development of Aboriginal Lands: Successes, Risks and Environmental Concerns Respecting Contaminated Sites." Pacific Business & Law Institute Conference, September 26, 2012. <http://www.ratcliff.com/sites/default/files/publications/Development%20of%20Aboriginal%20Lands%20-%20Successes,%20Risks%20and%20Environmental%20Concerns%20Respecting%20Contaminated%20Sites.PDF>
- Erazo, Juliet S. "Landscape Ideologies, Indigenous Governance, and Land Use Change in the Ecuadorian Amazon, 1960-1992." *Human Ecology*, vol. 39, no. 4, 2011, pp. 421-439. <http://www.jstor.org.proxy.bib.uottawa.ca/stable/pdf/41474622.pdf>
- Flanagan, Tom; Christopher Alcantara. "Individual Property Rights on Canadian Indian Reserves." *Fraser Institute*, 2004. <https://www.fraserinstitute.org/sites/default/files/PropertyRightsonIndianReserves.pdf>
- First Nations Gazette*. Accessed March 9th, 2018. <http://www.fng.ca/>
- First Nations Lands Management Resource Center. "A first for Quebec! Abénakis de Wôlinak VOTE yes!" March 6th, 2017. <https://labrc.com/a-first-for-quebec-abenakis-de-wolinak-vote-yes/>
- First Nations Lands Management Resource Center. Member Communities. 2018. <https://labrc.com/member-communities/>
- First Nations Land Management Development Center. "Application of the Indian Reserve Waste Disposal Regulations for First Nations Under the First Nations Land Management

- Regime.” <https://labrc.com/wp-content/uploads/2015/02/indianreservewastedisposalregulationupdate.pdf>
- Gailus, John W. “Management of Contaminated Sites on Indian Reserve Lands.” Devlin Gailus, 2013. http://www.dgwlaw.ca/wp-content/uploads/2014/12/Site_Remediation_Conference_Paper.pdf
- Georgescu, Catalina Maria. "Europeanization imagology, historical institutionalism and integration: comparative politics of institutional change in governance." *Revista de Stiinte Politice*, no. 43, 2014, pp. 222-234. https://www.researchgate.net/publication/270212969_Europeanization_Imagology_Historical_Institutionalism_and_Integration_Comparative_Politics_of_Institutional_Change_in_Governance_Work_supported_by_the_strategic_grant_POSDRU15915S133255_Project_ID_133
- Government of British Columbia. “Provincial laws to regulate on-reserve development projects.” 2012. <https://news.gov.bc.ca/stories/provincial-laws-to-regulate-on-reserve-development-projects>
- Government of Canada. *Indian Act (R.S.C., 1985, c. I-5)*. Current to February 15, 2018. <http://laws-lois.justice.gc.ca/eng/acts/i-5/>
- Government of Canada. “Indian Reserve Waste Disposal Regulations (C.R.C., c. 960).” *Indian Act*. Current to February 15, 2018b. http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._960/page-1.html
- Government of Canada. *Statement of the Government of Canada on Indian policy*. 1969. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cp1969_1100100010190_eng.pdf
- Government of Canada. “Summary of the Agreement.” <https://www.gcc.ca/pdf/LEG0000000017.pdf>
- Government of Quebec. *James Bay and Northern Quebec Agreement and Complementary Agreements*. Les publications de Quebec, 1998. http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/james_bay-e/jbnq_e.pdf
- Hansen, Erin. “Reserves.” University of British Columbia. 2009. <http://indigenousfoundations.arts.ubc.ca/home/government-policy/reserves.html>
- Hicks, Jack; Graham White. *Made In Nunavut: An Experiment in Decentralisation*, UBC Press, 2016, pp. 3-23.
- Holmes, Joan. “The Original Intentions of the Indian Act.” Joan Holmes & Associates Inc. 2002. <http://www.joanholmes.ca/Indian%20Act%20Paper%20Final.pdf>
- House of Commons. Standing Committee on Aboriginal Affairs and Northern Development. “Study of Land Management and Sustainable Economic Development on First Nations Reserve Lands.” 2014.

http://publications.gc.ca/collections/collection_2014/parl/xc35-1/XC35-1-1-412-4-eng.pdf

House of Commons. Standing Committee on Aboriginal Affairs and Northern Development. 2011. Evidence. 1 st Session, 41st Parliament, 13 December, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=1&DocId=5330214>

House of Commons. Standing Committee on Aboriginal Affairs and Northern Development. 2011. Evidence. 1 st Session, 41st Parliament, 13 December, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=1&DocId=5330214>

Howitt, Richard. “Sustainable Indigenous Futures in Remote Indigenous Areas: Relationships, Processes and Failed State Approaches.” *GeoJournal* vol. 77, no. 6, 817–828. 2012.
<http://www.jstor.org.proxy.bib.uottawa.ca/stable/pdf/23325390.pdf>

Hykin, Berry J. “Contaminated Sites on First Nations Land.” Woodward and Company, 2016.
http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated_Sites_on_First_Nation_Lands-Final.pdf

Hykin, Berry J. “Development on First Nations Lands: Laws of General Application.” Woodward & Company Lawyers LLP, 2016b.
http://www.woodwardandcompany.com/wp-content/uploads/pdfs/Real_Estate_Development-Laws_of_General_Application-Final.pdf

Immergut, Ellen M. “Historical-institutionalism in political science and the problem of change.” *Understanding Change: Model, Methodologies, and Metaphors*. Palgrave-Macmillan, 2006, pp. 282-310.
https://link.springer.com/chapter/10.1057%2F9780230524644_17

Indigenous and Northern Affairs Canada. *First Nations Commercial and Industrial Development Act*. 2012. <https://www.aadnc-aandc.gc.ca/eng/1100100033561/1498848820817>

Indigenous and Northern Affairs Canada. “Indian Reserve Waste Disposal Regulations (Regulations Amending), pursuant to the Indian Act.” 2016a. <https://www.aadnc-aandc.gc.ca/eng/1423604442004/1423604470475>

Indigenous and Northern Affairs Canada. “Land Management”. 2013. <https://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738>

Indigenous and Northern Affairs Canada. *National Assessment of First Nations Water and Wastewater Systems – 2009-2011*. 2016b. <https://www.aadnc-aandc.gc.ca/eng/1313426883501/1313426958782>

Isaac, Thomas. *Aboriginal Law, Fourth Edition: Commentary and Analysis*.
<https://tinyurl.com/zaunp7u>

- Kitigan Zibi Anishinabeg. “Kitigan Zibi Anishinabeg By-Law #17: a By-Law for Waste Disposal and Environmental Protection.” *First Nations Gazette*, 2014. http://sp.fng.ca/fngweb/073_waste_disposal_by-law_2014-17.pdf
- Kitigan Zibi Anishinabeg. “Kitigan Zibi Anishinabeg By-Law #18: Community Aquifer Zone.” *First Nations Gazette*, 2014. http://sp.fng.ca/fngweb/073_water_supplies_by-law_2014-18.pdf
- Kuokkanen, Rauna. “From Indigenous Economies to Market-Based Self-Governance: A Feminist Political Economy Analysis.” *Canadian Journal of Political Science / Revue Canadienne De Science Politique* vol. 44, no. 2, 2011, pp. 275–297. <http://www.jstor.org.proxy.bib.uottawa.ca/stable/pdf/41300542.pdf>
- Ladner, Kiera. “Treaty Federalism: An Indigenous Vision of Canadian Federalisms.” *New Trends in Canadian Federalism, Second Edition*, ed. François Rocher and Miriam Smith, Broadview Press, 2003, pp. 167-194.
- Legace, Naithan; Niigaanwewidam James Sinclair. “The White Paper, 1969.” *The Canadian Encyclopedia*, 2015. <http://www.thecanadianencyclopedia.ca/en/article/the-white-paper-1969/>
- Leslie, John F. “The Indian Act: An Historical Perspective.” *Canadian Parliamentary Review*, vol. 25, no. 2, 2002. <http://www.revparl.ca/english/issue.asp?param=83&art=255>
- MacDonald, Fiona. “Indigenous Peoples and Neoliberal ‘Privatization’ in Canada: Opportunities, Cautions and Constraints.” *Canadian Journal of Political Science / Revue Canadienne De Science Politique* vol. 44, no. 2, 2011, 257–273. www.jstor.org/stable/41300541.
- McDiarmid, Margo. “Native reserves polluted due to gaps in rules: AG.” *Canadian Broadcasting Corporation*, November 3, 2009. <http://www.cbc.ca/news/canada/native-reserves-polluted-due-to-gaps-in-rules-ag-1.785136>
- Moffat, John; David Nahwegahbow. “Roundtable on Environmental Management and the On Reserve Regulatory Gap.” *Institute on Governance*, 2004. https://iog.ca/docs/2004_November_tanaga3summary.pdf
- Murphy, Eamon, Matt Boulton. “A Lost Opportunity: Environmental Management Agreements.” *Woodward & Company LLP Newsletter*. No. 2, October 2015. <http://woodwardandcompany.com/wp-content/uploads/newsletter/October2015.pdf>
- Newhouse, David. “Indigenous Peoples, Canada and the Possibility of Reconciliation.” *Institute for Research on Public Policy*. 2016. <http://irpp.org/research-studies/insight-no11/>
- Office of the Auditor General of Canada. “Land Management and Environmental Protection on Reserve.” *Fall Report of the Auditor General of Canada*. 2009. http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_06_e_33207.html
- Office of the Auditor General of Canada. “Drinking Water in First Nations Communities.” *2005 September Report of the Commissioner of the Environment and Sustainable*

Development. 2005, Chapter 5. http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200509_05_e_14952.html#ch5hd3a

Oyegunle, Ahmed. “Solid Waste Management Practices in Two Northern Manitoba First Nations Communities: Community Perspectives on the Issues and Solutions.” University of Manitoba, 2016.

https://umanitoba.ca/institutes/natural_resources/pdf/theses/Oyegunle,%20Ahmed.MNR.M%202016.pdf

Oyegunle, Ahmed, and Shirley Thompson. “Solid Waste Disposal Practices in Remote First Nations Communities.” SWANA Northern Light Conference, 2015.

<https://swananorthernlights.org/wp-content/uploads/2015/02/Ahmed-Shirley-Solid-Waste-Disposal-Practices-in-Remote-first-Nations-Communities.pdf>

Papillon, Martin. “Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance.” In *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, ed. Hernan Bakvis and Grace Skogstad, Oxford University Press, 2012, pp. 286-301.

http://www.academia.edu/2081484/Canadian_federalism_and_the_emerging_mosaic_of_aboriginal_multilevel_governance

Papillon, Martin. *Aboriginal Quality of Life under a Modern Treaty: Lessons from the Experience of the Cree Nation of Eeyou Istchee and the Inuit of Nunavik*. IRPP Choices. Vol. 14, No. 9.

<http://irpp.org/research-studies/aboriginal-quality-of-life-under-a-modern-treaty/>

Penner, Melissa. “Examining Models of Water Service Delivery Systems for First Nations on Reserves in Canada.” University of Victoria, 2016.

https://dspace.library.uvic.ca/bitstream/handle/1828/7779/Penner_Melissa_MA_2016.pdf?sequence=1

Peters, Evelyn J. “Native People and the Environmental Protection Regime in the James Bay and Northern Quebec Agreement.” *Arctic*, Vol. 52, No. 4, 1999.

https://www.jstor.org/stable/40511754?seq=1#page_scan_tab_contents

Prime Minister of Canada. “Government of Canada to create Recognition and Implementation of Rights Framework.” 2018. <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>

Prime Minister of Canada. “Inuit Nunangat Declaration on Inuit-Crown Partnership.” 2017a.

<http://pm.gc.ca/eng/news/2017/02/09/inuit-nunangat-declaration-inuit-crown-partnership>

Prime Minister of Canada. “Minister of Indigenous and Northern Affairs Mandate Letter.” 2017b. <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

Prime Minister of Canada. “New Ministers to support the renewed relationship with Indigenous Peoples.” 2017c. <https://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples>

- Prime Minister of Canada. “Prime Minister of Canada and President of Inuit Tapiriit Kanatami announce the Inuit-Crown Partnership Committee.” 2017d. <http://pm.gc.ca/eng/news/2017/02/09/prime-minister-canada-and-president-inuit-tapiriit-kanatami-announce-inuit-crown>
- Prime Minister of Canada. “Statement by the Prime Minister of Canada on National Aboriginal Day.” 2016a. <http://pm.gc.ca/eng/news/2016/06/21/statement-prime-minister-canada-national-aboriginal-day>
- Prime Minister of Canada. “Prime Minister Justin Trudeau’s Speech to the Assembly of First Nations Special Chiefs Assembly.” 2016b. <http://pm.gc.ca/eng/news/2016/12/06/prime-minister-justin-trudeaus-speech-assembly-first-nations-special-chiefs-assembly>
- Prime Minister of Canada. “Prime Minister Justin Trudeau delivers a speech to the Assembly of First Nations Special Chiefs Assembly.” 2015a. <http://pm.gc.ca/eng/node/40159>
- Prime Minister of Canada. “Statement by the Prime Minister, Justin Trudeau, and the National Chief of the Assembly of First Nations, Perry Bellegarde.” 2016c. <http://pm.gc.ca/eng/news/2016/12/09/statement-prime-minister-justin-trudeau-and-national-chief-assembly-first-nations>
- Prime Minister of Canada. “Statement by the Prime Minister of Canada after delivering a speech to the Assembly of First Nations Special Chiefs Assembly.” 2015b. <http://pm.gc.ca/eng/node/40155>
- Privy Council Office of Canada. *Kitigan Zibi Anishinabeg economic case study : part II*. 1994. <http://www.publications.gc.ca/site/eng/9.829976/publication.html>
- R. v. Côté, [1996] 3 S.C.R. 139. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1421/index.do>
- Sasseville, Jacques. “Property Rights System on Cree and Naskapi Lands in Quebec.” *Natural Resources Canada*. Geomatics Canada Legal Surveys Division, 1997. <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/earthsciences/pdf/land-surveys/PropertyRightsSystemonCreeandNaskapiLandsinQuebec.pdf>
- Senate of Canada. “Final Report of The Standing Committee on Aboriginal Peoples.” 2007. <https://sencanada.ca/content/sen/committee/391/abor/rep/rep08jun07-e.htm>
- Smith, Miriam. *A Civil Society? Collective Actors in Canadian Political Life*. Broadview Press, 2005.
- Standing Committee on Indigenous and Northern Affairs (INAN). Meeting 57, Tuesday, May 16, 2017. <http://www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-57/minutes>
- Rynard, Paul. “Ally or Colonizer? The Federal State, the Cree Nation and the James Bay Agreement.” *Journal of Canadian Studies*, vol. 36, no. 2, 2001, pp. 8-48. <https://www.utpjournals.press/doi/abs/10.3138/jcs.36.2.8>

The Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. 2015.
http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf

Turner, Dale. "White Paper Liberalism and the Problem of Aboriginal Participation." *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy*. University of Toronto Press, 2006, pp. 12-37.

Valdez, Jorge M. "Deliberation, Cultural Difference and Indigenous Self Governance". *The Good Society*, Vol. 19, No. 2, 2010, 60-65.
<http://www.jstor.org.proxy.bib.uottawa.ca/stable/pdf/10.5325/goodsociety.19.2.0060.pdf>

Zagozewski, Rebecca, Ian Judd-Henrey, Suzie Nilson, and Lalita Bharadwaj. "Perspectives on Past and Present Waste Disposal Practices: A Community-Based Participatory Research Project in Three Saskatchewan First Nations Communities." *Environmental Health Insights*, no. 5, 2011, pp. 9–20.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3091372/>